Case and Comment

CRIMINAL LAW — EVIDENCE GIVEN IN JURY'S ABSENCE — OPEN COURT.—The Court of Criminal Appeal in England (Lord Goddard C.J., Byrne and Morris JJ.) in *Rex* v. *Reynolds*[1] has made a point "which is of the greatest importance" and which merits consideration in the light of the practice in Canadian courts.

In *Rex* v. *Reynolds* the accused was indicted before a jury on a charge of indecently assaulting a girl of eleven years of age, who was a pupil at a school for children of retarded development. When the question of her understanding of the nature of an oath arose, the prosecutor objected to the jury remaining and the chairman of the sessions asked them to retire. After the jury retired a school-attendance officer gave evidence on the child's mental development and background and the nature of the school to which she had been sent. On hearing the evidence the chairman ruled that the child could be sworn and give evidence. The jury returned. The child's evidence was given. The prisoner was convicted and appealed.

The Court of Criminal Appeal rejected the ground of appeal sought to be argued but took the point that, as the evidence of the school-attendance officer was given in the absence of the jury, there was such an irregularity that the conviction could not stand. The court quashed the conviction and discharged the prisoner.

The basis of the court's decision was expressed by Lord Goddard C. J. at page 611:

> I may say — and I am sure that I do so with the concurrence of my brethren — that it should be regarded as most exceptional that any evidence should be given in a criminal trial otherwise than in the presence of the jury. As I have said, there is one well-known exception to this rule which has been laid down in mercy and fairness to prisoners, namely, that any evidence with regard to whether a confession was properly made ought to be given in the absence of the jury; but the class of evidence given in the present case ought to be given in the face of the jury and in open court.

Such a pronouncement on such a subject by such a court is

[1] [1950] 1 K.B. 606.

entitled to the greatest respect. The Court of Criminal Appeal in England can properly be regarded as official guardians of the tradition of English criminal justice, which has been a distinctive feature of the development of Canada in unity. For this reason it is of vital importance to consider the precise application of this judgment to the conduct of Canadian criminal trials.

The decision has been approved in the Journal of Criminal Law[2] and in the Modern Law Review,[3] but has been questioned in the Law Quarterly Review.[4] In the second comment, Mr. H. A. Hammelmann agrees that the course pursued at the trial in *Rex* v. *Reynolds*, like that in *Rex* v. *Dunne*[5] which it purports to follow, "clearly offends against the basic principle that criminal proceedings must throughout be conducted in open court". The Law Quarterly Review, which criticized *Rex* v. *Dunne* at the time, now accepts it as authority for the statement based upon it, found in Halsbury's Laws of England referring to a judge's examination of a child of tender years:

> Such examination must take place in open Court, and not in the judge's private room.[6]

The Law Quarterly Review points out that the presence of the jury is a different thing again from the presence of the accused, and questions if the jury need be present when the matter is not for its decision. The writer cites *Rex* v. *Anderson*,[7] which follows *Rex* v. *Dunne* in the report. In the *Anderson* case, after a controversy had arisen on a document, the jury were requested to leave the box, over the protests of the defence. Lord Hewart C. J., dealing with that withdrawal by the jury, said at page 183:

> It is difficult to imagine any circumstance in which, except at the request or with the consent of the defence, a jury can possibly be asked to leave the box in order that statements may be made during their absence.

The writer in the Law Quarterly Review accepts the question as

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[2] (1950), 14 Journal of Criminal Law 173.
[3] (1950), 13 Mod. L. Rev. 235.
[4] (1950), 66 L.Q.R. 157.
[5] (1929), 21 Cr. App. R. 176.
[6] 13 Halsbury (2nd ed.) p. 722, note (c).
[7] (1929), 21 Cr. App. R. 178. It is surprising that the writer in the Law Quarterly Review accepts this case as authority that "an argument on a point of law need not be conducted in the presence of the jury because that is a matter which does not concern the jury". In the *Anderson* case the Court of Criminal Appeal quashed the conviction "on all these grounds jointly and severally". It surely is authority for the proposition that all statements must be made before the jury in a criminal trial unless the defence consents. This is opposed to common practice and to Wigmore, ss. 861 and 1808.

now settled by *Rex* v. *Reynolds*, but points out that two cases[8] are "slender authority" against the view there adopted and that Professor Wigmore is of an opposite view.[9]

It need not be argued that the decision in *Rex* v. *Reynolds* was unfortunate. The court admits as much at page 611. The prisoner was found guilty by a jury that heard all the witnesses on the issue which the jury had to decide. Because they did not hear one witness on an issue which was not for the jury but which was for the presiding judge, the prisoner went free. If he had chosen to assault a pupil of a school for normal children and the evidence for the jury had been the same, he would have remained convicted. Because his offence was morally more reprehensible, in that he chose a mentally retarded girl as his victim, and because the court sought to protect him against the evidence of a witness who might not be competent to testify, the law in its mercy set him free. There must be strong reasons for such a result.

The reason given is the general rule that evidence in a criminal trial should be given in the presence of the jury. One exception "in mercy and fairness to prisoners" was admitted by the court, the admissibility of confessions. But there are other exceptions to this rule.

All persons are now competent to give evidence in criminal trials except:

(a) children of tender years who are not possessed of sufficient intelligence to justify the reception of their evidence;[10]

(b) children of tender years who do not understand the duty of speaking the truth;[11]

(c) idiots, and insane persons are at the time of being tendered as witnesses are mentally incapable of testifying;[12]

(d) mutes who cannot make their evidence intelligible;[13]

(e) persons who through drink, drugs or other cause cannot understand questions or cannot make their answers intelligible;[14]

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[8] *Rex* v. *Bayliss* (1850), 4 Cox Cr. R. 23, and *Anon.*, 1 Leach Cr. L. (4th ed.) 430 n.

[9] Wigmore on Evidence, s. 487, Vol. II, p. 524.

[10] The Canada Evidence Act, R.S.C., 1927, c. 59, s. 16(1).

[11] *Idem.* As these two conditions are conjunctive to admit evidence, they must be disjunctive to reject it.

[12] 13 Halsbury (2nd ed.) pp. 722-3.

[13] The Canada Evidence Act, *supra*, s. 6; *Rex* v. *Whitehead* (1866), L.R. 1 C.C.R. 33.

[14] 13 Halsbury (2nd ed.) p. 723. The exception was recognized in *Rex* v. *Mansell* (1857), 1 Dears. & B. at p. 405.

(f) persons who do not understand the nature and obligation of an oath;[15]

(g) when called for the prosecution, the wife or husband of a person charged with any criminal offence other than certain offences against morality and happy domesticity.[16]

All these are cases, similar to that in *Rex* v. *Reynolds*, where the trial judge may have to determine whether or not a witness is competent to give evidence. That will depend on his finding an essential fact that in most cases has little or nothing to do with the offence the accused is being tried for and that may require evidence irrelevant to the main issue. The trial judge may have to assess the intelligence and conscience of an infant, the mental capacity of an idiot or of a person mentally ill, the intelligibility of a mute, the degree of understanding and expression of an alleged drunk or drugged person, the religious belief of an agnostic or an athiest, and the legality of marriages. Now it can be argued, as it was said by the court in *Rex* v. *Reynolds*, that if the jury can hear the answers given during any of these inquiries, they will be able to come to a conclusion on the weight to be attached to the evidence later to be given by the witness whose competency is being determined by the trial judge. That is a point of view which has something to commend it in reason, and which supports the steadfast place of the jury in the jury box, the basis of the English decisions. But there are grave reasons "in mercy and fairness to prisoners", and in good sense, against it.

Let us suppose that there were no precedents and no pronouncements from long experience, what should the rule be? Is not the basis of our courts that justice should be done and the accused fairly tried? The rules should be inflexible when they will always achieve these results and flexible when they do not, so that a good judge may alter them to achieve justice. Is it always fair to the accused that all the evidence and argument on the competence of witnesses or the admissibility of evidence should be given before the jury? Does this best enable justice to be done? Let us consider five examples which illustrate the issues judges must decide in ruling witnesses competent:

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[15] *Rex* v. *Wade* (1825), 1 Mood. C.C. 86. Roscoe's Criminal Evidence (15th ed.) 135; the Canada Evidence Act, *supra*, s. 14, but note that although this section permits a person, who is objected to as incompetent to take an oath, to make an affirmation instead, it does not make him competent unless he chooses to affirm. The section was discussed in *Rex* v. *Bluske*, [1948] O.R. 129 (C.A.).

[16] Canada Evidence Act, *supra*, ss. 4(2) and 4(4); the very inquiry as to the validity of the marriage was proposed in *Rex* v. *Wakefield* (1827), 1 Lew C. C. 279.

1. In a rape case in which there is some other evidence of the offence, the complainant is examined to see if she is of sufficient intelligence. All that she replies to the judge's questions on her background and education is "He done it to me, the dirty dog". The judge rules her not of sufficient intelligence to justify reception of her evidence. Has the accused not been prejudiced, particularly if some of the jury do not agree with the judge's ruling? Should there not be a new jury or a new trial? Who benefits?

2. In a murder case, a child witness for the prosecution, being examined by the judge, volunteers the statement, pointing at the accused, "He had the gun in his hand" and then says, as a devout witness in Ontario once testified, "If I am bad, when I die I will go away up there".[17] Her evidence is excluded but what does the judge do with the attentive jury?

3. A person suffering from a delusion that all bank clerks are grafters is called as a witness to prove that the accused was working miles away from the place of the crime at the time of the crime. A keeper and two doctors testify at length, as in a case in 1851 in England,[18] to the vivid and profane delusion from which the witness suffers. The judge permits him to be sworn. The jury, containing a bank clerk and an accomplished grafter, indignantly reject the alibi. Did the accused receive a fair trial? Was justice done better because the jury heard the evidence of the witness's delusion?

4. The accused's brother is called as a witness and demurs at being sworn. An inquiry ensues in which he blasphemes, and in which third persons testify that with his brother, the accused, he has attended pagan rituals denying God. His evidence is rejected by the judge. Will it and the evidence of the third person be rejected by the jury?

5. A woman is proffered as a witness for the prosecution and the defence alleges she is the wife of the accused. A long inquiry follows, from which it appears that the accused has committed a large variety of offences involving the witness but not relevant to the charge, and that he is but faintly united to the witness. She gives evidence. What do the jury do with their recollection of the shenanigans between the two?

Is it not evident that, in the interests of the administration of justice and of a fair trial for the accused, every effort should

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[17] Elizabeth Udy in *Udy* v. *Stewart* (1885), 10 O.R. 591 (a seduction case).

[18] *Rex* v. *Sam Hill* (1851), 2 Den. 254, 5 Cox C.C. 259, where the reports differ significantly and merit study.

be made to keep from the jury discussions and evidence which do not directly concern their task of deciding guilt or innocence but do concern the judge's responsibility of passing on the competence of witnesses.

The argument is much stronger with regard to discussions and testimony on the admissibility of particular evidence. Lord Goddard C.J. admits confessions as an exception to his rule, but there are others, and who is to measure the prejudice in each? Discussion of evidence, not admitted, can influence jurymen.[19] An excellent example is the admission of photostatic copies now authorized under amendments to the Canada Evidence Act[20] and the Combines Investigation Act.[21] The statutes require certain conditions to be met and now it is the practice in Canadian courts to receive the proof of those conditions in the absence of the jury. The judge then decides to admit or reject the evidence. If he rejects, no harm is done and the jury are not given the opportunity to speculate on the story of the photostats. If they are admitted, then the counsel tendering them calls as much evidence as he wishes to enable the jury to give them weight and other counsel, seeking to belittle them, cross-examine in the light of any information that has come out before the judge. Testimony extraneous to the main issues and to the weight of the evidence is excluded. So it is with regard to any evidence tendered, as to which the trial judge may require evidence or argument to discharge his duty of admitting or rejecting it.

It is submitted that this is a better practice than that which has lately found favour in England. Indeed if the rule, with its lone exception, as stated in *Rex* v. *Reynolds* were to be adopted reverently by the bench in Canada, the efficiency and fairness of our criminal trials would be endangered and the grounds of successful appeal by guilty persons multiplied.

If a distinction be sought between the usual situation and that in *Rex* v. *Dunne* (*supra*) and *Rex* v. *Reynolds* (*supra*), it may be found in the fact that in both those cases the jury were excluded over the protests of counsel for the accused, a consideration that appealed with such force to Lord Hewart C.J. in the passage from *Rex* v. *Anderson* quoted previously. But why the counsel for the accused should have an absolute right to invite occasions

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[19] Wigmore, s. 1808, Vol. VI, p. 275, has an eloquent passage saying that a sense of professional honour demands this and that the rule of law is based upon that sense.

[20] S. 29A, enacted by 6 Geo. VI, c. 19.

[21] S. 27 (2A), enacted by 10 Geo. VI, c. 44, s. 8.

for injustice or prejudice to his client in this matter, over the discretion of the trial judge, is by no means evident.

If authorities to the contrary be sought, a few are collected in the notes;[22] they are based on the principle often enunciated by great judges that the trial judge has his duty and the jury their duty, and what the judge needs for his task the jury need not of necessity have for theirs.

Finally, it is submitted that the true rules of general application should be:

1. All evidence in a criminal trial should be given in open court[23] and in the presence of the accused.

2. All evidence and discussion on the competence of witnesses and the admissibility of evidence is for the trial judge, and should not be heard by the jury in the first instance, if the trial judge in his discretion decides that it is not in the interests of justice or of the accused.

3. Evidence or observations going to the weight of evidence may be repeated before the jury, subject always to the rulings of the trial judge.

4. The equal administration of justice, and fairness to the accused, should move the trial judge in his rulings.

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WILLS — SPECIAL POWERS OF APPOINTMENT — DELEGATION. — Those who have to draw wills creating or exercising special powers of appointment would probably be wise not to lean too heavily on the case of *Re Moffat*.[1] The precise point decided by the case, namely that the terms of the power in question were sufficiently wide to permit the donee of the power to exercise it by appointing new trustees, is probably of no great consequence,

[22] The question of the withdrawal of the jury in the circumstances disapproved in *Rex* v. *Reynolds* does not appear to have been directly discussed in any previous British case. The fact that competence and admissibility are for the judge alone and not for the jury has been strongly stated in *Rex* v. *Wakefield*, *supra*, *Rex* v. *Sam Hill*, *supra*, and *Macdonnell* v. *Evans* (1852), 11 C.B. 930. The propriety of the withdrawal of the jury during all proof and arguments upon questions of admissibility is stated emphatically in Wigmore, s. 861, Vol. III, p. 349, and s. 1808(1), Vol. VI, p. 275. The authorities on the *voire dire* are discussed by Robertson J.A. in *Rex* v. *Antrobus*, [1947] 1 W.W.R. 157 (B.C. C.A.). This is the Norman French phrase (= to speak truly) describing the preliminary examination by the trial judge to enable him to determine the competence of witnesses or jurors. Its formalities and extent merit a more extended note.

[23] There are of course some exceptions to this salutary rule, which were discussed in an article by the present writer, The Open Court, in (1947), 25 Can. Bar Rev. 721.

[1] [1950] O.R. 606.

since such a change is not likely to be often advisable or worth the risk of litigation when the power to make it seems open to doubt. The case is of interest rather for the points it left undecided; and may be misleading if understood as deciding questions that seem not to have been argued, presumably because the parties did not desire to raise them.

The first question on which the advice of the court was asked was whether the special power had been validly exercised, and this question is disposed of in the judgment by the statement that all counsel were agreed that it had been. No doubt counsel, in taking this position, were acting in accordance with their instructions, but on the face of the documents the conclusion seems by no means self evident. The power given to the donor's wife was in the following form:

> From and after the death of my wife to dispose of the income and the capital of my estate among my said son *M*, his wife and his child or children or some or all of them at such time and in such manner as my said wife may by her Last Will and Testament appoint.

The exact terms in which the donee of the power exercised it are not set out in the judgment, but in fact her will directed that an annuity was to be paid to the son's widow (the son having died before the exercise of the power) and, after appointing trustees, provided that such trustees were:

> As to the balance of my said husband's estate to use such part of the income and of the capital as my Trustees in their absolute discretion consider advisable for the support, maintenance, and education, and advancement of my son's children *M* and *J*, until the elder attains the age of twenty-one years.

When the elder attained twenty-one the fund was to be divided into two equal shares, one for each of the named grandchildren, and the capital paid out in instalments, the final instalment being payable when the grandchild reached thirty-five years of age. Persumably both grandchildren had been born before the death of the donor of the power, since otherwise there would have been an obvious perpetuity; presumably also the son's widow was the person who was his wife at the date the donor's will was made, since had the son been married more than once there would almost certainly have been a question which wife was meant.[2]

The donee also authorized the trustees "to make advances of capital from the separate funds to the beneficiary thereof after she attains the age of twenty-one years as the said trustees may consider advisable, and I also empower them to pay out of the

[2] See *Re Cameron*, [1940] O.R. 49.

capital of the balance of my husband's estate prior to the setting up of the said separate funds, and on the marriage of either *M* or *J* or both of them such amount as they may consider appropriate to that occasion". There was a clause of accruer if either grandchild died before receiving the whole of her share but no provision for the possibility that neither might survive to attain thirty-five.

Presumably in the absence of argument, the learned Chief Justice of the High Court found no reason to question the validity of these wide discretionary powers granted by the donee of the original power, but on the contrary considered the existence of them a reason for sustaining her appointment of an additional trustee. But it is trite law that a special power of appointment cannot be delegated,[3] and unless clearly authorized by the original power a donee cannot grant to trustees the power to make advances when such a power, if exercised, might have the effect of turning a contingent into a vested interest.[4] On the other hand, the donee can add such a discretionary power where future interests are vested[5] or when authorized by the terms of the power.[6]

The question that might therefore have arisen in the *Moffat* case, had it been in anyone's interest to raise it, was whether the donee of a special power can give trustees a power to make advances when the interests created by the appointment are vested subject to being divested if the beneficiary dies before attaining a specified age. This question, which seems to lie somewhere in between the cases of *Re Joicey* and *Re May's Settlement*, must be regarded as still left open by *Re Moffat*. It is not likely to arise in England where the power to make advances is now statutory.[7] Draftsmen preparing wills containing special powers of appointment likely to be exercised by the creation of further trusts should therefore make sure that the power they are giving authorizes a delegation sufficient to enable advances to be made. This can be done in some form such as the following in the case of a special power in favour of issue of the donee:

> On the death of my daughter *A* my Trustees shall hold the capital of such share in trust for her issue or some one or more of them in such proportions and subject to such terms and conditions, and with such provisions for their respective advancement and maintenance and education at the discretion of my Trustees or any other person or persons

[3] Halsbury (2nd ed.), Vol. XXV, p. 526; Sugden on Powers (8th ed.) 179-180.
[4] *Re Joicey*, [1915] 2 Ch. 115 (C.A.); *Re Greenslade*, [1915] 1 Ch. 155.
[5] *Re May's Settlement*, [1926] Ch. 136.
[6] *Re Mewburn's Settlement*, [1934] Ch. 112.
[7] Trustee Act (1925) s. 32.

> as my said daughter may by her last Will direct, and in default of such direction. . . .

Similarly those preparing instruments in exercise of a special power should examine the terms of the power with care, having in mind that, in the absence of a clear authorization in the original instrument creating the power, the basic principle is still *delegatus non potest delegare.*

One other point that might have been dealt with in the *Moffat* case is the right of the donee of a special power to enlarge the investment powers given the trustees of the original will creating the power. In that case the first set of trustees were — subject to certain additional powers to deal with shares of companies — limited to trustee investments. The donee of the power granted the new trustees the right to make investments authorized for life insurance companies. The right of the donee to do this does not seem to have been questioned, but is at best doubtful. In *Re Cosby*[8] it was held that the donee of a general power exercisable by will could enlarge the investment powers of the trustees of the original instrument, but the reasoning of that case, which was based on the provisions of the Devolution of Estates Act, seems hardly applicable to a special power.

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TAXATION — INCOME TAX — TRANSFERS BETWEEN HUSBAND AND WIFE — TAXABLE IN HANDS OF TRANSFEROR — MINISTER'S DISCRETION.— The interpretation of section 31 of the Income War Tax Act, relating to husband and wife as partners, as employer and employee, or as employees of a partnership in which one of them is a partner, and section 32(2), governing transfers of property between husband and wife, has given rise in the past to difficulty. These sections have been re-enacted, with some amplification, in section 21 of the new Income Tax Act. Perhaps the questions of greatest concern to lawyers arise from transfers of property between husband and wife now covered in subsection (1) of section 21.

Section 32(2) of the old Act referred, simply, to transfers of property between husband and wife, or vice-versa, and shifted the tax upon the income arising from the property to the transferor as if the transfer had not been made. Its precise wording was:

[8] [1947] O.R. 129.

> Where a husband transfers property to his wife, or vice versa, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

The doubts that arose on this wording were whether the subsection covered transfers: (1) not made to evade taxation; (2) where proper and full consideration had been given by the transferee; (3) where the transferor and the transferee were not married until after the transfer; and (4) effected before the coming into force of the Income War Tax Act of 1917.

As to (1) and (2), the interpretation to be given section 32(2) appeared to have been settled finally in 1948 by the judgment of Mr. Justice Thorson, President of the Exchequer Court, in *David Fasken Estate* v. *Minister of National Revenue*,[1] but doubts were raised once more by the judgment of Mr. Justice Angers in *Dobell* v. *Minister of National Revenue*, delivered on June 6th, 1950.[2] In the *Fasken* case the findings, in the words of the headnote, were in part as follows:

> 1. That in construing a taxing Act the Court ought not to assume any tax liability under it other than that which it has clearly imposed in express terms.
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> . . . . .
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> 3. That the word 'transfer', as used in section 32(2) of the Income War Tax Act or its predecessor, section 7 of the 1926 Act, is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any particular form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer.
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> 4. That liability under section 32(2) of the Act or its predecessor, section 7 of the 1926 Act, is not confined to cases where the transfer of property was made for the purpose of evading taxation nor does the fact that the transfer was made in good faith or for valuable consideration place it outside the scope of the sections. *Molson et al.* v. *Minister of National Revenue*, [1937] Ex. C.R. 55 disapproved.

This, it seems to me, represents a correct and inevitable interpretation of the section. In a note to the report of the case in the Canadian Tax Cases the editor comments:

> It is gratifying to note in this judgment a restatement of the fundamental principles of taxation law that it is the form and language of the law which must govern and not its supposed or intended substance. In this connection the words of the Court are very much in point where it

[1] [1948] Ex. C.R. 580.
[2] [1950] Ex. C.R. 315.

is stated that 'It is the letter of the law, and not its assumed or supposed spirit, that governs. The intention of the legislature to impose a tax must be gathered only from the words by which it has been expressed and not otherwise.' In support of this considerable judicial authority is stated. In the face of the growing tendency to look to the substance of the transaction and the assumed intention of the legislators and to substitute them for the form and letter as evidenced more particularly by section 32(a) of the *Income War Tax Act* and section 126 of the new *Income Tax Act*, this is a salutary pronouncement.[3]

It will be observed that the learned President of the Exchequer Court disapproved certain conclusions of the court in the previous case of *Molson et al.* v. *Minister of National Revenue*.[4] His disapproval related particularly to the holding that the application of section 32(2) was restricted to transfers made for the purpose of evading taxation. A number of other questions, not directly relevant to the subject of this note, were involved in the *Molson* case.

Connell v. *Minister of National Revenue*[5] is another important case illustrating the doubts that may arise under section 32(2). This was the case of a marriage settlement made on September 1st, 1938. By it the future husband obligated himself to transfer certain specified shares to his future wife for her own absolute use and benefit and to settle certain other stocks, debentures and bonds upon her. Before the execution of the settlement he had delivered to trustees certain certificates and transfers of shares in part performance of his agreement. Then he transferred to the trustees stocks, debentures and bonds subject to the trusts of the settlement. The marriage took place on September 2nd, 1938. In allowing the appeal from the assessment of Mr. Connell on the income received by his wife, Mr. Justice Thorson held among other things:[6]

(i) That at the time of the transfer contemplated by sec. 32(2) the tranferor and the transferee must be married to one another and the rights to the transferred property must pass to the one spouse by transfer from the other;

(ii) That the disposition of the securities in question were not transfers of property by a husband to his wife within the meaning of sec. 32(2) and that neither the income from the shares nor that from the other securities was derived from property so transferred and that to that extent the assessments under appeal are erroneous and the appeal must be allowed with costs.

By way of obiter Mr. Justice Thorson says at page 566 of the *Connell* decision, consistently with what he was to hold later

[3] [1948] C.T.C. 265, at p. 268.
[4] [1937] Ex. C.R. 55; appeal dismissed, [1938] S.C.R. 213.
[5] [1946] Ex. C.R. 562.
[6] From the headnote in [1946] C.T.C. 330.

in *Fasken:* "I find no ambiguity in the words of section 32(2) and see no reason for restricting its application to transfers made for the purpose of evading taxation; nor am I prepared to hold that a transfer made for valuable consideration is necessarily excluded from its scope". But in another respect there appears to be some inconsistency between the two decisions. As against the suggestion in the *Connell* case that there should be a physical transfer of the assets from one spouse to the other, as well as a transfer of rights of ownership, must be put the holding in the *Fasken* case that "All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer."

The case of *Dobell* v. *Minister of National Revenue*, a decision of Mr. Justice Angers in the Exchequer Court, is a reiteration of an earlier view of section 32(2). The case concerned in part an appeal from an assessment under section 32(2) on the income from bonds handed over to Mr. Dobell's wife in 1943 pursuant to a marriage contract made six years before the passing of the Income War Tax Act of 1917. In the course of his judgment Mr. Justice Angers said:[7] "The case [presumably as to the legal effect of the marriage contract] is governed by the civil code of the Province of Quebec, particularly articles 754, 755, 819, 821 and 1257. The donation *inter vivos* of the sum of $10,000 made by Alfred Curzon Dobell to his future wife Helen Maffett, by their marriage contract, is legal and valid." Under the articles mentioned, the judgment implies, the future husband divested himself of the ownership of the bonds in favour of his future wife from the date of the marriage contract. "The donation therein stipulated was unquestionably made in good faith and not for the purpose of evading taxation, as it was effected prior to the coming into force of the Income War Tax Act, 1917, on September 20, 1917." And then Mr. Justice Angers continues: "It seems to me evident that the object of subsection 2 of section 32 is, as, before the revision of the statutes in 1927, the object of paragraph (*b*) of subdivision 4 of section 4 was, to tax in the hands of transferor property transferred for the purpose of evading taxation. The grant made by Alfred Curzon Dobell to his future wife was not a transfer to evade taxation and it is not, in my judgment, subject to the provisions of subsection 2 of section 32 of the Income War Tax Act. It was effected by said Dobell in fulfilment of the

[7] [1950] Ex. C.R. 315, at p. 320.

donation of $10,000 which he had made and had the right to make to his wife by his marriage contract." Support for this conclusion was found in the *Molson* and *Connell* cases, and a number of succession duty cases, though the learned judge conceded that the *Fasken* case was against him.

In my opinion "transfer" means exactly what it says, and what it says is clearly expressed in the *Fasken* case, "that the husband should so deal with the property as to divest himself of it and vest it in his wife", and that it does not matter whether "the transfer was made in good faith or for valuable consideration" — for the purpose of evading taxation — or not. Undoubtedly the Dominion has jurisdiction to pass appropriate legislation for the purpose of determining what income should be taxed, who should be taxed and how much the tax should be. But each province of Canada has by virtue of section 92 of the British North America Act jurisdiction over property and civil rights, and provincial law may and does fix the method and the legal procedure for the transfer of property. The Dominion having provided for the taxation of transfers between husband and wife, the question arises whether there was in fact a transfer under provincial law such as would divest the husband of the property and vest it in his wife. If the transfer is not made in accordance with provincial law, the property is not vested in the transferee and section 32(2) would not apply.

The effect of section 32(2) in my opinion is, and always has been, drastic, unreasonable and unfair. For example a husband owns an apartment house. He and his wife enjoy the scenic beauty and comfort of a penthouse at the top of the apartment. The husband is a manufacturer and in connection with his business requires $100,000 to increase production and profits. He informs his wife that he must sell the apartment to provide the money but the wife loves the penthouse and does not want to leave the surroundings. Since she had lately inherited $100,000 from her father, she purchases the apartment from her husband and pays him the $100,000 — its full market value. Normally one would expect the wife to be liable for the tax on the taxable income from the apartment but under a strict reading of the law the husband must pay it. At the same time the money received for the apartment is producing additional taxable income in the husband's business. The transaction may have occured five or twenty years ago. Nevertheless the tax authorities may and sometimes do go back that far, adding not only the net profits to the husband's taxable income but interest on the taxes so claimed.

To the same general effect as section 32(2) is section 21(1) of the new Income Tax Act:

> Where a person has, on or after the first day of August, 1917, transferred property, either directly or indirectly, by means of a trust or by any other means whatsoever, to his spouse, or to a person who has since become his spouse, the income for a taxation year from the property or from property substituted therefor shall be deemed to be income of the transferor and not of the transferee.

Of course this phraseology has removed at least some of the doubts attached to section 32(2). In view of the added words, "or to a person who has since become his spouse", the *Connell* case would probably now have to be decided differently. On the other hand, *Dobell* would be decided as in fact it was, because, although the transfer was between parties not yet married, it took place before August 1st, 1917. The holding in the *Fasken* case, that the means by which the transfer is effected, whether direct or indirect, are immaterial, has been expressly incorporated in the new section 21(1) and presumably, too, it does not matter that the transfer was made in good faith or for valuable consideration.

No doubt the reason for such a peculiar provision in the Act is the difficulty the tax officials have in discovering what really happened in husband and wife transactions. In practice section 32(2) was not, so far as I know, strictly enforced, and it should not have been, but the wording of section 21(1) is now imperative, "shall be deemed . . .". How the problem ought to be dealt with is indeed difficult, but a proposal was made at the Ottawa conference of the Canadian Tax Foundation in 1949 that bona fide transactions should be accepted and that the onus of proof should rest upon the husband and wife. It should not be difficult to require the keeping of records to establish the actual facts of transactions between husband and wife. In this way it would be comparatively easy to determine whether or not the transaction was for the purpose of evading taxation or bona fide in the nature of an ordinary sale and purchase.

The discretionary power of the Minister, which was common in the Income War Tax Act, has been largely eliminated in the new Act. Perhaps section 21(1) is one place where it should be restored.

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STATUTES — INTERPRETATION OF WILLS — INTERPRETATION OF COMMON LAW IN LIGHT OF STATUTES.— In *Re Hogbin*[1] Mr. Justice Manson of the British Columbia Supreme Court has recently held that the old established rule in *Hill* v. *Crook*[2] is not in force in British Columbia. Under that rule — which has been much criticized — the word "children" in a will includes legitimate children only unless (a) "it is impossible from the circumstances of the parties that any legitimate children could take under the bequest" or (b) "there is upon the face of the will itself an expression of the intention of the testator to use the word "children" to include illegitimate children".[3] Mr. Justice Manson gives two main grounds for his decision. The first ground is: that the word "child" in its ordinary meaning includes a natural child; that this ordinary meaning was restricted by "judge-made law" in England "doubtless . . . to meet the social conditions which prevailed in England";[4] and that in British Columbia "no social conditions exist which would justify holding it to be in force".[5] In this connection Manson J. points out that "today it is recognized that the law is a living thing and the Courts more and more shake off the shackles of decisions made in the light of conditions that no longer prevail"[6] and prays in aid *Perrin* v. *Morgan*, the well known decision of the House of Lords in 1943 on the word "money".[7] The second ground is: that since 1924, under the Intestate Succession part of the Administration Act, illegitimate children in British Columbia have in cases of intestacy inherited from the mother "as if the children were legitimate"; "that I am concerned with the spirit of the legislation and as to the declaration by the Legislature of public policy contained therein and as expressed in kindred statutes passed in the last 28 years"; and that to hold an illegitimate excluded from the benefits of a will simply because the word "child" without further identification was used by the testator would, in the light of the statutory rule in cases of intestacy, "be contrary to public policy as declared by the Legislature".[8]

This departure from one of the hoariest rules for the interpretation of wills is in itself worth a comment in the Review. It also deserves notice as one of the first fruits of *Perrin* v. *Morgan*. It is, in addition, of interest as an indication of how far we have

[1] [1950] 3 D.L.R. 843.
[2] (1873), L.R. 6 H.L. 282.
[3] Note (1949), 65 L.Q.R. pp. 8-9.
[4] [1950] 3 D.L.R. at p. 847.
[5] *Idem.*, at p. 850.
[6] *Idem.*, at p. 848.
[7] [1943] A.C. 399.
[8] [1950] 3 D.L.R. at pp. 850-851.

travelled from the early period of the common law "when the illegitimate child had no right of support, of inheritance, or even of a name" to these days when he has under Children of Unmarried Parents Acts a right of support and education, under Legitimation Acts an inchoate right of legitimation and under some Intestate Succession Acts a qualified right of inheritance.[9] Its chief attraction to me, however, is that Manson J. has dared to treat section 124 of the Administration Act, "illegitimate children . . . shall inherit from the mother as if the children were legitimate" as something more than a new direction as to what an administrator must do when a mother dies intestate leaving illegitimate children. He has dared to regard it as enshrining a new principle, and to use that new principle in determining what rights the common law gives to an illegitimate child under the will of a grandmother leaving a life interest in property to a mother and after her death the property itself to the mother's "child or children". He has dared, in other words, to do what judges rarely do — interpret the common law in the light of a statute.

To a layman who knows nothing about the lawyer's division of the "seamless web" of the law into two departments of "common law" and "statute law", interpreting the common law in the light of a statute seems the most natural thing in the world; to him a change of community policy embodied in "statute law" must inevitably have repercussions over the whole field of the law including "common law". Any lawyer can tell him that interpreting the common law in the light of a statute is unusual. Now, statutes are read in the light of the common law every day of the week. Under the common law principle of mens rea, for instance, the words "knowingly" or "personally" may be read by the judges into statutes imposing penalties;[10] for "when a statute introduced into our criminal code a new offence, it should be understood prima facie to intend the offence to take its place prima facie in a coherent general system and to be governed by the established principles of criminal responsibility".[11] A statute providing that "the residuary estate of an intestate shall be distributed if the intestate leaves issue but no husband or wife . . . to the issue" has been judicially amended by the addition of the phrase "provided that no issue who, being sane, has murdered the intestate shall be cap-

[9] Note, The Effect of Statutes Altering the Position of Illegitimate Children on Judicial Construction of Wills (1932), 45 Harv. Law Rev. 891, at pp. 891-892. This excellent note summarizes the *Re Hogbin* situation in United States courts as of 1932.

[10] *E.g.*, *Rex* v. *Tolson* (1889), 23 Q.B.D. 168; *Sherras* v. *DeRutzen*, [1895] 1 Q.B. 918.

[11] *Thomas* v. *The King* (1937), 59 C.L.R. 279, at p. 304, *per* Dixon J.

able of taking under this section"; because the principle of public policy which prevents a sane murderer from taking under the victim's will "must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to it must be read and construed as subject to it".[12] But the common law is not often read in the light of statutes. Indeed, as Dean Pound has remarked in his classic article on this topic, the proposition that the judges might receive a legislative innovation fully into the body of the law to be reasoned from by analogy the same as any other rule of law would "doubtless appeal to the Common Law lawyer as absurd".[13]

English and Canadian courts have on occasion taken a few faltering steps in this direction, but there is no uniformity of decision. In the field of "public policy" one would expect the courts to pay close attention to the course of legislation; as Hodgins J.A. said in *Walkerville Brewing Co. Ltd.* v. *Mayrand*,[14] "if there is any common knowledge in this country of which the Court should take notice and which indeed it should apprehend and apply continuously, it is the policy both of the Dominion and of the Province, as set out in their statute-law and regulations having the force of law". But even here the judges do not speak with one voice. In recent litigation in Ontario about the validity of restrictive covenants aimed against Jews, Mackay J. laid great stress on three Ontario statutes as indicating that restrictive covenants involving racial discriminations were contrary to public policy; of these the first, the Racial Discrimination Act, prohibited the display of "any notice . . . indicating . . . an intention to discriminate against . . . any class of persons . . . because of race or creed of such . . . class of persons"; the second, section 99 of the Insurance Act, rendered guilty of an offence any licensed insurer which discriminates unfairly between risks because of the race or religion of the insured; and the third, section 6 of the regulations passed under the Community Halls Act, provided that no organization should be denied the use of the hall for religious, fraternal or political reasons.[15] To Mackay J., that is, statutes are more than specific directions as to what is to be done in specific situations; they express a policy and judges should carry over the policy into the common law. Hogg J.A., however, drew a wholly different inference as to "public policy" from the existence of legis-

[12] *In re Sigsworth*, [1935] Ch. 89, at p. 92.
[13] Common Law and Legislation (1908), 21 Harv. Law Rev. at pp. 385-386.
[14] (1929), 63 O.L.R. 573, at p. 581.
[15] *Re Drummond Wren*, [1945] O.R. 778, at pp. 781-782.

lation; "this argument", said he, "would seem to support the view that the Courts should not attempt, by judicial decision, to encroach upon a subject which has already been a matter occupying a field of recent legislation".[16] This is the more traditional approach; not only are there two departments "common law" and "statute law", but the judges should leave "legislative policy" severely alone and abstain from trying to weave it into the common law fabric.

One might also expect to find that, in accordance with the respectable common law principle of *cessante ratione legis cessat ipsa lex*, a revision by detailed legislation of the law in a particular field sufficiently drastic to run counter to the fundamental principles on which that law was based would induce the judges to decide that all the minor rules and sub-rules produced by those principles were also abolished, whether expressly repealed or not. Here again the judges do not speak with one voice. The Married Women's Property Acts in effect did away with the doctrine of the unity of husband and wife; as a matter of express words, however, they merely rendered married women capable, inter alia, of holding and disposing of property and of suing and being sued apart from their husbands. In 1925 the House of Lords, Lords Birkenhead and Cave dissenting, rejected the argument of *cessante ratione legis cessat ipsa lex* and held that notwithstanding this fundamental Act a husband was still liable to be sued with his wife for a tort committed by her during the marriage; for the Act contained no provision expressly relieving the husband from that common law liability.[17] In 1946, however, the Court of Appeal accepted the argument and held that, since those Acts had removed all difference as regards property between a married woman and a single woman, a husband was no longer responsible as such for the expenses of burying his property-owning wife. There was no provision in any Act expressly abolishing this old established common law responsibility of the husband but, as Tucker L.J. said, "now that the separate estate of a married woman has ceased to exist and she has in this respect the status of her husband, the very foundation of the old common law rule has disappeared and the wife's estate is . . . liable for that which had previously been an obligation imposed on the husband who had by the marriage acquired his personality".[18]

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[16] *Re Noble and Wolf*, [1949] 4 D.L.R. 375, at p. 399 (Ontario Court of Appeal). The Court of Appeal's decision has been reversed by the Supreme Court of Canada but on grounds not involving the doctrine of "public policy".

[17] *Edwards* v. *Porter*, [1925] A.C. 1.

[18] *Rees* v. *Hughes*, [1946] 2 All E.R. 47, at p. 54. I am indebted for this

Let me conclude this note by drawing attention to one field in which interpreting the common law in the light of a statute would get over an awkward hurdle raised by our federal system — the field of so-called "statutory negligence". When the Dominion, as often happens today, decides to establish a new standard of conduct by the exercise of its power to legislate on criminal law and to enforce it by means of a penalty to be recovered in a court of summary jurisdiction, does conduct of mine which falls below that standard render me liable to compensate you for the injury I have caused you thereby? A layman would answer, unhesitatingly, yes; knowing nothing of lawyers' divisions of law into "statute law" and "common law" or "criminal law" and "civil law", he would say "well, the conduct was illegal wasn't it?" A lawyer would, and quite correctly, answer that it all depended on whether the statute, properly interpreted, *intended* to create a right of action.[19] Now, in a unitary system like England it is awkward and unreal, but no worse, that the courts should proceed to answer the question by inquiring whether the legislature (which is innocent of any intent in the matter) "intended" to confer on you a civil cause of action; but in our federal system, where "property and civil rights" are reserved to the provinces, it is fatal. On that line of reasoning the establishment by the Dominion of a new state-enforced standard of conduct for businessmen, for example to refrain from conspiring to fix prices (section 498, Criminal Code) cannot possibly result in rendering businessmen who fail to live up to the standard liable in damages to those they have injured; for even if Parliament did "intend" to create a civil cause of action it had no constitutional power to do so.[20] Approach the matter from the point of view of determining the common law of the province by analogy to the express provisions of the Dominion statute and the problem disappears. As Dean C. A. Wright has pointed out in a note in this Review: "The truth of the matter would seem to be that, as it is the courts' function to determine when a relationship arises which may entail a duty on the part of one per-

reference to Read and MacDonald, Cases and Other Materials on Legislation (Foundation Press, 1948) 1291. Pages 1268-1279, Analogical Reasoning from Legislation, and pages 1285-1299, Judicial Adaptation of Common Law to Basic Legislative Changes, contain a marvellous collection of materials on the topic of this note.

[19] See the latest House of Lords decision in this field, *Cutler* v. *Wandsworth Stadium*, [1949] 1 All E.R. 544, for an example of this technique.

[20] *Transport Oil Ltd.* v. *Imperial Oil Ltd.*, [1935] O.R. 215; criticized by J. Finkelman (1935), 13 Can. Bar Rev. 517. The principle was reiterated in *Gordon* v. *Imperial Tobacco Sales Company*, [1939] 2 D.L.R. 27. Some doubt may have been cast on it by certain dicta of Duff C. J. in another connection: *Philco Products Ltd.* v. *Thermionics Ltd.*, [1940] S.C.R. 501. See Wright, note 21 infra.

son so to act as to save another person from harm, in determining that duty problem the courts may be guided, although not necessarily controlled, by any legislation, whether of an authority having jurisdiction over civil rights or one which, as in Canada, has jurisdiction over criminal law".[21]

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The Adaptation of Law to Justice

Thus, again and again, the processes of judge-made law bring judges to a stand that they would be glad to abandon if an outlet could be gained. It is too late to retrace their steps. At all events, whether really too late or not, so many judges think it is that the result is the same as if it were. Distinctions may, indeed, supply for a brief distance an avenue of escape. The point is at length reached when their power is exhausted. All the usual devices of competitive analogies have finally been employed without avail. The ugly or antiquated or unjust rule is there. It will not budge unless uprooted. Execration is abundant, but execration, if followed by submission, is devoid of motive power. There is need of a fresh start; and nothing short of a statute, unless it be the erosive work of years, will supply the missing energy. But the evil of injustice and anachronism is not limited to cases where the judicial process, unaided, is incompetent to gain the mastery. Mastery, even when attained, is the outcome of a constant struggle in which logic and symmetry are sacrificed at times to equity and justice. The gain may justify the sacrifice; yet it is not gain without deduction. There is an attendant loss of that certainty which is itself a social asset. There is a loss too of simplicity and directness, an increasing aspect of unreality, of something artificial and fictitious, when judges mask a change of substance, or gloss over its importance, by the suggestion of a consistency that is merely verbal and scholastic. Even when these evils are surmounted, a struggle, of which the outcome is long doubtful, is still the price of triumph. The result is to subject the courts and the judicial process to a strain as needless as it is wearing. The machinery is driven to the breaking point; yet we permit ourselves to be surprised that at times there is a break. Is it not an extraordinary omission that no one is charged with the duty to watch machinery or output, and to notify the master of the works when there is need of replacement or repair? (Benjamin N. Cardozo, Law and Literature: And Other Essays and Addresses)

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[21] Note, Conspiracy — Breach of Criminal Statute as Basis of Tort Liability (1941), 19 Can. Bar Rev. 51.