Case and Comment

CONSTITUTIONAL LAW — B.N.A. ACT, S. 92(2) — WHAT IS A DIRECT TAX? — IMPORTANCE OF ECONOMIC CONSIDERATIONS.—[1] The dangers of using legal maxims to solve problems in constitutional law are well illustrated in the recent case of *Esquimalt & Nanaimo Railway Co. et al.* v. *Attorney-General of British Columbia.*[2] Section 92(2) of the British North America Act limits the provinces to "direct taxation within the province" and numerous cases have been decided on the question of what is a direct tax. Mill's celebrated definitions of direct and indirect taxes[3] have been quoted in every case, but they give little indication of the trend of decisions. Not even *Lambe's* case,[4] in which they were first referred to, applies the definitions in a way that Mill would have approved. Subsequent decisions have in effect established a sort of legal economic theory quite different from the economists' brand. Even though the facts as found by the court are insufficient to enable an economist to make any conclusion whatsoever as to the incidence of the tax in question, such as the bare fact that the commodity taxed is generally resold by the person taxed, the courts apply certain presumptions of law to supplement the facts and thereby reach a decision. Equally dangerous is the application of the time-honoured "pith and substance rule". Even though a tax on land, measured by the value of the products of that land, is in substance a tax on the

[1] This note may be regarded as a footnote to the very able, but unsigned, comment in (1942), 20 Can. Bar Rev. at p. 157, on *Atlantic Smoke-Shops Ltd.* v. *Conlon*, [1941] S.C.R. 670, [1941] 4 D.L.R. 129; affirmed, with a variation, [1943] A.C. 550, [1943] 4 D.L.R. 81.

[2] [1949] 2 W.W.R. 1233, [1950] 1 D.L.R. 305, reversing in part [1948] S.C.R. 403, [1949] 3 D.L.R. 343.

[3] "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs. The producer or importer of a commodity is called upon to pay tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price." — John Stuart Mill: Principles of Political Economy, Book V, Chapter II, Section 1.

[4] *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575.

products, so that, if they are generally resold, the tax would seem to be indirect, the validity of such a tax under section 92(2) has been declared beyond dispute by the *Esquimalt & Nanaimo* decision.

In this case, drafts of legislation for three proposed taxes on the timber cut on certain railway lands, heretofore untaxed by the province, were submitted to the courts for a determination of the constitutionality of the taxes. The pertinent questions referred to the courts were:

1. Would a tax imposed by the province on timber as and when cut upon lands in the Island Railway Belt, the ownership of which is vested in a private individual or corporation, the tax being a fixed sum per thousand feet board measure in the timber cut, be *ultra vires* of the Province?

2. Is it within the competence of the Legislature of British Columbia to enact a statute for the imposition of a tax on land in the Island Railway Belt, acquired in 1887 by the Esquimalt & Nanaimo Railway Company from Canada and containing provisions substantially as follows:

(a) When land in the Belt is used by the railway company for other than railroad purposes, or when it is leased, occupied, sold or alienated, the owner thereof shall thereupon be taxed upon such land as and when merchantable timber is cut and severed from the land.

(b) The tax shall approximate the prevailing rates of royalty per thousand feet of merchantable timber.

(c) The owner shall be liable for payment of the tax.

(d) The tax until paid shall be a charge on the land?

3. Is it within the competence of the Legislature of British Columbia to enact a statute for the imposition of a tax on land in the Island Railway Belt acquired in 1887 by the Esquimalt & Nanaimo Railway Company from Canada and containing provisions substantially as follows:

(a) The tax shall apply only to land in the Belt when used by the railway company for other than railroad purposes or when leased, occupied, sold or alienated.

(b) When land in the Belt is used by the railway company for other than railroad purposes or when it is leased, occupied, sold or alienated, it shall thereupon be assessed at its fair market value.

(c) The owner of such land shall be taxed on the land in a percentage of the assessed value and the tax shall be a charge on the land.

(d) The time for payment of the tax shall be fixed as follows:

(i) within a specified limited time after the assessment, with a discount if paid within the specified time,

(ii) or at election of the taxpayer, made within a specified time after assessment, by paying each year on account of the tax a sum that bears the same ratio to the total tax as the value of the trees cut during that year bears to the assessed value of the land?"

The railway company contended that all these taxes were *ultra vires* on the ground that they were, in pith and substance, timber taxes and therefore indirect and that, in any case, whatever label were attached to them, they were in their nature indirect as tending to be passed on to persons other than the assessees. The weight of such arguments may be seen from the fact that they were unanimously accepted in the Supreme Court of Canada,[5] though rejected, as to the third tax, in the Privy Council.

Kerwin and Locke JJ. thought that the incidence of the first tax would be shifted by the purchaser of timber lands to the railway company from which he bought or, if the tax levied was in excess of the amount estimated at the time of the purchase, the excess would be added to the price of the logs and passed on to the purchaser of the logs. As to the second tax, it was a matter of common knowledge, they said, that the value of these timber lands depends almost entirely upon the merchantable timber they contain; although stated to be upon the land, it is upon the timber that the tax is in fact to be levied. The additional complications of the third tax could not disguise the fact that what was intended was simply a tax on the timber when severed. The fact that under the first alternative the landowner might compound the tax by paying a lump sum did not alter the true character of the proposed legislation.

Rand and Kellock JJ. were of the opinion that each of the taxes was on severed timber and that they were in reality excise taxes and indirect in tendency. The second and third taxes were on land, but this was irrelevant, since they were conditioned on severance of the timber. The further fact that the taxes would influence the price at which the lands could be sold also made them indirect.

Estey J. thought that the first tax would in the ordinary course of business enter into the cost of production of lumber and into the computation of its selling price, and as a part of the cost would be passed on to purchasers. The second and third taxes differed from the first only in creating a charge on the land, but this could not in itself make the tax a land tax. Where in the normal course the tax would be passed on, calling it a land tax would not make it *intra vires*, for the tax was not upon the occupant's interest in the land but rather upon a specific commodity sold on the market in the course of normal commercial transactions.

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[5] [1948] S.C.R. 403, [1949] 3 D.L.R. 343.

The province appealed this decision to the Privy Council, as to the third tax only, and was successful. The Judicial Committee rejected the views of the Supreme Court of Canada in terms which suggest that, had the question been before them, the second tax might also have been upheld. A tax on land was not the same thing as a tax on timber, said their Lordships, however minute or even non-existent the difference in value of the land and the timber. They pointed out that if the land and timber came into different hands the landowner alone would bear the tax. The optional method of paying the third tax was not a sham, since it was natural that the legislature in imposing a tax of this nature should give the assessee the opportunity to defer payment until such time as he could provide himself with the necessary money by reaping the produce of his land. Consequently, this was a tax on land, a valid form of provincial taxation, even though the tax was measured by the reflected value of its products.

Although it is true, as the Privy Council remarked,[6] that the principles on which the decision was based are not in doubt, there are certain peculiarities about both the formulation and the application of these principles that still remain unclear. The courts have said that the law can look only to the general tendency of a tax, in deciding whether it is "passed on" to persons other than the assessee. For example, if a tax is imposed upon consumers of fuel oil within a province, the fact that a minority of consumers are engaged in trades in which the price of fuel oil enters into the cost of production and is "passed on" to the consumer must be ignored and the tax ruled constitutional.[7] As the Privy Council stated in *Lambe's* case, "The Legislature cannot possibly have meant to give the power of taxation, valid or invalid, according to its actual results in particular cases".[8] The cases seem to indicate the possibility of two qualifications to this general rule.

First, it is not entirely clear to what extent the mere description in the taxing statute of the person to be taxed as a "purchaser" rather than as a "consumer" will cause a court to declare a tax indirect despite its generally direct tendency. Fortunately, this problem did not arise in the *Esquimalt & Nanaimo Railway* case, but in the case of *Attorney-General of British Columbia* v. *Canadian Pacific Railway*,[9] the statute in question taxed every

[6] [1949] 2 W.W.R. at p. 1247.
[7] *Attorney General for British Columbia* v. *Kingcome Navigation Co.*, [1934] A.C. 45, [1933] 3 D.L.R. 364; affirming [1933] 1 D.L.R. 688.
[8] 12 App. Cas. at p. 582.
[9] [1927] A.C. 934, [1926] 4 D.L.R. 147; affirming [1926] 2 D.L.R. 674.

person who purchased within British Columbia fuel oil for the first time after its manufacture or importation into the province. It was admitted that resale took place only in two or three isolated cases; nevertheless the Judicial Committee held that this was indirect taxation, owing to the possibility of resale by any purchaser.[10] The ease with which the Privy Council upheld a tax upon "consumers" of fuel oil in the *Kingcome* case, after invalidating a tax on "purchasers" which affected the same class of persons, is strong evidence of the importance of mere terminology in this branch of the law.

Secondly, there is some doubt as to whether the matter to be investigated is the incidence of the particular tax levied or merely of taxes of that kind. There was disagreement on this point in the Supreme Court of Canada, Rand J. stating that, "Since the legislation would be *sui generis*, the incidence of the tax on the company cannot be brought within any general tendency rule except the general and indeed the only tendency of the special case".[11] Estey J., on the other hand, said, "It is not . . . the facts and circumstances in particular cases that determine whether a tax is direct or indirect, but rather the incidence or effect of such a tax in the normal or ordinary transactions of business".[12] The difference between these two views might be illustrated by referring to the first tax in question. If the view of Rand J. were applied, it ought to follow that the tax was to be imposed upon timber cut by a small group of lumbermen and could not be passed on to purchasers in a competitive market and was therefore direct in incidence. The alternative view would merely find that it was a tax on a commodity generally resold and it must therefore inevitably be indirect. In spite of this, however, Rand J. agreed with the other judges that the tax was indirect.

Apparently, the views of economists as to the incidence of a tax need not be considered at all in determining whether it is direct or indirect for the purposes of section 92(2). No economist would say that the mere fact that a commodity is generally resold by the person taxed is necessarily conclusive on the indirect

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[10] [1927] A.C. at p. 938: "Fuel oil is a marketable commodity and those who purchase it, even for their own use, acquire the right to take it into the market. It therefore comes within the general principle which determines that the tax is an indirect one." This case seemed to support the view that "commodity taxes" were necessarily indirect, a view not repudiated until the *Conlon* case, *supra*. In the latter case the possibility of resale was ignored as irrelevant.

[11] [1948] S.C.R. at p. 444.

[12] *Ibid.*, at p. 463.

nature of the tax. The economist would want to know what proportion of the total commodity sold is being taxed, whether it is sold in a competitive market, the supply and demand situation, and a host of other factors. For example, if Alberta wheat competes in a world market, a tax by Alberta on wheat grown within the province is unlikely to be passed on and is therefore direct. Nor would the economist say that the mere fact that the ultimate consumer of the commodity is taxed is sufficient evidence that the tax is direct; there are too many other economic forces at work — an answer cannot be given if only a few of them are known. However, the courts can and do give answers upon the basis of a few facts only, apparently supplementing these by certain arbitrary presumptions.[13] Indeed, in the *Esquimalt & Nanaimo Railway* case, the Judicial Committee admitted that considerations influencing the decisions of economists had no weight with them.[14] Mill would certainly have thought that the likelihood of the "passing back" of a tax by purchasers of timber land from a railway company to the railway company itself, in the form of a reduction of the purchase price, was sufficient evidence that the tax on the purchasers was indirect, but the Privy Council refused to commit itself to this proposition and stated, "Whatever is 'passed back', it cannot be the *tax*".[15] It might equally be asked whether a tax is ever "passed on" in the sense required by the Privy Council — all that can ever happen is that an amount more or less equivalent to the tax is passed on. Locke J., in the Supreme Court of Canada, recognized that, whether the burden is "passed on" or "passed back", its incidence is shifted from the person originally paying it.[16]

There are probably good reasons why the economic tendencies of a tax should not be investigated by the courts. The terms "direct" and "indirect" when applied to taxation have acquired

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[13] For example, *Reference re Agricultural Land Relief Act*, [1938] 3 W.W.R. 186, [1938] 4 D.L.R. 28, (Alta. C.A.), where a tax on producers of agricultural products was held to be indirect; and *Atlantic Smoke-Shops Ltd.* v. *Conlon*, *supra*, where a tax on consumers of tobacco was held to be direct. It is not suggested that these cases were wrongly decided, but merely that they were decided on the basis of too little information about the effects of the tax.

[14] [1949] 2 W.W.R. at p. 1253: "It is probably true of many forms of tax which are indisputably direct that the assessee will desire, if he can, to pass the burden of the tax on to the shoulders of another. But this is only an economic tendency. The assessee's efforts may be conscious or unconscious, successful or unsuccessful: they may be defeated in whole or in part by other economic forces. This type of tendency appears to their Lordships to be something fundamentally different from the 'passing on' which is regarded as the hallmark of a direct tax."

[15] *Ibid.*

[16] [1948] S.C.R. at p. 430.

meanings different from those attached to them by economists and the testimony of the experts might be confusing to the courts. Nevertheless, as a result of the failure to consider expert evidence, the courts have been compelled to devise their own theory of the incidence of taxation, a task in which their success has not been conspicuous. Some of the cases present very difficult problems in economic analysis, but the only evidence of doubt as to the correctness of a decision ever recorded was that of Duff J. (as he then was) in *Halifax* v. *Fairbanks Estate* [17] where he called attention to the great difficulties inherent in determining the actual incidence of local taxes on occupiers and land owners. Actually, there is little reason why the classification of taxes for the purposes of constitutional law should depend upon their economic tendencies. Probably the Fathers of Confederation intended to do little more than assign excise taxes and customs duties to the Dominion and income and property taxes to the provinces; they could scarcely have wished the courts to pursue their economic inquiries any further than to fit the tax in question into one of these categories. The Privy Council almost accomplished this in the *Fairbanks* case, where it used these words: "What then is the effect to be given to Mill's formula above quoted? No doubt it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed, but it cannot have the effect of disturbing the established classification of the old and well known species of taxation and making it necessary to apply a new test to every particular member of those species." However, this quite workable viewpoint was upset by subsequent decisions requiring the courts to investigate the incidence of the tax in each case.[18]

No principle of Canadian constitutional law has been more often quoted than the "pith and substance" rule. Certainly, in substance, the taxes proposed in the *Esquimalt & Nanaimo Railway* case were taxes on timber, and the majority of the Supreme

[17] [1926] 1 D.L.R. 1106, [1926] S.C.R. 349; reversed by [1928] A.C. 117, [1927] 4 D.L.R. 945.

[18] *Atlantic Smoke-Shops Ltd.* v. *Conlon*, [1943] A.C. 550, [1943] 4 D.L.R. 81: "[The expressions used in the *Fairbanks* case] should not be understood as relieving the courts from the obligation of examining the real nature and effect of the particular tax in the present instance or as justifying the classification of the tax as indirect merely because it is in some sense associated with the purchase of an article." The statement was quoted with approval in the *Esquimalt & Nanaimo Railway* case by the Privy Council.

Court of Canada were quite emphatic about it.[19] The Privy Council entirely rejected this approach, as to one of the taxes, and approved the dictum of O'Halloran J.A. in the British Columbia Court of Appeal to the contrary effect: "Because land bears a tax which is measured by the reflected value of its products is no reason to say that the tax on the land is a colourable tax on its products and that such a tax is not in truth a tax on the land itself".[20] Their Lordships stated:

> In the *Conlon* case the tax was held to be direct because it was imposed on the actual consumer on the occasion of a purchase by him. A similar result from the revenue point of view could no doubt have been secured by imposing the tax on the manufacturer or on the vendor. But such a tax would have been an indirect tax since the operation of passing the burden of the tax to the consumer in the shape of an increase of price would have been in practice almost automatic. This case affords a good example of the caution with which the 'pith and substance' principle ought to be applied. The object of that principle is to discover what the tax really is: it must not be used for the purpose of holding that what is really a direct tax is an indirect tax on the ground that an equivalent result would have been achieved by using the technique of indirect taxation.[21]

It is difficult not to agree with the observations of their Lordships on the *Conlon* case, but it is equally difficult to see how that case supports the view that a tax which is generally passed on, according to the Judicial Committee's own theories of economics, can become a direct tax because the taxing statute calls it a tax on land. The terms "direct" and "indirect" taxation have little meaning apart from their relation to the incidence of taxation. It seems absurd for taxes to be called "direct" when in fact their incidence is shifted, for the terms can refer only to substance and not to form. Nevertheless the *Esquimalt & Nanaimo Railway* case makes it clear that it is the form of the tax alone which counts. This is in marked contrast to their Lordships' attitude in the *Manitoba Grain Futures* case,[22] where it was held that the fact that a statute expressly declares that the tax imposed is a direct tax does not make such tax direct within the meaning of section 92(2), if it is in reality an indirect tax when tested by Mill's prin-

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[19] *Per* Rand J., [1948] S.C.R. at p. 442: "That the tax, so potential and contingent, should, when it emerges in esse, be charged on the land is, as to its nature, irrelevant, and I cannot view it other than a tax imposed on personal property at its initial stage of being worked into merchantable timber."

[20] This decision of the British Columbia Court of Appeal appears to be unreported.

[21] [1949] 2 W.W.R. at p. 1253.

[22] *Attorney-General for Manitoba* v. *Attorney-General for Canada* (*In re Grain Futures Taxation Act*), [1925] A.C. 561, [1925] 2 D.L.R. 561; affirming [1924] S.C.R. 317, [1924] 3 D.L.R. 203.

ciple. Is it now to be the case that, irrespective of the actual incidence of a tax, it can be rendered constitutionally valid by the use of appropriate words in the statute imposing it? The incongruity of such a result calls attention to the disorder in the cases which purport to apply Mill's definitions. The present allocation of taxing powers seems fortuitous rather then reasonable; only constitutional amendment can reallocate them in a more rational manner.

WOLFE D. GOODMAN

Toronto

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EVIDENCE — HUSBAND AND WIFE — EXTENT OF PRIVILEGE — ARTICLE 314 C.C.P.— PENDING REVISION OF QUEBEC CODE OF CIVIL PROCEDURE.— Because it settles a point in the law of evidence, the decision of the English Court of Appeal in *Shenton* v. *Tyler* should interest lawyers in Quebec as elsewhere in Canada. The question was whether the privilege which, under the Evidence Amendment Act, protects communications between husband and wife from disclosure persists after the death of one of the consorts. An action was brought by Mrs. Shenton against widow Tyler claiming a declaration that the late Mr. Tyler had established a secret trust in favour of the plaintiff by communicating a wish to his wife that she pay £2 a week to Mrs. Shenton for life. The plaintiff sought to interrogate the defendant on this communication but she refused to answer on the ground that the interrogatories referred to matters which had passed between herself and her husband during coverture and were, therefore, privileged from disclosure. This view prevailed in the court of first instance but not in the Court of Appeal, which reversed the trial judge and ordered the defendant to answer.[1]

As this point had not arisen before under the statute, the judges were referred to cases decided on the law as it was before the Evidence Amendment Act was passed in 1853. It appears that in England then, as in Quebec to this day, husband and wife were not competent and could not be compelled to give evidence against each other not only respecting communications between them but on any facts within their knowledge.[2] The old rule was freely used by the courts to exclude testimony in any way connected with the marriage state. Thus, it was held that the exclusion continued to operate after the marriage had been dissolved

[1] [1939] 1 All E.R. 827; 55 T.L.R. 522.
[2] Article 314 C.C.P.

by death or by divorce because, in the words of Chief Justice Best, ". . . the happiness of the marriage state requires that a confidence between man and wife should be kept forever inviolable". At the other end, the rule was stretched by holding that the consorts could not be examined as to happenings before the marriage or even as to the fact of marriage itself. Thus in one case, cited by the Common Law Commissioners in their report of 1852, where a married woman brought an action as a feme sole it was held that her husband could not be called by the defendant to prove the coverture and so defeat the plaintiff, and this despite the inescapable dilemma propounded by counsel for defendant, who put his case this way: If the witness is to be rejected it is because he is the plaintiff's husband; but if the plaintiff has a husband she has no action. Truly the life of the law has not been logic![3]

The Court of Appeal in the *Shenton* case refused to follow these old decisions and extend the statutory rule beyond the bare words of section 3, to wit:

> No husband shall be compellable to disclose any communication made to him by his wife during their marriage, and no wife shall be compellable to disclose any communication made to her by her husband during their marriage.

Having regard to this language, the court saw no reason to extend the privilege to widowers, widows or divorcees and held that it applied only to those who were actually husband and wife at the time the objection was raised.

It is still a question in Quebec (where our law is the same as it was in England before 1853) whether the courts would follow the cases decided under the common law and hold that the incompetency of husband and wife against each other persists after death or divorce. There are no reported decisions on the point but the Chief Justice of the Superior Court in a recent case tried in Three Rivers permitted two former wives to testify against their divorced husbands despite the objections of counsel based on article 314 C.C.P.,[4] and the likelihood is that our Court of Appeal, if the law remains the same, would seek to restrict the rule of incompetency in line with the *Shenton* case although, of course, it would not be a direct authority.

This raises the larger question whether the time has not come when this old rule of incompetency should be deleted from the

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[3] See cases cited in *Shenton* v. *Tyler*, *supra*, and the 2nd Report of the Common Law Commissioners, *infra*. p. 587.

[4] *Falkenhainer* v. *McCormick*, December 28th, 1949, S.C. 9809.

Quebec Code. The question was canvassed in England in 1852. In the Second Report of Her Majesty's Commissioners for inquiry into the Process, Practice and System of Pleadings in the Superior Courts of Common Law, we find the following at page 715:[5]

> A more difficult question [than husband and wife testifying *for* each other], however, arises when we proceed to consider whether it should be made competent to an adverse party to call a husband or wife as witness against one another. The case would, no doubt, be of rare occurrence, when it did occur, it would, in the greater number of instances, be where the husband and wife have separated, and are on bad terms with one another. In such cases the mischief apprehended from the interruption of domestic happiness becomes out of the question. But suppose the husband and wife living together in the usual terms; here the identity of an interest between them will deter an adverse party from calling one against the other, except under very peculiar and pressing circumstances, and when the fact to be proved is certain in its character and clearly within the knowledge of the witness; but if there be such a fact in the knowledge of one of two married persons, so material to the case of the adverse party as to make it worth his while to run the risk of calling so hostile a witness, it becomes a matter of very serious consideration whether justice should be allowed to be defeated by the exclusion of such evidence. It is clear that nothing but an amount of mischief outbalancing the evil of defeated justice can warrant the exclusion of testimony necessary to justice. What then is the mischief to be here apprehended?— The possibility of the resentment of a husband against a wife for testifying to facts prejudicial to his interest. But it is obvious, that such resentment could only be felt by persons prepared to commit perjury themselves, and to expect it to be committed in their behalf. Such instances we believe would be very rare and we do not think that a regard to the feelings of individuals of this class, or the amount of mischief likely to arise from a disregard of them, is sufficient to compensate for the loss which in many cases may result from the exclusion of the evidence.
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> The conclusion to which the foregoing observations lead us is that the husband and wife should be competent and compellable to give evidence for and against one another in matters of fact, as to which either could now be examined as a party to the cause; but that all communications between them should be held to be privileged.[6]

Parliament, surely without hesitation, adopted this recommendation which, as we have seen, became section 3 of the Evidence Amendment Act. In 1893 it became section 4(3) of the

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[5] Printed in Reports from Commissioners, Vol. XL, Session 1852-53. The Library of Parliament, Ottawa, has the only copy in Canada.

[6] *Ibid.*, p. 715: "So much of the happiness of human life may be said to depend on the inviolability of domestic confidence, that the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosure of confidential communications between husband and wife would be a far greater evil than the disadvantage which may occasionally arise from the loss of the light which such revelations might throw on questions in dispute."

Canada Evidence Act and is now the law in all the other provinces of Canada.[7]

Curiously, this change from complete incompetence to a restricted privilege seems to have gone unnoticed in Quebec. The codifiers of 1866, as we know, took all this part of the first Code of Procedure bodily out of Starkie on Evidence. Unfortunately, they had only the second edition of 1833, which by that time had been rendered obsolete by the reforms in England. In 1897 the Code was revised and brought more in line with the modern English system of trial procedure. Most of the old exclusions affecting witnesses were done away with but not that of husband and wife. The question is not even discussed in the Commissioners' report. In our time the rule of incompetency has been with us so long and the objections it gives rise to are so few that it seems part of the natural order of things, which no one would think of changing except as part of a general revision.

A draft of a new Code of Procedure is now being circulated. In it, article 314 remains unchanged and there is no comment in the accompanying report indicating an awaredness that the law is different elsewhere. Presumably, we shall have a new Code in 1952 after public hearings before the commissioners who are to be appointed. To them we respectfully submit that the recommendation of their English predecessors of 1852 be adopted for the reasons given by them and article 314 C. C. P. be accordingly amended.

ALASTAIR M. WATT

Montreal

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WILLS — ADMINISTRATION OF ESTATES — EXECUTORS NOT BOUND TO EMPLOY SOLICITOR NAMED IN WILL — TRUST NOT CREATED.— A recent decision of Gale J. in the case of *Re Croft*[1] should be of interest to the profession. The problem posed was precise and uncomplicated and, strangely, does not seem to have been dealt with in any previously reported judgment in Canada. The motion

[7] There is no uniformity in the United States. In some states, as in England, husband and wife are competent and compellable witnesses for or against each other but one consort cannot be compelled to disclose confidences made during marriage if the other objects. In other states husbands and wives are competent but not compellable witnesses generally, but incompetent with respect to confidences. In still others they are incompetent against each other for all testimony as in Quebec. See Wigmore on Evidence (3rd ed.) § 488, where all the American and Canadian rules of competency are collected. However, the American Law Institute, in its Model Code of Evidence 1942, adopts the English rule as limited by *Shenton* v. *Tyler:* Rules 214-217.

[1] [1950] O.W.N. 171.

was based upon the following terse paragraph in a will: "XI. I hereby appoint *A* to be solicitor for my estate".

Although the terms of this clause are blunt and unambiguous, most of us, upon reflection, would probably advise a testator that it only constituted an expression of confidence. In practice, frustration of the purpose of such a provision may seldom be met, albeit the point must often arise in the course of drawing wills. Apart from this, because of the obvious personal import of the matter to those of our calling, it is well to have the result of such words discussed and the authorities — which do not appear to Gale J. to be entirely in harmony — examined in a reported decision.

The will named a trust company and the testator's two sons as executors. A difference of opinion apparently arose between the company and the sons as to whether they were bound to employ the solicitor in question, the trust company not wishing to disregard the express words in the will, and the individual executors desiring to retain a different solicitor. It should be noted that there was no suggestion that the solicitor concerned was in any way unfit or was incapable of acting, a state of affairs which might have provided an escape from the dilemma. The decision in *Re Croft* was thus quite objective and did not rest upon particular facts. In finding that the executors were not under a trust to give effect to the testator's appointment of a solicitor, Gale J. stated this chief reason:

> Executors, when they assume office, take upon themselves varied and contingent responsibilities. Not only do they assume an obligation to all those who will benefit from the will and the administration of the estate, but they also have cast upon them potential liability to outsiders, and it would seem to me to be quite wrong to require the executors to undergo the risk of those responsibilities and obligations and at the same time withdraw from them the right to select the persons upon whose advice they will act.[2]

Counsel who argued for the binding effect of the appointment urged that it created a trust in favour of all those who were entitled to benefit by the terms of the will. Although it is difficult — and Gale J. inclined to the view that it was impossible — to define the limits of the trust and the obligations imposed by it, there are some cases decided in England which suggest that where the will appoints a person to act as agent for the executors, such a person is thereby given something of value and has an enforceable claim upon the estate.

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[2] *Ibid.*, at p. 174.

These cases are collected in Jarman on Wills[3] and the earliest is *Hibbert* v. *Hibbert* decided in 1808.[4] Here, though the will appointed certain executors, another individual was named to be the receiver (that is, one supposes, liquidator) of the testator's estate and it was directed that he should be the solicitor for all parties in propounding the will. The court gave effect to the testator's wish, but the report and judgment are so extremely brief as to be of little assistance. Moreover, the effectiveness of the purported appointment of a solicitor by the will does not appear to have been questioned. There is a disappointing lack of discussion of the same point in the 1862 case of *Saunders* v. *Rotheringham*.[5] In this instance the will declared that a named person should be employed by the executor to manage the testator's business, which was to be continued after her death. The judgment discusses only the question of continuing the business, holding that the terms of the will were effective in this regard. Because of the court's complete silence on the point it could be implied that the employment of the manager was mandatory. The third of this group of English authorities and the only one which, it is submitted, lends any express sanction to the idea that the executors are bound to employ a person appointed in the will is *Williams* v. *Corbet* decided in 1837.[6] Here the testator named a person — who was, curiously enough, a barrister — to be the auditor of the estate accounts. Sir L. Shadwell V.C. held that the executors could not remove him for anything short of impropriety, and that he had as much right to the office of auditor (and to the remuneration arising from it) as did any of the devisees of real estate to their benefits under the will. This result is rather startling and stands quite alone for such an extreme position. No other case more than implies the obligatory character of similar employment, and in none is there a question of removal for cause. It is respectfully submitted that *Williams* v. *Corbet* runs counter to good sense and to the many compelling arguments in the cases next to be examined, and that it is not law today.

The remaining English cases, as well as the decision in *Re Croft*, represent the opposite and, the writer suggests, the correct conclusion. The earliest of these is a case decided in Ireland in 1833, *Lawless* v. *Shaw*.[7] For the first time in the cases so far cited the argument turned expressly and to some length upon whether the manifest desire of the testator that a certain manager and

[3] (7th ed., 1930) 874.
[4] 3 Mer. 681.
[5] 3 Gif. 556.
[6] 8 Sim. 349.
[7] Ll. & Go. 154.

agent should be employed by his executors was binding upon them. The affirmative arguments advanced were similar to those in the *Croft* case. The original trial judge, Lord Plunket L.C., whose decision was restored by the House of Lords on appeal[8] (having meanwhile been reversed by a subsequent Lord Chancellor of Ireland), held the appointment was not binding and used these words:

> There can be no doubt that when the testator expressed his 'desire' that the plaintiff should be continued as agent over the estate after his death, he meant he should be continued on the same footing as he was employed by himself; that is to say, subject to be removed at pleasure, whenever the party should think fit either to substitute another person in his place or to act as his own land agent if he thought proper to do so.[9]

The *Lawless* decision was followed and applied by the House of Lords in 1846 in *Finden* v. *Stephens*.[10] Again in 1871 came a case with facts similar to *Re Croft*—*Belaney* v. *Kelly*,[11] though here the appointment of an agent in the will was only conditional upon his work being carried on to the satisfaction of the executors. Despite this stipulation it was argued that an interest in the estate was created by the appointment. The court rejected this contention, and Cleasby B. expressed himself thus:

> The testator says 'I appoint this man as my agent'. Nobody would contend that these words, whether as applicable to the testator or to the trustees afterwards, would operate as an *appointment for life*, therefore there cannot be an estate for life by the appointment. . . . But the appointment here cannot confer any interest, such as is contended for by the defendants. . . . It seems to me abundantly clear that this clause did not contemplate giving any right to him . . . for his life.[12]

The last of the English cases and the one chiefly relied upon and followed by Gale J. is *Foster* v. *Elsley*.[13] This judgment of Chitty J., rendered in 1881, involves a clause similar to the one in *Re Croft*. The will provided:

> And I declare that my solicitor W. E. F. [the plaintiff] shall be the solicitor to my estate and to my said trustees in the management and carrying out of the provisions of this my will.

[8] Reported as *Shaw* v. *Lawless*, 5 Cl. & Fin. 129, in which Lord Cottenham, the Lord Chancellor of England, likened the provision to the naming of a school at which the testator desired his son to be educated, saying: "Would [that] create a trust in favour of the schoolmaster? That would certainly be a matter for the advantage of the schoolmaster, but it could not be contended that he would have a right to enforce the performance of this desire of the testator. It would be an expression of desire made for the benefit not of the master but of the scholar."

[9] Ll. & Go. 154, at p. 165.

[10] 2 Ph. 142.

[11] 24 L.T. 738.

[12] *Ibid.*, at pp. 741-2.

[13] 19 Ch. D. 518.

Counsel cited *Williams* v. *Corbet* and *Hibbert* v. *Hibbert* to support the validity of the appointment, whilst *Lawless* v. *Shaw* and *Finden* v. *Stephens* were referred to by the opposing side. Chitty J. thus had the same set of cases before him which we are considering here. He was obviously impressed by the reasoning in the second group, and found no difficulty in disregarding the first two cases, for his judgment concludes as follows:

> I am told that no case is to be found in the books like the one before me where a testator has appointed a particular person as solicitor to his estate, but in analogy to the cases to which I have referred [the *Finden* and *Lawless* cases] I decide that the direction in this will imposes no trust or duty on the trustees to continue the plaintiff as their solicitor.

In following *Foster* v. *Elsley* the *Croft* decision is demonstrably correct. Not only does the reasoning of Gale J. appeal to logic and ordinary prudence, but the authorities are not as seriously at variance as might at first appear. The only plain statement in opposition to the learned judge's finding is in a case decided in 1837, *Williams* v. *Corbet*, which has never since been followed, which fails entirely to discuss the problem or give reasons for its conclusion and which, in indicating that an appointee of the testator could not be removed except for misfeasance, clearly departs from the realm of common sense.

H. M. BRUCE

Toronto

Survey of the Legal Profession in Canada

The Director of the Survey of the Legal Profession has announced the appointment of Provincial Directors in the four Western Provinces: Mr. Elmore Meredith, of Campbell, Meredith and Beckett, Vancouver, British Columbia; Mr. S. W. Field, K.C., of Field, Hyndman, Field, Zimmerman and Owen, Edmonton, Alberta; Mr. P. H. Maguire, K.C., of Hall, Maguire and Wedge, Saskatoon, Saskatchewan; and Mr. Samuel Freedman, K.C., of Freedman and Golden, Winnipeg, Manitoba. It is felt that the securing of information and the distribution of questionnaires on a provincial level can best be done with the assistance of a lawyer who is familiar with the local scene.