Case and Comment

INNKEEPER — LIABILITY FOR LOSS OF GUEST'S CAR — TRAVELLER — *Infra Hospitium* — CONTRACTING OUT OF LIABILITY — INNKEEPERS LIABILITY ACTS. — *Williams* v. *Linnitt*[1] is an important decision of the English Court of Appeal of interest to Canadian lawyers. The plaintiff was successful both in the trial court and on appeal in making the proprietor of an inn called the Royal Red Gate Inn liable for the loss of his automobile, which had been stolen from its parking place just outside the inn. The innkeeper was held liable notwithstanding the following facts: (a) the plaintiff lived within a mile of the inn and had just dropped in for a drink; (b) the car was left in an outer court that was open to the street; (c) there was a notice over the court to the effect that the innkeeper would not be responsible for cars parked in that place, and (d) there may have been a proper garage provided for guests at the rear of the inn.

In the plaintiff's favour, however, it should be noted that the car was left in a place which even the dissenting judge (Denning L.J.) was forced to admit was, prima facie, within the "hospitium" of the inn. Lord Tucker, who with Asquith L.J. dismissed the appeal of the innkeeper, thus describes the "car park":

> The car park consists of a wide triangular space in front of the inn which opens on to it, with the road . . . running along the side of the inn. The car park has a tar macadam surface and there is a large sign with the words 'Royal Red Gate' in conspicuous letters across one side of the park. It was clearly constructed and intended for the parking of visitors' cars and was so used. There was, however, attached to one of the uprights supporting the sign a small square board with the following notice on it:
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> 'Car Park. Patrons only. Vehicles are admitted to this parking place on condition that the proprietor shall not be liable for loss of or damage to (a) any vehicle (b) anything in or on or about any vehicle, however such loss or damage may be caused. R. W. Linnitt, Proprietor.'

Incidentally, the trial judge found that the plaintiff had not read the notice; nor is this surprising since all the incidents leading to the action took place between nine and ten o'clock of a February night in 1949.

[1] [1951] 1 All E.R. 278.

Also in the plaintiff's favour was the rather extraordinary fact that, although a plan in evidence indicated the existence of proper garages for visitors' cars at the rear of the inn, "no evidence was given to explain the situation or nature of these garages or whether they belonged to the defendant or some other person" (*per* Lord Tucker at p. 284). As a result, both Lord Tucker and Asquith L.J. decided the case on the basis that there were no such garages forming part of the inn. On the other hand, Denning L.J., assuming that there were such garages forming part of the inn, was able to find for the innkeeper on the ground that the car park was "palpably not a safe place to leave a car" (at p. 294).

In dismissing the appeal of the innkeeper, Asquith L.J. acknowledged that the appeal had been "very attractively argued". The main argument of counsel for the innkeeper was that the innkeeper's liability, although it no doubt extended to persons seeking merely temporary refreshment, did not extend to persons who were not "travellers" in some sense of the word. Counsel argued, in other words, that there was no liability where the case was simply that of a local resident dropping in for a drink. The appeal court refused to accept this contention. Agreeing with his brethren on this point, Denning L.J. would not permit a distinction between travellers and non-travellers: "the courts have opened the door of the inn to the man who stops for a drink on his way home, and, once he gets his foot in, the door cannot be shut against the local resident, for it is beyond the wit of man to know the one from the other" (at p. 290).

Another argument of counsel for the innkeeper was, of course, that the innkeeper had protected himself against his common law liability by putting up the notice that he would not be responsible for the cars in the parking lot. All three judges agreed that the innkeeper cannot contract out of the strict liability imposed on him by the law to keep safely the goods of his guests. In this connection, Denning L.J. reviewed the common law to show that innkeepers have never been permitted by the courts to contract out of the liability they have incurred by custom, whereas common carriers were allowed to do so—to the detriment of the travelling public. Counsel for the appellant did not argue this point on appeal. He was willing to concede that if the car park was within the "precincts of the inn" the innkeeper could not contract out of his common law liability. His argument was put thus by Lord Tucker (at p. 284):

> . . . he [counsel for the appellant] contended that the 'hospitium' of an inn prima facie includes only the inn itself, its stables, and (in modern

> times) its garages, though it may be extended beyond the stables or garages by the innkeeper either by accepting the goods by himself or his servants or by necessary inference from his conduct: see *Jones* v. *Tyler* (1834) 1 Ad. & El. 522; 3 L.J.K.B. 166. This extension being within the control of the innkeeper, he can, it is said, exclude by notice the extension which might otherwise have been inferred from the circumstances.

As both Lord Tucker and Asquith L.J. had concluded that there were no garages forming part of the inn, they had no difficulty in finding that the car park was included within the "hospitium" of the inn, that the strict liability of the innkeeper extended to the cars there parked and that the strict liability could not be displaced by the notice which the innkeeper had attached to his sign. Asquith L.J. commented further (at p. 288) that "such notice . . . , incidentally, would be quite invisible at 9 p.m. on a February night". Denning L.J., obviously disliking the thought of innkeepers being held liable in such circumstances, relied on three ancient cases[2] to find that the notice was effective to protect the innkeeper from his strict liability. The reasoning of the learned judge on this point is curious, inasmuch as he agreed with his brethren that (a) the car park was, prima facie, *infra hospitium*, and (b) an innkeeper cannot contract out of his liability to keep safely the goods of his guests.

The difference in result is explained by the inference drawn by Denning L.J. from the evidence before him concerning the existence of garages at the rear of the inn. A passage from his judgment (at p. 291) will make this clear:

> In most inns there is, or should be, a stable or garage in which travellers can put their horses or cars for the night, for, as I have already said, a common inn implies ability to give a lodging for those who wish to stay the night, and that implies ability to stable the horse or garage the car. The Royal Red Gate Inn in Watling Street apparently provided such accommodation, for *it has, according to one of the plans which was handed in at the trial, a double lock-up garage at the back.* We have to consider now, however, the car park in the front, which is obviously not a suitable place to leave a car for the night. [Italics added]

Denning L.J. did not agree with his brother judges, in other words, that "there is no evidence that any other accommodation belonging to the inn is provided for cars" (Asquith L.J., at p. 287). In his view the fact situation in the case before him was similar to the one obtaining in the three ancient cases he cites. Simply put, these were cases where there was an inner protected court for the safekeeping of guests' carriages as well as an outer yard which was unprotected and open to the street. The innkeeper in each

[2] *Brand* v. *Glasse* (1584), Moore, K.B. 158; *Sanders* v. *Spencer* (1566), 3 Dyer 266b; *Harland's* case (1641), Clay. 97.

case orally warned the guest that he would not be responsible for the carriage if it were left in the outer court. When the guest did not heed the warning of his host he, of course, lost his carriage. Substitute the notice posted by Mr. Linnitt for the warning of his earlier counterpart and you have, says Denning L.J., the same case, in which the innkeeper will win. The reason why the innkeeper can protect himself in such cases the learned judge puts as follows (at p. 293):

> The notice in such cases is not contractual. It is a limitation which the innkeeper is allowed to put on his strict liability, because of the obvious risk involved if the goods are put in that place. It takes the place, so to speak, out of the *hospitium*, so that the innkeeper is not liable as an insurer in respect of it, but only for negligence.

One cannot help feeling that Lord Tucker and Asquith L.J. are on much sounder ground here than Denning L.J. It is difficult to follow the argument of the dissenting judge when he asks us to agree that a notice the plaintiff did not read is as effective as a clear oral warning by the innkeeper that he would not be responsible for the car in the car park. Even assuming the existence of garages for guests' cars at the rear of the inn (as, apparently, Denning L.J. did), the basic fact pattern of the instant case is only superficially analogous to the pattern obtaining in the earlier cases cited by him. The principal case upon which he relies is a case decided in 1564 and vouched for in *Brand* v. *Glasse*.[3] The citation is as follows:

> A clothier came to an inn with his waggon of wool to lodge there, and on his entry the innkeeper said to him that, if he wished that he should undertake the charge of his waggon, he should draw it into the inner court or otherwise he would not be responsible for it; the clothier did not do it. The wool was stolen and the clothier brought an action; and for this special matter the innkeeper was discharged.

In a similar case, tried two years later, in 1566, the innkeeper was again held not liable, inasmuch as the guest had left his packages "in an outer court at large" despite a warning by the innkeeper that they would not be safe there.

Denning L.J.'s argument is that the innkeeper in such cases could not have escaped liability by giving notice had the goods been "placed under cover within the precincts of the inn" (at p. 292). It is the leaving of goods in an unprotected place beyond the precincts of the inn which, he says, enables the innkeeper to escape his strict liability. But the learned judge has already agreed that the car park is, prima facie, within the precincts of

[3] (1584), Moore, K.B. 158; 72 E.R. 503.

the inn. Physically, it is contiguous to the inn, within the curtilage of the inn, to use Denning L.J.'s own phrase. So this is not the case of an outer court or "an outer court at large". If, on the other hand, it is the fact of being under cover that is important, surely there is a significant difference between a modern steel motor car, which can be locked, and a wagon of wool in the 16th century. Possibly a Canadian requires less protection for his motor car than does an Englishman, but it is not likely that he would agree with Denning L.J. that a car park such as was provided by the Royal Red Gate Inn was "palpably not a safe place to leave a car" (p. 294).

In short, Denning L.J.'s whole argument rests on the assumption that the plaintiff had left his car in a place unsuitable for the reception of the cars of "travellers" and that therefore the innkeeper was entitled to escape his usual responsibility. It is a most difficult argument for a Canadian, used to Canadian hostelries, to follow. As I have suggested, I have more confidence in the reasoning of Lord Tucker and Asquith L.J. on this particular branch of the case.

Whether or not the reasoning of Denning L.J. is sound, we may, perhaps, commend him for doing his utmost to avoid what, to a layman, must appear to be an absurd result. As is pointed out in the May 17th, 1951, issue of the Australian Law Journal, a layman would be astonished if he were to read *Williams* v. *Linnitt* and then read *Tinsley* v. *Dudley*[4], a case heard three weeks later by other judges of the same Court of Appeal. In *Tinsley* v. *Dudley* the plaintiff, while having a beer at a public house, left his motor bicycle in a closed yard adjoining and forming part of the premises. On the gates of the yard was the name of the public house followed by the words: "Covered yard and garage". The bicycle was stolen but the proprietor of the place was held not liable.

Contrasting the two decisions, the writer of the note in the Australian Law Journal comments on the amusing result as follows:

> A layman might be pardoned his astonishment at the workings of the law when it is realized that in both cases mentioned, the plaintiffs had called in for a 'pint of ale', yet the one who left his car in an open area with a no-liability notice clearly displayed was successful, whereas the one who, in response to a printed invitation, drove into a closed yard, failed.

The explanation, obvious to lawyers only, is that the public house

[4] [1951] 1 All E.R. 252.

in *Williams* v. *Linnitt* was a "legal" inn, whereas the one in *Tinsley* v. *Dudley* was not. But even a lawyer may inquire if the distinction is a valid one to-day. The well-established law is that if, as in *Tinsley* v. *Dudley*, refreshment but not lodgings is provided, the public house is not an inn and the proprietor is not strictly liable for the goods of his guest. He will be liable only if it can be shown that he became a bailee of his guest's property. It is, of course, otherwise with the innkeeper.

Although the English Parliament and the legislatures of most of the provinces of Canada have, in theory, enabled the innkeeper to limit his liability very considerably as to most articles of his guest by putting up a proper notice, this limitation does not apply, as a general rule, to horses and carriages (including cars). As Denning L. J. points out (at p. 292), these are the only things for which, if stolen, an innkeeper is liable up to the full value.

The learned judge considers it a serious matter if, in the absence of assistance from the legislature, an innkeeper cannot protect himself by putting up a notice that he will not be responsible for cars parked outside his inn. He says (at p. 292):

> If he has no means of protecting himself in respect of the car park, it means that not only guests who stop for a drink during the day, but also those who come for a meal during the hours of darkness, will be able to leave their cars for a long time in the car park, without telling the innkeeper anything about them, and hold him liable for their full value if they are stolen. . . . if carried to an extreme, this responsibility would mean that an innkeeper ought to have an attendant to watch over cars in the car park — all night, if need be.

As we have seen, the solution of Denning L.J. was to unearth "cases in the books which show that the innkeeper can at common law protect himself by notice in the case of yards which are unprotected and open to the street" (at p. 292).

It would appear that the fact situation and the result of the instant case pose a live problem for Canadian lawyers and legislators. To-day in Canada many hotels are catering to the local resident who wishes to drop in for a drink. Many of these "travellers" drive their own cars to the inn and park them there in circumstances similar to those obtaining at the Royal Red Gate Inn. Surely there is force in the comment of Denning L.J. that it is a serious situation if our hotel-keepers cannot protect themselves against liability for loss of their guest's car by the convenient method of putting up a proper and adequate notice. Otherwise, they will be liable to the full extent of the loss because most of our statutes do not permit the innkeeper to limit his liability in the case of "carriages".

Assuming that Mr. Justice Denning is right and that even in respect of cars the innkeeper is entitled to protect himself from strict liability by putting up a notice, the real question is when such a notice will serve the purpose for which it was designed. The guest may not read it;[5] it will not always be possible to describe the parking place of the car as an "outer court". A better solution might be to rid the law of the notion of the strict liability of the innkeeper to everyone who happens to come within his door. This has been done by statute in Alberta where the innkeeper is not liable to make good for lost or injured goods to any person who is not registered as an occupant of a room in the hotel.[6]

But there still remains the problem of the car of a properly registered guest who casually leaves it, technically speaking, *infra hospitium*. It seems absurd to have to hold, as the English Court of Appeal did in the instant case, that in such circumstances the innkeeper is liable for the full extent of the loss. Even the guest would not normally anticipate such a windfall; he would be astonished to learn that the innkeeper was by law fully responsible for his $3,000 car which he has casually left standing just off the street in front of the hotel.

This is a problem for the legislature. *Williams* v. *Linnitt* should serve as a timely warning that some of the solicitude the common law displays towards the common wayfarer might now be better shown to the poor innkeeper. The peculiarly great responsibility of the innkeeper, grounded as it is in the custom of the realm, is, under modern conditions, a legal anachronism. Apart from this legal oddity, the difficulty the judges in *Williams* v. *Linnitt* had in applying mediaeval terminology and concepts to a 20th century "inn" should make it clear to us in Canada that the time has come to revise our law relating to innkeepers. We should, for instance, provide our innkeepers with a more effective method of limiting their liability in proper cases — not ask them to post up notices that no wise guest will ever read. We should remove the exception of horses and carriages (including cars) as to which the innkeeper is not at the present time permitted to limit his liability. Whatever the reason in earlier times for not permitting the innkeeper to relieve himself of his strict liability in the case of horses and carriages, the same reason surely does not hold in Canada to-day in the case of the modern automobile. It is trite

[5] On this point see the interesting comment by Horace E. Read, Innkeeper — Hotel Proprietor — Liability for Loss of Guest's Goods — Negligence of Guest — Limitation of Liability — Innkeepers' Liability Acts (1931), 9 Can. Bar Rev. 751.

[6] The Hotelkeepers' Act, R.S.A., 1942, c. 226.

to remark that the motor car has changed the lives of all of us; nevertheless, it may not be too much to ask that the motor car in *Williams* v. *Linnitt* may likewise effect a co-extensive change in Canadian innkeeper law.

R. GRAHAM MURRAY*

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WILLS — INTERPRETATION — AMBIGUITY — WHETHER INTENDED BENEFICIARY WAS NAMED INDIVIDUAL OR INSTITUTION — EXTRINSIC EVIDENCE.—The recent unanimous decision of the Supreme Court of Canada in *G. W. Lucey et al.* v. *The Catholic Orphanage of Prince Albert and F. C. Neate*,[1] involving the proper contruction of a gift in the will of the late Nellie Lucey of Prince Albert, is noteworthy if only because of its complete rejection of the rather surprising reasons for judgment given by the Chief Justice of the King's Bench of Saskatchewan,[2] which were unanimously affirmed by the Court of Appeal.[3]

The facts of the case were these. Nellie Lucey died on April 6th, 1949, leaving a short will in her own handwriting, the dispositive part of which read as follows:

> I devise and bequeath all the real and personal estate to which I will be entitled at the time of my decease, unto Reverend William Bruck o.m.i. St. Patrick's Orphanage of the City of Prince Albert in the Province of Saskatchewan, absolutely, and I appoint the said Reverend William Bruck sole executor of this my will. . . .

Because the Reverend William Bruck had predeceased the testatrix by two years, her next of kin — two brothers living in the United States — claimed the property on the ground that the gift, being a beneficial one to Father Bruck and not one to the Orphanage, had lapsed. The Catholic Orphanage of Prince Albert, commonly called St. Patrick's Orphanage, had been incorporated by Special Act,[4] with power inter alia to acquire property by gift, devise or bequest.

For the Orphanage it was argued that the property was given either to it as donee or to Father Bruck as trustee for it. The reasoning in support of these contentions, which is unusual in

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[1] As yet unreported. All references to the court's decision are to an uncertified copy of the judgment obtained from the solicitor for one of the parties, to whom the writer acknowledges his thanks.

[2] [1950] 1 W.W.R. 1057.

[3] [1950] 2 W.W.R. 1167.

[4] Statutes of Saskatchewan (1915), c. 46.

face of the principles governing the interpretation of wills, is well summarized by Cartwright J., who delivered the judgment of the court for the five members, Kerwin, Taschereau, Kellock, Locke and Cartwright JJ., hearing the case:

> Counsel for the respondent contends that the words 'unto Reverend William Bruck o.m.i. St. Patrick's Orphanage of the City of Prince Albert in the Province of Saskatchewan', describe as donee the Orphanage rather than the Reverend Father Bruck, that all the words quoted which precede the word 'Orphanage' are descriptive of the Orphanage and that, while the words 'St. Patrick's Orphanage' might well have been a sufficient description, the words 'Reverend William Bruck o.m.i.' were inserted as a further description out of an abundance of caution. Counsel argues that if the words 'St. Patrick's Orphanage' had been intended merely as the address of the Reverend William Bruck the word 'of' would have been inserted before the words 'St. Patrick's Orphanage' or a comma would have been inserted after the initials 'o.m.i'. Alternatively, the respondent submits that the words describing the donee are equally apt to describe either the Orphanage or the Reverend Father Bruck and that extrinsic evidence of the intention of the testatrix was admissible and shows that such intention was to make the Orphanage the donee.
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> In the further alternative the respondent contends that if the words are held to describe the Reverend Father Bruck as donee then, on the proper construction of the will, read in the light of the surrounding circumstances, he takes as director, or as the member of the o.m.i. in charge, of the Orphanage and as trustee for it.

In the King's Bench, Brown C.J. held that the gift was not to Father Bruck but to St. Patrick's Orphanage. It would seem that this decision would not have been reached by the learned Chief Justice if the testatrix had not written the letters o.m.i. after the name of the Reverend William Bruck. After stating that the letters amounted to an ambiguity (although they are a common designation and a title usually given to members of the Order in newspaper reports), he held that he was entitled to admit extrinsic evidence as to their meaning. This evidence was supplied by the affidavit of the Reverend Charles Charron, Chancellor of the Roman Catholic Diocese of Prince Albert, which brought out that the Reverend William Bruck o.m.i. was a member of the order of priests in the Roman Catholic Church known as the "Oblates of Mary Immaculate"; that as such he was required and did make perpetual vows of chastity and poverty; that he had been Director of St. Patrick's Orphanage from 1906 until the time of his death on January 9th, 1947; that testatrix was a Roman Catholic and knew that Father Bruck was a member of the Oblates of Mary Immaculate, being bound by a vow of poverty and could not receive property for himself. The Chief Justice then proceeded "to look at the will within its four

corners and apart from the affidavit of the Reverend Charles Charron", placing great emphasis on the fact that the bequest was made "unto Reverend William Bruck o.m.i. St. Patrick's Orphanage of the City of Prince Albert in the Province of Saskatchewan", and pointing out that she did not write *of* St. Patrick's Orphanage, or *of* the City of Prince Albert, but that it was the Orphanage that was identified as being of that city. He then concluded from the extrinsic evidence and from the context of the will that the testatrix intended to benefit the Orphanage by the bequest and not Father Bruck as an individual.

There is a further statement in the affidavit, which is quoted in full by the Chief Justice, that the testatrix had told Father Charron that it was her intention to leave all her estate to and for the benefit of St. Patrick's Orphanage and that she had made out her will in favour of the Orphanage.[5] Such direct evidence of intention is admissible only in the case of an equivocation.[6] An equivocation arises where the description of the legatee, or of the property bequeathed, is equally applicable in all its parts to two persons, or to two things.[7] The Supreme Court decided that there was no equivocation involved. The trial judge had not made a ruling on the point but apparently did not consider such evidence of the testatrix's actual intentions to be admissible. As to this, Cartwright J. stated:

> In my opinion those portions of the affidavit of the Reverend Charles Charron which state that the testatrix had in her lifetime told him that it was her intention to leave all her estate to and for the benefit of St. Patrick's Orphanage and that she had made out her will in favour of St. Patrick's Orphanage were inadmissible.
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> . . . I do not read the reasons of the learned Chief Justice of the King's Bench or those of the Court of Appeal as indicating that they regarded such evidence of intention as admissible.

With respect, the writer wonders whether such statements of the actual intentions of the testatrix did not exert some unconscious effect on the Chief Justice of the King's Bench and the members of the Court of Appeal. The ratio decidendi of the King's Bench and of the Court of Appeal would seem to be that there was an ambiguity or uncertainty on the face of the will as to the meaning of the letters o.m.i. and that evidence was admissible to show what they meant. Once that evidence was admitted, along with evidence of the circumstances surrounding the testatrix at the time of the execution of the will, the courts concluded from

[5] [1950] 1 W.W.R. 1057, at p. 1063.
[6] *Doe d. Gord* v. *Needs* (1836), 2 M. & W. 129.
[7] See Bailey on Wills (3rd ed., 1948) at p. 188.

the evidence and from the context of the will that the testatrix meant to give the property to the Orphanage and not to Father Bruck. The foundation on which the Saskatchewan courts based their decision, and which the Supreme Court destroyed, was fabricated out of the inferences drawn by them from the wording of the will and from the circumstances surrounding the testatrix at the time of the execution of the will. Were some of those inferences unconsciously constructed with the aid of the statements of the actual intentions of the testatrix? The Supreme Court found that the trial judge was justified in admitting evidence as to the meaning of the letters o.m.i. and as to the circumstances surrounding the testatrix at the time of the execution of the will, but that he was going too far when he drew and gave effect to the inference, in view of the wording of the will, that the testatrix intended to give the property to the Orphanage. Even when that evidence was admitted, the court held, there was no doubt but that Father Bruck and not the Orphanage was the donee of the property, that the letters "o.m.i." were simply a further description of the donee and the words "St. Patrick's Orphanage" denoted the place where he lived and worked.

As regards the Orphanage's contention that the words "Reverend William Bruck o.m.i." should be taken as an adjectival phrase descriptive of the Orphanage, Cartwright J. said that "it would involve a violent and unnatural construction" to do so, and that he did not believe that the testatrix had so used them. He then observed:

> This view is, in my opinion, somewhat strengthened by the use of the words 'the said' in the sentence which follows — 'and I appoint the said Reverend William Bruck sole executor of this my will'.— The testatrix first gives her estate to Reverend William Bruck and then appoints 'the said Reverend William Bruck' her executor. I have concluded that the words of the will mean that the donee of the estate is the Reverend William Bruck and not the Orphanage.

It is interesting to note that, although the Saskatchewan courts did not deal with the Orphanage's contention that, even if it should be held that the gift was to the Reverend William Bruck, it was not a beneficial one but given *virtute officii* impressed with a trust for the benefit of the Orphanage, the Supreme Court held on the authority of *In re Delany, Conoley* v. *Quick*[8] and *Torner* v. *Wilson*,[9] that the mere fact that a gift was expressed to be made to the holder of an office, with a designation of him as such, was not sufficient to raise an inference that it was made to

[8] [1902] 2 Ch. 642, at p. 646.
[9] 4 Drew. 350, at p. 351.

him as trustee for the office, unless the context and circumstances show that the gift was to the holder of the office for the time being and not for the holder personally. In *In re Delany, Conoley* v. *Quick*, Farwell J. stated that the mere description of the legatee as the holder of an office was not sufficient to raise the inference that it was not a personal bequest.[10] This statement was an obiter dictum, but Cartwright J. said that he was unable to find any reported case at variance with it and that in his opinion it correctly stated the law. The court said further that, even in view of the context and circumstances surrounding the testatrix at the time of the execution of the will, the words could not be so construed as to make Father Bruck a trustee for the Orphanage, since the words were words of gift to the Reverend Father who was further described as the holder of an office.

It would seem, to the writer, that the Saskatchewan courts placed too great emphasis on the idea that Father Bruck was incapable, because of his vow of poverty, of taking property beneficially for himself. Brown C.J. seemed to assume that the testatrix was convinced that Father Bruck never would have renounced his vows, and the Court of Appeal stated:

> The Reverend Father could not accept the bequest for himself. . . .[11]

Cartwright J. dispelled this idea:

> I have found no case which decides, and I do not think it should be held, that the fact that a beneficiary is described in a will as a member of an order, vowed to poverty, is of itself sufficient to prevent his taking beneficially.

One will, three courts, six Saskatchewan judges reaching one conclusion, five Supreme Court judges reaching an opposite conclusion — this is an extremely interesting feature of the history of the case. With all respect, perhaps an explanation for the decisions of the Saskatchewan courts may be found in the statement of Cartwright J. near the end of his judgment:

> There is, I think, no doubt that if the Reverend Father Bruck had survived the testatrix he would have used all her estate either for the Orphanage or for other equally worthy objects and would have retained nothing whatever for himself; but, in my opinion, no obligation to so deal with the estate was imposed upon him by the words which the testatrix used in her will.

Is it possible that, with the question whether approximately $30,000 should go to an Orphanage or to two brothers of the testatrix, who had been out of touch with her for many years be-

[10] [1902] 2 Ch. 642, at p. 647.
[11] [1950] 2 W.W.R. 1167, at p. 1168.

fore her death, depending upon the interpretation of the gift in the will, the judges may have been influenced unconsciously or otherwise by certain ideas of ultimate social values?[12] Is it also possible that they may have believed that they were aided in weighing down the scales on the side of an interpretation favourable to the Orphanage by the fact that the problem of the interpretation of wills is one of the most difficult with which a court has to cope?[13] The Saskatchewan courts may have believed that, since they were deciding a question of fact and not laying down a rule of law to be followed,[14] they could go as far as they wished in the interpretation of the will. But certain rules delimit this area of discretion of the court.[15] These rules are designed to prevent violations of the Wills Act by deducing the will from the intention of the testator. The Supreme Court held that the trial judge was justified in admitting evidence of the circumstances surrounding the testatrix at the time of the execution of the will, but, in view of the wording of the will, was not justified, along with the Court of Appeal, in concluding from such circumstances that the testatrix intended to give the property to the Orphanage and in giving effect to that conclusion.

In effect, the Saskatchewan courts were attempting to deduce the will from the intention of the testatrix. The objection to that technique is that when they endeavoured to ascertain the testatrix's intention they were approaching so close to the frontiers of the speculative that there was an ever-present danger that they would still fail to discover the testatrix's actual intention. Since it is not possible to ask her, how can the courts determine with absolute certainty what she intended? The Supreme Court holds that in such a situation the safest way to avoid the uncertain result of speculation is to take refuge in the ordinary and grammatical construction.

C. V. COLE*

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[12] See Wambaugh, The Study of Cases (2nd ed., 1894) pp. 57-61.

[13] See *Perrin* v. *Morgan*, [1943] A.C. 399, where Lord Atkin referred to the problem in colorful language at p. 415. Its perplexity is probably due to the fact that when a court is interpreting a will it is essentially deciding a question of fact: What was the intention of the testator?

[14] *Re Masson, Morton* v. *Masson* (1917), 86 L.J. Ch. 753, at p. 756; *Walford* v. *Walford*, [1912] A.C. 658, at p. 664.

[15] For example, the equivocation principle, *Doe d. Gord* v. *Needs, supra.*

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INSURANCE — WIFE NAMED AS BENEFICIARY — SUBSEQUENT ANNULMENT OF MARRIAGE — MEANING OF "DIVORCE" AND "ANNULMENT".— The decision of the Ontario Court of Appeal in *Re Miles; Steffler* v. *Miles*,[1] allowing an appeal from the judgment of Gale J.,[2] achieved a desirable result in the particular case. At the same time, it is unfortunate that the reasons for judgment in the Court of Appeal contain language suggesting that the dissolution of a valid marriage and the annulment of a voidable marriage are but different examples of the same kind of proceeding.

The problem arose in a contest over the proceeds of a policy of insurance paid into court by the insurer. The insured, a man, had gone through a ceremony of marriage with *A* and she had been designated beneficiary as "*A*, wife of the insured," in a policy of insurance on his life. The marriage had later been annulled for impotence. The insured then married *B* and later died intestate without making a new designation of beneficiary. *B* had been appointed administratrix of his estate. *A* claimed the proceeds of the policy as the beneficiary named in it and *B* claimed the proceeds as belonging to the estate of the insured.

There do not appear to have been any decided cases to guide the court. Counsel for *B* based his submission on section 169(1) of the Insurance Act,[3] which reads as follows:

> Where the wife or husband of the person whose life is insured is designated as beneficiary, and is subsequently divorced, all interest of the beneficiary under the policy shall pass to the insured or his estate, unless such beneficiary is a beneficiary for value, or an assignee for value.

Gale J. held that *A* was entitled to the proceeds. He drew attention to the difference between dissolution of a valid marriage, which we call divorce, and the annulment of an invalid marriage, whether void or, as in this case, voidable. In his opinion, the legislature had used the word "divorce" in its ordinary sense of dissolution of a valid marriage. He could not, therefore, hold that the interest of *A* in the policy had been terminated by section 169(1).

Laidlaw J. A., in the Court of Appeal, took a different view of the statute. He said that the annulment of a voidable marriage was a proceeding for the dissolution of a marriage. The legislature must have intended the word "divorce" to include any form of dissolution of marriage. He concluded that *B*'s rights as bene-

[1] [1951] O.W.N. 656.
[2] [1951] O.R. 1; [1951] 2 D.L.R. 72.
[3] R.S.O., 1950, c. 183, first enacted as s. 143 of Ontario Statutes (1924), c. 50.

ficiary were terminated by the statute and the proceeds of the policy were assets of the estate of the insured.

The word "divorce", as a legal term and as a word of common speech, has since 1857 been applied in England and in this country exclusively to the dissolution of valid marriages as distinct from annulment. The former application of the word in canon law to annulment and judicial separation is now merely of historical interest.[4] The justification for extending the word, in the Ontario Insurance Act, to include annulment is hardly to be found in the general connotation of the word itself.

Dissolution presupposes a valid marriage. An invalid marriage, whether void or voidable, does not require to be and cannot be dissolved. A void marriage is no marriage at all, but the court may annul it in the sense that it declares it to be void; a voidable marriage is an invalid marriage which must be treated as if it were valid until it has been annulled by the court. The court's judgment annulling the marriage declares it to be and to have been from the beginning absolutely void. After the annulment the parties must be treated as never having been married. The distinction between dissolution and annulment may be illustrated by an action for dissolution of marriage in which a counterclaim is made for annulment based on impotence. The counterclaim must be disposed of first.[5] If the counterclaim is successful, the action must be dismissed, since there is and has been no marriage to dissolve. The difference between the two proceedings appears to preclude the classification of the annulment of a voidable marriage as a kind of dissolution of marriage. It would follow that "divorce" could not include annulment.

On these grounds, the interpretation of the statute by Gale J. seems, with respect, to be preferable to the one adopted by Laidlaw J.A. Since, however, the result achieved by the Court of Appeal would be generally accepted as desirable, an effort might be made to see whether the same conclusion could have been reached in another way. It is suggested, as a basis for discussion, that there is another line of argument which could have led the Court of Appeal to the same conclusion. *A* was designated bene-

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[4] In Nova Scotia, New Brunswick and Prince Edward Island, in the language of the pre-confederation statutes providing for the establishment of divorce courts, it was enacted that divorces might be granted for impotence or kindred within the prohibited degrees. It would appear that marriages in those provinces are dissolved for impotence and not annulled. The problem before us would not arise in those provinces if, as appears to be the case, a marriage where one party is impotent is valid by their laws until dissolved.

[5] Halsbury (2nd ed.) X, 747.

ficiary as wife of the insured. After the annulment she would be estopped by the nullity judgment from asserting that she had ever been married to the insured, and could not advance before the court a claim to a right under an executory contract to which she might have been entitled as wife of the insured. She could not say that she had ever answered to the description of the beneficiary in the policy. If this argument is correct, the designation of beneficiary was rendered void by operation of law on the granting of the judgment of nullity, and the proceeds of the policy belong to the insured or his estate. There is no need to refer to the statute for the determination of the contest.

It does not appear that such an argument was presented to or considered by the courts in the instant case, or that the problem has arisen in the same form in a previously reported case in Canada or England. The court deciding the case of *In Re Williams and Ancient Order of United Workers*[6] might have had to deal with a similar problem, but was able to avoid doing so. For this reason, the solution suggested must be tentative. Some assistance may be gained from the rule that, if it were not for statutory provisions, marriage settlements would be avoided *ipso jure* on the granting of a nullity judgment.[7]

It must be admitted that my reasoning would not apply automatically to the description of the named beneficiary as wife of the insured in every case where there is a void marriage. For instance, if the insured knew that the marriage was void, it would be clear that he intended the named beneficiary to receive the proceeds and that the benefit was not intended to be to the wife. Nevertheless, if a judgment declaring the marriage void were made after the designation of beneficiary it is suggested that the beneficiary's interest in the policy would be immediately terminated. If so, the question raised by Gale J., in pointing out that section 169 could not apply where the marriage was void, as distinct from voidable, would no longer complicate the issue.

If it was in fact unnecessary to construe section 169(1) in deciding *Re Miles*, it is regrettable that the Court of Appeal spoke of annulment and dissolution in a manner which, in other proceedings, might lead to a wrong result.

STUART RYAN*

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[6] (1907), 14 O.L.R. 482.
[7] Halsbury (2nd ed.) X, 803.
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CRIMINAL LAW — CONSTRUCTIVE MURDER — DEATH ENSUING FROM INVOLUNTARY DISCHARGE OF REVOLVER DURING FLIGHT FROM ARMED ROBBERY — CANADIAN LAW COMPARED WITH LAW IN ENGLAND AND UNITED STATES — HISTORY AND EFFECT OF SECTION 260(d) OF THE CRIMINAL CODE.— On one view of the evidence in the recent case of *Rowe* v. *The King*[1] it was open to the jury to find the following facts. Accused, Rowe, committed an armed robbery in Windsor and in order to make a clean get away hired a taxi driver, Jolly, to drive him to London. At the time when the taxi arrived in London, a hundred miles and some hours away from the scene of the robbery, the Windsor police had not been notified of the robbery and accused was not in fact being pursued, but he was in his own mind still engaged in an attempt to evade arrest. The taxi-driver had by now become suspicious of accused and drove into a gas station in London in order to notify the police. Accused went in with him and, when he asked the operator to get the police, accused pulled out his revolver and ordered him into the rear of the station. Accused did not point the gun at the taxi driver or at anyone else.[2] At this point accused's foot slipped on the floor and, without any act of accused done with the intention of discharging it, the revolver went off and the bullet passed through the door of a room at the rear of the station and killed Galbraith, a person whose presence in that room was unknown to accused. The trial judge in effect instructed the jury that if they found these facts they must convict accused of murder; for, in accordance with section 260(d) of the Criminal Code, "in case of robbery . . . culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue . . . (d) if he uses . . . any weapon during . . . the flight of the offender upon the commission . . . [of robbery] and death ensues as a consequence of its use".[3] On appeal

[1] (1951), 100 C.C.C. 97 (Supreme Court of Canada).

[2] The report does not expressly so state, but I infer it from the statement of Kerwin J., quoted in the next paragraph, that "Rowe not only had the Colt upon his person, but pulled it out and held it in his hand"; if Rowe had pointed the gun at the taxi-driver or anyone else, I think Kerwin J. would have said so.

[3] The murder sections of the Code are as follows:

259. Culpable homicide is murder,

(a) if the offender means to cause the death of the person killed;

(b) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;

(c) if the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed;

(d) if the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby

by the accused from his conviction to the Supreme Court of Canada it was held that the instruction was correct.

Two arguments were made on behalf of the accused. It was said, first, that accused did not "use" the revolver within the meaning of 260(d); the accused did no act of discharging the revolver with the intention of discharging it; what happened was that the accused slipped and the gun went off accidentally and of itself, and that does not constitute "use". Kerwin J. (with whom Rinfret C.J.C. and Estey and Taschereau JJ. concurred) and Cartwright J. (who dissented on the second point to be mentioned in a moment) agreed in rejecting this contention; Kellock J. did not refer to it. "Section 260(d)", said Kerwin J., "was enacted as a result of the decision in *R.* v. *Hughes et al.* [to which I shall refer later] and its provisions are met in this case by the facts that Rowe not only had the Colt upon his person but pulled it out and held it in his hand. That was a use, under any definition of that very ordinary word, and the death of Galbraith ensued as a consequence."[4] It was said, second, that even if accused "used" the revolver, he did not use it during his "flight . . . upon the commission" of the robbery; for "the word 'flight' as used in the section, pre-supposes the existence not only of a person who is fleeing but also of a pursuer and . . . a 'flight upon the commission of an offence' cannot still be in progress hours after such commission when there has been no pursuit at all".[5] The majority of the court held that neither the absence of pursuers nor the time and distance separating accused from the scene of the robbery rendered

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kills any person, though he may have desired that his object should be effected without hurting any one. R.S., c. 146, s. 259.

260. In case of treason and the other offences against the King's authority and person mentioned in Part II, piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody resisting lawful apprehension, murder, rape, indecent assault, forcible abduction, robbery, burglary or arson, culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue,

(a) if he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or

(b) if he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or

(c) if he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath. R.S., c. 146, s. 260.

(d) if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use. R.S., c. 146, s. 260; 1947, c. 55, ss. 6 and 7.

[4] 100 C.C.C. at p. 101. See also p. 108 *per* Cartwright J.

[5] 100 C.C.C. at p. 108.

it impossible for the jury to say that accused was in the circumstances of this case in "flight . . . upon the commission" of the robbery. It was, in a word, enough to constitute "flight upon" the commission of the robbery that the accused thought he was in danger of apprehension and had not yet completed the uninterrupted act of withdrawal from the scene of the robbery, which he had begun by leaving the house when the robbery was committed and continued by taking a taxi.[6] Cartwright J. dissented: "I do not think it necessary to decide whether the existence of a pursuit is in all cases a necessary condition of the existence of a flight; but for an offender's conduct to fall within the meaning of that word as used in cl.(d) after he has got well away from the scene of the crime I think it necessary that there be in progress a pursuit continuing from such scene".[7]

(a) *Rowe v. The King compared with law in England and United States.* This case, the first reported one dealing with section 260(d) of the Code since it was enacted in 1947, raises two points of interest to all countries whose criminal law contains the doctrine of constructive murder, that is, the doctrine which treats as a murderer and subjects to a murderer's penalty a man who has accidentally brought about the death of another in the course of committing another crime involving violence to the person. First, how long does the absolute liability for accidental death imposed by the rule continue after the completion of the crime of violence? Second, and more important, in what sense must the act of the accused which brings about the death be voluntary in order to bring into play the rule of absolute liability? On both of these matters the Canadian law contained in section 260(d) now treats the hold-up man more savagely than does the law in England and the United States.

How long does the absolute liability for accidental death imposed by the rule continue after the completion of the crime of violence? Ever since the Code was first enacted in 1892, section 260, the constructive murder section, has expressly continued it during the time the offender was in "flight upon the commission or attempted commission" of that crime. All that the *Rowe* case involved — and this is the first time the question has come before our courts — was the comparatively minor question of how long does "flight" continue? What the case decided was: (i) it is, in general, a question for the jury whether an accused is still "in flight",

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[6] See judgment of Kerwin J. at pp. 101-102, and judgment of Kellock J. at pp. 102-103.

[7] At p. 110.

and (ii) a jury is entitled to find that an accused who is not being pursued and has put a hundred miles and several hours between him and his crime is still "in flight upon the commission" of the crime. In Canada, therefore, the absolute liability can continue a long time after the completion of the crime. In England the absolute liability appears to end with the completion of the crime of violence to whose completion it is directed. In the classic English statement of the doctrine which treats as murder an unintended killing "by an act of violence done in the course or in the furtherance of . . . a felony involving violence" [8] the expressions "done in the course of" and "done in furtherance of" would naturally refer only to things done before the felony is achieved and the absolute liability, therefore, seems to come to an end with the completion of the crime of violence;[9] it does not, as in Canada, appear to continue as long as the offender is in "flight upon" the commission of the offence. In the United States all states except one (Washington) require the accidental killing to have been done in the perpetration of the felony, or some equivalent expression, but wide limits appear to have been set, at least in robbery cases, to the time during which a felony may be considered in progress; thus "where the robbers have not relinquished the property in their flight, the courts generally, including the New York courts, are inclined to consider the felony still in progress", but "escape and flight after the abandonment of the loot are not normally to be considered part of the perpetration of the felony".[10]

The second, and more important question, is in what sense must the act of accused which brings about the death be voluntary in order to bring into play the rule of absolute liability. Any layman would, I think, say that what brought about the death of Galbraith in *Rowe* v. *The King* was not the voluntary act of Rowe, but the involuntary discharge of the gun produced by Rowe's slipping on the floor. Any Canadian lawyer must reply that, given the wording of section 260(d) ("uses . . . any weapon . . . and death ensues as a consequence of its use") the Supreme Court was justified in ignoring this difficult question and asking itself two questions only: (1) did Rowe "use" the gun, and (2) did Galbraith's death "ensue as a consequence of its use"; and to both questions the plain answer is yes. Voluntary act or no volun-

[8] *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479, at p. 493.

[9] The question has never come before the English courts, but I have adopted the opinion of the editor of the new edition of Russell on Crimes (10th ed., 1950) at pp. 557-558.

[10] Arent and MacDonald, The Felony Murder Doctrine and its Application under the New York Statutes, 20 Cornell L.Q. 288, at pp. 303-305; see also 40 Corpus Juris Secundum, 870-872.

tary act, Rowe used the gun and, Galbraith's death having ensued as a consequence of that use, Rowe is a murderer. I have looked at a number of United States cases and have not encountered one where the rule of absolute liability was sought to be applied to an accused in such a situation; in every case I have seen the accused had deliberately pulled the trigger of his gun, had deliberately set the fire, etc., and the death was accidental only in the sense that he did not foresee that death would or might be the result of these deliberate acts. In England, however, the rule of absolute liability has been applied to a case where only in the most attenuated sense of those words could it be said that the death was caused by a "voluntary act" of the accused. In *Rex* v. *Jarmain*,[11] a case of a hold-up with fatal results, the accused alleged that the loaded gun, which he had cocked and pointed, with his finger on the trigger, at a cashier in order to frighten her into handing over the money, went off accidentally; he had not, he said, discharged the gun voluntarily; he had pressed the trigger inadvertently and his will did not go with the action of his pressing the trigger. The Court of Criminal Appeal held that, even accepting the accused's own story, he was still guilty of murder. It was strenuously argued that the death of the woman killed was not due to a voluntary violent act performed by the appellant, but to an inadvertent and involuntary act — an argument that to me, at any rate, is an exceedingly hard one to answer. But the court replied — while not denying the necessity for a voluntary act before criminal liability can be established — that the act, the "act of violence", which brought about the death of the cashier, consisted of loading, cocking and pointing the gun, and that every one of these things was voluntarily done. And the judgment contains expressions which suggest that even if Jarmain had done no more than what Rowe did in our case, that is, pulled out his loaded gun, held it in his hand without pointing it and then slipped, the court would still have come to the same conclusion. "We think that the object and scope of this branch of the law is at least this, that he who uses violent measures in the commission of a felony involving personal violence does so at his own risk, and is guilty of murder if those violent measures result even inadvertently in the death of the victim. For this purpose the use of a loaded firearm, in order to frighten the person victimized into submission, is a violent measure."[12]

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[11] [1946] K.B. 74. The case was commented on by Unger, The Limits of Constructive Murder (1946), 9 Mod. Law Rev. 72.

[12] S.C. at p. 80.

Thus far the English and the Canadian law appear to be the same. But if we go one step farther and take the next case — where the accused has the gun in his hand but the gun is discharged by the finger of the *victim* in the course of a struggle — the Canadian law would appear to treat the resulting death of the victim as murder while the English law would appear to treat it as manslaughter only. This case has not yet come up for decision in England. In 1942, however, a Canadian court, the Supreme Court of Canada, ruled in *Rex* v. *Hughes*[13] that a death so caused was not murder at common law; and the reason it gave was that the death was not caused by the voluntary act of the accused. *Rex* v. *Jarmain*, a 1946 decision of the English Court of Criminal Appeal, dealt only with the case where the accused pointed the gun and the gun went off through an unintended pressure of the accused's finger and, in my submission, there is no reason to believe that the English courts would wrench some of the wide expressions used in the *Jarmain* judgment out of their context and make use of them to convict of murder a man whose gun was not only not discharged by his act, but was discharged by the act of another.[14] But it is not possible to say with any confidence what the English law is. On the Canadian law it is, since the *Rowe* case, possible to speak with more confidence. Before this decision the application of section 260(d) to the situation dealt with in the *Hughes* case was obscure. The subsection treats the offender as a murderer "if he uses or has upon his person any weapon . . . and death ensues as a consequence of its use". Now, a hold-up man who has a gun in his hand certainly "has upon his person" a weapon, but the subsection, a poorly drafted one, does not expressly render him a murderer if "death ensues as a consequence of his having the weapon upon his person"; it only renders him a murderer if "death ensues as a consequence of its use", a very different thing. Can he then be said to "use" the gun if he does not actively fire it or actively point it, but only passively holds it in his hand? If he can, the subsection applies to him and his offence is murder. To this question the Supreme Court of Canada answered yes and both Kerwin J., speaking for the majority, and Cartwright J, the dissenting judge, treated section 260(d) as intended to change the law laid down in the *Hughes* case. Because it is now committed both to the passive sense of the word "use" and to the proposition that section 260(d) was intended to change

[13] [1942] S.C.R. 517.

[14] Mr. Alfred Bull, the author of Murder or Manslaughter? (1946), 24 Can. Bar Rev. 13, would probably disagree with my submission.

the law laid down in the *Hughes* case, the Supreme Court would, I think, to-day hold a hold-up man guilty of what picturesquely-minded laymen call "wilful murder" when the gun he holds in his hand is discharged in the most unwilful of all ways, namely, by the act of another.

(b) *History of constructive murder doctrine in Canada.* It is now time to ask how this savage doctrine, more savage in Canada than in England or the United States, found its way into the Code. The short answer is that section 260(d) in Canada, like *Rex* v. *Jarmain* in England, and like it dealing with a death accidentally caused in the course of a hold-up, is a recent revival — in order to meet the menace of the hoodlum with a gun — of the constructive murder doctrine which our liberal grandfathers and great-grandfathers almost, but not quite, succeeded in killing by the end of the last century.

During the sixty years preceding the enactment of the Criminal Code in 1892, the definition of the "malice aforethought" required to constitute the crime of murder at common law was several times discussed by Royal Commissions in England. To "malice" in the sense of "foresight that death would or might result" there was, of course, no objection, but "constructive malice", and in particular death caused by an act of violence done in the course of or in the furtherance of a felony involving violence, "was not approved by the Commissioners in 1839 and was reprobated by that eminent judge and legal scholar, Sir James Stephen. It was omitted from the Draft Code formulated by the Criminal Code Commission of 1878-79, save for the special instances [which correspond to the Canadian sections 260 (a), (b), and (c) to be mentioned in a moment]. It might have been expected that the movement just outlined would have been continued during the twentieth century and that by the present day constructive malice would have disappeared from our law. This, however, has not been the case, for modern decisions seem at first sight to have reversed the law of development." That is how the editor of the new edition of Russell describes the present situation in England.[15]

The Canadian Criminal Code of 1892 was a compromise between those who wished to retain the doctrine and those who wished to do away with it altogether. The constructive murder section was, with the exception of clause (d), substantially the same as the one we have today. In the first place it was murder "if the offender, for any unlawful object, does an act which he

[15] Russell on Crime (10th ed., 1950) pp. 543-544.

knows or ought to have known to be likely to cause death and thereby kills any other person . . ."; this is, in effect, the test proposed by Stephen J. in the famous case of *Rex* v. *Serne*;[16] the Crown must prove (a) voluntary act, and (b) foresight that his act would or might cause death.[17] Had the Code stopped there, "constructive malice" would have been entirely omitted from Canadian criminal law, but the Code did not stop there; it went on. In the second place, it was murder if, for the purpose of facilitating the commission or escape after the commission of the specified offences of treason, piracy, escape from custody, resisting lawful apprehension, murder, rape, forcible abduction, robbery, burglary, arson, the offender (a) meant to inflict grievous bodily injury, (b) administered a narcotic, or (c) wilfully stopped the breath; in these cases it was immaterial that the offender did not mean to kill or did not know that death was likely to ensue.[18] This is the constructive murder doctrine in a severely restricted form; foresight or no foresight of the likelihood of death, the offender risks his own neck if, in order to achieve those particular ends which experience up to 1892 had shown to involve peculiar danger to human life, he (a) intends to inflict injury which, although short of deadly, is serious, (b) administers narcotics, or (c) suffocates. Case (a) does not in any real sense continue the law of constructive murder — the offender may not have foreseen the possibility of death, but he certainly did foresee and meant to bring about serious physical injury. In Canada, therefore, the doctrine survived only in the two highly special cases of deaths accidentally caused by case (b), the administration of narcotics, or by case (c), suffocation — cases which were probably selected for this special treatment because experience up to 1892 had shown that these brutal ways of overpowering resistance (for example, the thief who gives his victim knock-out drops or the rapist who squeezes the neck of a girl to stop her struggles) were of all ways the most productive of accidental deaths. No special provision was made for what is today the typical example of a death accidentally caused in the commission of a crime of violence — the accidental death which occurs in the course of an armed robbery — and the Canadian law in 1892 therefore was that such a killer was not guilty of murder but only of manslaughter.

In the years between 1892 and 1947 the Crown twice attempted to induce the courts to invent that special provision. The first

[16] (1887), 16 Cox C.C. 311.

[17] S. 227(d), numbered s. 259(d) in the present Code.

[18] S. 228, numbered s. 260 in the present Code. Indecent assault was added to this list of offences in 1947.

attempt was made in Manitoba in 1920 and was successful. In that year the Manitoba Court of Appeal managed in the case of Elnick,[19] an armed robbery case with fatal results, whose facts were indistinguishable from those in the later English case of *Rex* v. *Jarmain* already discussed, to convince itself that the Canadian law rendered the accused guilty of murder. The court did not and could not assert that that was the law under the Code, but it held — a most unhistorical conclusion — that there was still in effect in Canada the common law rule of constructive murder that death caused by an act of violence done in the course of or in the furtherance of a crime of violence was murder. The second attempt was made in 1942 in *Rex* v. *Hughes*[20] before the British Columbia Court of Appeal and the Supreme Court of Canada; this, it will be remembered, was the case where the fatal bullet from the robber's gun was discharged, as it was alleged, by the act of the victim. This time the result was inconclusive; the Supreme Court held that even if the *Elnick* case was good law it was distinguishable and expressly refused to pass upon the question whether the common law of constructive murder was still in effect in Canada.[21] In 1946 Mr. Alfred Bull ended an article in the Canadian Bar Review by saying that "whether or not a bandit holding up a bank teller at the point of a gun and killing him say that the gun went off accidentally and thereby permit a jury to bring in a verdict of manslaughter is something that Parliament should ponder".[22] In the same year some sturdy citizens declared themselves outraged at the result of the Tobias murder trial in Toronto, in which four young fellows who had carried out an armed robbery on a store and accidentally killed the storekeeper were able to persuade the jury to do what Mr. Bull thought it shouldn't be allowed to do, namely, convict them of manslaughter only.[23] In 1947 there was introduced into the house of Commons, as one of several amendments proposed to be made in that year to the Code, yet another special case in which an accidental killing would be murder — using a weapon to facilitate the commission of crimes of violence. This method of proceeding — asking Parliament, a body of laymen, to add, in line with the method which the 1892 Code had adopted in dealing with constructive murder, a further special case to cover specified behaviour which experi-

[19] (1920), 33 C.C.C. 174.
[20] [1942] S.C.R. 517.
[21] S.C. at p. 525.
[22] Murder or Manslaughter? (1946), 24 Can. Bar Rev. 13, at p 17.
[23] The successful appeal by the Crown from the sentences imposed on the accused for manslaughter in this case is reported as *Rex* v. *Warner, Urquhart, Martin* and *Mullen*, [1946] O.R. 808.

ence since 1892 had shown to be peculiarly liable to bring about accidental deaths — was obviously more satisfactory than allowing the judges, in defiance of the whole scheme and history of the Code, to resurrect the vague and general common law rule. Unfortunately, the House of Commons did not discuss the matter at all; they were too interested in discussing two other amendments, one dealing with drunken driving and the other with the detention of habitual criminals. What happened was that the Senate, in an unreported committee, turned a drastic but coherent amendment into the savage and incoherent section 260(d) which appears in the Code today. The House of Commons refused at first to concur in the changes made by the Senate, but the Senate insisted on them and, after a conference between managers appointed by each of the two Houses, the House of Commons accepted the amendment in what was in the substance the Senate's form. The Government could not do anything else; the end of the session was near and in order to secure the passage by the Senate of all the other amendments to the Code, they had to advise the House of Commons to concur in the Senate's version of the new section 260(d).[24] Throughout all this hurly-burly, the Debates, Senate and Commons alike, contain not a line of public discussion. The present position is therefore as follows. Section 260(d), as it now appears in the Code, was never discussed by the laymen in the House of Commons who, like the jury in the *Tobias* case and many other cases, are likely to have views on the extension, however confined and however specific, of the curious legal doctrine which makes a man answer with his life for a death he neither planned to achieve nor foresaw as likely to happen.

(c) *Why section 260(d) should be repealed.* As passed by the House of Commons the new section 260(d) rendered the offender guilty of murder "if he uses any weapon for the purpose of facilitating the commission of any of the offences in this section mentioned [for example, robbery] or the flight of the offender upon the commission or attempted commission thereof and death ensues as a consequence of such use". This is of course a drastic section. It tells an armed robber that if he pulls his gun out to frighten his victim or a pursuing policeman into submission, and the gun accidentally goes off and kills someone, then he goes to the gallows.

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[24] See, and in the following order, Debates, House of Commons (1947), Vol. VI, p. 5464; Debates, House of Commons, Vol. VI, pp. 5027-5039, and 5046-5064; Debates, Senate (1947), pp. 552-554; Debates, Senate, pp. 577-578; Debates, House of Commons, Vol. VI, p. 5464; Debates, Senate, p. 621; Debates, House of Commons, Vol. VI, p. 5625; Debates, Senate, p. 631; Debates, House of Commons, Vol. VI, pp. 5697 and 5725.

It would seem to render murder the death which occurred in *Rowe* v. *The King*. But drastic as it is, it was not drastic enough for the Senate. As amended by the Senate and finally enacted into law, the section reads: "if he uses *or has upon his person* any weapon *during or at the time of* the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use". This is more than drastic; it is savage; and what is more it is incoherent. It is savage because it is solemnly proposing to hang an armed robber whose only connection with the death is that he pulled the gun out of his pocket and the gun happened to go off and kill someone while he was at the scene of the crime or departing from it; even if he pulled the gun out to make it safe by taking the bullets out of it, or to throw it away, and it went off and killed someone, that would still be murder under the present section 260(d). It is incoherent because the words "or has upon his person" are entirely without effect. They were, I do not doubt, added by the Senate to render guilty of murder the armed robber who carried the fatal gun in his pocket but did not "use" it, that is, pull it out. But they are clearly ineffective to do so, for in order that the section may apply at all the death must ensue as "a consequence of [the] *use*" of the gun. It is not enough that death ensues as a consequence of having the gun upon his person. The section as it now stands is preposterous. It came into being as an end of session compromise between a stubborn Senate, a reluctant Government and a bewildered House of Commons. It should, as a minimum programme, be repealed and be replaced by the previous version which passed the Commons but failed to pass the Senate.

And now, as a last question, are Canadians willing to allow section 260(d) in any form to remain in the Code in this year of grace 1951? Against such a section I would urge the following. First, it is wholly arbitrary to select, as do clauses (b), (c) and (d) of section 260, specific type situations of accidental killings for the penalty of death. Is pointing a gun at a night watchman inherently more dangerous or more vicious than gagging him and leaving him in an unheated shed? That's not what my commonsense tells me. But it is what the law tells me. For if I point my gun at the night watchman and it goes off accidentally, I go to the gallows automatically (s. 260(d)), but if I tie him up in an unheated shed and he dies of exposure, I am no murderer unless in the circumstances as I saw them it was a deadly thing to do (s. 259(d)).

Second, it is quite probable that a section like 260(d) will never be more than "law in books". Would a jury acquiesce in convicting in a case where they were satisfied that the killing was really and truly accidental?[25] And even if it did, would the Government leave the offender to his fate? It is worth remembering that neither Beard nor Jarmain, the heroes of the two leading English cases on constructive murder — cases on which oceans of legal ink have been spilt — was executed.[26] The lawyers said they deserved a murderer's penalty; the Government said they didn't; and in criminal law the Government has the last word. Third, section 260(d), as exemplified by the facts of the case of *Rowe* v. *The King*, goes further than any English or American case; Canada seems to be unique in imposing on the armed robber an absolute liability for the fatal results of an involuntary act and unique also in continuing that liability a hundred miles and several hours away from the robbery he has completed. And fourth, section 260(d), and all the other offspring of the constructive murder doctrine, are entirely at variance with the layman's conception of murder. How can one explain intelligently to a layman why an armed thug who slips on the floor during the hold-up and accidentally kills someone is guilty of "wilful" murder and must be hanged, or even — and this is a much easier case to explain — why a rapist who deliberately squeezes a girl's neck in order to stop her resistence but does not mean to hurt her, still less to kill her, must pay for it with his life if she dies. The mens rea conception, that a man is criminally responsible for those consequences of (a) his voluntary act (b) which he foresaw, and for no other consequences, is deeply ingrained in the layman's moral code and nothing but overwhelming public necessity should justify the disregard of that conception where a man's life is at stake. I do not find the arguments on the other side convincing. As to deterrence, will a hoodlum who always carries a gun to defend himself against the guns of an opposing gang be deterred from taking it with him on a bank hold-up merely because section 260(d) tells him that if he is unfortunate enough to kill someone there with it accidentally he will go to the gallows? Will a rapist in his uncontrollable excitement be deterred from squeezing the girl's throat merely because section 260(c) tells him that if he squeezes too hard and the girl dies he will be hanged. Maybe, but I'm from Missouri. As to the remark — so often made — that he who uses violent

[25] In the *Rowe* case there was evidence from which the jury could draw the conclusion that Rowe (a) voluntarily discharged the gun (b) with the intention of wounding Jolly as he tried to run out of the room.

[26] Russell on Crime (10th ed.) p. 39, n. 74.

measures in the commission of a crime involving personal violence should do so at his own risk, and should be guilty of murder if those measures result, even inadvertently, in the death of the victim[27] — this is at the worst a mere rationalization of the existing savage law, and at the best a surrender to the primitive desire to see the other fellow "get a taste of his own medicine", the desire to beat up the table which banged against us in the dark.

JOHN WILLIS*

Appellate Court Opinions

There is a great deal of mystery as to how some appellate courts work, and a great deal of this mystery, I fear, would not stand the light of day. In more than half of our [American] courts opinions are assigned in rotation in advance of the oral argument. Judges, being mere men, doubtless listen more attentively to the arguments in the case where they are to write the opinion than they do to the arguments in other cases. There is an art, I am told, of seeming to listen. At any rate it would seem to be significant that in courts where opinions go in rotation, the law secretary of the judge who is to write the opinion generally comes to court and listens to the argument. In some jurisdictions the practice of rotation has been exalted to a cardinal principle; judges have been called upon to write an opinion for the majority of the court with which they did not agree, but then they have been permitted to accompany such a majority opinion with a dissenting opinion of their own expressing their true views! There are other courts in which there is no conference at all after the argument, but the judge to whom the case goes in rotation writes an opinion which is circulated and if nobody dissents, it becomes the opinion of the court without any conference whatsoever. If the judge disagrees with the opinion writer, he may prepare a dissenting opinion and circularize it, but a mere description of this process discloses its weakness. No opinion, I submit, should become the opinion of the court without a full discussion of all the issues developed at the argument by the entire court before the case is assigned for the writing of the opinion; and after the opinion has been written, it should likewise be studied by every member of the court and subjected to frank criticism in conference both as to substance and language. One-judge opinions are really a fraud on the litigants and the public. (Hon. Arthur T. Vanderbilt, Some Principles of Judicial Administration, an address delivered on October 5th, 1950, on the Alexander F. Morrison Lectureship Foundation, at the Annual Meeting of the State Bar of California)

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[27] See *R.* v. *Jarmain*, [1946] K.B. 74, at p. 81.

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