Case and Comment

WILLS—EFFECT OF A GENERAL REVOCATORY CLAUSE—"REVOKING ANY AND ALL FORMER WILLS MADE BY ME".—A recent case dealing with a will containing a clause generally revoking earlier wills, *Bégin* v. *Bilodeau*,[1] is of importance both in civil and common law jurisdictions. The case involved the two wills of one Arthur Guay. The first was made in 1937 at the town of Lauzon in the province of Quebec, and the other, in 1939, at Dormont in the state of Pennsylvania. Guay lived and had his domicile in the United States. In August 1937 he came to visit his nephew, Wilfrid Guay, at Lauzon. Wilfrid was his only living relative. On August 27th, 1937, Arthur Guay bought the building in Lauzon that became the subject of the litigation. On the same day, he made the first of the two wills, in which he left to his nephew "all the moveable and immoveable property without exception which I will leave in Canada on the day of my death" ("tous les biens meubles et immeubles sans aucune exception que je delaisserai en Canada au jour de mon deces"). The same day he also gave the nephew a copy of the will, had it read aloud, and handed the nephew a copy of the deed of acquisition. Thereafter, the nephew paid the taxes on the property and, upon the expiration of the existing insurance policy, the new insurance was made payable, in case of loss, to the nephew, who had complete enjoyment of the property as though he were the owner, and lived in it with his family.[2] The uncle came to visit Wilfrid again in 1938 and 1939.

In 1941 the uncle died. Meanwhile he had made the second will, in Pennsylvania, which commenced with the following sentence:

> I, Arthur Gay, of the Borough of Dormont, County of Alleghany and State of Pennsylvania, being of sound mind and memory, do hereby

[1] [1951] S.C.R. 699, affirming [1950] K.B. 818.

[2] Wilfrid was clearly not the owner, as the property was registered in the name of the uncle and no deed had been executed transferring it to the nephew. Moreover, the making of the will showed clearly that the property was to belong to the nephew only upon the uncle's death.

> make, publish and declare this to be my Last Will and Testament, hereby revoking any and all former wills made by me.

By this will the testator left to persons in the United States (after making some pecuniary bequests) "all the rest, residue and remainder of my estate, real, personal and mixed", and named as executor the Monongahela Trust Company, of Homestead, Pennsylvania. The will did not refer specifically to the earlier will, nor did it mention the building in Lauzon, which was the only thing in Canada that belonged to the testator.

After the death of Arthur Guay, the nephew and his family — and later the family alone, the nephew having died — continued to occupy the building at Lauzon. In 1944, the executor wrote to the widow of the nephew, asserting his claim to the ownership of the property on the basis of the second will. In 1945, the executor caused a declaration of transmission to be registered against the property, and from 1945 to 1948 letters of demand and refusal were exchanged between the trust company and the widow. In 1948, the executor sold the property to one Bégin, who, in 1949, took action against the widow, asserting that she was occupying his property without a lease, and demanding the payment of the rental value as well as the termination of her occupation. The Quebec Superior Court maintained his action. The Court of King's Bench (Appeal Side) unanimously reversed this judgment. The Supreme Court of Canada agreed with the Court of Appeal, and unanimously rejected Bégin's appeal.

Before discussing the Supreme Court judgment, it must be admitted that the result of the litigation gave effect to the testator's apparent wishes. From all the circumstances, it seems clear that the uncle's intention was that the nephew and his family were to have the Lauzon property. When he made the second will, he did not intend that the "rest, residue and remainder" should include this property in the province of Quebec. Nor did he, by the general revocatory clause, mean to cancel the previous will.

Several reasons were given by the Court of Appeal and the Supreme Court for rejecting Bégin's action. The judgment of the Court of Appeal is not recited in the brief summary given in Q.R. [1950] K.B. 818. From the notes of Rinfret C.J., however, we gather that three of the judges of the Court of Appeal thought the circumstances indicated that the uncle had intended to make the nephew irrevocably the owner of the property, and therefore that the second will was not meant to affect the property. The other two judges relied on two technical points: (a) the powers of

the executor had expired upon the termination of the period of a year and a day fixed by Quebec law in the absence of an express extension in the will, and (b) a trust company cannot, under Quebec law, act as executor (except after complying with certain formalities, which was not done in this case). Therefore, the Monongahela Trust Company was not capable of transferring title to Bégin, and he could not assert the rights of an owner. In the Supreme Court, Rand and Kellock JJ. relied on the ground of the incapacity of the trust company, in their view it being unnecessary to decide the other question, namely, whether the general revocatory clause was to be taken to have included the will of 1937. Rinfret C.J. and Taschereau and Fauteux JJ., however, tackled directly this latter question, and concluded that the general clause of revocation did not revoke the first will and that both wills must be given effect to.

After setting forth the facts, Rinfret C.J. points out that, in the absence of proof of the foreign law, it must be taken to be the same as that of the province of Quebec.[3] The learned Chief Justice continues that the second will did not "expressly" revoke the former will, but merely revoked *in general terms* "all former wills". Article 892 of the Quebec Civil Code, it is pointed out, provides in part:

> Wills and legacies cannot be revoked by the testator except:
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> 1. By means of a subsequent will revoking them either expressly or by the nature of its dispositions;
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> 2. By means of a notarial or other written act, by which a change of intention is expressly stated; . . .

Article 894 also uses the term "express":

> Subsequent wills which do not revoke the preceding ones in an express manner, annul only such dispositions therein as are inconsistent with or contrary to those contained in the later wills.

From the use of the terms "express" and "expressly" in these two articles (and in article 896, which need not be cited) it is argued that since the will of 1937 was not expressly referred to in the later will, the former was not revoked and "Dans ce cas, l'on me parait justifié, à défaut de disposition expresse, de chercher dans les circonstances et les indices de l'intention du testateur si réellement la nature des dispositions de l'un et de l'autre des testaments fait qu'ils se contredisent".

With deference, it may be questioned whether the word "express" in the Code is intended to convey the meaning thus ascribed to it. Article 892 says a subsequent will can annul earlier

[3] Citing *Trottier* v. *Rajotte*, [1940] S.C.R. 212.

ones "expressly or by the nature of its dispositions". It may be suggested that the legislators were here doing nothing more than opposing the term "express" to an equivalent of "tacit". In other words, the new will can say: "I cancel previous wills [or a specific one]" or it can so dispose of the estate that it is clearly the testator's intention to replace the former will with the new one. In the one case, the revocation is "express", whether couched in general terms or referring to a specific testamentary disposition; in the other, it is tacit, and results from "the nature of [the] dispositions". On this point Demolombe says: "La révocation peut être expresse ou tacite, c'est-à-dire que la volonté du testateur, d'où elle dérive, peut se manifester soit explicitement, soit implicitement".[4]

Rinfret C.J. then points out that it results clearly from all the circumstances that the testator did not intend the second will to affect the Lauzon property. This seems beyond dispute, but does not overcome the difficulty of the revocatory clause. On this point, a dictum of Planiol is cited in the judgment: "Malgré leurs formules absolues, par lesquelles les testateurs declarent révoquer toutes les dispositions antérieures, les révocations expresses sont susceptibles d'être interprétées, et certaines dispositions de date plus ancienne peuvent parfois être maintenues. Voyez-en des exemples dans Cass., 5 juillet 1858, D. 58.1.385, S.58.1.557; Cass., 10 juillet 1860, D.60.1.454, S.60.1.708; Cass., 17 novembre 1880, D.81.1.180, S.81.1.249."[5] Unfortunately, Planiol does not develop this sweeping thesis and the cases he cites do not support it. In each of the cases cited, the second will contained a revocatory clause and other provisions that could not take effect owing to their being contrary to some specific law or for some other reason. The question then arose, Was the revocatory clause to be given effect to despite the failure of the main body of the new will or, on the other hand, was the revocatory clause to be deemed to be conditional upon the carrying out of the impugned dispositions? If it was conditional, then it did not take effect, and the former will was not revoked. And the court could determine from the circumstances whether it was the testator's intention that the revocation was intended to be conditional upon the carrying out of the other terms of the new will. That seems to be as far as the French jurisprudence has gone. Planiol cites no instance where the courts failed to give effect to a revocatory clause in a will that was complete, legal and capable

[4] Vol. 22, No. 133. Cf. Aubry et Rau, vol. 11, no. 725.
[5] Droit Civil (8th ed., 1921) t. 3, p. 709, no. 2842.

of being carried out in all its provisions. Nor has my admittedly incomplete search turned up such a case. In all the cited cases, moreover, no distinction was made between general and explicit revocations. As a matter of fact, in a case cited as *Cass. req., 18 décembre 1894, S.95.1.125,* the same rule was extended to tacit revocations and, where the trust created by a codicil was void for uncertainty, it was held that the tacit revocation implicit in it was conditional upon the creation of the trust. The trust having failed, the earlier will was not revoked.

The learned judges of the Supreme Court also cited cases decided in common law jurisdictions. There the line of cases on this question is most interesting and I feel justified in discussing it despite the fact that, strictly speaking, it would seem to be rather the civil law than the common law that applies. The general rule is stated in Halsbury:[6]

> An earlier will is revoked by a later will or codicil expressly revoking such earlier will or all former wills, and no particular form of words is required for the purpose of effecting such revocation. An express clause of revocation is not essential, but if inserted in general terms operates as a rule to revoke all testamentary instruments previously executed by the testator,[7] including testamentary appointments. Such a clause is not, however, conclusive evidence of an intention to effect a complete revocation,[8] and may be shown to have been inserted by mistake and without the approval of the testator.[9]

In section 112 of the same volume of Halsbury, we read:

> Where a later unambiguous will deals with the testator's entire property, it revokes all earlier wills, even though it contains no clause of revocation.[10]

The Supreme Court judgment in the *Bégin* case cites *Dempsey* v. *Lawson,* which in turn quotes *Denny* v. *Barton.* Both these cases are referred to in the footnote to the second edition of Halsbury (see footnote 8 below). In *Dempsey* v. *Lawson,* the will contained no revocatory clause at all, and the court held that the will could be interpreted to see whether it revoked the previous

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[6] The Laws of England (2nd ed.) vol. 34, p. 78, no. 110.

[7] *Sotheran* v. *Dening* (1881), 20 Ch. D. 99; *Cottrell* v. *Cottrell* (1872), L.R. 2 P. & D. 397.

[8] *Denny* v. *Barton* (1818), 2 Phillim. 575; *O'Leary* v. *Douglass* (1878), 1 L.R. Ir. 45, at p. 50. And see *Methuen* v. *Methuen* (1817), 2 Phillim. 416, at p. 426; *Gladstone* v. *Tempest* (1840), 2 Curt. 650; *Dempsey* v. *Lawson,* [1877] 2 P.D. 98, at p. 107; *Robinson* v. *Clarke* (1877), 2 P.D. 269.

[9] *Powell* v. *Mouchett* (1821), Madd. & G. 216; *In the Goods of Oswald* (1874), L.R. 3 P. & D. 162. It seems that a mere misunderstanding by the testator as to the effect of the insertion of a clause of revocation is not sufficient to justify the omission of the clause from the probate (*Collins* v. *Elstone* [1893] P. 1).

[10] *In the Goods of Palmer,* (1889), 58 L.J. (P.) 44; *Cadell* v. *Wilcocks,* [1898] P. 21; *In the Estate of Bryan,* [1907] P. 125.

will. This was perfectly sound, but the court went further, in an *obiter dictum*, by saying:

> Even if the second instrument contains a general revocatory clause, that is not conclusive, and the court will, notwithstanding, consider whether it was the intention of the testator to revoke a bequest contained in a previous will: *Denny* v. *Barton.*

Now it is by no means clear that *Denny* v. *Barton* decided anything of the sort, although it has often been cited as authority for the rule stated in the *obiter dictum* in the *Dempsey* case. *Denny* v. *Barton* had to do with the will of one William Harris. He died on May 17th, 1817, leaving a will dated March 13th, 1812, and a codicil dated October 26th, 1815. The will and codicil were duly probated at the demand of two of the executors named in them. The will contained a clause generally revoking all former wills. Then a natural daughter of the deceased presented a second codicil in the form of a letter dated June 1808, written by the deceased, addressed: "To Joseph Leacock, Esq., not to be opened until after the death of William Harris, Esq.". Leacock was a nephew and one of the executors under the will (unfortunately, he himself died shortly after the testator). The letter set forth that Harris felt he had not long to live and wanted to tell his nephew a secret, which was that he had a natural daughter for whom he wanted to provide, but whom he did not want to mention in his will, so that the world would not know of his indiscretion. The letter continued:

> I desire you (to whom I have left all my property) to pay within six months after my decease, to this young lady, £1000, or allow her an annuity of. . . . I have always found you to be a good lad, and I trust, as a man of honour, you will attend and follow the directions I have here given you, in the same manner as though contained in my will.

The judgment, rendered by Sir John Nicholl, is short:

> There is no doubt in this case. The codicil is in the form of a letter: but it is quite clear that the deceased intended it to be a confidential trust to his nephew not to be communicated until after his death. It was intended to operate independently of his will. I should not consider it irrevocable; but I think a will with a common revocatory clause would not revoke this paper. There have been a variety of instances in which papers of this sort have been admitted to probate. It was found uncancelled and unrevoked; and it has only been in consequence of the nephew's death that it has been necessary to bring it before the court. I am clearly of the opinion that it can operate; and that it was not intended to be revoked notwithstanding the revocatory clause in the will; and, therefore, I admit the allegation.

The principle stated in this judgment seems to me to fall far short of what is claimed for it in the *Dempsey* case. What I under-

stand it to say is that if a testator drafts a paper that is intended to take effect after his death and independently of his last testament, the paper will be permitted to take effect regardless of the terms of the will, unless the will specifically or by clear implication provides otherwise. A similar situation arose in the later case of *Gladstone* v. *Tempest*.[11] In that case, a man gave to two of his servants bank drafts in sealed envelopes to be opened after his death. He left a will with a revocatory clause; these papers were not referred to. The court ruled: "It is probable the deceased did not intend that these papers should form any part of his will, and he intended to revoke such dispositions only as were contained in a will or codicil". The two drafts were admitted to probate.

The judgment in the *Bégin* case also cited the Canadian case of *Re Erskine*.[12] This was an unopposed application for the probate of two wills that disposed in identical terms of the same property, but differed in that the later one, which contained a general revocatory clause, did not provide that the beneficiary should be executrix, while the earlier one did. Both wills were admitted to probate, the revocatory clause being disregarded.

A more recent Canadian case dealing with a general revocatory clause is *In re Buller*.[13] In that case, Farris C.J. gave effect to a second will containing a general revocatory clause, even though it was clear that the testator would have wanted his estate to go to the persons mentioned in an earlier will rather than to his intestate heirs, who inherited as a result of the second will, the universal legatee named in it having predeceased the testator. The court quoted with approval the remarks of Sir Gorel Barnes P. in *Simpson* v. *Foxon*:[14]

> But what a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound, by his expressed intention. If that expressed intention is unfortunately different from what he really desires, so much the worse for those who wish the actual intention to prevail.

After referring to a long list of cases, the court summarized as follows the jurisprudence at common law on the subject:

> (1) That a revocatory clause in a will may under particular circumstances be held not to be the intention of the testator and therefore ignored or eliminated in the granting of probate of the testamentary documents;

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[11] (1840), 2 Curt. 650.
[12] [1918] 1 W.W. R. 249.
[13] [1944] 1 W.W.R. 228 (B.C. S.C.)
[14] [1907] P. 54, at p. 57.

(2) That a man making a testamentary document and those who take after him are bound by his expressed intention and not by what he actually intends;

(3) That a mere mistake on the part of a testator in inserting a revocatory clause in a testamentary document is not sufficient in itself in the granting of probate to ignore or eliminate such revocatory clause;

(4) That when a testamentary document on its face is complete and contains a revocatory clause there is a heavy burden cast upon a plaintiff who comes into court to say that the revocatory clause was not intended to be operative, and the submission of the plaintiff in such connection will only be given effect to on the most cogent evidence in support;

(5) That if evidence is admissible as to the circumstances under which the testamentary document containing the revocatory clause was made, such evidence must relate to about the time such document was executed.

I do not propose to discuss whether the common law jurisprudence so ably summarized by Farris C.J. provides a complete and consistent set of rules for the decision of cases involving revocatory clauses. It seems to me that the summary reflects a degree of uncertainty and contradiction in the jurisprudence. In any case, at civil law, the only authority that seems to give some warrant for the principle that a revocatory clause in an otherwise valid and effective will may be disregarded is the citation from Planiol. It is doubtful that Planiol himself would have have carried the principle to the length to which it was taken in the *Bégin* case. Certainly the cases cited by him do not go so far.

To return to the *Bégin* case, the learned chief justice and Taschereau and Fauteux JJ. found, as had the Court of Appeal, that there was no incompatibility between the two wills, and both could take effect. The earlier will disposed of all the moveable and immoveable property in Canada. The later will, after certain monetary bequests, left all "the rest, residue and remainder" of his property to relatives of the testator's deceased wife. The majority judges found that by the words "rest, residue and remainder" the testator meant the residue of the property in the United States, leaving the first will to dispose of the assets in Canada. Undoubtedly, that is what the testator intended, but the decision seems to open the serious question: How far can a court go, in such a case, in supplying words that are required to express the intention of the testator as disclosed by the evidence and that the testator himself failed to use in drawing up the will?

On the whole, the decision leaves the matter in an unsatisfactory state. The two common law judges relied on the incapacity of the trust company to justify their decision, specifically stating

that they were not dealing with the effect of the general revocation. They point out, "that issue then is to be taken as unaffected by the judgment and as free for such determination in other proceedings as the parties may see fit to seek". The three civilian judges held that the revocatory clause could be disregarded and the two wills applied, the earlier one dealing with the property in Canada, and the later one with that in the United States. The result is that the question, at least in so far as the civil law is concerned, seems to be decided in the sense that a general revocatory clause does not necessarily mean what it says, but that it is open to any interested parties to show, by such proof as they can muster, that although the testator said one thing he meant another. From one viewpoint, this is an unfortunate result, in that it will no longer be safe for the practitioner drafting wills to use the handy and simple formula of general revocation. To be perfectly safe he will have to refer specifically to previous wills that the new one is intended to replace. This may not always be convenient or even possible, especially in the case of wills made *in extremis*. Moreover, it can be conceived that specific reference to wills that it is desired to revoke may omit mention of a will the testator forgot about or failed to disclose. If it be objected that the lawyer or notary, to provide for such a case, could supplement a specific revocation with a general one, the answer would seem to be that a general revocation in such a case would be no more effective than if it stood alone, since it would be open to a court to consider, as was done in the *Bégin* case, that the general revocation might be nothing more than a *clause de style* inserted by the practitioner.

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CONSTITUTIONAL LAW — MARKETING LEGISLATION — DELEGATION BY THE DOMINION PARLIAMENT TO A PROVINCIAL BOARD.— Despite the brave assertion that the Dominion and the provincial legislatures possess between them the totality of legislative jurisdiction in Canada, the fact remains that areas exist into which neither authority may venture. The lacunae result from the impossibility of separating the Dominion and provincial aspects of a particular subject matter of legislation. A potential field of legislation very often possesses both Dominion and provincial implications; for example, a product may be grown or manufactured

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within a province but its market may extend beyond the bounds of the province. In the light of the decided cases and as a matter of pure mechanics, it is frequently impossible to distinguish between those stages in the production and marketing that lie between Dominion jurisdiction and those that are purely provincial. The courts are unhesitating in striking down both Dominion and provincial legislation that extends beyond their respective jurisdictions, no matter how slight the degree of extension may be. Both the Dominion and the provinces are, naturally, reluctant to jeopardize the major part of their legislation by extending it to cover doubtful territory. The result has been the creation of a legislative "no man's land". Although the difficulty undoubtedly exists in many fields of legislation, attempts to overcome it have been largely confined to the regulation of the marketing of agricultural products.

Spurred on by the tantalizing dictum that "unless and until a change is made in the respective legislative functions of Dominion and Province, it may well be that satisfactory results for both can only be obtained by co-operation",[1] the Dominion and provinces have engaged in a series of legislative gymnastics in an attempt to achieve the necessary degree of "co-operation". Their efforts have been uniformly unsuccessful, with the very limited exception of conditional and referential legislation, both of which are generally accepted as valid,[2] but are subject to uncertainty in that it cannot be predicted what the courts will consider to be truly conditional or referential legislation. The more ambitious, and unsuccessful, plans may be grouped into three classifications: (a) "enabling legislation"; (b) the establishment of a Dominion board to regulate all aspects of a trade, of which only a portion may be extra-provincial; and (c) straight delegation of legislative power by the province to the Dominion. The first type took the form of provincial legislation which purported to make such parts of Dominion legislation on the same subject as were declared *ultra vires* by the courts automatically a part of the law of the particular province. The device was struck down by the courts on the ground that it involved an actual delegation of legislative power.[3] The Dominion board foundered on the familiar reef that the Dominion cannot justify an invasion of provincial jurisdiction on the ground that a portion of the same subject matter may lie within

[1] *A.-G. B.C.* v. *A.-G. Can.*, [1937] 1 D.L.R. 691, at pp. 694-5.

[2] *Russell* v. *R.* (1882), 7 App. Cas. 829; *A.-G. Ont.* v. *A.-G. Can.*, [1896] A.C. 348; *Lord's Day Alliance* v. *A.-G. Man.*, [1925] A.C. 384.

[3] *R.* v. *Zaslavsky*, [1935] 2 W.W.R. 34. See Wahn, comment (1936), 14 Can. Bar Rev. 353; *R.* v. *Thorsby Traders*, [1936] 1 D.L.R. 592; *R.* v. *Brodsky*, [1936] 1 D.L.R. 578.

the Dominion's competence.[4] The delegation was rejected unanimously by the Canadian Supreme Court in *Attorney-General of Nova Scotia* v. *Attorney-General of Canada*[5], for convenience referred to later as the *Nova Scotia* case.

The latest technique to receive judicial scrutiny was the delegation of legislative power by the Dominion to a provincially appointed and controlled board.[6] Strange to relate, this act of delegation was approved unanimously by the Supreme Court of Canada. Although the result in the *Willis* case is gratifying to those who advocate a greater legislative flexibility, it is little less than bewildering in the light of the recent decision by the same court in the *Nova Scotia* case. The net result of the two decisions is the rather startling proposition that the Dominion cannot delegate to the provincial legislature but can delegate to a creature of the provincial legislature.

An evaluation of the *Willis* decision necessitates a brief reversion to the *Nova Scotia* case. In the latter decision, legislation by the province that would have enabled the Lieutenant-Governor in Council to delegate the provincial legislative jurisdiction over certain matters relating to employment in any industry, work or undertaking to the Dominion, as agent of the province, was declared *ultra vires*. The central *ratio* developed by the court was that such a delegation would constitute a breach of the "watertight compartments" of the British North America Act, and would permit the Dominion and provinces to enlarge and contract each other's jurisdiction at will.[7]

The *Willis* case arose on the following pattern of legislation. The Prince Edward Island legislature had passed the Agricultural Products Marketing Act[8] to provide "for the control and regulation in any or all respects of the transportation, packing, storage

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[4] *A.-G. B.C.* v. *A.-G. Can.*, *supra*, footnote 1.

[5] [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

[6] *P.E.I. Potato Marketing Board* v. *Willis and A.-G. of Can.*, [1952] 4 D.L.R. 146 (for convenience, referred to later in this comment as the *Willis* case).

On the subject of intergovernmental devices generally, see, Royal Commission on Dominion-Provincial Relations (1940), Appendix 7, Corry, Difficulties of Divided Jurisdiction; and Appendix 8, Gouin and Claxton, Legislative Expedients and Devices Adopted by the Dominion and the Provinces.

[7] In this connection, see Ballem, comment (1951), 29 Can. Bar Rev. 79, in which I developed the thesis that the Supreme Court had not given sufficient weight to the agency argument. That argument would have justified the delegation on the ground that the Dominion would be acting only as the *pro tem* agent of the province and consequently there would be no enlargement of the Dominion's or contraction of the province's jurisdiction under the B.N.A. Act. The judgment of the Supreme Court of Nova Scotia was commented upon by Scott (1948), 26 Can. Bar Rev. 984.

[8] Stats. P.E.I., 1940, c. 40.

and marketing of natural products within the Province".[9] Under the Act the Lieutenant-Governor in Council received powers to establish schemes to regulate the transportation, packing, storage and marketing of natural products and the power to set up marketing boards to administer the schemes and to vest in the boards all necessary powers to enable them to carry out their functions.[10] The board, once constituted by the Lieutenant-Governor in Council, had the power, on the approval of the Lieutenant-Governor in Council, to perform any function or duty and to exercise any power imposed or conferred upon it by the Dominion.[11]

To complete its part of the arrangement, the Dominion enacted the Agricultural Products Marketing Act.[12] The relevant provision in the Dominion Act is section 2(1):

> The Governor in Council may by order grant authority to any board or agency *authorized under the law of any province* to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product *outside* the province *in interprovincial and export trade* and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province [italics added].

In effect, section 2(1) gave the Governor in Council the power to delegate the Dominion's jurisdiction over the interprovincial and external aspects of the trade in natural products to a provincial board.

The Lieutenant-Governor in Council exercised his powers and set up a scheme to regulate the local trade in potatoes and constituted the Prince Edward Island Marketing Board. The Governor in Council exercised his powers of delegation and passed order in council P.C. 5159[13] granting authority to the Prince Edward Island Potato Marketing Board to regulate the extraprovincial marketing of potatoes produced in certain areas of Prince Edward Island.

The matter came before the courts on a reference by the Lieutenant-Governor in Council to the Supreme Court of Prince Edward Island.[14] The provincial Supreme Court held the technique to be unconstitutional on the ground that, if the Dominion could not delegate legislative functions to the provincial legislature,

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[9] *Ibid.*, s. 4(1).
[10] *Ibid.*, s 4(2).
[11] *Ibid.*, s. 7.
[12] Stats. Can., 1949, c. 16.
[13] [1950] S.C.R. 1411.
[14] [1952] 2 D.L.R. 726.

then, *a fortiori,* it could not delegate to a *mere agent* of the provincial legislature.

The decision in the Supreme Court of Canada turned on the pivotal point of the constitutionality of delegation by the Dominion to a provincial board.[15] During the oral arguments the bench displayed a serene confidence that the *Nova Scotia* case did not apply to the case at bar. This confidence, however, was not reflected in the written opinions, which, without exception, reveal a lively anxiety on the part of each individual judge to justify the distinction so blithely drawn. An attempt to assess the worth of the various justifications is the burden of this comment.

The court had recourse to previous decisions in an attempt to locate analogies that could serve to differentiate the act of delegation to an agent of the legislature from delegation to the legislature itself. *Re Gray*[16] and the *Chemicals* reference[17] were introduced as examples of already existing delegation to subordinate bodies. The *Gray* case established the validity of delegation by the federal government to the executive; and the *Chemicals* reference validated delegation by the federal government to a controller, a direct subordinate of the federal government. The net effect of these two authorities is to confirm that the maxim *delegatus non potest delegare* does not apply to the Dominion government, a proposition that has not been questioned since *Hodge* v. *The Queen.*[18] With respect, the introduction of the two precedents contributed little to the solution of the problem involved in the present litigation.

On the surface, the court's reference to *Valin* v. *Langlois*[19] would seem to have a greater claim to relevancy. That case involved a determination of the constitutionality of the Dominion Controverted Elections Act, 1874, which imposed on provincial superior courts the duty of trying controverted elections of members of the House of Commons. The Supreme Court of Canada held the Dominion Act to be *intra vires.* Even the most cursory examination of the written judgments reveals, however, that the result was predicated on the historical rôle played by the courts in the administration of justice in Canada. The courts are the enforcement agencies of both federal and provincial laws throughout

[15] This comment is confined to an examination of the delegation issue; it does not purport to deal with the finding of the court on the validity of certain parts of the provincial scheme, or the constitutionality of the proposed levy.

[16] (1918), 57 S.C.R. 150, 42 D.L.R. 1.

[17] [1943] S.C.R. 1, 1 D.L.R. 248.

[18] (1883), 9 App. Cas. 117.

[19] (1879), 3 S.C.R. 1; leave to appeal denied, 5 App. Cas. 115.

Canada. Their function being of a *judicial* nature rather than *legislative*, the problem of the division of legislative powers did not arise. "These Courts are surely bound to execute all laws enforced in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislature, respectively. . . . They are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislature."[20] The courts are as much the instrument of the Dominion as they are of the provinces. The transposition of this decision and the use of it as a precedent in the altogether different area of delegation of legislative power from the Dominion to a provincial board is surely misleading. The main issue in the *Willis* case did not enter into the *Valin* situation and it is difficult to justify the reliance that the Supreme Court placed on the latter decision.

A court that purports to perceive and describe a line of distinction between a government and the creature of that government must inevitably grapple with the metaphysics surrounding the concept of the "legal entity". The decision of the Supreme Court, considerably enlivened by the appearance of "twin phantoms",[21] led to the simultaneous creation and destruction of the board as a "legal entity" separate from the Prince Edward Island legislature. This judicial ambivalence resulted from a unique twist placed upon the standard doctrine of "legal entity" by the Supreme Court. The modification worked by the court may be termed, appropriately, the "coincidence theory".

The argument that necessitated the elevation of the board to the status of a "legal entity" took this form: since the board is a "legal entity", separate and distinct from the Prince Edward Island legislature, a delegation to it does not represent a delegation to the provincial legislature. This argument found its clearest expression in the words of Mr. Justice Estey:

> The problem here presented is quite different [from the *Nova Scotia*

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[20] *Ibid.*, at pp. 19-20, *per* Ritchie C.J. It is interesting to contrast these statements with the theory currently being nourished by Mr. Justice O'Halloran of the British Columbia Court of Appeal. The learned judge advocates the restriction of the right of appeal to the Supreme Court of Canada from a provincial court to those matters that are within Dominion legislative competence: see *Gill* v. *Ferrari*, [1951] 1 D.L.R. 647, and *Smith* v. *Smith and Smedman*, [1951] 4 D.L.R. 593. For an indignant reaction to this "judicial balkanization" see Laskin, The Supreme Court of Canada (1951), 29 Can. Bar Rev. 1038, at pp. 1055 and 1076. In its treatment of the *Valin* case, the Supreme Court displays the same tendency to overlook the distinction between *legislative* and *judicial* competence.

[21] *Supra*, footnote 6, at p. 167 (Rand J.).

> case] in that it is the delegation by the Governor-General in Council to the Potato Board, an agency created by the Legislature of the Province.[22]

The learned judge then goes on to cite *Labour Relations Board of Saskatchewan* v. *Dominion Fire Brick & Clay Products*[23] as an authority for establishing the board as a "legal entity". With the interjection of the "legal entity" doctrine the court has ventured into admittedly artificial and conceptualistic grounds, hardly suitable it would seem to the determination of a constitutional issue.

Entirely apart from this larger objection, the court has also made itself susceptible to a criticism on strict legal grounds directed to its application of the "legal entity" doctrine. In determining the question of whether or not the board was an entity separate and distinct from its creator, the court embraced the *Labour Relations Board* case. This decision went no further than holding the Labour Relations Board to have a sufficient existence to appear on its own behalf before the courts. The court in the *Willis* case made no reference to the more specific test laid down in *Halifax* v. *Halifax Harbour Commissioners*[24] to govern the determination of whether or not a government agency has an existence separate from the government itself. The criterion is the degree of control retained by the government over its agency. It is submitted that this criterion is a much more practical and realistic test and, had it been applied to the present circumstances, the board could not have been considered an entity distinct from the province. Effective control over the board was retained by the Prince Edward Island legislature. This was made abundantly clear in the decision of the Supreme Court of Prince Edward Island:

> In the present case, the ultimate delegate or subordinate agency is constituted, as to personnel and organization, solely under the authority of the Provincial Legislature, is responsible solely to the Provincial Government and Legislature, and depends upon the Provincial Government and Legislature for the continuance of its official existence.[25]

The statement that the Prince Edward Island legislature retained control over the board was not contradicted in the Canadian Supreme Court, indeed, it was expressly confirmed: "The Province, under s. 7 of the Provincial Act, retains control over its Board".[26]

[22] *Ibid.*, at p. 177. Considerable discussion was also devoted to a subsidiary problem. The problem was raised by the wording in *Bonanza Creek Gold Mining Company* v. *The King* (1916), 26 D.L.R. 271, which limited the extra-territorial capacity of statutory companies. The Prince Edward Island Act abstained from incorporating the board to avoid the limitation created by the *Bonanza* dictum.

[23] [1947] 3 D.L.R. 1.

[24] [1935] S.C.R. 215.

[25] [1952] 2 D.L.R. at p. 731 (Campbell C.J.).

[26] *Ibid.*, footnote 6, at p. 179 (Estey J.).

The province's retention of control over the organization, presonnel and the very fate of the board itself makes it difficult to visualize any realistic distinction between Dominion delegation to the province and Dominion delegation to the board.

On the other hand, the "coincidence theory" not only disregards the board as a "legal entity" but would ignore its very existence and leave the five individual members exposed to the judicial gaze. Having isolated the individuals, the argument proceeds: although it is true that the province has conferred certain powers and responsibilities upon these five men, what is to prevent the Dominion from selecting the same five individuals as its appointees? "It is immaterial that the same persons be empowered by the Legislature to control and regulate the marketing of natural products within the Province. It is true that the Board is a creature of the Lieutenant-Governor in Council, but this does not prevent it from exercising duties imposed by the Parliament of Canada."[27]

Although the Dominion may be conceded to have an almost unlimited choice in the matter of potential agents, with the exception of provincial legislatures, is it not remarkable that the agents so selected have already received identical powers in relation to the same subject from the province? Even more remarkable is the propounding of such a theory by a court that has been rigid in its condemnation of the slightest taint of "colourability" in Dominion and provincial legislation.

Mr. Justice Rand undertook a more detailed analysis of the rationale underlying the coincidence approach:

> What the law in this case has done has been to give legal significance called incidents to certain group actions of five men. That to the same men, acting in the same formality, another coordinate jurisdiction, in a federal constitution cannot give other legal incidents to other joint actions is negated by the admission that the Dominion by appropriate words could create a similar board, composed of the same persons, bearing the same name, and with a similar formal organization, to execute the same Dominion functions. Twin phantoms of this nature must, for practical purposes, give way to realistic necessities. . . . No question of disruption of constitutive provincial features or frustration of provincial powers arises: both Legislatures have recognized the value of a single body to carry out one joint, though limited, administration of trade. At any time the Province could withdraw the whole or any part of its authority. The delegation was, then, effective.[28]

It is instructive to replace the individual members of the board in this statement with the individual members of the Prince Ed-

[27] *Supra*, at p. 163 (Taschereau J.).
[28] *Ibid.*, at p. 167.

ward Island legislature; and to replace the word "board" with the words "provincial legislature". On the basis of Mr. Justice Rand's argument the same result would be achieved in either case with the board or the provincial legislature, as the case may be, acting in the capacity of agent to the Dominion. Delegation by the Dominion to a provincial legislature and delegation by the Dominion to a creature under the control of the provincial legislature are cut from the same cloth. The arguments that can be advanced in support of one *ipso facto* support the other.

It is not the intent of the writer to place the Supreme Court in a "we're damned if we do, and damned if we don't" position. The result of the present case is consonant with both practical demands and sound legal theory. It introduces an element of much needed flexibility into Canadian legislation and allows the provinces and Dominion to work together and achieve greater legislative harmony. Its main legal tenet, that the provincial board may validly act as the *agent* of the Dominion, is impeccable.

The weaknesses in the rationale of the case are directly attributable to the necessity of circumventing the previous adjudication of the Supreme Court in the *Nova Scotia* case. Attempts to distinguish between delegation to a province and delegation to the agent of the province led the court into very dangerous and dubious territory. The arguments advanced to reinforce the distinction are, with respect, wholly lacking in conviction and impart a distressing air of artificiality.

Probably the strongest criticism that can be lodged against the decision is that, in conjunction with the *Nova Scotia* case, it amounts to a tacit permission to do *indirectly* what cannot be done *directly*. This last criticism calls for the strictest and most searching re-examination of the *Nova Scotia* case on its appeal to the Privy Council, which now represents, ironically enough, the last avenue of escape from the present judicial impasse.

JOHN B. BALLEM*

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TRADE UNION — APPLICATION FOR CERTIFICATION — NECESSITY OF SHOWING APPLICANT TO BE A "TRADE UNION"— IMPORTANCE OF CHARTER FROM A NATIONAL UNION.— *Rex* v. *Labour Relations*

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Board, Ex parte Gorton-Pew (New Brunswick) Limited,[1] a decision of the Appeal Division of the Supreme Court of New Brunswick, provides authority for the proposition that if a local body contemplates obtaining a charter from a national union, it does not acquire a status as a union unless and until it receives the charter, and, until that time, is not entitled to be certified as a bargaining agent.

In May 1949 an organization, which, for the sake of brevity and contrast, can be referred to as the Employees' Organization, had been certified by the New Brunswick Labour Relations Board as the bargaining agent of the employees of Gorton-Pew (New Brunswick) Ltd. On April 1st, 1951, the company and the employees' organization entered into a collective agreement governing labour and working terms and conditions for certain specified groups of the company's employees. The collective agreement provided that it should be in effect for one year and should continue from year to year thereafter unless either party gave notice of its desire to negotiate a new contract. Some of the employees became dissatisfied with the employees' organization and requested the Canadian Fish Handlers' Union of Nova Scotia to organize a new local. The Fish Handlers' organizer made an attempt to organize among the company's employees a new union to be affiliated with and chartered by the Canadian Fish Handlers' Union and to be known as Local No. 4. On June 26th, 1951, Local No. 4 filed with the board an application under the Labour Relations Act, 1949, for certification as the bargaining agent for the company's employees. The application was based on the ground that a large majority of the employees involved were not satisfied with the employees' organization and had joined Local No. 4. The only signature to the application consisted of the words "Local No. 4 Canadian Fish Handlers' No. 4 (N.S.)". The application was not signed by the president and secretary of the local. There was, however, a statutory declaration in the prescribed form by Boudreau as president and Boucher as secretary declaring that the statements in the application were true. On July 25th the board held a vote to ascertain whether the majority of the company's employees had selected Local No. 4 as their bargaining agent. A substantial majority of all the eligible votes were cast in favour of the local; of 202 who actually voted only 30 voted in favour of the employees' organization. On October 9th, 1951, the board made an order certifying Local No. 4 as bargaining agent for the company's employees with the exception of office staff and fore-

[1] (1952), 30 M.P.R. 12, [1952] 2 D.L.R. 621.

men. The company commenced certiorari proceedings and obtained from Bridges J. an order for a writ of certiorari and an order nisi to quash.

When the matter came before the Appeal Division of the Supreme Court of New Brunswick that court, in a judgment delivered by Harrison J., quashed the board's order of October 9th, 1951. The judgment proceeds on two main grounds. One involves the alleged disregard of the essentials of justice by the board. In deciding this issue in favour of the company, the court considered the board's failure to give to the company, as required by the board's regulations, a fourteen day period in which to file its reply to the local's application, the reliance placed by the board on hearsay evidence,[2] the insufficiency of the evidence to support the board's order, the intimidation of voters at an election ordered by the board, and the participation in the judgment of the board of members who had not heard the presentation of the company's case.[3] This broad issue raises questions over the efficacy of statutory provisions abrogating the right of judicial review,[4] the conclusiveness of the findings of the board on questions of fact, especially where the questions of fact relate to the jurisdiction of the board, and the ability of a superior court to use certiorari as a device to inquire into the sufficiency of the evidence adduced before the inferior tribunal.[5] These are familiar topics and they are already the subject of considerable authority and critical writing. I do not intend to discuss them in this comment.

It is the second ground that furnishes the topic for this note. It relates to the status of Local No. 4. The view taken by the court was that the local had never become a trade union within the meaning of the act, or, perhaps more accurately, that the evidence submitted both to the board and to the court did not establish that the local had become a trade union. This finding is fatal to its application for certification because, under section 7 of the Labour Relations Act, 1949, only a trade union is entitled to make an application for certification as a bargaining agent.

[2] S. 55(4) of the Labour Relations Act, 1949 (N.B.), provides, *inter alia*, that the board may receive and accept such evidence and information as it in its discretion may deem fit and proper whether admissible as evidence in a court of law or not.

[3] *Local Government Board* v. *Arlidge*, [1915] A.C. 120, is of interest on this point.

[4] S. 57(2) of the Labour Relations Act, 1949 (N.B.), which provides: "A decision or order of the Board is final and conclusive and not open to question, or review, but the Board may, if it considers it advisable so to do, reconsider any decision or order made by it under this Act, and may vary or revoke any decision or order made by it under this Act".

[5] Compare *In re Canada Safeway Ltd. and Labour Relations Board*, (1952) 6 W.W.R. (N.S.) 510, and (1952) 7 W.W.R. (N.S.) 145.

This reasoning raises a number of subordinate issues: Is the status of the applicant as a trade union a jurisdictional issue? Probably the court would answer in the affirmative. Is the court, in the course of certiorari proceedings, entitled to inquire whether the applicant is a trade union, or is the decision of the board on that question final and conclusive? Section 57(1)(b) of the act provides that, if in any proceedings before the board a question arises under the act whether an organization is a trade union, the board shall decide the question and its decision shall be final and conclusive for all the purposes of the act. That section did not deter the court from inquiring whether the applicant was a trade union or from disagreeing with the board, although the board had, at least by necessary implication, already decided the question in favour of the applicant.

What is a trade union? Section 2(1)(r) of the act defines "trade union" as meaning "any organization of employees formed for the purpose of regulating relations between employers and employees". The definition presents no unusual features. It follows standard lines. It is identical with the definition contained in the federal Industrial Relations and Disputes Investigation Act and closely similar to that provided by the Labour Relations Act of Ontario. The definitions used by the Trade Union Acts, 1871 to 1913, and by the federal Trade Unions Act are cast in a slightly different form but they require the same essentials.

For a common law, non-statutory or natural definition of a trade union we can turn to the judgment of Farwell L. J. in *Osborne* v. *Amalgamated Society of Railway Servants:*[6]

> Prior to the passing of the Act of 1871 a trade union, as such, had no legal status. It was, speaking generally, an association of wage-earners for the purpose of improving or maintaining the conditions of their employment.

This definition is substantially the same as New Brunswick's statutory definition. Both Cozens-Hardy M. R.[7] and Fletcher Moulton L. J.[8] remarked that the act of 1871 did not create trade unions or even invent the name, but that it dealt with existing combinations of a known type, denoted by the term "trade union" and formed for well-recognized objects and purposes.[9]

These definitions, including that used in the New Brunswick statute, concur in requiring the presence of two main elements:

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[6] [1909] 1 Ch. 163, at p. 189.
[7] *Ibid.*, at p. 174.
[8] *Ibid.*, at p. 184.
[9] See also: *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87, at p. 107, *per* Lord Shaw.

(1) there must be a group of employees organized into an organization, association or combination; and (2) the purpose of the organization must be the regulating of relations between employers and employees. In the instant case the second element requires no detailed analysis; the purpose of the organization, assuming that it had come into existence, was indubitably the regulating of relations between employers and employees. This type of definition makes no mention of the obtaining of a charter from a parent organization. It contrasts with the definition used in the Wartime Labour Relations Regulations,[10] with its positive demand that a local branch must be "chartered by, and in good standing with a provincial, national or international employees' organization".

The conclusion reached by Harrison J. involves altering the definition of the crucial term "trade union". Because Local No. 4 had not received its charter from the Canadian Fish Handlers' Union, "there was certainly no trade union in the ordinary sense, namely a body with a charter and constitution with properly elected officers". Everything was in a preliminary stage. In the result, no Local No. 4 of the Canadian Fish Handlers' Union was in existence.[11]

What were the attributes of Local No. 4? Among the most noticeable of them was a complete disregard of formality. Some of its progenitors contemplated that it would be affiliated with, and chartered by, the Fish Handlers' Union. They had been informed that it would be known as Local No. 4. But no charter had ever been issued. If, as was held by the court, the granting of a charter and the writing of a formal constitution[12] were decisive, there certainly was no union.

There was however a series of events tending to prove the birth of an organization. Some of the persons who participated regarded themselves as having formed a local union. Three, or possibly four, meetings were held. One meeting was attended by some 149 persons and a later meeting by about 250. Either one, or possibly both, of these meetings voted expressly to form a new local union independently of the existing Employees' Organization. A president, vice-president, secretary and treasurer were elected at one of the earlier meetings and were sworn in at a

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[10] P.C. 1003, s. 2(1)(n) of February 17th, 1944.

[11] *Op. cit.*, at pp. 629-630.

[12] Citrine, Trade Union Law (1950) pp. 176 and 290, regards a written constitution as desirable, but not obligatory, in the case of an unregistered trade union. His view is that it is possible for a trade union, like any other purely voluntary society, to operate without written rules.

subsequent meeting. One of the larger meetings decided to apply for a charter, although they never implemented that decision. Membership cards were signed. Initiation fees were collected from almost 200 members or prospective members. Somewhere there was a group possessing enough unanimity and cohesiveness to call themselves Local No. 4 and to instruct counsel to represent the local. When the matter was put to a vote by the board, 169 persons out of the 202 who voted cast their votes for the local. The evidence as to the birth of an organization was, in all probability, most unsatisfactory. That was due at least in part to the impetuous way in which its was organized. Its founders appear to have taken its birth for granted and to have swept on to the enrolment of a large membership and the acquisition of bargaining powers without pausing to inquire whether the child had ever breathed. Yet in all of this there is evidence that a substantial number of persons had, by mutual consent, banded themselves together into an organization for the purpose of regulating relations between employers and employees, and that is a trade union.

The main factor tending to deny the existence of a union is the absence of a charter. It is submitted that, in the circumstances of this case, the obtaining of a charter is not an essential condition precedent to the creation of a union. Under the definition contained in section 2(1)(r) the decisive question is whether an organization of employees has come into existence. That depends on the mutual consent or manifested intention of those who are said to be the members of the organization. A trade union is nothing but a group of persons who have combined together for a particular purpose. It is often charged that, in forming their union, they are guilty of combining. The converse is equally true; it is by combining together for a particular purpose that they form their union.[13] One purpose of trade union legislation from 1871 onwards, and of sections 497 and 498(2) of the Criminal Code, is to enable them to combine themselves into a union without thereby incurring the sanctions visited on those who combine or conspire in restraint of trade. The obtaining of a charter will be a condition precedent to the origin of the organization, association, combination or union only if it is intended so to be by those who are associating or combining.

That the originators of Local No. 4 intended to seek a charter is undeniable. But, if their own actions are any guide to their in-

[13] Cases as far back as *Hornby* v. *Close* (1867), L.R. 2 Q.B. 153, are predicated upon the identity between the combining and the formation of the union.

tention, it is equally undeniable that a substantial nucleus intended the local to act as a union even before it had received a charter. It is true that they applied for certification as a bargaining unit before they applied for a charter but, by the very act of applying for certification, they were acting, and manifesting their intention to act, as an organization in association or combination with each other.

The judgment would be more convincing if the court had followed the example set by Farris C.J.S.C. in *Lakeman and Barrett* v. *Bruce*[14] and had called for evidence on the effect of the relevant portions of the Fish Handlers' constitution. Does the constitution treat the charter as the act that brings the local union into existence? If so, it might be quite possible to infer that the members of the prospective local intended the birth of their organization to be contingent upon obtaining a charter. Or does it permit, or even require, the local union to come into existence before it applies for a charter? If so, the charter merely results in affiliation between two bodies both of which are already in existence and the inference might easily be that the sponsors of the local did not intend its existence as a union to depend upon the issue of the charter. So far as can be gathered from the judgment, there was no evidence as to the contents or effect of the constitution. One may be permitted to doubt whether the pertinent portions of the constitutions of charter-granting unions are so stereotyped that the courts can take judicial notice of their contents and effect. The authoritative tone of the word "charter" should not be permitted to entice us to think in terms of royal charters and to believe that, without a charter, nothing is accomplished. In support of its conclusion on the decisive effect of a charter the court relied on two recent British Columbia decisions.

The first of these is *Lakeman and Barrett* v. *Bruce*. A charter had been granted by a national union, the Amalgamated Building and Construction Workers of Canada, to a local union in Vancouver. The charter was revoked on May 19th, 1948. Following the revocation of the charter a majority of the members of the local decided to continue as a union and to obtain a charter from a rival national organization. A minority of the members remained loyal to the original union. The question for decision was, in substance, whether the property of the erstwhile local belonged to the seceding majority or to the national union whose claim was apparently buttressed by a claim on behalf of the loyal minority.

[14] [1950] 2 W.W.R. 1209.

The constitution of the Amalgamated Building and Construction Workers contained the following provision:

> When the Local Union becomes defunct, its funds and other property shall revert to the Amalgamated Building and Construction Workers of Canada.

Farris C.J.S.C. held that the Vancouver local had come into existence only when it was granted its charter by the national body, and that when the charter was taken away it became defunct and dead. This led directly to the conclusion that its funds and other property had reverted to the national body.

It is one thing to admit that *Lakeman and Barrett* v. *Bruce* was correct in holding, on its own facts, that when its charter was revoked the Vancouver local became defunct to the extent that its funds and other property reverted to the parent organization.[15] It is quite a different thing to use the decision as an authority for a sweeping breath of life doctrine that if the sponsors of a union contemplate obtaining a charter from a national union their proposed union has no existence as such before the charter is obtained.

At the trial the Chief Justice had been most explicit in reminding counsel that the question of the local union being defunct could not be determined until there was evidence on how it came into existence and obtained its charter. In his view the evidence might show that the local existed and had an independent status as a union before it obtained a charter. It might even show that a charter could not be obtained unless the union was already in existence. In those circumstances the charter merely results in affiliation between a national body and a local body both of which are already in existence. It does not create the local. The revocation of the charter merely cancels the affiliation between the national body and the local body. It does not destroy the local.[16] It is submitted, though parenthetically, that this is a strictly accurate use of the word "affiliation". It denotes the adoption of an existing person or organization into a larger family or association. It does not denote creating or the giving of life.

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[15] The successful claimants had not always been so positive about relying on a fatalistic death and dissolution theory that would result in the local becoming absolutely defunct and in its property reverting to the national organization. They had obtained an interim injunction by a very different argument, namely, that the local still existed and was still entitled to its property, but that it was the loyal minority, and not the seceding majority, who now constituted the local. For a body that was later alleged to have died, the local was displaying an almost irreverent disregard for the biblical adjuration that it could take nothing out of the world. See: [1949] 1 W.W.R. 886.

[16] [1950] 2 W.W.R. 1209, at pp. 1212-1213.

The other possibility was that the evidence would show that the charter created the local union and was the very source of its existence. Then the revocation of the charter would result in the death of the local. The evidence convinced the Chief Justice that the Vancouver local was entirely dependent on the charter both for its birth and its continued existence. What the evidence was is not clear from the report. What is clear is that it was not until he had examined the constitution of the national body and had considered its provisions on the granting of local charters — a step apparently omitted in the New Brunswick case — that he reached his decision as to the origin of the local and expressed the opinion relied on by Harrison J:[17]

> A group of 10 could apply for a charter and, when granted a charter, such group became the local union. This union, therefore, came into existence only when it was granted its charter by the national body. The national body alone gave the breath of life to and created the union and so, when the charter was revoked, the body giving the breath of life to the union took the same away and then the union no longer existed. It was dead or defunct.
>
> . . . The original union ceased to exist on May 19, 1948, when the charter was revoked.

When *Lakeman's* case is analyzed in this way it becomes clear that the applicability of the breath of life theory depended on the facts of the case and the decision is far from propounding the unqualified principle that no local body has any status as a trade union until its sponsors obtain a charter from the national body with which they wish to affiliate.

The other British Columbia case in which the obtaining of a charter became material is *Saunders* v. *Billingsley et al.*[18] In early February 1950 the international representative of the United Steel Workers of America conducted a membership campaign among the employees of the Consolidated Mining and Smelting Company, with a view to the formation of a new local. On February 8th, 1950, the plaintiff, an employee of the company, signed a card agreeing to accept membership in the new local and also signed a voluntary check-off authorization directed to his employer. These documents were delivered to the international representative on the same day. An application for a charter was submitted to the international union. The charter was issued on February 23rd, 1950. It designated the new local as Local Union No. 4281. The plaintiff was presumably one of the persons who made application for the charter. The charter named him as one

[17] *Ibid.*, at p. 1213.
[18] [1950] 4 D.L.R. 685.

of the officers of the new local. A meeting of the membership of the local was held on March 9th, 1950, after the charter had been granted. The judgment makes absolutely no mention of any earlier meeting. The constitution provided that no applicant for membership should be regarded as being a member in good standing until the obligation had been administered to him. The obligation was not administered to the plaintiff until the meeting of March 9th, 1950.

The question submitted for the opinion of the court was exceptionally narrow: Was the plaintiff a member in good standing in Local No. 4281 on February 8th, March 11th and May 6th, 1950? The answer given by Coady J. was equally narrow: The plaintiff did not become a member of the local until it came into existence on February 23rd. He did become a member on that date, but he did not become a member in good standing until he took the obligation on March 9th.

A precise question as to the acquisition of membership in good standing in a local union of a specified national or international body may well be dependent on the granting of a charter, especially if the charter has been obtained and the alleged member did not comply with the other requirements of the constitution until after the granting of the charter. The evidence may not have been directed to the point, but the judgment conveys the impression that the sponsors of Local No. 4281 were almost deliberate in intending that the existence of the local should be conditional upon the issue of the charter. There was nothing to suggest that the local had acted as a union at any earlier stage of its career. It is difficult to regard this case as supporting the conclusion that, if the facts had been as different as they were in the *Gorton-Pew* case, the local group would have had no existence as a trade union before the issue of the charter. Indeed Coady J.[19] went to the extent of recognizing that, even before the charter was granted, there was "a voluntary organization composed of a group of men" who were banded together for a common purpose and were actively pursuing that purpose. That organization might not be a local union of the United Steel Workers of America, but, if its object was to regulate relations between employers and employees, it might be a trade union.

Re National Union of Ships' Stewards, Cooks, Butchers and Bakers,[20] a decision of Tomlin J., holds that a group of employees can combine themselves into a trade union which comes into ex-

[19] *Ibid.*, at p. 689.
[20] [1925] 1 Ch. 20.

istence before they obtain registration under the Trade Union Acts, 1871 to 1913, even though they are most explicit in intending to seek registration under those acts. Two alleged trade unions, the one represented by the appellants and the other by the respondents, applied to the Registrar of Friendly Societies for registration under the name of the National Union of Ships' Stewards, Cooks, Butchers and Bakers. The respondents' was the earlier of the two applications.

The judgment is based on two fundamentals. The first is that, on the construction of the statutes, a trade union must be in existence before a successful attempt can be made to register it.[21] The second is that it is difficult to say what is a condition precedent to the existence of a trade union, or, in other words, what brings a trade union into existence. Whether a trade union has come into existence must, therefore, be a question of fact on the particular circumstances of each case.[22] The results produced by applying these principles to the two conflicting groups are instructive.

It is simpler to start with the respondents. One of them, Wade, gave evidence on what they had done. They, seven in number, thought that it would be a good thing to form a union. They held one or two meetings. They enrolled no members and took no money. Wade said that they intended to form a union when they had got the proposed union registered. He said, in terms, that the union was not formed, because they wanted to get registered before they took members. Tomlin J. held, almost inevitably, that the respondents were a prospective trade union, but that they were not an existing trade union. Consequently they were not entitled to registration though they had made the earlier application.

The appellants stood in a different position. That they had succeeded in forming a union was treated as almost self-apparent and Tomlin J. devoted only a minor part of his judgment to the evidence adduced on that issue. He did, however, remark that by the end of March about 200 members had been enrolled in the appellants' union and had paid entrance fees and subscriptions. Though they did not apply for registration until early in April, the judge was able to fix March 3rd as the exact date of the union's birth. As it had already come into existence, it was, in the absence of a prior application by another existing union, entitled to registration under the name in question.

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[21] *Ibid.*, at p. 30.
[22] *Ibid.*, at p. 29.

The implications of the case are not pointed out in the judgment, but it is a reasonable inference that the reason why the respondents had not acquired an identity as a union was that they expressly intended the formation of their union to be contingent upon the obtaining of registration. By way of contrast, the appellants had succeeded in forming a union because, though they intended to apply for registration, they intended to organize themselves, and did organize themselves, into a combination or association for the statutory purposes before they sought registration. They did not intend the existence of their union to be contingent on the success of the application for registration.

Notwithstanding the final result in two of them, it is submitted that the rationale of the three cases leads to the principle that the part played by a charter of affiliation in the creation and existence of a local union will depend on the actions and intentions of those who sponsor the new body. If their manifested intention is that its existence as a union shall be dependent upon obtaining a charter from a national union, then success in that direction becomes a condition precedent to the existence of the union. But, if they intend to be and act as, and do indeed act as, a union before a charter is obtained, then they have an existence as a union in spite of the fact that the charter is not obtained. Moreover, the fact that they clearly contemplate an application for a charter is not, of itself, sufficient to make the whole existence of the local body contingent upon the fulfilment of that desire. The contents of the constitution of the national body will probably be material evidence, as it was in the *Lakeman* case, but a court should not, without evidence of its terms, assume that it is decisive of a purely inchoate existence. The enrolment of members, the collecting of fees and the other pre-charter activities of the local body must be accorded their proper weight on the issue of intention.

E. F. WHITMORE*

Comme toutes les choses humaines ont une fin, l'Etat dont nous parlons [l'Angleterre] perdra sa liberté, il périra. Rome, Lacédémone et Carthage ont bien péri. Il périra lorsque la puissance législative sera plus corrumpue que l'exécutrice. (Montesquieu, L'Esprit des lois, livre XI, chapitre VII)

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