Case and Comment

CRIMINAL PROCEDURE — ISSUE OF INSANITY — CHALLENGES TO JURORS — PEREMPTORY CHALLENGE — CHALLENGE FOR CAUSE. — By section 967(1) of the Criminal Code, provision is made for the trial of an issue, either before or after the accused is given in charge to a jury, in the following words:

> 967. If at any time after the indictment is found, and before the verdict is given, it appears to the court that there is sufficient reason to doubt whether the accused is then, on account of insanity, capable of conducting his defence, the court may direct that an issue shall be tried whether the accused is or is not then, on account of insanity, unfit to take his trial.

Under subsections 2 and 3 of the same section, if this issue is directed before the accused is given in charge to a jury, it is tried by "any twelve jurors" or in the province of Alberta by "any six jurors". But if the issue is directed after the accused has been given in charge to a jury, "such jury shall be sworn" to try it in addition to the issue on which they are already sworn.

Section 967 does not make any provision for challenges, either peremptory or for cause, to any juror called to try the issue of fitness of an accused to take his trial. Sections 931 and following of the Code seem to have reference only to challenges to jurors called to try the general issue of guilt or innocence of the accused. The question therefore arises: Can there be a challenge of any juror called to try an issue about the fitness of an accused person to take his trial?

It seems clear that there cannot be a peremptory challenge in such a case. Crankshaw in the last edition of his Criminal Code says in his notes to section 967 that "Peremptory challenges are not allowed upon a collateral issue"[1] and cites as authorities in support *Rex* v. *Ratcliffe*[2] and Taschereau's Criminal Code.[3] The last edition of Archbold's Criminal Pleading, Evidence and Practice says that "Jurors impanelled to try collateral issues may not

[1] (6th.ed., 1935) p. 1146.
[2] (1746), Fost. 40
[3] (1893) p. 780.

be challenged peremptorily"[4] and also cites *Rex* v. *Radcliffe*.[5] There is no reference to the question under consideration in either Tremeear's or Snow's Criminal Codes.

In the *Ratcliffe* case (according to Foster's Reports) the accused had been involved in the Rebellion of 1715. He was, in 1716, convicted of high treason and, while under sentence of death, escaped from Newgate Prison and got over to France. In 1745 he was, with other officers, captured on board a French ship of war. In 1746 he was brought before the bar and pleaded that he was not the person mentioned in the record of 1716. An issue was thereupon directed, over identity, and a jury returned. On peremptory challenges, I quote from page 42:

> As the jurymen were called to the book, the prisoner challenged one of them, and insisted on his right to a peremptory challenge; but his challenge was over-ruled. For though there are some opinions in the books (S.P.C. 163, Co. L. 157b) that in collateral issues of this kind the prisoner hath a peremptory challenge, yet the later and better opinion is that he hath not; and the modern practice hath gone accordingly.
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> Chief-Justice Hale saith (2 Hale, 267), That in case of an issue joined on error in fact assigned for reversing an outlawry, the prisoner hath no peremptory challenge; and in p. 378 of the same book it seemeth to be admitted as a general rule, that in inquests of office (and the present trial is in nature of an inquest of office) the prisoner hath no peremptory challenge. In *Barkstead's* case (1 Lev. 61, 1 Keb. 244), cited before, the prisoners were not permitted to challenge peremptorily; and in the case of *Roger Johnson*, which hath likewise been already cited, the Court declared, that the prisoner had no peremptory challenge.

For those who are curious about the result, the jury found that the prisoner was the same person mentioned in the previous record, and he was duly beheaded on Tower Hill.

On the page of *Hale* referred to is the following passage:[6]

> By the common law, if a man were outlawed of felony or treason, and brought a writ of error upon the outlawry, and assigned some error in fact, whereupon issue was joined, he could not challenge peremptorily or without cause.
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> The like law seems to be, if he had pleaded any foreign plea in bar or in abatement, which went not to the trial of the felony, but of some collateral matter only.

In *Rex* v. *Barstead*,[7] also cited in *Ratcliffe's* case, the issue was collateral, that is, whether the prisoners were the same persons as had been attainted. It was held that they had no peremptory challenges. Incidentally, *Barkstead's* case involved three judges who

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[4] (32nd ed., 1949) p. 174.
[5] As reported in 1 W. Bl. 3. *Rex* v. *Ratcliffe* and *Rex* v. *Radcliffe* are the same case.
[6] Hale's History of the Pleas of the Crown (1736) Vol. 2, p. 267.
[7] (1662), 1 Keb. 244.

had pronounced sentence of death upon Charles I. They were executed at Tyburn.

The matter of peremptory challenges upon any collateral issue is dealt with in Taschereau's Criminal Code, where the late judge of the Supreme Court of Canada reviews the already mentioned authorities.[8] At page 862, under the heading of insanity, he says: "It has been seen . . . that no peremptory challenges are allowed on collateral issues". He was here referring to an issue over the fitness of the accused to stand trial.

It remains to be determined whether there may be challenges for cause upon a collateral issue. The words in Hale's quoted statement, "he could not challenge peremptorily or without cause" would seem to imply that an accused may challenge *for* cause. I cannot find any further discussion of this particular aspect of the matter in any of the textbooks or authorities, including Stephen's *History of the Criminal Law of England* and Forsyth's *History of Trial by Jury*.

It is said in *Halsbury* that:[9]

> As a general rule jurors are not to be challenged where there is no issue joined between parties, and *a fortiori* where they are jurors of inquiry and presentment only.

It seems to me that an issue over fitness of an accused person to stand trial is not an issue between parties, but rather is an inquiry by the court, with the assistance of a jury. If I am right in this view, there is no right of challenge, either peremptorily or for cause.

Further, it is the case that a right of challenge to a juror is the right of the accused person and not of his counsel. The rule was, at one time, that the accused had personally to make the challenge. Even if the challenge is made by counsel for the accused, as is now the practice, it is nevertheless made upon instructions of the accused. It follows that if there is a doubt about the mental competence of the accused to understand the proceedings, and if he is not capable of making full answer and defence to the charge, then there is equally the question whether he can instruct his counsel upon challenges to a prospective juror. In short, having regard to the very nature of the issue before the court, it would seem unlikely that challenges could be made.

In my view, the words used in section 967 in themselves preclude a right of challenge. Subsection 3 provides that if the "issue is directed after the accused has been given in charge to a jury for

[8] (1893) p. 780.
[9] (2nd ed.) Vol. 19, p. 303, f.n. (*q*).

trial on the indictment, *such jury* shall be sworn to try this issue". Although it is true that there is a right of challenge when *such jury* is originally empanelled to try the guilt or innocence of the accused, yet it is clear that there can be no further challenge when the jury is re-sworn, to try the issue of fitness to stand trial. Referring back to subsection 2 of the same section, which covers the case where a jury has not already been empanelled, the issue is to be tried by *any* twelve jurors. The use of the word "any" seems to me to preclude a right of choice by means of challenges or otherwise. The right of choice belongs to the court conducting the inquiry.

In *Rex* v. *Kierstead*[10] the accused was arraigned and pleaded not guilty. The jury was empanelled in the usual manner, the defence exercising their right of challenge. Counsel for the defence then moved that an issue be directed whether or not the prisoner was then unfit, by reason of insanity, to take his trial, and that the jury be re-sworn to try this issue, The attorney-general contended that the application was too late because it had not been made before the indictment was pleaded to and the trial begun. During the course of the ensuing argument, as reported, counsel for the accused said this:

> Had we moved before the main issue was entered upon we would have been obliged to take the jury as called *without the benefit of challenge.* [Italics added]

The court directed the issue and the accused was found unfit, by reason of insanity, to take his trial.

In result, in my opinion, there is no right of challenge in an issue of fitness to stand trial, by the crown or the accused, either peremptorily or for cause.

J. J. KELLY*

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COMPANY LAW — DUTY OF DIRECTOR TO ACCOUNT FOR "SECRET PROFITS"— OUTSIDERS ASSOCIATED WITH DIRECTORS AFFIXED WITH CONSTRUCTIVE TRUST.— Mr. Justice Manson of the Supreme Court of British Columbia, in delivering judgment in the

[10] (1920), 33 C.C.C. 288.

* The author of this comment, Mr. Justice Kelly of the Manitoba Court of Queen's Bench, unfortunately passed away suddenly on April 3rd of this year, after his manuscript had been completed. He had served in the First Great War and, during the Second Great War, was A. J. A. G. with the Canadian Army Overseas, with the rank of Lieutenant-Colonel. For many years he lectured at the Manitoba Law School, from which he himself graduated in 1922, and from 1937 to 1949 he was a Bencher of the Manitoba Law Society. He became King's Counsel in 1938 and was appointed to the Bench in 1949.

case of *Canada Safeway Ltd.* v. *Thompson et al.*,[1] has indicated that Canadian courts may take a stricter view of the conduct required of a director in his commercial dealings with his company. In this case Manson J. disparaged *Burland* v. *Earle*,[2] adopted the absolute liability of directors to account for "secret" profits established by the House of Lords in *Regal (Hastings), Ltd.* v. *Gulliver*,[3] and held that outsiders with knowledge of the facts who deal with the director might be contaminated to the extent that they become constructive trustees to the company.

The decision rested on the following facts. Canada Safeway Ltd., the plaintiff, is a wholly-owned subsidiary of Safeway Stores Incorporated, a Maryland corporation with its head office at Oakland, California. One, Raley, was the president and managing director of the plaintiff during the relevant period and it was one of his duties to expand the business and, with a view to their purchase by the plaintiff, to investigate other businesses. In late 1935 or early 1936 Raley began an investigation of the Empress Jam Company. He obtained its balance sheets and sent an employee of the plaintiff to take an inventory. He then began negotiations with the three defendants, who had no connection with the plaintiff, to have them purchase Empress Jam. The learned trial judge found as a fact that the defendents knew of Raley's connection with the plaintiff, that his duty to the company and his personal interest were in conflict, and that they limited their investigations to Raley's assurance that it was "all right". Further, Raley undertook to finance the purchase of one-third of the shares himself and did so, but the certificates for these shares were never registered in his name, remaining instead in the name of one of the original shareholders of Empress Jam who held them with the understanding, shared by the outsiders, that Raley was the beneficial owner. In the same manner, one Crawford, the managing director of another subsidiary of Safeway Stores, took a one-ninth interest in the shares of Empress Jam, and Manson J. found that this transaction also took place with the knowledge of the outsiders. The remaining shares were registered in the name of the defendants, with the exception of a small number of shares retained by one of the original shareholders of Empress Jam.

The intention of the purchasers was to rehabilitate the equipment of Empress Jam and then to re-sell it. The first, unsuccessful, attempt to sell was made by Raley to a concern in Winnipeg

[1] [1951] 3 D.L.R. 295, appeal pending.
[2] [1902] A.C. 83.
[3] [1942] 1 All E.R. 378.

entirely unconnected with Safeway Stores. In 1938 the president of Safeway Stores wrote Raley that he was contemplating the establishment of a tea and coffee plant in Vancouver. Raley suggested that rather than establish such a plant it would be better to buy out the already existing Empress Jam. Raley made no disclosure of his own interest, but treated the registered shareholders as the sole owners of the company. Negotiations broke down, and the next effort to sell was to another Winnipeg firm which was a leading rival of Safeway. Before a sale took place, however, Raley took advantage of the presence of the president of Safeway in Western Canada to reintroduce the subject of the purchase by Safeway of Empress Jam. Meetings between the defendants and the president took place in Vancouver in the summer of 1939. No disclosure of the interests of Raley and Crawford was made to the president, who was left to assume that the registered shareholders were the sole owners of Empress Jam. As a result of these meetings a sale of Empress Jam to Canada Safeway was agreed upon and a contract drawn up. The contract made no mention of the interests of Raley and Crawford, it appointed one of the defendants, Thompson, as vendor and directed that the purchase price, in the form of preferred shares in Safeway Stores, was to be paid through him.

The matter might have rested there had it not been for the workings of the Foreign Exchange Control Board. As a result of investigations into declarations made to the Board, the president of Safeway Stores learned that Raley had become the registered owner of preferred shares in Safeway Stores. Further inquiry elicited the facts surrounding the Empress Jam transaction.

Raley was not a party to the British Columbia action; the sole defendants were the co-purchasers of Empress Jam. The relief sought was recovery of the profit made on the resale. The defendants had no connection with the plaintiff and, in normal circumstances, would owe no duty to it. Their liability, if it is to be established at all, must be predicated upon a finding of duty owed by Raley to the plaintiff and a breach of that duty. Thus, Manson J. turned first to an analysis of the position of Raley *vis-à-vis* the plaintiff company.

It is necessary to bear in mind the remedy sought. The action is not for rescission of the contract, which probably would have been justified on the non-disclosure of interest,[4] but for retention by the plaintiff of the benefit of the contract plus return of the

[4] *Marler Estates* v. *Marler* (1916), 85 L.J.P.C. 167; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218.

profit made by the vendors. It is submitted that such recovery can only be supported on a finding that the plaintiff had acquired an equity in Empress Jam at the time of the purchase by Raley and the defendants.

Raley was a director of the plaintiff and, as such, was in a *fiduciary* relationship with it. What are the legal consequences when a person who is in such a relationship engages in a transaction similar to the one in the instant case? Any attempt by a Canadian court to answer this question must take into account the opinion delivered by the Judicial Committee of the Privy Council in *Burland* v. *Earle*.[5] The facts of *Burland* v. *Earle* bear a close resemblance to those of *Canada Safeway* v. *Thompson*. Burland filled the offices of president, manager and director in the British American Bank Note Company, in which he was also the majority shareholder. He was also a shareholder in the Burland Lithographic Company, then in the process of winding-up. Burland attended the public sale of the assets of the latter company and purchased all the assets in four lots. One of these lots was later sold to the British American Bank Note company at a greatly enhanced figure. The manner in which this transfer was effected is relevant. Burland did not immediately close the transaction with the liquidator and accept a bill of sale; rather he called a meeting of the directors and a meeting of the shareholders to consider the purchase of the property from himself, not disclosing the price at which he had obtained it. It was resolved to purchase the equipment from Burland for $60,000 (there was evidence at the trial that this was a fair market price); only then did Burland close with the liquidator, paying him the auction price of $21,564. On discovery of the profit made by Burland a number of the shareholders of the Banknote Company brought an action seeking reimbursement by Burland to the company. The Judicial Committee, reversing the Ontario Court of Appeal, was of the opinion that Burland could not be forced to disgorge the profit. The opinion is based on the finding that Burland was under no mandate or commission from the company to purchase the property. That fact established, his intention in making the purchase became irrelevant: "It may be that he had an intention in his own mind to resell it to the company; but it was an intention which he was at liberty to carry out or abandon at his own will".[6] The property in the equipment had vested in Burland in his personal capacity; he could do with it as he willed, and if he elected to sell it to the

[5] *Supra*, footnote 2.
[6] *Ibid.*, at pp. 98-99.

company, he could do so on his own terms. The Judicial Committee intimated that, in proper circumstances, Burland's failure to disclose the price he had paid for the equipment might have justified an action for rescission, but it could not have the effect of forcing Burland to return his secret profit, with the company retaining ownership of the equipment.

The defendants in the *Canada Safeway* case, whose liability to account rested solely on the liability of Raley to account, relied heavily on *Burland* v. *Earle*. That precedent, however, received short shrift in the hands of Manson J.: "It was indeed a strange decision. . . . Upon the facts as found by the Judicial Committee the case is without the facts in the case at bar."[7] The learned trial judge leaves no doubt that he distinguished *Burland* v. *Earle*, but, unfortunately, he leaves considerable doubt why the distinction was made. The Judicial Committee had found that Burland was not under a mandate from his company at the time of the purchase, and Manson J. obviously considered that finding to be the point of distinction, yet nowhere did he make a finding that Raley was under a mandate from the plaintiff to purchase Empress Jam. The nearest approach to a finding that a mandate existed took the form of holding Raley's duties to include the investigation of other concerns with a view to their purchase by the plaintiff. There was no evidence that he had been specifically authorized to do this in connection with Empress Jam; indeed, all the evidence negatived such an inference. After the initial purchase of Empress Jam, efforts were made to sell it to parties other than the plaintiff and, in fact, the plaintiff rejected the first negotiations, saying that it would not be interested in such a plant in Vancouver for an indefinite period. A comparison of Raley's actions with Burland's indicates that if Burland was held not to be acting under a commission, then, *a fortiori*, Raley could not be considered as acting on the behest of his company.

Burland v. *Earle* having been rejected, the way was cleared for the introduction of the apparently much stricter rule laid down by the House of Lords in *Regal* v. *Gulliver*.[8] In the latter case, the appellant company, in the business of operating cinemas, had been negotiating for the leases of two cinemas in nearby communities. To effect this purpose, it was decided to establish another com-

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[7] *Supra*, footnote 1, at p. 322.

[8] *Supra*, footnote 3. Had *Burland* v. *Earle* not been distinguished on the facts, an interesting problem in *stare decisis* would have arisen. Where there is a conflict between a House of Lord's decision and an opinion of the Judicial Committee of the Privy Council on a non-constitutional matter, which one is controlling on a Canadian court?

pany, known as the Amalgamated, with an authorized capital of £5,000, of which only £2,000 would be issued and owned by the appellant company. The prospective lessors demanded guarantees which no one was willing to provide; instead, it was decided to issue the full share capital of Amalgamated. At a meeting of the board of directors of the appellant, the chairman invited his fellow directors and the company solicitor, not a director, each to subscribe for £500 worth of shares in their own names. This was done and within a week a transaction differing in its nature from the one originally contemplated took place, with the result that the shares in both the appellant company and Amalgamated were sold. The shares in Amalgamated were sold at a considerable mark-up, and the action by the appellant company sought a return of the difference. Any imputation of fraud or *mala fides* was expressly repudiated. In the result, all the directors were compelled to disgorge the profit, with the exception of the chairman, who was able to prove that the beneficial ownership of the shares he took belonged to an outsider, and the solicitor who was not in any fiduciary relationship to the company. The decision is rendered somewhat unreal by the admission of the House of Lords that if the directors had gone one step further and called a general meeting of the appellant company, in which they were a majority, to approve their purchase of the shares, recovery would have been impossible.

What is the basis of the director's liability? The answer given by the House of Lords is very simple; if the relationship of director and company exists and a profit has been made through the holding of the office of director, then the liability to account attaches. All other considerations are irrelevant. The only method by which a director can retain his profit is by full disclosure to, and approval by a general meeting of shareholders. In effect, the decision imposes an absolute liability on the director in such circumstances. The absolute quality of the liability is justified by a public policy argument imported from the law governing trustees: that courts are not competent to inquire into the details of every transaction to determine whether the *cestui que trust*, or company, has in fact been injured. The rule is inflexible, "for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an enquiry as that".[9] It should be borne in mind, however, that before any liability to account attaches the profit

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[9] *Parker* v. *McKenna* (1874), 10 Ch. App. 96; 44 L. J. Ch. 425; 31 L.T. 739 (quoted by Lord Wright, p. 393).

must have been obtained "by reason and in the course of their office of directors".[10]

On the surface, *Burland* v. *Earle* and *Regal* v. *Gulliver* appear to be totally inconsistent and irreconcilable and they are treated as such in the instant case. The Judicial Committee appears to have been pre-occupied with the concept of equitable ownership, its major inquiry directed, as it was, to the question whether or not Burland had been acting under a commission to purchase on behalf of his company. The obvious inference from this inquiry is that if Burland had been acting under such a commission his company would have been the beneficial owner from the first, and the second transaction would have amounted to the company buying its own property and being therefore entitled to reimbursement for the difference. The existence of a commission not being established, Burland had purchased the property for himself and could strike what bargain he liked with the company. The House of Lords, on the other hand, pays no attention to the existence or non-existence of a commission, but looks to the fiduciary relationship of director to company, and the existence of a profit made by the directors by *reason of their office*. It was clear that the directors obtained the shares only because they were directors, and absolute liability to account flowed from that fact. In *Burland* v. *Earle*, *there was no evidence that Burland had obtained the equipment because he was a director of the Banknote Company*, in fact, all the evidence pointed the other way. Since he had not obtained the property through his office as director, the only conceivable ground on which the Banknote Company could get relief was that he had bought the property as the agent of the company and the company had thereby become the equitable owner. It would appear, therefore, that *Burland* v. *Earle* and *Regal* v. *Gulliver* are not *inconsistent* but *alternative*. There are two grounds on which a director may become liable to account for profit to his company: (a) where the property has been acquired through his office as director (the *Regal* v. *Gulliver* pattern), and (b) where he has purchased the

[10] *Regal* v. *Gulliver*, *supra*, footnote 2 (Lord Russell of Killowen at p. 386). See also *Cavendish Bentinck* v. *Fenn* (1887), 12 App. Cas. 652, at p. 658, *obiter dicta* of Lord Herschell: "Mr. Fenn as a director of the company was in the position of an agent, and undoubtedly *if he filled any fiduciary position towards them at the time when he purchased this property* he would be bound to pay to the company the difference between the price at which he purchased it and the price at which it was sold to the company" (italics added). Note that the mere relationship of a director *vis-à-vis* company is not sufficient. He must be in a fiduciary relationship (obtained the property through his office as director, or purchased the property as the agent of the company) at the time he purchased the property. The House of Lords in deciding *Regal* v. *Gulliver*, *supra*, footnote 3, did not refer to Lord Herschell's dicta.

property as agent of the company (converse of the *Burland* v. *Earle* pattern). It is significant that, in a case subsequent to *Burland* v. *Earle*, the Judicial Committee worked out an equitable trust in favour of a company whose directors had fraudulently used its resources to acquire a benefit for themselves.[11] If *Regal* v. *Gulliver* worked any change in the existing law, it is only in so far as it expressly negatived the presence of fraud or *mala fides* as a necessary ingredient.

Applying the two bases of liability to the facts of the instant case, what should be the result? Did Raley acquire Empress Jam by reason of his being a director of Canada Safeway? There is some evidence that he did. He used an employee of the plaintiff to take an inventory and there is an inference that he obtained the balance-sheets and other information concerning Empress Jam because of his position. There was evidence that the plaintiff company was one of the leading customers of Empress Jam and that Raley, through his position in the plaintiff company, could put pressure on the shareholders of Empress Jam, but there was no evidence that he had, in fact, done so. In short, the strongest case that can be made out for the plaintiff on this point is that Raley used his position to obtain information concerning property he later purchased. In some circumstances, it might well be the receipt of mere information is enough to justify the imposition of the trusteeship;[12] but should it not be information of a type that arose *solely* through the directorship and was not available to the director in his private capacity? A definite finding on the following point would have been helpful: Did Raley, by reason of his position in the plaintiff company, have access to information concerning Empress Jam that would not have been available to him as an ordinary man of business? The history of subsequent dealings clearly destroys any contention that Raley knew of the plaintiff's intention to buy Empress Jam, since in 1938, and inferentially in 1936, the plaintiff demonstrably had no such intention.

The evidence on the existence of a commission is contradictory. On the one hand, Raley was charged, as one of his duties, with investigating other businesses and reporting to the plaintiff company with a view to their purchase. On the other hand, the evidence as accepted by the learned trial judge negatived the existence of a particular mandate in connection with Empress Jam. During the 1938 negotiations when Raley made his first attempt

[11] *Cook* v. *Deeks*, [1916] 1 A.C. 554.

[12] On this point, see *Allen* v. *Hyatt* (1914), 17 D.L.R. 7; 30 T.L.R. 444 (where information was one of the factors used by the court in affixing a trusteeship on the directors *qua* the *shareholders*).

to sell Empress Jam to the plaintiff, before the question of price had even been raised, the president of Safeway Stores said, "We should forget Empress altogether for the moment and that means for the next two years at least".[13] In addition, the earliest indication that the plaintiff was considering the establishment of a tea and coffee plant in Vancouver (similar to the one owned by Empress Jam) came in 1938, two full years after the purchase of Empress Jam by Raley and the defendants. In short, the evidence supports two findings: first, the existence of what may be called a "general" mandate; secondly, the absence of what may be called a "particular" mandate. Does the existence of the "general" mandate satisfy the test of *Burland* v. *Earle*? If the learned trial judge distinguished the instant case from *Burland* v. *Earle* on the ground of the existence of a mandate, as he appeared to do, the answer would necessarily be in the affirmative. If this is so, then by hypothesis the existence of a "general" mandate to buy would impose a liability to account, despite the non-existence of a "particular" mandate to buy the subject-matter of the controversy.

To recapitulate, it is necessary to distinguish between the two different remedies that may be available to a company in the position of the plaintiff. First, there is the remedy of rescission, available where a director who has an interest in the transaction fails to disclose his interest.[14] If rescission is the remedy sought, then inquiries as to the conduct of the director *at the time of re-sale to the company* are relevant, for, if he fails to make a complete disclosure at the time of the resale, the contract is voidable at the option of the company. The second remedy, the one sought in the present case, is retention of the property purchased by the company and return of the "secret" profit made by the director. If a company is able to enforce the second remedy, it can only do so on the finding that it had an equity in the property arising out of the conditions under which the property was originally acquired by the director. The proper inquiry now is directed to *the time of the purchase of the property by the director*. If the conditions of the purchase by the director are such that the company can be said to be the equitable owner, it is treated as the owner from that time, and in the later transaction it was merely buying its own property, thus becoming entitled to a return of the difference while retaining the property. The difference between the two remedies

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[13] *Supra*, footnote 1, at p. 306. In the report the date of the statement is given as January 6th, 1936, but this is an obvious typographical error, the actual date being January 6th, 1938.

[14] See authorities cited under footnote 4, *supra*.

was clearly drawn in *Marler Estates* v. *Marler*:[15] "an agent, whose duty is to acquire property on behalf of his principal, cannot, without the like consent, acquire it on his own behalf and subsequently resell it to his principal at an enhanced price. In such a case the principal can treat the property as originally acquired for him and the resale as nugatory, and may, therefore, recover from the agent the money paid on resale, less the original price, and expenses incurred by the agent in acquiring the property. This, however, only applies where the relationship of principal and agent existed *at the time when the agent acquired the property*. . . . There is another principle of equity which ought to be distinguished from, but is sometimes confused with, that to which I have already referred. Equity treats all transactions between an agent and his principal, in matters of which it is the agent's duty to advise his principal, as *voidable* unless and until the principal, with full knowledge of the material facts and under circumstances which rebut any presumption of undue influence, ratifies and confirms the same."[16]

The remedy chosen in the present case stands or falls on the existence of an equity inuring to the plaintiff at the time of the purchase of Empress Jam by Raley and the defendants. If my reading of *Regal* v. *Gulliver* and *Burland* v. *Earle* is correct, the plaintiff must establish that Raley and the defendants acquired Empress Jam by reason of Raley's position as a director in the plaintiff company, or that Raley was acting as the agent of the plaintiff at the time he acquired it. The learned trial judge made an affirmative finding on the first ground. There are two observations which seem relevant to this finding: Could Raley have obtained the information concerning Empress Jam in his private capacity and, if so, does his procuring the information satisfy the test of *Regal* v. *Gulliver*? Does the evidence establish that Raley used his position as a director of the largest customer of Empress Jam to enforce favourable terms? No conclusive finding was made on the existence of a mandate except in so far as one may be inferred from the learned judge's remarks in distinguishing *Burland* v. *Earle*.

The judgment shows that Manson J. attached great weight to the fact that Raley failed to disclose his interest in Empress Jam in his dealings with the plaintiff. This failure would be relevant if the action had been for rescission, but it is irrelevant in an action for retention of the property and return of profit, except in the very limited sense in which it may cast light on the

[15] *Supra*, footnote 4, at p. 167.
[16] Italics added.

state of affairs at the time the director purchased the property. The two remedies are separate, they arise from different bases. Rescission is predicated upon non-disclosure of a material fact, while retention of the property and return of the profit depends on an equity to the benefit of the company attaching to the property.

Raley, had he been a defendant, would have been liable to account. The actual defendants were his co-purchasers, and, in the result, they were made liable to account for all profit on a constructive trusteeship which imposed a joint and several liability. This aspect of the case, while of undoubted and far-reaching importance, lies outside the scope of the present comment, which is confined to an examination of the liability of the director, on which everything turned, and an attempt to indicate that there are two distinct remedies, each with its separate line of inquiry.

JOHN B. BALLEM*

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WILLS — FREEDOM OF WILLING IN QUEBEC — PUBLIC ORDER AND GOOD MORALS — STARE DECISIS.—In a judgment rendered a little more than two years ago, turning on the validity of a will in which the testator, ignoring his sister and brothers, had bequeathed the whole of his estate to the woman with whom he had been living in concubinage, Associate Chief Justice Tyndale said that "under our present law, a will is not invalid merely because the legatee has had irregular or even adulterous sexual relations with the testator".[1] The brothers of the deceased (the sister had died in the interval) sought to set aside the will on a number of grounds, the strongest of them being that the will contained immoral clauses and clauses against public order. The one particularly objected to stated it as a condition of the bequest to the legatee that she could inherit only if she was still living with the testator at the time of his decease.

According to article 831 of the Civil Code,

> Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favour of his consort, or of one or more of his children, or of any other person capable of acquiring and possessing, and without reserve, restriction, or limitation; saving the prohibitions, restrictions, and causes of nullity mentioned in this code, and all dispositions and conditions contrary to public order or good morals.

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[1] *H et al.* v. *Dame T & Prudential Insurance Co.*, [1949] S.C. 281, at p. 283.

An important general principle to be resolved in *H et al.* v. *Dame T* was this: Where a man bequeathed his estate to the woman with whom he had been living in concubinage, does the bequest contravene public order or good morals? An answer was given by Associate Chief Justice Tyndale, and the answer in effect was no. The Associate Chief Justice cited Mignault as his authority;[2] the latter, in turn, had many years before based himself on the decision rendered by the Privy Council in the *King* v. *Tunstall.*[3]

It now appears to be assumed, therefore, that the law is fixed on this point: that with regard to a bequest in a will, adulterous sexual relations between testator and legatee are not a contravention of public order or good morals invalidating the bequest. But *is* the law fixed? The writer is prepared to dispute the assumption on the following grounds: (a) although judicial pronouncements are of great importance in the province of Quebec, the paramount authority, in matters covered by it, is the Civil Code; (b) as a general principle (to be discussed more fully later on) the case law is not as unchanging and as unyielding as it is commonly assumed to be; (c) in the light of the wording of article 831 of the Civil Code, the principle of freedom of willing should be given an interpretation more restricted than that upheld in *H et al.* v. *Dame T.*

Let us look into the background of article 831 of the Civil Code. The Quebec Act of 1774 recognized that the inhabitants of the province, although but recent subjects of His Majesty, nevertheless enjoyed an established form of constitution and a *system of laws* in virtue of which their persons and property had been protected; it set out, further, that these inhabitants (religious orders excepted) may hold and enjoy their property and possessions together with all customs and usages relative thereto and all other of their rights in as large, ample and beneficial a manner as if previous proclamations, commissions and ordinances had not been made. It went on to say that in all matters of controversy relative to the property and civil rights of the inhabitants of the province, resort shall be had to the laws of Canada for the decision of the same and that all causes to be hereafter instituted in any of the courts of justice, with respect to such property and rights, were to be determined in accordance with the said laws and customs of Canada and the ordinances that shall from time to time be passed in the said province. The one radical change came in the passage that follows:

> . . . it shall and may be lawful to and for every Person in the said Prov-

[2] Droit Civil Canadien, vol. 4, p. 259.
[3] (1875), 20 L.C.J. 49.

> ince, whether Canadian or English, that is Owner of any Goods or Credits in the same, and that has a right to alienate the said Lands, Goods or Credits in his life time by Deed of Sale, gift or otherwise, to devise or bequeath the same at his or her death by his or her last Will and Testament to such Persons, and in such manner as he or she shall think fit, any Law, Usage or Custom heretofore or now prevailing in the Province to the contrary hereof in any wise notwithstanding.

If this rather lengthy quotation is read in its context; if furthermore it is remembered that, changing as it did the *droit commun,* the passage must be interpreted restrictively; if all this is considered, then one must take issue (however reluctantly, in view of the high authority whence it comes) with the pronouncement of the Supreme Court in the case of *Renaud* v. *Lamothe,*[4] namely, that recourse should be had to English (rather than French) jurisprudence in interpreting the principle of unrestricted liberty of willing, taken from the common law of England and introduced into the law of Quebec.

It is interesting to note that in *Russell* v. *Lefrancois,*[5] which turned on the quality of the legatee and on the question of the *cause* of the bequest, the Supreme Court applied French and Roman law; that in the case of *Mayrand* v. *Dussault,*[6] dealing with the question of what constitutes undue influence and the proof necessary to establish it, the Supreme Court again resorted to French, rather than English, law. In this same case, Judge Girouard, in discussing the principle of freedom of willing, qualified it by adding, "whether or not it exists in our law".[7]

In the Superior Court of Quebec, Judge Davidson, faced with the problem of determining the validity of a bequest made conditional upon the beneficiary obtaining a separation as to bed and board from her husband (so that he could have control over his wife's property), likewise went to French sources. He said:

> I have not been referred to, nor have I found any French authority which runs on all fours with the present case. It is fairly covered, however, by the general principle which Demolombe asserts, that a condition is illicit if it tends to prevent the fulfilment of family duties.[8]

To the writer of this commentary at least, the position taken by J. Emile Billette[9] is more logical, more consistent, than that of the Supreme Court as set out in *Renaud* v. *Lamothe,* when he says:

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[4] (1901-1902), 32 S.C.R. 357.
[5] (1884), 8 S.C.R. 335.
[6] (1907), 38 S.C.R. 460.
[7] *Ibid.*, at p. 488.
[8] (1891), M.L.R. 7 S.C. 25, p. 29.
[9] Donations et Testaments, vol. 1 (1933) p. 65.

> The whole foundation and form of the French law with respect to testamentary disposition remained in full force and vigour, saving the French restrictions as to persons and as to property[10] . . . but all the other and very numerous French laws and customs relative to testamentary disposition remained unchanged, including the different forms of bequeathing, to which the Quebec Act only added the form drawn up according to the laws of England.[11]

For a little more than a quarter of a century following the Quebec Act there was no change in the law on testamentary bequests. In 1801, however, a statute was introduced to remove elements of doubt which had in the meantime arisen. This statute, declaratory as well as enacting, was the basis for the later article 831 of the Civil Code, which has already been quoted. It is true that, according to this article, property may be left to *any* person "capable of acquiring and possessing"; and, if the article ended with these words, there could be no questioning the correctness of the decision in *H et al.* v. *Dame T and Prudential Insurance Co.* It is, however, qualified by what follows: "saving the prohibitions, restrictions, and causes of nullity mentioned in this code,[12] and all dispositions and conditions contrary to public order or good morals".[13]

Now when words are inserted in a statute (or an article of the Code) they are of course presumed to have meaning. When the Codifiers inserted in article 831 the words "public order" and "good morals"— words that appear but rarely in other parts of the Code —those words assume even greater significance. The conclusion becomes inevitable that the Codifiers attached great importance to them for the principle of freedom of willing.

"Public order" and "good morals", what do they mean? They have formed the subject-matter of prolonged discussion by leading writers in France and in Quebec, so that what is said in a

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[10] Such, for example, as the "reserve de quatre-quints" and the difference between "acquets" and "conquets immeubles".

[11] P. 65.

[12] Much has been made by some persons of the fact that in their report the Codifiers state that the restrictions as to gifts inter vivos between concubinaries do not apply to bequests in wills. No attempt is being made here to state that bequests between concubinaries should — as in the case of gifts inter vivos — be limited to maintenance. There is, however, a great difference between this severe restriction and the principle of completely unrestricted liberty of bequeathing as enunciated in *King* v. *Tunstall* and in *H et al.* v. *Dame T and Prudential Insurance Co.*

[13] Much has also been made of article 760 C.C., which states that, in the case of a bequest with an immoral condition attached to it, the bequest stands without the condition. A bequest of the type forming the basis of the action in *King* v. *Tunstall* and in *H et al.* v. *Dame T and Prudential Insurance Co.* does not come within the purview of article 760 C.C. The bequest does not have an immoral condition attached to it; it is instead a bequest *without* condition, tainted "au fond".

restricted comment of this kind must of necessity be limited in scope. On this question, Trudel (writing in Quebec) says:

> In the civil law, any disposition which interests first and foremost our social order is classified under this notion [of public order].[14]

And further on, he says:

> Good morals evidently form part of public order. They constitute, nevertheless, a notion of special character which it is necessary to make a little more precise. *They are based on Christian morality.* Anything touching on fraud or immorality is incompatible with them. . . [italics added].

Trudel is representative of what might be called the religious approach toward good morals, which holds that moral values are eternal and unchanging.

There is also what might be called the layman approach, typified best perhaps by Baudry-Lacantinerie:

> What is public order [he asks]? What constitute good morals? Notions variable, evidently, in time and in space. . . . One must include among the laws touching on public order and good morals all those which, by their very basis, rest on concepts considered by our legislators, instrument of our national thinking, as essential to the maintenance of our society as we want it to be.[15]

Laurent, tending toward the same viewpoint, says:

> Morality changes then, but in becoming purer, in becoming more perfect. And what is the instrument of this incessant progress? The human conscience.[16]

Demolombe has this to say:

> we are concerned here with much more than a law as to politics, a law as to social organization, for society is the family, the reunion of all the families.[17]

Whether we accept the religious approach, with its assumption of unchanging and eternal values, or the layman approach, which holds that values are relative, affected by time and by space — in the light of either approach the rule or principle enunciated in *King* v. *Tunstall* and in *H et al.* v. *Dame T and Prudential Insurance Co.* falls by the wayside. As to the religious approach, it is unthinkable that the Christian religion ever tolerated, or ever would tolerate, a principle (if such it deserves to be called) holding it as moral and right for vast property to fall into the hands of a testator's "adulterine bastard son"[18] whilst the lawful wife and

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[14] Traité de Droit Civil, pp. 87-88. This and other French passages referred to in this comment have been translated into English by the writer.
[15] Droit Civil, vol. 1 (2nd ed.), p. 233.
[16] Droit Civil Francais, vol. 1 (3rd ed.), no. 56, p. 90.
[17] Cours de Code Civil, vol. 1 (4th ed.), no. 17, p. 16.
[18] These are the exact words used by the law lords in the *King* v. *Tunstall.*

daughters were virtually passed over; it is unthinkable that Christian morality ever allowed, or ever would allow, a concubine to receive the whole of a testator's estate whilst the brothers and sister were ignored.

As to the layman viewpoint, it is difficult to imagine the layman mind of today, in Quebec, considering a bequest of the type just mentioned as being in conformity with morality or with public order. It is doubtful, despite what was said by the law lords in *King* v. *Tunstall*, whether the "pensée nationale" of Quebec ever accepted the principle of completely unrestricted freedom of willing enunciated in that case, so radically different from the spirit of the French civil law, with its emphasis on family solidarity. But even if we are to grant—and this, for argument's sake only—that the "pensée nationale" of Quebec ever accepted it as moral and right, are we, nearly a century later, to be bound by it? Must we adhere to nineteenth century notions of public order and good morals, even if they outrage present-day ideas of what is right, of what is just?

It is true that in Quebec, as in the other provinces, courts of lower jurisdiction follow as a rule the decisions of higher courts—and rightly so, for only in this way can a measure of certainty, of stability, be achieved in the law. It is, nevertheless, a fact that in Quebec—unlike the other provinces of Canada—the paramount authority in matters of the civil law is the Code and not the decision.[19] If, therefore, a Quebec judge, called upon to render a decision on the validity of a testamentary bequest, comes to the conclusion that it must be interpreted in the light of the *whole* of article 831 of the Civil Code, including the words "public order" and "good morals"; if, in the light of that interpretation, he comes to the further conclusion that the principle enunciated in *King* v. *Tunstall* should not be followed, he would not be violating his oath of office, the oath he takes to uphold the law.

There is another ground for attacking as invalid a bequest of the nature upheld in *H et al.* v. *Dame T.* The ground is illicit or immoral cause. According to article 754 of the Civil Code:

> A person cannot dispose of his property by gratuitous title, otherwise than by gift inter vivos or by will.

Whichever of the methods is used in the disposition of one's property, however, *cause* is a constituent element of the liberality. When a man bequeathes the whole of his estate to his concubine (or to their adulterine child) and leaves to the winds of fate his

[19] Mignault, The Authority of Decided Cases (1925), 3 Can. Bar Rev. 1, at p. 19.

lawful wife and children, what *is* the ascertainable cause? It cannot—to a reasonable person at least — be reparation. How can one speak of reparation in a case where the lawful wife and children are so cruelly treated? Such a bequest can have but one ascertainable cause: that of rewarding concubinage. As Planiol et Ripert have said:

> this consideration is immoral and taints the 'ensemble' of the liberality. On the basis of the theory of cause, one could arrive at a solution practically akin to that of the ancient incapacity. The modern jurisprudence has been too indulgent.[20]

Quebec jurisprudence has likewise been too indulgent. It has — on this specific question—ignored the fact that twentieth century notions of public order and good morals might not be the same as those of the eighteenth or nineteenth century. It has—on this particular question — ignored the fact that in the twentieth century private rights as to property, though still the basis of our society, are nevertheless much more restricted than before; it has—on this specific question—ignored the fact that the emphasis is now on the protection to be given the family, and that where this protection comes into conflict with the notion of the rights of property, property must give way. A host of legislation all over the western world attests to this contention.

Past jurisprudence, on the question of liberalities between concubinaries, veered from the strict to indulgent. It can change the other way around. There is in fact no greater misapprehension than to believe that the jurisprudence never varies. If it did not vary, an impossible situation would be created. Law is essentially the instrument for making workable the day-to-day relations of people with one another. It follows inevitably therefore that as social conditions change the jurisprudence follows suit. There is of course a time lag between the two, with the social conditions changing more rapidly than the law. In the end, however, the law — or rather its interpretation — must take account of these changes.

The problem cannot be met solely by the expedient of enacting additional laws. Social changes are much too varied, much too numerous, to be solved solely by this expedient. Thus, we have a picture of the French tribunals of the latter part of the nineteenth century, cognizant of the new industrial conditions in the land, taking heed of the writings of Josserand and of Salleiles and, in consequence, adopting a line of interpretation of articles 1382 to

[20] Droit Civil, Donations et Testaments, vol. 5 (1933 ed.), pp. 271-272, 281.

1384 of the Code Napoléon in keeping with the new conditions. We have a similar—somewhat later—picture of the Supreme Court of Canada doing the same thing with respect to article 1054 of the Quebec Civil Code.[21] Again, we see the French tribunals of the middle of the nineteenth century reversing, at least in part, the stand they previously took over the restitution of moneys paid under an illegal contract. This reorientation was followed in Canada by a similar reorientation on the part of the Supreme Court.[22] One of the greatest judges the United States ever had—Justice Cardozo—categorically stated that change in the interpretation of law, gradual though it had to be in order to ensure stability, was an essential part of the judicial process. Otherwise the law became atrophied, a potential source of trouble, instead of what it was meant to be, an instrument to help man live in tolerable peace with his fellow-man.

A judicial reorientation in Quebec, restricting the impact of *King* v. *Tunstall* and interpreting the words "public order" and "good morals" in the light of modern conditions, modern aims (centred on the protection of the family circle), would no doubt create comment and even opposition. That, however, need not *of itself* deter. Change and innovation, whether in the judicial or any other field, is bound to arouse comment and opposition. When, however, the change is not the result of thoughtless haste or envy — when, instead, it is the product of long consideration, of selflessness, of search of the conscience — the result can only enure to the general good.

GERTRUDE WASSERMAN*

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DOMICILE — COMMUNITY OF PROPERTY — FATHER'S UNKNOWN DOMICILE OF ORIGIN — INDICES OF CHOICE OF NEW DOMICILE — SON'S CHOICE OF NEW DOMICILE UPON REACHING MAJORITY.— The dissenting opinions in *Fisher* v. *Holland*,[1] decided by the Quebec Court of Appeal, suggest some comment. But first let me outline the circumstances.

Faucher *père* moved his family in 1905 from Trenton, Ontario, to Montreal where he lived until his death in 1914. His son, H. P. Faucher (Faucher *fils*) was, so far as the record shows, born in

[21] *The Shawinigan Carbide Company* v. *Jean Doucet* (1910), 42 S.C.R. 281.
[22] *The Consumers Cordage Company* v. *N. K. Connolly et al.* (1899-1901), 31 S.C.R. 244.

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[1] *Dame Fisher* v. *Dame Holland and Sun Life Assurance Co. of Canada*, [1951] K.B. 118.

Trenton on March 17th, 1895, and was about ten years old at the removal to Montreal. A birth certificate was not produced and oral evidence of his birth was made without objection. If the date of his birth was correct, he came of age on March 17th, 1916. In February 1914 he went to Brooklyn, N.Y., where he worked for N. K. Fairbanks Company until April 1916, when he returned to his father's home in Montreal, enlisted, was married on September 11th, 1916, in Quebec City to a girl domiciled in Montreal, and at the end of the month sailed for Europe. The marriage certificate described them both as of Montreal.

Faucher *fils* returned from Europe in November 1917. The Fairbanks Company, having no work for him in Brooklyn (he appears to have been ready to go there for the company), employed him at Montreal in January 1918; in February sent him to Moncton, N.B., where he worked a year and a half, next to Port Arthur, Ontario, for six or eight months. Each time he returned to Montreal with his wife. After his last return he lived with her there until 1936 when there was a separation and he went to Ste. Rose near Montreal where he lived "avec, ou chez" ("with, or in the home of") Dame Fisher, a widow, until March 1949, when he died. On February 4th, 1943, he made a will, naming Mrs. Fisher his universal legatee and executrix, and stating that when he married in 1916 he was domiciled in New York and hence was separate as to property from his wife. In September 1943 he sold to Mrs. Fisher a property in Ste. Rose (which he had acquired in 1942) for "one dollar and other considerations", the deed reciting that he was then married and his wife still living.

His marriage was not preceded by a contract of marriage stipulating separation of property, so that if at the marriage he was domiciled in Quebec the consorts were common as to property by the law of the province. If he was domiciled in New York State, they were separate as to property. I might explain, for those of the English law, that under the Quebec regime of community all movable property brought into the marriage or acquired during it, and all immoveable property acquired during it (otherwise than by succession or an equivalent title), fall into the community to be shared equally at its dissolution. Hence if Faucher *fils* was in community, he could by will bequeath only half the community assets to Mrs. Fisher, and the other half belonged to his widow.

Dame Holland (widow of Faucher *fils*) sued Mrs. Fisher, praying that she be declared to have been married in community, which she alleged was the case, that the community be declared to have been dissolved by her husband's death, that his will and

the sale to Mrs. Fisher be annulled, and that she be declared to be entitled to one-half of the community assets.

Like any other plaintiff, she had to satisfy the court that her action was proved. It turned upon satisfying the court that at her marriage to him Faucher *fils* was domiciled in Quebec Province. She met two obstacles. First, the contention that there was no evidence as to the domicile of origin of Faucher *père* or of his having abandoned some domicile of origin in favour of a domicile of choice in Quebec and hence, by way of argument, that Faucher *fils*, having at least during minority the domicile of his father, whatever that was, did not, during minority, acquire a domicile in Quebec unless it was shown that his father had abandoned his domicile of origin in favour of a Quebec domicile, and that it was not shown that Faucher *fils* upon coming of age had selected a domicile of choice in Quebec.

Secondly, at the trial a document was fyled — endorsed "Memorandum and Declaration of Henry Faucher dated February 4, 1943" — the date of the will. In it he declared that he was born on March 17th, 1895, at Trenton, where his father lived then and until in 1905 he moved with his family to Montreal, where he lived until he died in 1914 and where his mother lived until her death in 1928; that in February 1914 (he being then nineteen years old) he went to Brooklyn where he worked until April 1916 (that is, for about a month after attaining his majority), and that "during all the time he was in Brooklyn" he intended to make Brooklyn "the seat of my principal establishment" and to return there after his war service.

The real purpose, and the futility, of that much delayed declaration were not overlooked by the court below or by the majority in appeal, the latter holding *per* St. Jacques J. (translated):

> The legality of the production of this document is most debateable. It is an *ex parte* declaration made by Faucher six years before his death, and manifestly as a means of justifying his will and the sale to the defendant made at almost the same time, namely, December 23, 1943 — with the evident intention of defrauding his wife.

The trial judge gave the widow judgment, holding that (translated):

> The court has no hesitation in declaring that the said Faucher, plaintiff's husband, was, at the time of his marriage with the plaintiff, domiciled at Montreal where he had always resided since 1905, when his father elected domicile at Montreal, excepting only the few months during which he had worked in New York.

The Court of Appeal, by a majority, agreed. It held that, regardless of what may have been the father's domicile of origin, he

established himself and his family in Montreal in 1905, there lived and died and brought up his family, and there became domiciled; Faucher *fils* had no other domicile than that of his father and could not, while a minor and away from the home to which he always returned, take a domicile of his choice.

Whatever may have been the father's domicile of origin, a question about which the court did not speculate, the circumstances pointed to his having established his home, apparently his only residence, and the seat of his family and of his principal establishment in Montreal in 1905 for an indefinite future. The court was not invoked, and it was not its function, to find that neither Faucher *père* nor *fils* had an ascertainable domicile of origin (it being fundamental that a person must at all times have a domicile, somewhere), but to find whether in all the circumstances it could reasonably be seen that there was a domicile in Montreal. There was the undoubted fact of long residence which, it is true, does not *of itself* establish the factual domicile — there must in addition be the intention to make it the seat of the principal establishment, of which long residence may be an element of proof. The proof of such intention results from the declarations of the person and from the circumstances of the case (articles 80 and 81 C.C.). Whether all the circumstances and practical deductions disclose to a reasonable judicial scrutiny the existence of intention, the court is left to decide.

But what of the dissenting opinions? The opinion of Barclay J. stressed the absence of proof of the *domicile of origin* of Faucher *père* and, in his view and in consequence, of Faucher *fils*. After reviewing the family history, his Lordship continues:

> I would have no hesitation in deciding the domicile of the plaintiff's husband if I took for granted, as did the trial judge, that the father had elected domicile in Montreal, but there is nothing in the record to justify any such assumption other than the fact that the father lived in Montreal for some nine years. This finding is at least a finding to the effect that the father had a domicile of origin before coming to Montreal. Whether that domicile of origin was in Ontario where the father had lived for some years, or was elsewhere there is nothing in the proof which is sufficient to allow anyone with any certainty to state.
>
> If the original domicile was not in Quebec, and the proof does not establish the election of a new domicile in Quebec by the father, then the domicile of the son is equally unknown. Mere residence in Quebec is not sufficient to establish the abandonment of the domicile of origin.

Does it necessarily follow that because the father's domicile was unknown, the son's domicile at his marriage in 1916, when he was of age, "is equally unknown"? When he came of age an element of free choice on his part entered the picture, and we must ask:

Is there not a reasonable indication that of his own free choice he felt himself at home in Quebec where he came as a boy of ten, grew up, married, owned property and necessarily paid taxes, returned to, however far he wandered, and lived out his life to the end? Even his memorandum of 1943, rejected as not proving a domicile of choice in New York, may be looked at out of the corner of one's eye as some indication that he did not in 1916 feel himself without a domicile or bound to some unknown domicile of origin of his father, but rather that he knew that he was free to choose. He would not have tried in 1943 to avoid the appearance of a Quebec domicile in 1916 had he not felt that appearances favoured a Quebec domicile, and possibly have been so advised. And, where there may be doubt, appearances can be conclusive for a court. Lord Macnaghten, in *Winans* v. *Attorney-General*,[2] in a passage relied on by Judge Barclay, warns that: "unless you are able to show that [that is, a change of domicile] with perfect clearness and satisfaction to yourselves, it follows that a domicile of origin continues". I submit that Lord Macnaghten's statement is tight and severe beyond the requirements of Quebec law, which by article 81 C.C. leaves a wide discretion to the court to decide, "from the declarations of the person and the *circumstances* of the case", whether there has been a change of domicile. In few domicile questions is there "perfect clearness and satisfaction". In almost every case there is some doubt. If there is doubt there can hardly be "perfect clearness and satisfaction". Our Quebec rule, in case of doubt, allows some wider discretion to the conscientious deliberation of the court. Lord Macnaghten's statement must not operate to change our civil law. Where there is doubt, the *mystique* of decision enters—the weighing of fact and of reasonable inferences as to what must have been the intention. Whether proof is very strong or not the court looks for the intention implicit in all the circumstances and reasonable probabilities. The son could not be held forever poised in measureless time and space at some unknown domicile of origin of his father, and his children after him. *Boni judicis est ampliare juridictionem.* It is well that we later married men have some highly respectable authority as to at least the domicile of origin of Adam and Eve.

Stuart McDougall J. also dissented. Quoting the trial judge's ruling that he had no hesitation in finding Faucher *fils* domiciled in Quebec, his Lordship continues:

> With great respect I think that the trial Judge has confused residence with domicile. It is an accepted rule that the place of residence alone does

[2] [1904] A.C. 287, at p. 291.

not establish domicile. A change of domicile from the domicile of origin is effected by change of residence combined with *animus manendi*. The late H. P. Faucher would have had as his domicile of origin the domicile of his father. The only proof relating to the father's domicile is that of residence, and if any presumption is to be drawn from the facts I would be inclined to the view that his domicile was the Province of Ontario. The mere fact of 9 years residence in Montreal would not effect a change of domicile. The domicile of Faucher *père* at the time of his son's birth is in doubt and unless the evidence show that Faucher *fils* elected to change his domicile of origin to Quebec his domicile is also in doubt. In such case the plaintiff would fail to discharge the burden resting on her.

As regards the possible election by H. P. Faucher of domicile in Quebec it is true that in his marriage certificate he is described as being 'son of age of the late Theodore Faucher and Josephine Goulet of the Infant Jesus Parish of Montreal'. However, that description is merely one of residence, and in my opinion is very far from establishing his intention to abandon his domicile of origin and adopt the Province of Quebec as his permanent abode. Apart from the marriage certificate there is only the element of residence which as above stated is not sufficient in itself to indicate the abandonment of the domicile of origin.

It is impossible to agree that the trial judge (and the majority in appeal) "confused", as not knowing the difference between, bare residence and effective domicile. True, there must be the *animus manendi* — but continuance in Quebec from 1905 to 1949, or even from 1916 to 1949, was a fairly limpet-like clinging to a place of residence with the *animus manendi*, the perennial "at home" where the son chose to be and where *animo revertendi* he always turned up. Did he ever return to Trenton or Brooklyn as to his home and principal establishment? No — he had as to them no credible *animus revertendi*. As for the marriage certificate, the description of the husband in such a formal document as "of" a certain place, though by no means conclusive, may be an *element* of proof of intention to be weighed with other elements, such as the actual conduct of the person, his actions being, as has been held in respect of declarations as to domicile, more eloquent than words — either confirming or contradicting the words. Though the declaration may technically, in the case of marriage, be one of residence rather than of international domicile, it may coincide with the latter. But if he was at his marriage domiciled in Brooklyn, as he claimed in 1943, why describe himself as of Montreal? Did the conduct of Faucher *fils* throughout a lifetime contradict or confirm his marriage declaration? True, the domicile at the marriage was the critical time. But until 1949 he remained anchored and at home here. Surely a court can look retrospectively at such a record and draw conclusions.

The case involved the matrimonial domicile not of the father

but of the son. At some point the drag of the father's unknown domicile of origin must at least lessen, and that point is reasonably the coming of age of the son and his then absolute freedom to establish his domicile and permanent home for an indefinite future. His conduct henceforth alone becomes significant. Forget about the father. Concentrate on the son. Look at all the elements that may indicate his intention, not consciously, as a lawyer might, to abandon his father's unknown domicile of origin, but content with his existence as he found it, to make his own home and settle himself, "stay put" in Quebec Province. If those elements are evidence of intention, then Barclay J., I most respectfully submit, is not quite accurate in saying:

> The only evidence of the intention of the parties is the evidence of the plaintiff herself, which is as follows:
>
> *Q.* When you were married were any plans made as to where the two of you would live?
>
> *A.* No, nothing more than young couples make. We presumed we had a long time to go and when he came back from overseas we presumed we would stay at Montreal. You do not discuss those things much.
>
> *Q.* Was any other place mentioned as to where you would go?
>
> *A.* No, no place in particular.

That, though it is the plaintiff's evidence, and she had an interest, is because of her very restraint a helpful element of proof. She could have tried to push the evidence more vigorously and thus have spoiled its effect. "We presumed we had a long time to go . . . and we presumed we would stay at Montreal."

McDougall J., not mentioning that bit of evidence, says that "Apart from the marriage certificate there is only the element of residence which as above stated is not sufficient in itself to indicate the abandonment of the domicile of origin".

The simple Quebec rule as to domicile is, as already stated, that the domicile of a person, for all civil purposes, is at the place where he has his principal establishment. He may change that domicile as freely as he breathes. He resides in one place, a domicile of choice, regarding it as the place of his principal establishment. He moves with his family and possessions to another place, regarding it as henceforth the place of his principal establishment. In our Quebec law, the change is not complete, the *lien* of the former domicile of choice attaches, until he reaches and actually takes up his new place of residence, whereupon the abandonment of the former is complete. In the English-law concept his abandonment of the former is complete when he leaves it, and in and for the interval he reverts instantly and automatically to his domicile

of origin. So, in the dissenting opinions, poor Faucher *père* came to Montreal trailing that sticky shadow of an English-law concept of domicile of origin from which he did not emerge — neither he nor his son, both still nebulous in some outer limbo of an unknown domicile of origin — tossed by the winds of a frustrating doctrine — though there was reasonable evidence that he did exactly what Quebec law countenanced — come with his wife and young family and possessions to Quebec and there make his home and his principal establishment for the indefinite future. Intention? Was it not implicit in what he did? Did the son, during the long fifty-four years of his life, never acquire by use and conduct and repute a recognizable domicile of his own?

He acquired by choice no domicile outside Quebec after coming of age. If it can be seen, considering all the circumstances, that he was a person to whom a Quebec domicile can reasonably be attributed, the point to which we can retroactively trace that domicile, in the absence of contrary indications, of which there were none, is his coming of age, before his marriage.

WALTER S. JOHNSON*

Judicial Independence

The rendering of an honest unbiased opinion, based on the law and the facts, is far from simple: it is one of the most difficult tasks which can be imposed on fallible men. It demands wisdom as well as knowledge, conscience as well as insight, a sense of balance and proportion; and if not an absolute freedom from bias and prejudice, at least the ability to detect and discount such failings so that they do not becloud the fairness of the judgment. It is evident that the ordinary political environment is unable to provide the proper incentives which will call forth these qualities nor will it permit these qualities to be exercised without a large measure of interference which will deprive them of the greater part of their value. The judiciary, in short, must be given a special sphere, clearly separated from that of the legislature and executive. They must, to accomplish this separation, be given privileges which are not vouchsafed to other branches of the government; and they must be protected against political, economic, or other influences which would disturb that detachment and impartiality which are indispensable prerequisites for the proper performance of their function. It is these unusual factors which create the condition known as the "independence" of the judiciary. (Dawson, The Government of Canada, 1948)

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