Case and Comment

TORTS — INTERSECTION COLLISION — EFFECT OF PRIOR ENTRY — EFFECT OF FAILURE OF DRIVER WITH RIGHT OF WAY TO MAINTAIN LOOKOUT. — Thirteen judges, including all nine members of the Supreme Court of Canada, participated in *Walker* v. *Brownlee and Harmon*,[1] which arose out of an intersection collision. The facts can best be presented by taking the trial judge's statement and adding to it the slight variations upon the theme introduced as the case progressed through the higher courts. The following statement is taken from the judgment of Barlow J.:[2]

> The plaintiff's claim is for damages for injuries sustained on the 23rd August 1948 at about 5 p.m., when a taxicab owned and driven by the defendant Harmon, in which the plaintiff was a passenger for hire, came into collision with an automobile owned and driven by the defendant Walker, at the intersection of Hugel Avenue and Third Streets in the town of Midland. Hugel Avenue runs east and west and is intersected at right angles by Third Street, which runs north and south.
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> Harmon was travelling west on the north side of Hugel Avenue and Walker was travelling north on the east side of Third Street. The two vehicles collided in the north-east quarter of the intersection, the front of the Harmon vehicle coming into contact with the right rear of the Walker vehicle.
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> Hugel Avenue is designated by by-law a through street, but there was no stop sign at the south-east corner of Hugel Avenue and Third Street, and since Walker was quite unfamiliar with Midland, and had no knowledge that Hugel Avenue was so designated, he was given no warning that he was required to stop. Walker was travelling north at about 10 or 15 miles per hour, and Harmon was travelling west at about 26 miles per hour. Harmon, being on Walker's right, had the statutory right of way. Walker came to the intersection and proceeded to cross the same at 10 or 15 miles per hour, clearly believing that he could cross in safety. His daughter, a passenger in the Walker car, saw the Harmon car approaching but believed that it was a sufficient distance away for her father to cross in safety. Harmon was looking to his right as he approached the intersection and did not look to his left until Bell, a passenger in his car,

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[1] Judgment rendered by the Supreme Court of Canada on February 5th, 1952 (as yet unreported).

[2] [1951] O.W.N. 12, at pp. 12-13.

yelled 'look, look', when Harmon was so close to the Walker vehicle as to be unable to avoid a collision. It was the duty of Harmon to look to the right, but it was also his duty then to look to the left. He did not look to the left and clearly would not have seen the Walker vehicle until the collision if his passenger Bell had not yelled.

The evidence of Guy, a passenger in Harmon's vehicle, who was a quite independent witness, satisfies me that Walker was some distance into the intersection before Harmon entered it. Harmon himself admits that Walker was into the intersection before he entered it. Furthermore, the evidence clearly satisfies me that if Harmon had looked to his left as he should have done, he would have seen Walker in ample time to avoid, and could have avoided, the accident. Guy says the Walker car was past the middle of the intersection when hit. Harmon admits that if he had looked to the left 35 feet back from the intersection he could have turned left and avoided the accident.

In the Court of Appeal the judgment of the majority, Roach and Bowlby JJ.A., delivered orally by Mr. Justice Roach, without in any way questioning the findings made by the trial judge, which in substance it repeats, makes this addenda:

this collision must have occurred when the Walker car had reached the point where the front of it, approximately the front half, was north of the centre line of Hugal [*sic*] Avenue and, of course, the rear half approximately south of it. The Harmon car, at the moment of impact, would appear to have been wholly north of the centre line of Hugal Avenue but reasonably close to that centre line. . . . there were two duties imposed upon Walker, first to stop before he entered the intersection, and second, having stopped, to look to his right before he proceeded into it.[3]

If this oral location of the front end only of the Walker car as just past the centre of the intersection is to be taken seriously, it means that the Court of Appeal must have thought that the Walker car was hit on the *front* of its right side, because its right *rear* would be protected by being on the wrong side of the centre line. This is something upon which the evidence hardly could have been conflicting. However unreliable witnesses' estimates of speed may be, there can be no mistake as to which fender is damaged by the impact of another car.

In the Supreme Court of Canada no interest whatever is shown in this vital difference in the facts as found by the courts below. Mr. Justice Cartwright, with whom Mr. Justice Locke concurred, writing one of the majority judgments, makes the only reference in any of the judgments with respect to the location of the collision. He puts it this way:

The front of Harmon's car struck the appellant's car on the right-hand side. The collision occurred in the north-east quarter of the intersection.

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[3] [1951] O.W.N. 166, at pp. 166-167 (Ont. C.A.).

This location of the point of collision agrees with that of the trial judge but ignores the problem of which end of the Walker car was hit. This much is clear. The trial judge heard all the evidence. No one purports to question his conclusions in this respect, and he found that Walker's car was hit on its right rear.

The majority judgments, however, add further significant facts. In Mr. Justice Cartwright's judgment two appear as follows:

> Both Third Street and Hugel Avenue were paved with macadam, the width of the pavement between curbs being 24 feet in each case.
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> He [Harmon] immediately applied his brakes but said he had no time to swerve. His wheels left skidmarks of fifteen to eighteen feet.

Another appears in Mr. Justice Estey's judgment only:

> . . . there was no other traffic sufficiently near to be relevant in the determination of the issues here raised.

Other matters must be mentioned. The reason why Harmon failed to look to the left was not because he was exercising care with respect to traffic on his right (there was none), but because he was looking for a friend. Mr. Justice Kerwin, one of the majority judges, refers to Harmon's conduct in these words:

> Harmon looked to his right and, although the impelling reason for so doing seems to have been in order to see an expected friend, the fact remains that he did so.

None of these addenda is disputed in any of the judgments. There was apparently no conflict of evidence on any question of fact. Since no one attacks Mr. Justice Barlow's finding that the Harmon car hit the right rear of the Walker car, I am taking it as established as one of the facts of the case that that is where the Walker car was hit. This involves ignoring the purely inferential statement by the Court of Appeal that it was the front end of the Walker car which Harmon hit. It is, nevertheless, significant that none of the judges expresses concern over where the Walker car was hit. Without settling where the Walker car was hit, it is difficult to determine how much earlier it would have been necessary for Harmon to apply his brakes to have avoided the collision. The record must have shown the source of Mr. Justice Barlow's finding. It may be that Mr. Justice Roach did not intend to state that Walker's car was hit on the front end, and that Mr. Justice Barlow's finding was too well supported by clear evidence for there to have been any dispute concerning which end of the Walker car was hit.

The plaintiff recovered at the trial from Harmon only; in the Ontario Court of Appeal, from Walker only. The majority in the

Supreme Court of Canada sustained the majority in the Ontario Court of Appeal. The correct result, holding both drivers liable, was reached by three judges only; one in the Ontario Court of Appeal, and two in the Supreme Court of Canada.

The case raised three main problems. (1) Does Walker's substantial prior entry into the intersection from the left give him a right of way? This the Supreme Court answers with an emphatic "No". (2) Was Harmon, the driver on the right with the right of way, under obligation to maintain a lookout for traffic from the left, and otherwise exercise reasonable care to avoid collision with such traffic? This question the court answers with an emphatic and unanimous "Yes".[4] All members of the court found that Harmon was negligent in not maintaining a proper lookout. (3) The crucial and deceptive question — deceptive because it looks like a question of fact but really involves the question of what standard of behaviour is applied to Harmon's driving as he hypothetically maintains his lookout and observes Walker entering and crossing the intersection while Harmon is still approaching it — may be phrased thus: Had Harmon been maintaining a proper lookout *could* he have avoided the collision? This is not the question the court asked. The question took a more moral form. Had Harmon been maintaining a proper lookout, *should* he have avoided the collision? It is obvious that Harmon could have slowed to let Walker pass in front of him, and the problem posed is to what extent is Harmon bound to do what he can do to avoid a collision? To this question the court gives three divergent answers. These answers are not answers to questions of fact. They are all value judgments. They are all answers to questions of policy. They concern the extent to which Harmon *should* do what he *could* do to avoid collision. Chief Justice Rinfret answers by saying that it is so clear that Harmon (had he been looking) should have avoided the collision that he is entirely to blame for it. Mr. Justice Taschereau and Mr. Justice Kellock agree that Harmon, had he been looking, should have avoided the collision, but do not feel that Walker's sins are washed clean by Harmon's misconduct. They held both drivers morally and legally responsible for the collision and consequent damage. In fact, they find Walker, who entered from the left without properly looking (or appreciating what he saw) to the right, more blameworthy than Harmon who failed to look to the left. The majority, however, say that they are not satisfied that had Harmon been maintaining a lookout he would have realized

[4] See also *Theriault* v. *Huctwith*, [1948] S.C.R. 86. This is a well established principle.

that Walker was going to fail to yield in time to have done anything to avoid the collision. This is, in substance, a moral or value judgment too. The majority concludes that the man with the right of way would have been morally and legally entitled to insist on it. In other words, his hypothetical conduct in hypothetically insisting on the right of way is excused. Had he been looking, as he ought to have been, he would, nevertheless, have been in no way to blame for the collision. His failure to look is therefore irrelevant.

The really startling thing about the conclusion of the majority is that it means that the driver on the right is entitled to insist on his right of way at undiminished speed with no obligation to slow or turn until by hypothesis it has become too late for him to do anything whatever to avoid a collision. This makes it bootless to require him to maintain a lookout at all. In other words, the answer the majority gave to question (3) ignores or stultifies its answer to question (2). Why make the driver on the right look at the driver on the left, if notwithstanding what he sees, he is entitled to assume, until it is too late, that the man on the left is going to yield?

This comment deals with two aspects of the problem of the right of way: (1) the effect, if any, of prior entry; and (2) the effect of having the right of way on the conduct of the driver who has it.

(1) The *Brownlee* case, following earlier Ontario decisions[5] and an earlier case in the Supreme Court,[6] decides that prior entry into an intersection does not give the driver on the left a right of way over the driver on the right. The thesis of these decisions is that when two cars approach or enter an intersection at such relative rates of speed and from such relative distances that, if each held its course and speed, collision could occur within the intersection, the car on the right has the right of way. The courts in the Prairies have taken the same view.[7] The legislation in the Prai-

[5] *Canada Bread* v. *Grigg*, [1946] 2 D.L.R. 374 (Ont. C.A.); *Bothwell* v. *Galloway*, [1950] O.R. 377 (Ont. C.A.).

[6] *Swartz* v. *Willis*, [1935] S.C.R. 628.

[7] *Brooks* v. *Winnipeg Electric Ry.*, [1947] 2 W.W.R. 763, affirmed without reasons, [1948] 1 W.W.R. 480 (Man. C.A.); *Todd* v. *Guenter*, [1949] 2 W.W.R. 1058 (Sask. C.A.); *Lasky* v. *Elliott*, [1950] 1 W.W.R. 130 (Sask. C.A.); *Sanford* v. *Hamilton*, [1949] 2 W.W.R. 1117 (Alta. D.C.); *Goble* v. *McMahon & MacMahon*, [1950] 2 W.W.R. 222 (Alta. S.C.). Although Alberta had until 1947 legislation resembling the Nova Scotia statute, it now has legislation similar to that in force in Ontario. Cf. R.S.A., 1942, c. 275, s. 52, as amended by the Statutes of Alberta, 1947, c. 67. See now Statutes of Alberta, 1950, c. 76, s. 11, re-enacting s. 52 (the right of way section). Saskatchewan has the Ontario section. See The Vehicles Act, Statutes of Saskatchewan, 1951, c. 85, s. 124(4). Manitoba has the Ontario section: The Highway Traffic Act, R.S.M., 1940, c. 93, s. 50.

rie provinces is the same as in Ontario, and this case will therefore confirm previous decisions in those provinces. In British Columbia, notwithstanding a reversal by the Supreme Court of Canada in *Willis* v. *Swartz*,[8] prior entry still confers a right of way. The British Columbia courts have distinguished the *Swartz* case on the ground that in that case the driver on the left deliberately accelerated to gain prior entry.[9] Nova Scotia, by legislation, confers a right of way to the driver first in the intersection;[10] and New Brunswick, though somewhat less clearly, grants a right of way to the driver first in the intersection.[11] Although there is a difference in emphasis between the New Brunswick and Nova Scotia statutes, both definitely recognize prior entry, and this case in the Supreme Court, which interprets entirely different legislation in force in Ontario, should have no effect on the law now in force in those provinces. It is not clear whether or not the case will control the problem in British Columbia.

The *Brownlee* case does remove the basis upon which the British Columbia courts were able to distinguish the *Swartz* case, because Walker did not accelerate to enter the intersection first. On the other hand, the British Columbia legislation is not the same as the Ontario legislation,[12] which this case interpreted.[13]

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[8] See footnote 6, *supra*.

[9] *Fewster* v. *Milholm*, [1943] 3 W.W.R. 27 (B.C.C.A.). See also *Craig* v. *Sinclair* (1944), 61 B.C.R. 256 (B.C.C.A.); *Hunter* v. *Lake of the Woods Milling Co.*, [1946] 3 W.W.R. 340 (B.C.C.A.); *Craig* v. *Struben*, [1951] 1 W.W.R. (N.S.) 769 (B.C.C.A.).

[10] The Motor Vehicle Act, Statutes of Nova Scotia, 1932, c. 6, s. 100(1): "The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection. When two vehicles enter an intersection at the same time, the driver of the vehicle on the left shall yield to the driver on the right." And see *Fell* v. *Doucette* (1950), 25 M.P.R. 63 (N.S. S.C. en banc).

[11] The Motor Vehicle Act, Statutes of New Brunswick, 1944, c. 20, s. 42(9): "When two vehicles enter an intersection of main trunk highways at the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. The driver of the vehicle approaching such an intersection shall yield the right of way to the vehicle which has entered the intersection." And see *Barbary* v. *Pollard*, [1949] 4 D.L.R. 682 (N.B.C.A.).

[12] The Ontario legislation, The Highway Traffic Act, R.S.O., 1950, c. 167, s. 141(1), reads as follows: "Where two persons in charge of vehicles or on horseback approach a cross-road or intersection, or enter an intersection, at the same time, the person to the right hand of the other vehicle or horseman shall have the right of way."

The British Columbia legislation, The Highway Act, R.S.B.C., 1948, c. 144, s. 21, reads as follows: "The person in charge of a vehicle so drawn or propelled on a highway shall have the right of way over a person in charge of another vehicle approaching from the left upon an intercommunicating highway and shall give the right of way to the person in charge of another vehicle approaching from the right upon an intercommunicating highway; but the provisions of this section shall not excuse any person from the exercise of proper care at all times."

[13] It is, of course, in these days of tourist travel, a ridiculous state of affairs to have the wide variation with respect to the rights of way at intersections

As suggested in the opening general analysis, this case affirms the proposition that the driver on the right, although he must look at the driver on the left, is under no obligation to take any action to reduce the risk of collision until it is safely too late for him to have any hope of success. Two doubtful subsidiary propositions combine to lead the court to this result. (1) As already mentioned, the driver with the right of way is entitled to rely on the driver on the left yielding until it becomes too late for the driver on the right to do anything about the situation. (2) Following the lead taken in an earlier Ontario case,[14] it is said that the driver on the left has the burden of proof that the driver on the right negligently caused the collision. Apart from special statutory provisions, the burden of proof that any party acted negligently is always on the other party who needs to establish that negligence as part of his case. Similarly, any injured party must prove causal relationship between the other parties' negligent conduct and his injury. This observation, therefore, appears to add some new burden of proof on top of an existing burden of proof. However emotionally satisfying this new punitive burden may be to talk about, it is difficult to understand how much proof beyond proof a party must muster to satisfy it.

Whatever justification there may be for thus punishing Walker, the driver on the left, it can have no possible bearing on the facts in the present case, because the plaintiff was not the driver on the left; he was a passenger in the car on the right. The court's condemnation of Walker, who wrongfully entered from the left, apparently caused it to overlook the fact that Brownlee is seeking recovery against two separate negligent drivers, and that he should not be punished for Walker's sins by denying him recovery against Harmon.

If Harmon had been looking, should he have avoided the accident? The only facts available are those set out in the judgments: that is to say, the trial judge's statement of facts re-asserted by the Supreme Court of Canada, which ignored the modifications added by the Ontario Court of Appeal. These are fully set out in the opening paragraphs of this comment, and can be briefly summarized as follows.

Walker, travelling at 10 to 15 miles an hour, made substantial prior entry into a 24 foot intersection. This being Ontario, Walker

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which now prevail in the several provinces. A tourist travelling the Trans-Canada Highway from Halifax to Vancouver might know what to do once he had crossed the continent and arrived at the British Columbia border, provided he did not get struck down en route.

[14] *Bothwell* v. *Galloway*, [1950] O.R. 377 (Ont. C.A.).

did not thereby acquire the right of way, and was, therefore, negligent in entering. Harmon, travelling at 25 to 27 miles an hour, had the right of way, but was driving negligently because he was inexcusably maintaining no lookout whatever for traffic approaching from the left. While Harmon was still short of the intersection, one of his passengers yelled, "Look, Look". This yell caused Harmon to return his attention to his driving. He looked, saw the Walker car, jammed on his breaks, and skidded into the intersection to hit Walker's car, which was then so nearly through the intersection that only its right rear was exposed to the possibility of impact. The taxi struck the Walker car on the Walker car's right rear. There was no other traffic in or near the intersection.

Before considering these facts in detail, it should be noted that the majority in the Supreme Court took a very narrow view of Harmon's obligation. For the purpose of examining what the Supreme Court did, it is necessary to assume that Harmon was maintaining a lookout. Harmon is postulated as being entitled to continue at undiminished speed, with no duty to take any steps to avoid the collision, except to stop when it becomes clear to Harmon that Walker is not going to yield. There is no suggestion that Harmon should slow before it becomes necessary to stop. There is no suggestion that Harmon should blow his horn to warn Walker that Harmon was not going to slow; there is no suggestion that Harmon should turn to the left to pass behind Walker. The situation which the hypothetically watchful Harmon sees, as he sees Walker crossing the intersection from the left while Harmon is still approaching, is one every driver meets nearly every day in traffic. The prudent driver applies his brakes many hundreds of times with intent to *slow*, for every once he applies them with intent to *stop*. He also makes frequent use of his steering wheel for purposes other than turning corners.

However, disregarding Harmon's wider obligation to take the normal steps which the prudent driver takes to remove risks of collision in traffic, and considering only, as the court did, Harmon's obligation to apply his brakes with intent to stop, the facts make it clear that had Harmon maintained a proper lookout he should have known that Walker was not going to yield substantially earlier, and would then have attempted to stop; and that attempt, whether it stopped Harmon or not, would have slowed him sufficiently to have avoided the collision.

The most significant evidence is Harmon's passenger's yell of terror. The fact that the passenger yelled demonstrates that imminent danger of impending collision became apparent to the pas-

senger an appreciable interval before Harmon returned his attention to his driving. The passenger was not charged with the responsibility of driving, nevertheless he (1) saw the danger, (2) realized that Harmon was not looking, (3) overcame a taxi-passenger's reluctance to interfere, (4) yelled. After the passenger yelled, Harmon had time to (5) react and look ahead, (6) realize the danger, (7) react and jam on his brakes. All this took time: the kind of time that makes all the difference between collision and no collision. When Harmon applied his brakes, he applied them so hard that the car skidded all the way to the Walker car. And yet, notwithstanding the unnecessary delay, Walker nearly made it. Had Harmon been watching, the inference is irresistible that he would have realized the danger at least as early as the passenger did. Had Harmon then applied his brakes, Walker would without doubt have made the crossing ahead of him. Even if Walker were travelling at only 10 miles an hour, a half second's postponement of the arrival of Harmon's taxi would have put Walker seven and a quarter feet ahead of where he was when Harmon's taxi arrived at the point where impact took place.

The case is further complicated by the ghost of the missing stop sign, which led the majority in the Ontario Court of Appeal astray. The oral judgment there delivered stated (see the statement of facts in the opening paragraphs of this comment) that Walker should have stopped before entering the intersection. It is difficult to estimate how much the non-existent stop sign influenced the decision in that court. This stop sign, which was not there and which could not have been known to Walker, but which Harmon believed to be there because he did not know that it had been removed, also appeared in some of the judgments in the Supreme Court of Canada in the following form. The stop sign which was not there but which Harmon had reason to believe was there was said not to "militate against" or "worsen" Harmon's position. It is difficult to tell how much more than what is said is here meant. If the non-existent stop sign did not militate against or worsen Harmon's position, and if it did not better it, it is completely irrelevant. But this mention of it does not state that it is irrelevant, and one is left with the impression that the members of the court who mentioned the missing stop sign felt that it should count to some extent in Harmon's favour. Actually, from the point of view of liability to Brownlee, it should count very much against Harmon. Although after liability to Brownlee has been determined and the problem of contribution between the two tort feasors arises, it can be seen that Harmon's belief in the stop

sign makes his failure to look less negligent. Had Harmon been maintaining a lookout, he would have seen Walker passing through what Harmon believed to be a stop street. Walker passed the missing stop sign some time before the passenger yelled, and that means that Harmon, by not maintaining a lookout, missed an earlier signal that Walker's car was a threat to Harmon's passengers. What driver is not alerted to danger when he sees a car crossing in front of him pass through a stop street without stopping? The missing stop sign, therefore, does count twice: (a) it makes Harmon's failure to look a cause of the collision, and (b) it reduces the degree of Harmon's negligence.

Walker v. *Brownlee and Harmon* decides that prior entry can confer no right of way in the province of Ontario. This probably adds nothing new in that province. The case should not affect the state of the law in New Brunswick or Nova Scotia. It will be followed in the Prairie provinces. Its effect in the province of British Columbia is an open question.

Whatever may be the relative wisdom of the Ontario/Prairie rule vis-à-vis the coastal rule, the latter is more in accord with the basic caution and courtesy which characterize careful drivers. As the rule is applied in British Columbia, the prior entry must be reasonably made. This discourages racing to enter the intersection first. If the driver on the right were to exercise his theoretical right to charge up to and through all intersections at undiminished speed whenever he saw a car entering from the left which, by continuing at undiminished speed, he might manage to hit in the intersection, progress in downtown traffic would (since every driver at every intersection is a driver on the left as well as a driver on the right) be slow indeed. Ontario drivers probably do not insist on their theoretical rights of way at undiminished speed. A parallel may be seen in another instance of the right of way. British Columbia legislation does not, as Alberta legislation does,[15] give the driver making a left turn across traffic a right of way. Nevertheless, a sufficient number of British Columbia drivers do slow in downtown traffic to permit the making of left turns. It is only because drivers with the right of way do slow, regardless of their theoretical right to continue at undiminished speed, that movement in downtown traffic is possible.

These considerations make the *Brownlee* case a dangerous decision, unless, as is probable, the rule it lays down with respect to

[15] See Statutes of Alberta, 1947, c. 67, s. 1. This has been perhaps slightly qualified by Statutes of Alberta, 1950, c. 76, s. 11, which repeals and re-enacts section 52 (the right of way section in that province).

Harmon's responsibility has little, if any, effect on the conduct of future drivers with the right of way. Drivers with the right of way are not likely to rely on it and fail to look left at an intersection in the hope that what they do not know about traffic from the left will not hurt them in the higher courts.

In reaching the conclusion which lends support to the startling proposition that the driver with the right of way is entitled to approach an intersection at the legal speed limit, relying on a driver who has made substantial entry yielding the right of way until it is too late for the driver on the right to do anything about it if the driver on the left does not yield, the majority, in my opinion, did not make a satisfactory general analysis of the problem or a satisfactory particular analysis of the facts before it. If my analysis is correct, the decision must therefore be regarded as an unfortunate one.

Unfortunate decisions not infrequently are the result of difficult struggles in which common sense succumbs to the over-powering force of legal dogma. In seeking the dogma which may have influenced the decision in this case, let us examine the three possible results at which the majority could have arrived. (1) It could have followed the trial judge and Chief Justice Rinfret, who held Harmon solely responsible for the damages to the plaintiff on the ground that Harmon, after he ought to have become aware of the risks created by Walker's negligent conduct, nevertheless failed to avoid the collision and was therefore the sole proximate cause and solely liable because he had the last clear chance to avoid the collision. (2) It could have agreed with the result arrived at by the dissenting judges who held both parties liable. These judges found Walker, who entered the intersection from the left without looking to the right more negligent than Harmon, who approached the intersection from the right without looking to the left, and apportioned the damages in the proportion of two-thirds against Walker and one-third against Harmon. For the dissenting judges the missing stop sign ceases to be a spectre and can be given its proper weight in the case. For the majority, it is only a source of confusion. Both choices (1) and (2) are difficult. Choice (1) involves placing full liability on Harmon, the less negligent of the two actors, and exonerating Walker, the more negligent of the two. The second choice involves either a repudiation of *McLaughlin* v. *Long*,[16] a decision of the Supreme Court of Canada, which had held that if one of two negligent actors has a last chance to avoid the accident, he must be solely liable because he is the sole proxi-

[16] [1927] S.C.R. 303.

mate cause of the accident, or a quibbling escape from *McLaughlin* v. *Long*.

Apparently unable to hold both parties liable and apportion the damages because Harmon's negligence resembled too strongly last chance negligence,[17] shocked at the thought of exonerating Walker and holding the less negligent Harmon solely liable, and diverted by the non-existent stop sign and the punitive burden of proof, the majority escaped from its dilemma by taking an unduly narrow view of the obligation of the driver with the right of way to reduce the risk of collision with traffic crossing in front of him.

M. M. MACINTYRE*

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TAXATION — INCOME TAX — BENEFIT CONFERRED ON TAXPAYER BY COMPANY RENTING RESIDENCE TO HIM AT A LOSS.— The decision of the Income Tax Appeal Board in *Henry Frederick Reifel* v. *M.N.R.*[1] provides an interesting exercise in the logic of tax avoidance. The facts are quite simple. The taxpayer's personal corporation, Sterling Estates Limited ("Sterling"), originally owned an expensive home, in which the taxpayer resided. Sterling transferred the property to Vested Estates Limited ("Vested"), a corporation 50% of the shares of which were owned by Sterling and 50% by Gulf Estates Limited, a personal corporation of the taxpayer's brother. Vested leased the property to Sterling for $4,200 a year and Sterling in turn sub-leased it to the taxpayer at the same figure. The evidence indicated that this rental was at least equal to the rent which would have been obtained on the open market, the demand for this sort of expensive rental accommodation being almost non-existent. The rental paid, though sufficient to cover the out-of-pocket operating expenses for the property, was, however, insufficient to cover the depreciation, resulting in Vested showing an annual operating loss of $5,700 in respect of the property, which operated to reduce its income from other sources.

[17] As a matter of fact Harmon's negligence only *resembled* last chance negligence because Walker was not the plaintiff at all. Nevertheless, the whole case proceeds on the assumption that the real contest is between Walker and Harmon. Although the plaintiff should recover against both drivers irrespective of their rights *inter se*, if Walker had been suing Harmon for damage to his car, Walker, assuming him to have been twice as negligent as Harmon, should on a correct analysis of the last chance doctrine recover one-third of his damages, notwithstanding the fact that before the contributory negligence apportionment statutes, Harmon would on the last clear chance doctrine have been liable for the whole damage to Walker's car. See MacIntyre, The Rationale of Last Clear Chance (1940), 53 Harv. L. Rev. 1225; (1940), 18 Can. Bar Rev. 665.

[1] (1952), 52 D.T.C. 174.

The Minister added the amount of this operating loss to the taxpayer's income as "benefit or advantage" conferred upon him by Vested and taxable under section 8(1)(c) of the Income Tax Act. The taxpayer appealed and his appeal was allowed by Mr. W. S. Fisher, Q.C., of the Income Tax Appeal Board, whose reasons are summed up by the following quotation:

> [Vested] is a separate entity, and therefore depreciation will be charged in the books of that company as an offset against the income derived from the property. According to the books of the company, the rental derived from the property is more than sufficient to meet the taxes and insurance thereon. It is the item of depreciation which turns the income from the property into an overall loss in respect of this particular residence. The appellant has a 50% interest in this company, but the fact that the company has a loss on this particular building can hardly be said to be a benefit or advantage to the taxpayer. On the contrary, this loss goes to reduce the company's income from other sources and also goes to reduce the amount of surplus in the hands of Vested Estates Limited which might be available for the payment of dividends which would ultimately come into the hands of the appellant. I doubt very much whether this can be considered as a benefit or advantage.
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> It may be said that Vested Estates should not hold the property in question, and that, by merely holding it and suffering a loss on its operation after depreciation is charged against the income derived therefrom, there is a presumption that the appellant is gaining some benefit or advantage from the situation. I am of the opinion that something more concrete would have to be presented before any court would rule that a benefit or advantage had been obtained under such circumstances and, in any event, since Vested Estates Limited is an independent corporation, it is entitled, at least under the present laws of the land, to hold whatever properties it may consider advisable, even although those properties may be operating at a loss.[2]

With respect, this argument seems difficult to follow. It is obviously true that Vested's surplus has been reduced by this transaction, but this reduction merely represents an expenditure which the taxpayer would have made personally in any event, but which, if it had been made by him, would have been a non-deductible personal or living expense. The benefit or advantage to the taxpayer is quite obviously the saving in income tax. To put the matter in its simplest form, *A* is the sole shareholder of A Limited (not a personal corporation). A Limited's income is $15,000 and it pays $10,000 in dividends to *A*, out of which *A* pays $2,000 to keep up a house. *A* then transfers the property to A Limited which in turn leases it back to him for its rental value in the open market, $1,500. As a result of owning the property, A Limited's income is reduced to $14,500, out of which it distributes $9,500 in dividends

[2] *Ibid.*, at p. 177.

to *A*. *A*'s real income, before tax, is the same whether he receives $10,000 and pays $2,000 upkeep for the house or receives $9,500 and pays only $1,500 rent. He is substantially better off, however, when he has to report only $9,500 income on his income tax return. The measure of this benefit is the tax saved on $500 income and it would seem that the taxpayer is properly assessed when the $500 is added back to his income and tax levied on it. There seems no reason why the broad provisions of section 8(1)(c) should not be effective to deal with this situation. Nor does there seem to be any substantial reason why A Limited's loss on this transaction should not also be disallowed, perhaps under section 12(1)(a), as an expense incurred not for the purpose of earning the company's income but for some reason personal to the taxpayer, under section 12(2) as an unreasonable expense, or under section 125(1) as a transaction unduly or artificially reducing the income. Surely the company would not have purchased so unremunerative an investment were it not for the fact that the parties were not dealing at arm's length. As the Americans would say, there was no element of "business purpose" in the transaction.

The Income Tax Appeal Board seems to have given its assistance to this polite form of tax avoidance, despite what appear to be the clear words of Parliament to the contrary. There is little point in defending this type of transaction by copious quotations from judgments to the effect that the taxpayer is not bound so to arrange his affairs as to incur the greatest tax liability or in saying, as does Mr. Fisher, that a company is entitled to hold whatever properties it may consider advisable, however unprofitable. Section 8(1)(c) and other such general sections of the Income Tax Act were enacted precisely to prevent the application of such doctrines, although Parliament's intention in this connection, as in many others, seems to have been deliberately ignored by the courts.[3]

From the lawyer's, if not from the taxpayer's, point of view, it seems a pity that this matter was not argued on the basis of section 125(2), on which we have not had as yet any reported decision. In the Minister's notice of assessment he relied only upon section 8(1)(c), but at the trial counsel for the Minister also attempted to base the case upon section 125(2), concerning which Mr. Fisher merely remarked:

> It is to be observed that the provisions of subsection (2) of sec. 125 came into force with the new Income Tax Act in the year 1949. The sale of the

[3] See Professor Willis's comment on *Nolan* v. *Canadian Wheat Board*, [1951] S.C.R. 81, in the March 1951 issue of the Canadian Bar Review, at p. 296.

> property from Sterling Estates Limited to Vested Estates Limited took place in 1947 and the lease in question was entered into from 1st January, 1948. It is doubtful, therefore, whether the provisions of subsection (2) have any application in the circumstances unless it could be said that there was a continuing benefit from year to year. However, I am not prepared to go that far.[4]

I find it difficult to avoid the conclusion that there was, in the words of Mr. Fisher, "a continuing benefit from year to year" so as to make this section applicable. Had Sterling been the personal corporation of the taxpayer's brother instead of the taxpayer's own personal corporation, section 8(1)(c) might well have been inapplicable and section 125(2) the only relevant provision.

Mr. Fisher has some quite interesting comments to make upon a matter which, while not really germane to the decision in the instant case, is probably of general importance, that is, the tax position at the time the property was held by Sterling:

> Although Sterling Estates Limited was a separate corporation which would presumably be receiving rent from the appellant and would be charging up in its books amounts paid for taxes and insurance on the property, and possible depreciation thereon, nevertheless, as this was a personal corporation and under the provisions of the Income Tax Act was, to all intents and purposes, ignored as a separate organization, the appellant would not get any benefit, since, as I understand the situation, the income of Sterling Estates Ltd. which would be taxable in the appellant's hands would be exclusive of the rental income received by the corporation from the appellant, and any expenditures in connection with the property would also be excluded. This would be done on the principle that a taxpayer cannot make a profit or loss out of himself, and the expenditures in connection with the property would be considered to be personal expenditures which would be disregarded when determining the income of Sterling Estates Limited which was taxable in the appellant's hands under the provisions of the Act.[5]

The principle invoked by Mr. Fisher, that a taxpayer cannot make a profit or loss out of himself, is of course the basis for holding that a mutual company earns no income. However, the decided cases make it clear that a company will be held to be truly mutual only when its surplus belongs to the members of the company in some proportion based upon the volume of their transactions with it.[6] Unless this is the case, the company is considered to be entirely distinct from its members. It seems quite possible to maintain

[4] 52 D.T.C. at p. 176.
[5] 52 D.T.C. at p. 177.
[6] See, in particular, *Saskatchewan Co-operative Wheat Producers Ltd.* v. *M.N.R.*, [1930] S.C.R. 402, 1 D.T.C. 186; *Fraser Valley Milk Producers' Association* v. *M.N.R.*, [1929] S.C.R. 435, 1 D.T.C. 148; and *Stanley Mutual Fire Insurance Co.* v. *M.N.R.* (1950), 50 D.T.C. 454 (I.T.A.B.), reversed on appeal (1951), 51 D.T.C. 5471 (Ex. Ct.), in which Mr. Fisher's dissenting opinion was upheld.

exactly the converse of Mr. Fisher's proposition concerning personal corporations. There is no reason why a non-mutual company, personal corporation or not, cannot be said to make a profit in renting to its chief shareholder the house in which he resides. If this profit is then distributed or deemed to be distributed as a dividend to the shareholder, his taxable income is thereby increased, even though from a common-sense point of view he is no better off than he was before. This anomaly is to be explained by the fact that our Income Tax Act, unlike Schedule A of the English Income Tax Act, does not tax the rental value of a house owned and occupied by the taxpayer. To extend this anomaly to the case of a company controlled by the taxpayer seems unwarranted. If, then, the company can make a profit, it can also make a loss. The reason for excluding such loss from the computation of income for income tax purposes is not, it is submitted, that the company cannot incur a loss in dealings with its chief shareholder but that the deduction of the loss is forbidden by section 12(1)(a), section 12(2) or section 125.

WOLFE D. GOODMAN*

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WILLS—TRUSTEE AUTHORIZED TO DETERMINE CAPITAL AND INCOME—REPUGNANCY—PUBLIC POLICY.—The case of *Re Wynn's Will Trusts*[1] may come as something of a shock to those who imagine all problems in the administration of estates can be solved by providing in the will that the trustees are to have the widest possible discretion to settle all questions that may give rise to differences of opinion or interest among the beneficiaries. The will under consideration created a number of trusts of income and capital and contained the following comprehensive clause:

> I authorise and empower my executors until they shall have assented to the bequests contained in this my will or in any codicil hereto and thereafter I authorise and empower my trustees to determine what articles pass under my specific bequest contained in this my will or any codicil hereto and whether any moneys are to be considered as capital or income and how valuations are to be made and/or value determined for any purpose in connection with the trusts and provisions of this my will or any codicil hereto and to apportion blended trust funds and to determine all questions and matters of doubt arising in the execution of the trusts of this my will or any codicil hereto and I declare that every such determination whether made upon a question actually raised or only implied in the acts or proceedings of my executors or trustees shall be conclusive

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[1] [1952] 1 All E.R. 34.

and binding upon all persons interested under this my will or any codicil hereto.

The facts that gave rise to the application to the court were quite simple. During the late war the trustee sold some trees and timber standing on certain freehold property forming part of the assets of the trust estate, and credited the proceeds to capital. Later the trustee felt its decision on the application of the proceeds might not have been the correct one and applied to the court for advice. There seems to have been no serious difference of opinion over the principles of law applicable, apart from the discretionary power of the trustee, and it was clear that, if those principles were applied, the proceeds referred to would be apportionable between capital and income. Two questions, therefore, arose: first, whether having once made its decision to credit the proceeds to capital the trustee could later reconsider; and, secondly, whether the clause giving such wide discretionary powers to the trustee was invalid. Danckwerts J. held, first, that if the trustee had a discretion to determine the matter it had exercised that discretion once and for all, but, secondly, the clause in question was void and, since therefore the trustee never had any validly created discretion to exercise, the question of the application of the money remained open for decision in accordance with accepted principles.

The court held the clause void on two grounds: "because it is both repugnant to the benefits which are conferred by the will on the beneficiaries and also because it is contrary to public policy as being an attempt to oust the jurisdiction of the court to construe the will and to control the administration of the testator's estate".[2] In reaching this conclusion the court followed *Re Raven*,[3] which in turn followed the Irish case of *Massy* v. *Rogers*.[4]

In *Re Raven* the question was as to the proper identity of a charitable legatee and the will provided that "If any doubt shall arise in any case as to the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties". It was held that this clause should be disregarded and the identity of the legatee determined in accordance with the ordinary rules of construction excluding, incidentally, any extrinsic evidence of the testator's intention. "In my opinion", said Warrington J., "the gift of a legacy to a legatee, even if it be of doubtful construction, is in fact a gift to the person who shall be determined to be the legatee

[2] *Ibid.*, at p. 346.
[3] [1915] 1 Ch. 673.
[4] (1883), 11 L.R.I. 409.

according to legal principles, and to give effect to a provision such as the provision which the testator has inserted in his will in the present case is in fact to assert the direct contrary and to say that the gift is not to the person who shall be determined to be the legatee by the Courts which administer the legal principles to which I have referred, but to the person who shall be decided to be the legatee by the trustees, who by the will are unfettered and may make their decision upon such grounds as they think fit. I think therefore that I can safely decide the point on that ground alone; but I also think I may and ought to decide it on wider grounds, namely, that it is contrary to public policy to attempt to deprive persons of their right of resorting to the ordinary tribunals for the purpose of establishing their legal rights."

As authority for the latter point Warrington J. quoted *Massy* v. *Rogers* in which a clause was held to be contrary to public policy which provided that "all differences of opinion as to my intentions shall be left to the decision of my executors whose decision shall be final".

With respect to a power given to trustees to determine which items of receipts should be credited to income and which to capital, a similar result to the one in *Re Wynn's Will Trusts* was reached by a different route in *Re Fenwick*,[5] where the will gave the trustees the power "To determine in all cases of doubt whether any moneys coming into their hands are to be considered capital or income". Without considering whether the clause—it conferred a number of other discretionary powers—was void in whole or in part, the court considered that it conferred no authority to disregard the provisions of the Apportionment Act whose application was not open to doubt, at any rate not in the mind of an experienced judge of the Chancery Division.

All these cases — particularly *Massy* v. *Rogers* — are in sharp contrast with *Smith* v. *Smith*,[6] a decision of Boyd C. In *Smith* v. *Smith* the will provided that "In all cases when any question may arise as to the intention or construction of this will—or under the carrying out of the trust—such question shall be decided by R. J. whose decision shall be absolute uncontrolled and final". Sir John Boyd seems to have had no doubt about the validity of the clause by which he said:[7] "The power and authority are to be exercised according to the judgment and discretion of the trustee as a quasi-arbiter, without check or control from any superior tri-

[5] [1936] 2 All E.R. 1096.
[6] (1906), 7 O.W.R. 586.
[7] *Ibid.*, at p. 592.

bunal or court, provided always there is no mala fides with regard to its exercise". In support of this interpretation he referred to *Gisbourne* v. *Gisbourne*[8] and *Re Schneider*,[9] decisions that are not, perhaps, too strictly relevant, since the former dealt with a discretion to decide how much income should be expended from time to time, for the maintenance of a lunatic, and the latter with a power to postpone conversion under a trust for sale. The research of counsel does not seem to have unearthed *Massy* v. *Rogers*, which was not mentioned.

It will be seen that the authorities on the subject of the validity of clauses of the kind under consideration are confusing. The situation is not clarified by the fact that the reasoning in *Re Raven* was severely criticized by Glanville L. Williams in the Law Quarterly Review,[10] but that his criticism was not mentioned in *Re Wynn's Will Trusts*. Until the situation is clarified by higher authority, perhaps the wise course is that suggested by Danckwerts J.: "In my view, the insertion of a clause of this kind in wills is not very desirable because it is likely to mislead both trustees and beneficiaries as to their true position and right".

There is at least one additional reason for avoiding the attempt to empower the trustees to decide what is income and what is capital. Presumably if the trust continued for more than twenty-one years after the testator's death it would automatically become void at the expiration of that period, to the extent that it empowered the trustees to treat as capital items that in law would be regarded as income. Since the Accumulations Act prevents the testator from making a direct accumulation of income for a period in excess of twenty-one years, it would seem equally to prevent his conferring powers on his trustees that would indirectly produce the same result. However difficult, therefore, it may be to apply the rules for determining the relative rights of life tenant and remainderman to different sets of circumstances, and however convenient it might appear to be to substitute the presumably common sense decisions of trustees for the erudite reflections of counsel or the court, the temptation to make the substitution should probably be resisted. The short cut could easily turn out to be the long way round.

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[8] (1877), 2 App. Cas. 305.
[9] (1906), 22 T.L.R. 223.
[10] (1944), 60 L. Q. Rev. 82.

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