Case and Comment

CONSTITUTIONAL LAW — UNION OF SOUTH AFRICA — THE NEW HIGH COURT OF PARLIAMENT. — Immediately after the Appellate Division of the Supreme Court of South Africa had, on March 29th, 1952, handed down its decision in *Harris* v. *Minister of the Interior*,[1] Prime Minister Malan took the opportunity of attacking the decision in the Union Parliament:

> The judgment of the Appeal Court in the matter of the separate representation of voters, which reverses its previous judgment of 1937, has created a constitutional position which cannot be accepted. Neither Parliament nor the people of South Africa will be prepared to acquiesce in a position where the legislative sovereignty of the lawfully and democratically elected representatives of the people is denied, and where an appointed judicial authority assumes the testing right. . . . particularly since the judicial authority does not, or is not obliged to, act consistently. . . . It is imperative that the legislative sovereignty of Parliament should be placed beyond any doubt, in order to ensure order and certainty.[2]

As a result, the Malan Government proceeded to draw up the High Court of Parliament Bill, which was quickly passed by the Union Parliament (by simple majority of the Senate and of the House of Assembly, sitting separately) and formally assented to on June 3rd, 1952.

The essential purpose of the High Court of Parliament Act[3] is indicated in section 2 of the Act, which provides that

> any judgment or order of the Appellate Division of the Supreme Court of South Africa, whether given or made before or after the commencement of this Act, whereby the said Appellate Division declared or declares invalid any provision of any Act of Parliament . . . or whereby it declared or declares that any such Act is not an Act of the Parliament of the Union, or whereby it refused or refuses to give effect to any provision of such an Act or prohibited or prohibits any person from giving effect to any such provision or in any other manner rendered or renders such a provision

[1] 1952 (2) S.A. 428; [1952] 1 T.L.R. 1245.

[2] (1952), 33 Journal of the Parliaments of the Commonwealth 348.

[3] Act No. 35 of 1952. I am indebted to the South African Embassy, Washington, D.C., for supplying me with a copy of the text of this Act, and also advance copies of the opinion of the High Court of Parliament of August 28th, 1952, and of the judgment of the Cape Provincial Division of the Supreme Court of August 29th, 1952, which are referred to *infra*.

> inoperative or denied or denies that it has the force of law, shall, subject to the provisions of this Act, be subject to review by the High Court of Parliament . . .

It will be noted that the Act is thus expressly made retrospective in its operation, so as to apply to past decisions of the Appellate Division of the Supreme Court, and in fact promptly after the passage of the Act the Malan Government applied to the new High Court of Parliament for review of the *Harris* case decision.

The High Court of Parliament itself, in terms of the Act, is composed simply of all the members for the time being of the two Houses of Parliament (the Senate and the House of Assembly) of the Union of South Africa (section 3). It is, however, expressly declared to be a court of law (section 2), and it may, by majority vote of the members present, vary or set aside any judgment or order of the Appellate Division of the Supreme Court, or make such other order or such order as to costs as it may think fit: in addition, a decision of the High Court of Parliament is to be final and binding, and to be executed in every respect as if it were a decision of the Supreme Court (section 8).

Since the quorum for conduct of business in the High Court of Parliament is declared to be fifty members (section 3), the new High Court of Parliament would seem at first sight to be cumbrous and unwieldy beyond effective working operation as a court of law.

It is clearly envisaged by the Act, however, that the actual business of the High Court of Parliament will be conducted by a smaller working committee of the whole; for the Act provides for the establishment of a Judicial Committee of ten members (of whom four comprise a quorum) to whom applications for review of Supreme Court judgments are to be referred in the first instance. The Judicial Committee is empowered to receive written and verbal representations concerning any application for review of a Supreme Court judgment, and after it has considered the record of proceedings in the Supreme Court and the opinions handed down at the time by the Supreme Court judges, it is to report back to the High Court of Parliament, with any recommendations it may care, by the majority vote, to make (section 6).

This procedure was in fact followed when the Malan Government applied to the High Court of Parliament for review of the *Harris* case decision. The application was heard by the Judicial Committee, though only six of the ten committee members were present, four representatives of the opposition parties choosing to resign from the committee. The Judicial Committee appears to

have heard oral argument on behalf of the Minister of the Interior, but the other parties to *Harris* v. *Minister of the Interior* in the action in the Supreme Court were not represented or present before the Judicial Committee, and these other parties did not submit written representations to the Committee: at the conclusion of the argument, the Judicial Committee announced that it would compile a report for submission to the High Court of Parliament. Finally, on August 28th, 1952, the High Court of Parliament (with 91 government members of Parliament attending the sitting, but no opposition members) announced that, having considered the report of the Judicial Committee, it now ordered that the judgment and orders of the Appellate Division of the Supreme Court in the *Harris* case be set aside on the grounds set out by the Judicial Committee in its report.

The report of the Judicial Committee involves, in effect, a recanvassing of the ground covered by the Appellate Division of the Supreme Court in the *Harris* case. The Judicial Committee saw the problem in the *Harris* case as one of a conflict between two different principles — the "sovereignty approach of British constitutional law" which, the Judicial Committee said, was followed by the Supreme Court in *Ndlwana's* case in 1937,[4] and a "fundamental law" approach which, the Judicial Committee felt, must have been applied by the Supreme Court to arrive at its decision in the *Harris* case. The Judicial Committee now proceeded categorically to reject the "fundamental law" approach. The superior legal force of sections 35 and 152 of the South Africa Act in relation to the Union Parliament arose, in the Judicial Committee's view, from one consideration alone, namely, that the South Africa Act was an Act of the supreme British Parliament and not because it was an Act embodying the constitution of the Union and thus a fundamental law. The fact that the British Parliament was advised in regard to it by a National Convention did not, in the Judicial Committee's view, alter the position. The Union Parliament was now, since the passing of the Statute of Westminster, as indeed it declared itself to be in the Status of the Union Act of 1934,[5] the sovereign legislature in and over the Union, and as in the case of the British Parliament, there was no criterion by which the validity of its laws could be tested.

There is not much point at this stage in debating at length the contentions advanced by the Judicial Committee, for most of these arguments have already been discussed fully in connection

[4] *Ndlwana* v. *Hofmeyr*, [1937] A.D. 229.
[5] Act No. 69 of 1934, s. 2.

with the *Harris* case.[6] The Judicial Committee does, however, raise the essential issues of the *Harris* case squarely when it asserts that the authority for the continued binding force of the entrenched clauses of the South Africa Act upon the Union Parliament must be derived either from the sovereignty of the United Kingdom Parliament in relation to the Union of South Africa (an argument that surely is no longer tenable in view of the vast changes that have taken place in the relationship of the United Kingdom to the members of the present Commonwealth); or else must be derived from some local South African source, whether from the agreement of the four original colonies in South Africa that formed the basis of the South Africa Act as passed by the United Kingdom Parliament in 1909, or else perhaps from the acceptance of the South Africa Act itself as "fundamental law" for the Union through the developing conventions of South African constitutional law.

Chief Justice Centlivres, in giving the judgment of the Appellate Division of the Supreme Court in the *Harris* case, seems to have rested his holding that the entrenched clauses were still binding on the Union Parliament solely upon the argument of sovereignty of the United Kingdom Parliament; for, notwithstanding the suggestion of the Judicial Committee that he must have applied a "fundamental law" approach, he does not in fact appear to have adverted at all to this argument as justification for the continued binding force of the entrenched clauses.

There seems no reason why the constitutions of the members of the Commonwealth cannot be regarded as having had, in their historical origins, a local source as well as an Imperial source: though those Constitutions each were enacted in the form of statutes of the United Kingdom Parliament, they were generally preceded locally by representative constitutional conventions, sometimes extending over a considerable period of years. Even apart from this question of a local source and justification, in addition to the Imperial statute, for the origin of the constitutions of the members of the Commonwealth, it may be that continued user and acceptance over the years can enroot those constitutions locally. Custom and convention, after all, are accepted agencies of constitutional change in British and Commonwealth constitutional law — the great changes in the legal position of the United Kingdom vis-à-vis the Commonwealth countries were effected

[6] See, earlier in this number, an article by McWhinney, The Union Parliament, the Supreme Court, and the "Entrenched Clauses" of the South Africa Act (1952), 30 Can. Bar Rev. 692.

through developing custom and convention, rather than through isolated positive law enactments like the Statute of Westminster.

If Chief Justice Centlivres may seem to have leaned too strongly in the *Harris* case on the weak reed (in terms of the present day) of the sovereignty of the United Kingdom Parliament in relation to the Commonwealth countries, in order to uphold the continued binding force of the entrenched sections of the South Africa Act, the Judicial Committee of the new High Court of Parliament for its part has been curiously eager to assume that the "fundamental law" approach, with its necessary premise of a local South African source and justification for the South African Constitution, may be summarily waived aside. The Appellate Division of the Supreme Court is not the only body, it seems, to continue to be mesmerised by the concept of the sovereignty of the United Kingdom Parliament.

On August 29th, 1952, just after the High Court of Parliament had released the result of its review of the *Harris* case decision, the Cape Provincial Division of the Supreme Court of South Africa, sitting as a court of the first instance, announced its own decision on the question of the constitutionality of the High Court of Parliament, a challenge in this regard having been filed after the passage by the Union Parliament of the High Court of Parliament Act. The judgment of the Cape Provincial Division, as might be expected of a court of first instance from whom an appeal would lie to the Appellate Division of the Supreme Court of South Africa, is given on narrow grounds. The burden of the court's opinion, as written by Judge President J. E. de Villiers, is to the effect that the High Court of Parliament Act, in so far as, *inter alia*, it purports to authorise review of decisions of the Appelate Division of the Supreme Court concerning the entrenched clauses of the South Africa Act, necessarily involves an alteration of those entrenched clauses, and therefore, in order validly to be enacted, must be passed by a two-thirds majority of the two houses of the Union Parliament at a joint sitting, as is required under the South Africa Act for any alteration of the entrenched clauses. Judge Newton-Thompson of the Cape Provincial Division, though agreeing with Judge President de Villiers' opinion, saw fit to append a statement of his own which is of particular interest here, because Judge Newton-Thompson chooses to leave behind the self-restraint approach of Judge-President de Villiers in order to venture into the policy field. "In the case of any constitution whether unitary or federal", the judge asserts, "which contains any constitutional guarantee to any individual, it necessarily follows that the

established courts of justice must have the power and duty to decide whether or not the guarantee has been infringed by members of a legislative body".

Now as a statement of the concept of judicial review as actually applied in the United States and in those countries of the Commonwealth whose courts have adopted the American practice in this regard, this is no doubt true; and the Anglo-American constitutional lawyer, especially if he remembered Dicey's strictures upon the utility of written constitutional guarantees in the countries of Continental Europe, might reasonably conclude that the power of judicial review is necessary to the effectiveness of any such written guarantees. But Judge Newton-Thompson is clearly in error in generalising from United States and Commonwealth constitutional experience alone and in concluding, without more, that where there are written constitutional guarantees it follows that there must be judicial review as part of the machinery of the constitution.

Again, Judge Newton-Thompson makes the somewhat surprising assertion that "the founders of our constitution thought fit to follow the American example by entrenching clauses 35, 137, and 152 of the South Africa Act"; and then he proceeds to rub salt in Prime Minister Malan's wounds by blithely adding, "I wish they had not done so". But the concept of special "entrenched clauses" of the Constitution, distinct from the normal provisions of the Constitution, is foreign to the United States Constitution. It is possible that Judge Newton-Thompson is thinking here of the procedure for amendment of the United States Constitution, established in the Constitution itself, whereby proposals for amendment of the Constitution may be initiated by two-thirds majorities in each House of Congress; but this is the general procedure for the initiation of amendments to the Constitution of the United States, not a special case. It seems more likely, however, that he is trying to say that those who drafted the South Africa Act intended to follow the United States concept of the supremacy of the Constitution (with its concomitant of judicial review) rather than the United Kingdom concept of the sovereignty of Parliament. Judge Newton-Thompson here seems to be falling backwards into the "fundamental law" approach, and it would be better for him to avow his approach openly rather than to rely on doubtful analogies in the field of comparative constitutional law.

The comparative constitutional lawyer, indeed, will find a great deal to interest him in the new High Court of Parliament in South Africa. The very title "High Court of Parliament", and probably

also the idea of a committee of the legislature rather than the courts as final agency for the adjudication of constitutional questions, seems to stem from legal eclecticism. The powers of that High Court of Parliament that existed in England in mediaeval times certainly embraced, as McIlwain pointed out in his famous historical essay,[7] all of what we would to-day classify separately as legislation and adjudication. But the mediaeval concept of the High Court of Parliament involved a fusion of powers, quite incompatible with the modern principle of a separation of powers: it was implicit in McIlwain's survey that the concept of the High Court of Parliament had by the 17th century at least long since ceased to be an accurate description of the English constitutional system. It is clear, therefore, that the High Court of Parliament of mediaeval England can in no way be assimilated to the British Parliament of the present-day, or *a fortiori* to the legislature of the Union of South Africa.

The American constitutional lawyer, remembering the great struggle of the early New Deal era between President Roosevelt and the "old Court", and the accusation then made that the United States Supreme Court was functioning, in effect, as a "super-legislature", may find a special interest in Prime Minister Malan's High Court of Parliament. For once it is conceded that, in Bishop Hoadly's words, "Whosoever hath an absolute authority to interpret any written or spoken words, it is he who is truly the law-giver", it can be logically argued that the judges, in striking down acts of the legislature as unconstitutional, are performing an essentially legislative function that should more properly be exercised by popularly-elected representatives.

In the United States, public recognition of the essentially policy-making rôle exercised by the Supreme Court in constitutional adjudication has produced a very active and informed body of opinion prepared to examine and appraise the court's work according to the policy choices embodied in the individual decisions. It has led, also, at the stage of Senate confirmation of Presidential nominations to judicial office, to a very close scrutiny (sometimes, admittedly, not always with fortunate results) of the background, affiliations and value preferences of the individual nominees: a few nominations have actually been rejected by the Senate, while other nominees, like Mr. Justice Black in recent times, have had to run the gauntlet of a protracted and searching inquiry before securing the necessary majority vote in the Senate.

Be that as it may, it is impossible to divorce Prime Minister

[7] McIlwain, The High Court of Parliament and its Supremacy (1910).

Malan's High Court of Parliament from its immediate political context. It is avowedly designed for one specific end — to overcome the invalidation by the Appellate Division of the Supreme Court, in the *Harris* case, of the Separate Representation of Voters' Act cutting down the coloured vote in the Cape Province. Whatever long-range merits the idea of a committee of the legislature as the final adjudicating agency for constitutional matters may seem to have, the legislature in question should surely be a representative legislature. Throughout the constitutional crisis in South Africa, there has seemed this basic contradiction in the position of the Malan Government, that its case has rested in the ultimate upon a claim of the sovereignty of Parliament and that claim is being advanced by a legislature that is not itself fully representative and that uses its asserted sovereignty to abridge representation still further.

If the courts have, as Mr. Justice Stone has suggested in his famous footnote in the *Carolene Products* case,[8] a duty to try and safeguard the operation of the normal political processes, legislation like that contested in the *Harris* case inhibiting admission to the national power process, and also the present High Court of Parliament Act, which is colourably linked to the earlier legislation, clearly call for the exercise of the most exacting judicial scrutiny.

EDWARD MCWHINNEY*

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TORTS — INJURIOUS FALSEHOOD — CAUSE OF ACTION — MALICE AS AN ELEMENT — DUTY OF CARE OF NEWSPAPERS.— The degree of care newspapers must exercise in checking the authenticity of the material they publish has recently been reviewed in the British Columbia courts. In *Guay* v. *Sun Publishing Company Limited*,[1] the trial judge, and the dissenting judge in the Court of Appeal, found reason to deviate from the established approaches to liability in actions for publication of an injurious falsehood. Both judgments held that the modern principles of negligence have replaced the older and more narrowly defined requisites of a cause of action in this tort.

The question before the courts was: Is a newspaper under a special duty to take care before uttering a statement that may cause physical shock to another? A news item printed in the Van-

[8] *U.S.* v. *Carolene Products* (1938), 304 U.S. 144.

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[1] [1951-52] 4 W.W.R. (N.S.) 549, and [1952] 5 W.W.R. (N.S.) 97. An appeal to the Supreme Court of Canada is now pending.

couver Sun reported that the plaintiff's husband and their three children had been killed in an automobile accident in Ontario. The report, which was untrue, was read by the plaintiff, who resided in Vancouver and who was unaware of the whereabouts of her husband and children. It caused her mental shock and anxiety. As a result she was unable to carry on her work and required psychiatric treatment. The newspaper was unable to explain the source of the incorrect news report. The plaintiff based her claim on negligence alone and did not plead or attempt to prove malice.

Similar facts to these have usually been considered in relation to the tort of injurious falsehood. This well known tort was predicated upon the proof of three incidents of action: falsehood, malice and resulting damages. The trial judgment in the *Guay* case was the first reported decision of an English or Canadian court to discount these historically standard elements. It approached the case as a problem of negligence alone. The trial judge, Wood J., discarded the proof of malice demanded by many former decisions and instead applied the more recent principles of negligence laid down in *Donoghue* v. *Stevenson*[2] and *Bourhill* v. *Young*.[3] This is a novel and singular approach and was discarded by the British Columbia Court of Appeal, but with a strong dissenting opinion by O'Halloran J.A.

The tort of injurious falsehood deals, as the name implies, with the spoken or written word. For this reason the tort is of particular application to newspapers. News items in newspapers vary considerably in their degree of authenticity. The bulk of English law on this tort holds that where parties seek to make persons or companies responsible for damages arising out of false statements other than those defaming the reputation, the ingredient of malice must be proved. The argument in British Columbia now arises that proof of malice is unnecessary if negligence can be shown, which would place a heavy duty of care upon the publishers of magazines and newspapers.

The term "injurious falsehood" describes an actionable wrong that bears resemblance to defamation, except that the reputation is not attacked, and to slander of goods, except that the interest infringed is not one in property but rather in personalty. Its history is described by Holdsworth in his *History of English Law* in the following passage:[4]

> Cases of the latter part of the sixteenth century established the principle

[2] [1932] A.C. 562.
[3] [1942] 2 All E.R. 396.
[4] Volume 8, pp. 351-352.

> that, if an owner of land was negotiating for its sale or other disposition to another person, and a third person made false statements as to the vendor's title, which prevented the sale or disposition, the vendor could bring an action on the case and get damages for the slander.... As early as 1629 it was recognized that the form and incidents of the action were different than those of the ordinary action for defamation.... In the seventeenth century the action was extended to other cases in which damage had thus been caused. Thus in 1622, in the case of *Sheperd* v. *Wakeman*, (1662), 1 Sid. 79, it was held, after much debate, that a statement made falsely and maliciously of a plaintiff, whereby she lost a marriage for which she was in treaty, was actionable; and this extension is the origin of the general rule that a tort is committed if damage is caused by the making of oral or written statements falsely and maliciously. The action given for the tort 'is not', said Bowen L.J.[5] 'one of libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title'. This sentence not only accurately describes the nature of the action, but also indicates the manner in which it had been developed. It is not an action for libel or slander for, historically, the action on the case for defamation became distinct at a comparatively early date; and this action is simply an extension of the action for slander of title.

The three requisites for injurious falsehood actions are the same as in actions for slander of title or goods. They were set out by Lord Davey in *Royal Baking Powder Co.* v. *Wright, Crossley and Co.*[6] In this case the plaintiff's registered trade marks had been expunged from the register at the instance of the defendants. The defendants then issued and published a circular which was alleged to be an intimation that the plaintiffs were not entitled to sell baking powder as Royal Baking Powder. Lord Davey decided that the plaintiff must base his case on three elements:

> To support such an action it is necessary for the plaintiffs to prove (i) that the statements complained of are untrue; (ii) that they were made maliciously, i.e., without just cause or excuse; (iii) that the plaintiffs have suffered special damage thereby.

Indeed, no reported decision of an action for slander of title dispenses with the necessity of proving malice, as Lord Coleridge in *Halsey* v. *Brotherhood* pointed out:[7]

> It seems to be clear law that in an action in the High Court in the nature of slander of title, where the defendant has property of his own in defence of which the supposed slander of the plaintiff's title is uttered, it is not enough that the statement should be untrue, but there must be some evidence, either from the nature of the statement itself or otherwise, to satisfy the Court or the jury that the statement was not only untrue, but was made *malâ fide* for the purpose of injuring the plaintiff, and not in the *bonâ fide* defence of the defendant's own property.

[5] *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524, at pp. 527-528.
[6] (1900), 18 R.P.C. 95, at p. 99.
[7] (1881), 19 Ch. D. 386, at p. 388.

Wilde C. J. in *Pater* v. *Baker* came to the same conclusion:[8]

> It seems to have been admitted, and, indeed, it could not well have been denied, that proof of actual malice was requisite to sustain the action.

Parke B. in *Brook* v. *Rawl* laid down the same principle:[9]

> In order to maintain this action there must be malice and falsehood, and special damage must ensue therefrom.

In a Canadian case, *Manitoba Free Press* v. *Nagy*, Davies J. said:[10]

> The plaintiff was bound to prove malice. . . . It is laid down by Mr. Pollock in his work on Torts, page 301, that in actions of this kind, 'the wrong is a malicious one in the only proper sense of the word, that is, the absence of good faith is an essential condition of liability'.

Blackburn J., in *Wren* v. *Weild*, also demanded that malice had to be proven in an action for slander of goods:[11]

> . . . We think that the action could not lie, unless the plaintiffs affirmatively proved that the defendant's claim was not a *bonâ fide* claim in support of a right which, with or without cause, he fancied he had; but a *malâ fide* and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without any foundation.

Although no judicial doubt was ever cast, it appears, upon the necessity for the proof of malice in these actions, there has been much doubt and many shades of opinion on what constituted malice. As late as 1923 the English Court of Appeal addressed itself to what was by that time an old question. In *Shapiro* v. *La Morta and another*, Scrutton L.J. said:[12]

> Actions for slander of title and similar malicious falsehoods, affecting not reputation but property or business, differ from statements defamatory of reputation in that (i) only actual damage resulting from the untruths can be recovered and the plaintiff must prove it, and (ii) the plaintiff must prove malice instead of it being presumed. The terms 'malice' and 'malicious' have caused more confusion in English law than any judge can hope to dispel. Malice is sometimes said to be, 'where any person wilfully does an act injurious to another without lawful excuse', per Blackburn J. in *Regina* v. *Pembliton*. This is applied to cases similar to slander of title by Bowen L.J. in *Ratcliffe* v. *Evans* as a statement of 'damage wilfully and intentionally done without just cause or excuse' in which definition it is not clear what 'wilfully' adds to 'intentionally' or what is a 'just cause or excuse'. Lord Davey in *Royal Baking Powder Company* v. *Wright, Crossly and Co.* again defines 'maliciously' simply as 'without just cause or excuse'. . . . In neither of these cases was it necessary to define 'malice' and neither definition explains what is a just cause or excuse.

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[8] (1847), 3 C.B. 831, at p. 865; 136 E.R. 333, at p. 343.
[9] (1849), 19 L.J. Ex. 114, at p. 115.
[10] (1907), 39 S.C.R. 340, at p. 348.
[11] (1869), 4 Q.B. 730, at p. 737.
[12] (1923), 40 T.L.R. 201, at p. 203.

Before the decision in *Donoghue* v. *Stevenson*, then, the plaintiff had to prove malice to succeed in an injurious falsehood action. The arguments of Wood J. and O'Halloran J.A. in the *Guay* case acknowledge these older statements by the courts, but suggest that they are no longer applicable. In other words, these two judges do not base their decisions on a successful effort to discover an implied or circumstantial malice; they rather dispense entirely with the need for malice. Their view is that the tort of injurious falsehood should now, since *Donoghue* v. *Stevenson*, be approached from a duty concept, and liability should flow from careless statements rather than only from wilful untruths. Several other courts have been called upon to decide injurious falsehood actions since *Donoghue* v. *Stevenson* was decided, but none has followed the line of reasoning initiated by Wood J. in the *Guay* case.

In *Balden* v. *Shorter*,[13] it was held that an action for injurious falsehood does not lie without proof of actual malice in the sense of a wrongful intention to injure the plaintiff. In *Worsley and Co.* v. *Cooper*,[14] Morton J. felt that malice was a necessary element:

> It seems to me, therefore, that the plaintiffs have to satisfy me that the words of which complaint is made expressly or by innuendo convey a statement of facts which is untrue, that the words were written maliciously — that is to say, with an indirect or improper motive — and that the plaintiffs suffered special damage.

The English law on the subject has been applied in some American cases. The statement of Bowen L.J. in *Ratcliffe* v. *Evans*, quoted previously in this comment in the passage from Holdsworth, was approved and quoted by Crane J. in the New York Court of Appeal in 1934 in *Al Raschid* v. *News Syndicate Co., Inc.*[15]

Before the *Guay* case the most recent Canadian decision on an action of injurious falsehood was a 1945 decision of the Supreme Court of Alberta, *Bresden* v. *Johnson*.[16] This case was not referred to by Wood J. in the *Guay* case, nor by O'Halloran J.A. on the appeal. In the *Bresden* case, the defendant made a statement that the plaintiff, an osteopathic physician, was not legally entitled to prescribe narcotics. Ewing J. said:[17]

> . . . the plaintiff's claim seems to come within that class of action which is founded on the proposition that whenever false statements, maliciously made, produced as a direct consequence damage which is capable of legal estimation then a wrong is committed and a corresponding remedy is given. The present action is not an action based on personal libel, but is

[13] [1933] 1 Ch. 427.
[14] [1939] 1 All E.R. 290, at p. 302.
[15] 191 N.E. 713, at p. 714.
[16] [1945] 1 W.W.R. 273.
[17] [1945] 1 W.W.R. 273, at p. 276.

> in many respects analogous to an action for slander of title, i.e., an action on the case for maliciously damaging the plaintiff in the practice of his profession by denying his right to prescribe narcotics.

Ewing J. then set forth the requisites of a cause of action for injurious falsehood as stated by Lord Davey in the *Royal Baking Powder* case and dismissed the action on the ground, *inter alia*, that malice was not shown. No reference was made to the possible effect of *Donoghue* v. *Stevenson* on injurious falsehood actions.

The opinion of Wood J. and O'Halloran J.A., that the principles of negligence laid down in *Donoghue* v. *Stevenson* should now apply to cases of injurious falsehood, was vigorously disputed by the English Court of Appeal in the 1951 decision of *Candler* v. *Crane, Christmas and Co.* Here the court held, with Denning L.J. dissenting, that a false statement made carelessly, as contrasted with fraudulently, by one person to another, though acted on by that other to his detriment, was not actionable in the absence of any contractual or fiduciary relationship between the parties, and that this principle had in no way been qualified by the decision of the majority in *Donoghue* v. *Stevenson*. Further, Asquith L.J. observed that the principle laid down by Lord Atkin in *Donoghue* v. *Stevenson* in answer to the question, "Who then, in law, is my neighbour?", has never yet been applied where the damage complained of was not physical in its incidence to either person or property.

O'Halloran J.A. came out most vigorously against the argument that the fastening upon a newspaper of a duty to its readers in the terms of the *Donoghue* principle would make it commercially impossible to operate a newspaper. He says that this argument is fundamentally unsound and his reasons are set out most convincingly. Sydney Smith J.A., for the majority of the Court of Appeal, takes a different approach. Towards the end of a short judgment he says:[18]

> As a matter of principle, I feel that the ruling made by the court below would impose an intolerable burden on individuals as well as on newspapers. It would practically mean that every one would have to warrant the accuracy of every word uttered. It seems to be implied in the judgment below and in the respondent's argument here that a higher standard of conduct is imposed on a newspaper than on others. I know of no principle to justify this distinction, and it would be tantamount to judicial legislation for us to support such a distintion.

It will be interesting to see if the Supreme Court of Canada agrees with this theory.

IVAN L. HEAD*

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[18] [1952] 5 W.W.R. (N.S.) 97, at p. 118.

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CRIMINAL LAW — ADMISSIBILITY OF EVIDENCE OBTAINED BY METHODS THAT OFFEND A "SENSE OF JUSTICE" — TRESPASS TO THE PERSON — SELF CRIMINATION.— *Rex* v. *McIntyre*[1] is the latest reported Canadian case in which evidence of analysis of a blood sample removed from the person of the accused without warning is held admissible in evidence. The facts present a now familiar pattern. The accused was charged with "motor manslaughter" and, in order to establish intoxication, the Crown sought to introduce evidence of the analysis of a blood sample removed from her person without warning shortly after the accident. The accused unsuccessfully urged that the rules on the admissibility of confessions should apply to the results of an analysis of blood samples or, if they did not apply, the question should be settled upon analogous principles. In adopting the decisions in *Rex* v. *McNamara*[2] and *Rex* v. *Nowell*,[3] and expressly disapproving those in *Rex* v. *Ford*[4] and *Rex* v. *Frechette*,[5] the Supreme Court of Alberta adhered to the distinction between the exclusionary principles of evidence governing coerced confessions and the principles governing the privilege against self crimination.

As a question of law, the admissibility of the evidence of blood tests would now seem to be too well settled to merit comment, were it not for an apparent exception recently enunciated by the Supreme Court of the United States in *Rochin* v. *California*.[6] The following extracts, one from each of the two subject cases, silhouette the new development, which in the writer's opinion finds no basis at common law. In the *McIntyre* case, Egbert J. said:[7]

> Accordingly, in my opinion, evidence of the analysis of a blood sample is properly admissible, although it was obtained by a person in authority, although it was obtained without the consent of the accused, although no warning was first given to the accused, and even although it was improperly obtained under circumstances which would give the accused a right of action or prosecution for trespass to his person; and neither the supposed analogy between the admission of such evidence and the admission of confessions nor the supposed privilege against self-incrimina-

[1] (1952), 102 C.C.C. 104; 2 D.L.R. 713 (Alta. Supr. C.). Cf. annotation by C. C. Savage, K.C., Blood Tests in Intoxication Cases (1950), 96 C.C.C. 241, and articles by Rabinowitch, Medicolegal Aspects of Chemical Tests of Alcoholic Intoxication (1948), 26 Can. Bar Rev. 1437, and Letourneau, Chemical Tests in Alcoholic Intoxication (1950), 28 Can. Bar Rev. 858.

[2] (1951), 99 C.C.C. 107 (Ont. C.A.).

[3] [1948] 1 All E.R. 794 (C.A.).

[4] (1948), 90 C.C.C. 230; 1 D.L.R. 787; 1 W.W.R. 404 (Alta. Supr. C.).

[5] (1949), 93 C.C.C. 111 (Que.).

[6] *Rochin* v. *California* (1952), 72 S. Ct. 205; 342 U.S. 165.

[7] (1952), 102 C.C.C. 104, at p. 111; 2 D.L.R. 713, at p. 719.

> tion nor the supposed inviolability of the person of the accused constitutes a sound reason for its exclusion.

In the *Rochin* case, Frankfurter J. concluded that:[8]

> . . . prosecutions cannot be brought about by methods that offend a 'sense of justice'. It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.

It is not the purpose of this comment to discuss the principles governing coerced confessions and self crimination.[9] Historically, the doctrines spring from different roots. The modern exclusionary rule on the admissibility of confessions received its first full expression in 1783 in *Warickshall's* case.[10] Historically, confessions were thought of as "the highest evidence of guilt", and the exclusionary rule applied rationally only to those confessions *apparently* untrustworthy, based on the ordinary observation of human conduct that under certain stresses a person may falsely acknowledge guilt.[11] The privilege against self crimination, modified by statute in Canada,[12] finds its historical roots in a public revulsion at centuries of forced testimony under oath in the ecclesiastical courts.[13] By the end of Charles II's reign the common law courts consistently held that no man was bound to incriminate himself on any charge and the privilege was extended to include, as well as the party charged, an ordinary witness. The exclusionary principle and the privilege are properly kept distinct in *Rex* v. *McIntyre*. It is not an unnatural error to suppose the two rules to have something of a common principle or spirit; but they have no common origin. The *McIntyre* case asserts settled common law in holding that:

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[8] *Rochin* v. *California* (1952), 72 S. Ct. 205, at p. 210.

[9] See the comment by J. S. Woods in (1951), 29 Can. Bar Rev. 521.

[10] 1 Leach Cr. C. (3rd ed.) 298.

[11] Nares J. and Eyre B. in *Warickshall's* case, *supra:* "It is a mistaken notion that the evidence of confessions which have been obtained from prisoners by promises or threats is to be rejected from a regard to public faith. No such rule ever prevailed. . . . Confessions are received in evidence or rejected as inadmissible under a consideration whether they are or are not entitled to credit."

[12] See Canada Evidence Act, R.S.C., 1927, c. 59, s. 5(2): "If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him . . . then although the witness is by reason of this Act, . . . compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial . . ."

[13] See *Lilburn's Trial* (1637-1645), 3 How. St. Tr. 1315. The courageous John Lilburn was committed to prison by the Council of the Star Chamber for asserting: "I think by the law of the land, that I may stand upon my just defence and not answer to your interrogation". His sentence was subsequently vacated by the House of Lords as "illegal and most unjust, against the liberty of the subject and law of the land and Magna Charta".

(a) There is no analogy between the admission of evidence obtained by trespass to the person and the admission of confessions. In the case of confessions evidence is rejected because of doubt over truthfulness. Such doubts cannot obtain in the case of trespass to the person.

(b) The privilege against self crimination applies to witnesses only, and has no application to the admissibility of evidence obtained by trespass to the person.

(c) The person of a suspect or of an accused person is not inviolable. Evidence obtained by trespass to the person may be admitted in evidence against him, though he have at law a civil cause of trespass or assault.

To these may be further added the accepted principle that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.[14]

It may be said that these holdings have, until the decision in *Rochin* v. *California,* represented established principles of law both in the United States and Canada. *Rochin* v. *California,* decided by the Supreme Court of the United States at about the same time as the *McIntyre* case was decided in Canada, indicates an attempt to pierce the apparent rigidity of the rules by a "sense of justice" exception in the United States, based on the Fourteenth Amendment to the United States Constitution,[15] and rationalized from analogies to the rules governing the admissibility of confessions. Rochin's bedroom had been forcibly entered by three sheriff's officers, who saw him quickly swallow a number of capsules. Immediate efforts to extract the capsules from his mouth proving unsuccessful, the officers removed Rochin to a hospital, where a physician acting under their instructions forced an emetic solution into his stomach through a tube. In the stomach contents extracted were two capsules containing morphine, evidence of which, the Supreme Court held, was inadmissible, due to the manner in which it was obtained.

That this case necessitates a re-examination of the law on self crimination through the removal of evidence from within the body of the accused in the United States becomes obvious upon reference to a comprehensive monograph by Fred E. Inbau, Pro-

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[14] *Regina* v. *Doyle* (1886), 12 O.R. 347. Liquor seized illegally was admitted in evidence against the accused for illegal possession of it, and it was held that the means by which the evidence was obtained was immaterial to its admissibility.

[15] Justices Black and Douglas, dissenting, would base the same conclusion upon the Fifth Amendment.

fessor of the Law of Evidence at Northwestern University, published in 1950 and devoted to compulsory self incrimination.[16] Professor Inbau covers the general problems presented by cases like the *McNamara* and *Rochin* decisions. In his treatise we find the categorical statement:[17]

> The courts have had very little difficulty with the self-incrimination problem in instances where *foreign objects* [italics his] of evidentiary value have been removed from the surface or even from within the body of an accused person; . . . He can even be compelled to submit to a pumping of his stomach by physicians in order to obtain a specimen of the stomach contents for a chemical analysis to determine the presence of marajuana.

The *Rochin* case has most seriously jeopardized the significance of this conclusion.

The Ontario Court of Appeal has recently taken the orthodox position on facts not dissimilar to those in the *Rochin* case. In *Rex* v. *Brezack*,[18] the accused was arrested on suspicion of having illegal possession of narcotics. Constables rushed upon him from their place of concealment in a public street. One of them seized him by the arms and one caught him by the throat, to prevent him swallowing anything he had in his mouth. The three of them fell to the ground and a considerable struggle ensued. One of the constables persistently tried to insert his fingers in the accused's mouth, to recover the drug he assumed was there, and each time he tried, Brezack bit his finger. A good deal of force was applied by the constables, and finally the accused's mouth was opened and the constables satisfied themselves that there was no drug there. Subsequent search disclosed no narcotics on the accused's person, but narcotic capsules were in fact found in his car nearby. Upon these facts Brezack was charged with unlawfully assaulting a police officer engaged in the lawful execution of his duty, and was convicted. The conviction was upheld, the Court of Appeal noting that the rather zealous search was justifiable as an incident of the arrest, which involved the duty of making reasonable efforts to obtain possession of any narcotics believed to be in the possession of the person arrested. In finding that the act of the appellant

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[16] Inbau, Self Incrimination (1950).

[17] Inbau, *op. cit.*, at p. 70, citing as the settling authority *People* v. *One 1941 Mercury* (1946), 74 Calif. App. (2d) 199. The court held it mattered not whether the evidence is legally or illegally obtained; it is still admissible on a criminal charge. It further held that the privilege against self-incrimination protects the individual against only such oral or written disclosures as he may be forced to make, that: "The privilege . . . does not preclude the introduction of physical disclosures the defendant is forced to make, or the results of tests to which he has involuntarily submitted". This would also be a fair statement of the *McNamara* ratio.

[18] (1950), 96 C.C.C. 97; 2 D.L.R. 265.

in biting the constable's fingers constituted an assault, Robertson C.J.O. said:[19]

> It is important to observe that the search that was made is justifiable as an incident of the arrest. The constable who makes an arrest has important duties, such as to see that the prisoner does not escape by reason of being armed, and to see if any evidence of the offence for which he was arrested is to be found upon him. A constable may not always find his suspicions to be justified by the result of the search. It is sufficient if the circumstances are such as to justify the search as a reasonable precaution. . . . While, therefore, it is important that constables should be instructed that there are limits upon their right of search, including search of the person, they are not to be encumbered by technicalities in handling the situations with which they often have to deal in narcotic cases, which permit them little time for deliberation and require the stern exercise of such rights of search as they possess.

The acts of the sheriff's officers in the *Rochin* case are similar in spirit if not in fact. The observations of the Supreme Court of the United States upon these acts are so startlingly unlike those of the Ontario Court of Appeal that the casual reader of both cases might justifiably conclude that they arise from legal systems at opposite ends of the jurisprudential pole. The following paragraphs from the judgment of Frankfurter J. contain in essence the reasons of the Supreme Court for denying the admissibility of the evidence extracted from the accused's stomach:

> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. It is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.[20]
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> To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State Criminal Trials is unconstitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction brutal conduct would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.[21]

American commentators have stressed the constitutional

[19] [1950] 2 D.L.R. 265, at p. 269.
[20] *Rochin* v. *California* (1952), 72 S. Ct. 205, at p. 209.
[21] *Ibid.*, at p. 210.

significance of the *Rochin* decision in its jurisdictional extension of the Fourteenth, or Due Process, Amendment[22] to the criminal procedure of the various states.[23] It is, however, highly significant that Justices Black and Douglas, dissenting vigorously from the majority use of the Fourteenth Amendment, achieve the same conclusion as the majority by simple application of the Fifth Amendment.[24] It could be argued that our lack of these constitutional guarantees need not bar the application of the *Rochin* ratio to Canadian development in this evidentiary field, for it might be said that the Fifth Amendment only crystallizes the common law privilege against self crimination, and that the Due Process Amendment may be pertinently translated to Canadian usage in some such form as, "nor shall there be any conviction of a criminal offence except by rigid adherence to the Criminal Code and the laws therein provided . . .".

A Canadian lawyer may be thought to skate upon the thin ice of presumption when he comments upon a decision of the highest court of the United States. With respect, however, it can be submitted that the Supreme Court has used the vague contours of the due process clause to give expression to an exclusionary principle based only upon a sentimental conception of the function of the court, namely, that the court, as the fount of justice, must not entertain before it evidence, no matter how obviously reliable, obtained by breach of law or in a manner offensive to the community's "sense of justice".

It is clear that in *Rex* v. *Frechette* Roy J. enunciated the same principle; though drawing the classic distinction between the exclusionary rules barring coerced confessions and the rules of evidence governing self crimination, he concluded:[25]

> . . . under no pretext whatever can the accused be forced to furnish evidence of his guilt. . . . It can be said that the person of the accused is inviolable and that the right that each individual reserved as to his person cannot be taken away. This is a forbidden domain. . . .

McBride J., in *Rex* v. *Ford*, excluding the evidence of blood analysis, struck almost the same note as Frankfurter J. when he observed:[26]

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[22] "Nor shall any state deprive any person of life, liberty, or property, without due process of law . . .".

[23] See John M. Drescher Jr. in (1952) Washington University Law Quarterly 471, and 22 Tenn. L. Rev. 568.

[24] "No person . . . shall be compelled in any criminal case to be a witness against himself . . .".

[25] (1949), 93 C.C.C. 111, at p. 113.

[26] [1948] 1 D.L.R. 787, at p. 793. Frankfurter J. concluded similarly, if more elegantly, in the *Rochin* case, 72 S. Ct. 205, at p. 210, when he said, "It would be a stultification of the responsibility . . . cast upon this Court to hold

> There is one further distinction which I perhaps ought to add. I can see no practical distinction or difference in principle in an accused person furnishing criminating evidence against himself by word of mouth or by using his hand to write or sign a confession, and furnishing such criminating evidence by authorizing and assisting in a blood sample being taken.

It will be interesting to note what stature the doctrine enunciated in the *Rochin* case will attain. Its critics will undoubtedly be vigorous. In commenting upon a state decision to similar effect Dean Wigmore has said:[27]

> All this is misguided sentimentality . . . this view appears indifferent to the direct and immediate result, *viz.*, of making Justice inefficient, and of coddling the law-evading classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer.

Canadian courts could accept *Rochin* v. *California* only by upsetting *Rex* v. *McIntyre* and by denying the historical principles of evidence upon which it is based. Such a singular amendment to our laws of evidence properly lies within legislative function.

SYDNEY PAIKIN*

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DIVORCE — STANDARD OF PROOF OF ADULTERY — PROOF BEYOND A REASONABLE DOUBT — PREPONDERANCE OF EVIDENCE — BASTARDIZATION OF CHILD.— In a recent decision — *Smith* v. *Smith and Smedman*[1] — the Supreme Court of Canada held, so far at least as British Columbia is concerned, that the standard of proof required to prove adultery in a divorce action, where the legitimacy of offspring is not in question, is the civil standard of proof by preponderance of evidence rather than the criminal standard of proof beyond a reasonable doubt.

The problem of the standard of proof of adultery has been before Canadian and English courts on numerous occasions. Two distinct and separate lines of cases have developed, one holding that the criminal degree of proof is necessary and the other that the degree required in civil cases will suffice. In view of the two excellent comments by W. L. Stirling in this Review,[2] it would be

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that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach".

[27] Wigmore, Law of Evidence (3rd ed., 1940), vol. III, p. 36, commenting on *Youman* v. *Commonwealth*, 189 Ky. 152.

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[1] [1952] 3 D.L.R. 449.

[2] (1950), 28 Can. Bar Rev. 1009, and (1951), 29 Can. Bar Rev. 891.

redundant to discuss the earlier cases, which were so ably dealt with by him. I accordingly propose to deal particularly with those judgments published subsequent to the date of Mr. Stirling's last comment and to mention only briefly one or two of the more important of his cases.

The situation, as set out in Mr. Stirling's comments, before the decision in *Smith* v. *Smith and Smedman*, may, I think, be fairly summarized as follows:

(1) there are two different views on the question of the standard of proof required to prove adultery in a divorce action (a) the criminal standard of proof beyond a reasonable doubt, (b) the civil standard of proof by a preponderance of evidence, although that evidence should be of a more preponderating and stronger character than is required in less serious issues; (2) ecclesiastical authorities can no longer be relied on in settling the controversy because the Divorce and Matrimonial Causes Act of 1857[3] created a jurisdiction the ecclesiastical courts did not possess; (3) criminal and civil jurisdictions are distinct and, therefore, the precedents of one cannot be used in the other; (4) the word "satisfied" used in the Divorce and Matrimonial Causes Act[4] is not necessarily applicable to either degree of proof, nor does it connote the degree of proof necessary; (5) public policy may not be used as a basis to justify whatever rule is decided upon; (6) the requirement of the criminal standard is an example of judge-made law that has proceeded in a backward direction and should therefore be corrected by the highest court.

The most important case to appear in the last year or so that the proponents of "the strict proof theory" would have cited as being in support of their views is *Preston-Jones* v. *Preston-Jones*,[5] a judgment of the House of Lords. Mr. Stirling in his later comment deals extensively with this case, and this writer is in full accord with what he says. It should be pointed out, however, that a finding of adultery in the *Preston-Jones* case would have resulted in the bastardization of a child. Their Lordships said that from time immemorial the fact of illegitimacy has required the strictest proof, and there is no doubt that this consideration was very much in their minds when they decided the case. In addition, Lord MacDermott stated:

> I should perhaps add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from criminal law. I do not think it is possible to say, at any rate since the decision of the

[3] 20 & 21 Vict., c. 85.
[4] *Ibid.*, s. 31.
[5] [1951] 1 All E.R. 124.

> House of Lords in *Mordaunt* v. *Moncrieffe*,[6] that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard — proof beyond reasonable doubt — lies not in any analogy but in the gravity and public importance of the issue with which each is concerned.[7]

It is submitted that Lord MacDermott thereby cut the ground from under the proponents of "the strict proof theory", who have relied on the supposed quasi-criminal nature of adultery and the analogy between divorce actions and criminal proceedings. But he based the rule of strict proof on public policy and public policy is a ground that has been held to be "unsafe and treacherous". It is suggested that to prolong a marriage that has passed beyond all hope of reconciliation by requiring that adultery be proved beyond a reasonable doubt is more injurious to the public than it would be to end the marriage. Public policy should not enter into the matter at all. To quote Egbert J. in *May* v. *May*:[8]

> With deference, it seems to me that no great harm can be done to the public by granting that relief which is created and sanctioned by statute and by exercising a jurisdiction which has, in fact, been freely exercised for years.

As to the view that the civil rule of proof by a preponderance of evidence should be applied, there are four important recent cases, which, apart from *Smith* v. *Smith and Smedman*, to the writer's mind settle the controversy. The cases of *Davis* v. *Davis*[9] and *Bater* v. *Bater*,[10] judgments of the Court of Appeal in England, and *de Falco* v. *de Falco*,[11] a judgment of the Ontario Court of Appeal, have been mentioned by Mr. Stirling. In *Bater* v. *Bater*, Denning L.J., who was also one of the sitting judges in *Davis* v. *Davis*, said:

> It [a civil court] does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.[12]

Davis v. *Davis* and *Bater* v. *Bater* were quoted with approval by the Court of King's Bench of Saskatchewan in *Cheveldayoff* v. *Cheveldayoff*.[13] This decision is most interesting because the same court one year earlier, in *Scheidl* v. *Scheidl and Upton*,[14] had followed *Ginesi* v. *Ginesi*[15] and decided the other way.

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[6] (1874), L.R. 2 Sc. & Div. 374.
[7] [1951] 1 All E. R. 124, at p. 138.
[8] [1951-52] 4 W.W.R. (N.S.) 577.
[9] [1950] 1 All E.R. 40. See also (1950), 66 L. Q. Rev. 435.
[10] [1950] 2 All E. R. 458.
[11] [1951] 4 D.L.R. 128.
[12] [1950] 2 All E.R. 458, at p. 459.
[13] [1951] 1 W.W.R. (N.S.) 288.
[14] [1949] 4 D.L.R. 630.
[15] [1948] 1 All E.R. 373.

The last of the four cases is *May* v. *May*,[16] a judgment of the Supreme Court of Alberta. In that case, Egbert J. held that the standard of proof required is the civil standard of preponderance of evidence, which, however, should be stronger and more preponderating than in cases involving less serious issues — the same view as was stated in the separate judgment of Cartwright J. in *Smith* v. *Smith and Smedman*. In coming to this conclusion, Egbert J. relied heavily on a judgment of the Alberta Appellate Division in 1921, *Lebouef* v. *Lebouef*,[17] which has never been overruled. Here Hyndman J. A. stated:

> The rule as to preponderance of evidence in civil cases, of course, applies to actions for divorce, but I agree with the learned trial judge that this rule should not be weakened, but owing to the nature of such cases and the consequences resulting, if anything, should be stronger and more preponderating.[18]

Perhaps the recent case of *Kerr* v. *Kerr*,[19] a decision of the Court of Appeal of Manitoba, should also be noted. In this case, the court held that the civil standard of proof applies and agreed, in essence, with Mr. Stirling's attitude to the *Preston-Jones* case. The *Kerr* case dealt, however, with the standard of proof required to annul a marriage on the ground of insanity, rather than the standard of proof of adultery.

It has been suggested in several cases, for example, *Preston-Jones*, that the criminal standard of proof is required by certain sections of the Divorce and Matrimonial Causes Act. McBride J., in *Mogen* v. *Mogen*,[20] felt that any requirement other than the civil standard would be inconsistent with section 29 of that Act and an instance of judge-made law. Judge-made law is of course an essential part of our legal system, without which it would be impossible to keep pace with changing times. But when a judge errs in making law, and imposes upon an out-dated set of legal doctrines additional barriers to the exercise of statutory jurisdiction, it is incumbent upon other courts, unless bound by higher authority, to assert what they conceive to be the correct view. Egbert J. in *May* v. *May* was most emphatic in asserting this. It is submitted, with respect, that the courts that favoured the criminal standard of proof did not correctly exercise their limited prerogative of making law and imposed upon our most archaic divorce laws a burden that is almost intolerable. To prevent a spouse

[16] [1951-52] 4 W.W.R. (N.S.) 577.
[17] [1921] 1 W.W.R. 423.
[18] *Ibid.*, at p. 427.
[19] [1952] 5 W.W.R. (N.S.) 385.
[20] [1948] 2 W.W.R. 1151.

from obtaining a divorce simply because adultery cannot be proved beyond a reasonable doubt is inequitable and pointless. "There is no sound historical, legal, or logical foundation for such a view", said Egbert J.[21]

It is submitted that the Supreme Court of Canada in *Smith* v. *Smith and Smedman* has laid down a basic rule that should be followed by all Canadian courts. In it Locke J. said:

> The question we are to determine in the present matter is restricted to the standard of proof required in divorce proceedings in British Columbia, where the issue is as to whether adultery has been committed. No question affecting the legitimacy of offspring arises. The nature of the proof required is, in my opinion, the same as it is in other civil actions. If the Court is not 'satisfied' in any civil action of the plaintiff's right to recover, the action should fail.[22]

Cartwright J. added, after agreeing with Locke J.:

> I wish, however, to emphasize that in every civil action, before the tribunal can safely find the affirmative of an issue of fact required to be proved, it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.[23]

Locke J.'s perfectly proper, though cautious, limitation of the question for decision to British Columbia ought not to mean that the application of the *Smith* decision is in fact limited to British Columbia, because the divorce laws in other Canadian provinces, such as Alberta and Ontario, are very similar to the law in British Columbia. Cartwright J. said that in his opinion there is no difference between the laws of British Columbia and Ontario.

The writer is puzzled by only one thing in the decision in the *Smith* case, the pointed statement of Locke J. that the illegitimacy of offspring was not in question. This fact, it is submitted, should make no difference whatever to the basic question whether the civil or criminal standard prevails. Perhaps he was influenced by the decision in the *Preston-Jones* case where, as was stated earlier, the bastardization of a child was, in fact, at stake.

If the question comes before the Supreme Court of Canada again, it is hoped that the court will explain that the question of illegitimacy is merely one of those matters affecting the seriousness of the issue, or the gravity of the consequences flowing from a particular finding, referred to by Cartwright J., and that the standard of proof required is nevertheless the civil standard of

[21] [1951-52] 4 W.W.R. (N.S.) 577, at p. 581.
[22] [1952] 3 D.L.R. 449, at p. 462.
[23] *Ibid.*, at p. 463.

proof by preponderance of evidence, which, however, when such issues are involved, should be of a more preponderating character than is required for less serious issues. With this clarification, the courts of all the provinces would have an explicit rule to follow, a rule based on sound and logical foundations.

W. G. N. EGBERT*

The Nature of the Judicial Power

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers'. And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches, and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security. (Hamilton: The Federalist: No. LXXVIII)

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