Case and Comment

MARITIME LAW—LIMITATION OF LIABILITY AGAINST AND BY THE CROWN—CROWN LIABILITY ACT—CANADA SHIPPING ACT—RESOLUTION OF CANADIAN BAR ASSOCIATION.—In maritime law, limitation of the shipowner's liability is of considerable practical interest and importance. The Crown Liability Act passed by the Canadian Parliament in 1953[1] purports to give the Crown the right to seek limitation of its liability and it has recently been decided by the Supreme Court of Canada in *The Queen* v. *Nisbet Shipping Company Limited*[2] that it had that right even before the new legislation. But what is the position of the private shipowner against the Crown? Can he limit his liability to the Crown? It is the purpose of this comment, after some discussion of the Crown Liability Act and the *Nisbet Shipping* case, to draw attention to the fact that he cannot under the existing law, a situation, it is submitted, that is out of keeping with the new legislation and ought to be corrected.

The purpose of the Crown Liability Act, it was explained,[3] was

> to place the Crown in substantially the same position as a private person as regards liability for
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> (a) torts committed by servants,
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> (b) torts arising out of breach of duty attaching to the ownership, occupation, possession or control of property,
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> (c) damages caused by a motor vehicle upon a highway, and
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> (d) civil salvage,
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> and to permit certain actions [up to $1,000] to be taken against the Crown in the provincial courts.

In a valuable statement to the House of Commons in moving the second reading of the bill, the Minister of Justice pointed with some pride to the "enlightened attitude of Canada", where as

[1] 1-2 Eliz. II, c. 30.

[2] [1953] 1 S.C.R. 480. Application for leave to appeal to the Privy Council is pending.

[3] Explanatory notes to Bill 105, an Act respecting the Liability of the Crown for Torts and Civil Salvage. These main purposes are effectuated by subsections 1, 2 and 3 of section 3 and by part II, sections 8 and following.

early as 1887, sixty years before the United Kingdom passed its Crown Proceedings Act, jurisdiction was given to the Exchequer Court to hear and determine actions against the "federal crown" based on the negligence of its officers or servants.[4] The Minister said that the effect of section 3(1)(a) of the new act would be to make the Crown liable for the following torts of its servants, in addition to negligence: nuisance, trespass, assault, false imprisonment and false arrest, malicious prosecution, libel and slander, deceit, interference with contract rights, trover and conversion, slander of title and infringement of patent.[5] The terms of section 3(1)(a), as well as of others extending the liability of the Crown in respect of property, section 3(1)(b), and for salvage services, section 3(3), were taken with some modifications from the Crown Proceedings Act enacted in the United Kingdom in 1947.[6]

Subsections 4 and 5 of section 3 of the Crown Liability Act, also taken from the English statute,[7] deal with important matters of maritime law that were not mentioned by the Minister in his statement. As re-enacted by section 25(3)(b) of the Crown Liability Act upon the coming into force of the Revised Statutes of Canada on September 15th, 1953, they read as follows:

> (4) Sections 655 and 657 to 663 of the *Canada Shipping Act* apply for the purpose of limiting the liability of the Crown in respect of Crown ships; and where, for the purposes of any proceedings under this Act, it is necessary to ascertain the tonnage of a ship that has no register tonnage within the meaning of the *Canada Shipping Act*, the tonnage of the ship shall be ascertained in accordance with section 94 of that Act.
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> (5) Section 546 of the *Canada Shipping Act* applies in respect of salvage services rendered to Crown ships or aircraft as it applies in respect

[4] House of Commons Debates, January 29th, 1953, vol. 95, pp. 1470 ff. Under the earlier legislation, the liability of the Crown arose only when the negligence occurred on a "public work". This restriction was removed in 1938. See D. Park Jamieson, Proceedings by and against the Crown in Canada (1948), 26 Can. Bar Rev. 373, and s. 18(1)(c) of the Exchequer Court Act, R.S.C., 1952, c. 98, now repealed by s. 25(3)(a) of the Crown Liability Act.

[5] H. of C. Debates, *loc cit.*, pp. 1471-2. The Minister's entire statement was couched in the language of the common law and the statute seems to have been drafted without regard, if not for the civil law of delicts and quasi-delicts, at least for its terminology. The key phrase of section 3(1), "liable in tort", is translated in the French version of the statute as "responsable *in tort*", words altogether foreign to the civil law.

[6] H. of C. Debates, *loc cit.*, p. 1472; 10 & 11 Geo. VI (U.K.), c. 44, s. 2(1)(a) and (c) and s. 8(1). See an article on the English statute by the then Treasury Solicitor, Sir Thomas Barnes (1948), 26 Can. Bar Rev. 387. There is, however, the noteworthy omission in the Canadian section 3(1)(b) of the words, "at common law", which appear in the English section 2(1)(c): "duties attaching at common law to the ownership, occupation, possession or control of property".

[7] Ss. 5(1)(5), 6 and 30.

of salvage services rendered to other ships or aircraft, and sections 648 to 650 of that Act apply in respect of Crown ships as they apply in the case of other ships.

Section 655 of the Canada Shipping Act,[8] referred to in subsection 4, imposes a two-year prescription or limitation period in collision cases and section 546, referred to in subsection 5, imposes a similar limitation period of two years in salvage cases. Although section 655 is grouped with sections 657 to 663, to be discussed in a moment, the intent is that by the combined effect of section 3(4) and (5) of the Crown Liability Act and sections 655 and 546 of the Canada Shipping Act actions against the Crown in maritime collision and salvage cases must be instituted within two years. Incidentally, this same result is achieved by section 30(1) of the English statute. Sections 648 to 650 of the Canada Shipping Act reproduce the provisions of the Maritime Conventions Act[9] on apportionment of damage or loss caused by vessels in accordance with the degree of fault, which in turn had given effect to the international convention of 1910 on liability for collisions. By applying sections 648 to 650 to Crown ships as it did, Parliament undoubtedly has removed the effect of section 721 of the Canada Shipping Act with regard to apportionment of liability,[10] but there is a question whether the words used are sufficient to satisfy section 16 of the Interpretation Act, to be referred to later.

The explanatory note accompanying section 3(4) in the printed bill suggests to me that no very expert attention was paid to these maritime clauses when they were included in the Crown Liability Act. The note reads:

> Section 647 [now section 655] of the *Canada Shipping Act* imposes a two-year limitation in collision cases, and sections 649 to 655 [now 657 to 663] *limit the amount of salvage claims.*[11]

There is of course no statutory limitation of the *amount* of salvage claims. The note is correct as to section 655, but sections 657 to 663 deal with the subject of the limitation of the amount of a shipowner's liability. Section 655 has no place in subsection 4 along with sections 657 to 663, because it has nothing to do with limitation of liability as understood in maritime law. Section 655 should have been referred to in a separate subsection either by itself or along with section 546, which is another section dealing with the limitation of time for taking proceedings.

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[8] R.S.C., 1952, c. 29. [9] Formerly R.S.C., 1927, c. 126.
[10] See [1946] S.C.R. 466, at p. 468, adopted by Thorson P. in *The Queen* v. *Nisbet Shipping Company Ltd.*, [1951] Ex. C.R. 226, at p. 245.
[11] Italics added.

The new Crown Liability Act specifically and, as will now be seen, superfluously gives the Crown the right to limit its liability if it meets the statutory condition prescribed in section 657 of the Canada Shipping Act, namely, if the occurrence causing loss or damage took place "without [its] actual fault or privity". This limitation is based on the tonnage of the vessel involved: liability is limited to $38.92 or $72.97 for each ton, depending on whether or not there is loss of life or personal injury. What the recent decision of the Supreme Court of Canada[12] holds is that, under the law as it existed before the Crown Liability Act, the Crown was entitled to limit its liability under the Canada Shipping Act, if it were able to show that the damage or loss occurred without its actual fault or privity.

In February 1945 a merchant vessel, the S.S. Blairnevis, became a total loss following a collision in the Irish Sea with the frigate H.M.C.S. Orkney. The Crown ship was found solely liable for the damage and one of the questions for decision was whether the Crown in the right of Canada could ask to limit its liability under the Canada Shipping Act, 1934. Whether the Crown had brought itself within section 649 (now section 657), by showing that the loss occurred without its actual fault or privity, was not in issue and presumably the Crown still has to institute proceedings for the purpose of obtaining a declaration that it has established its right to the statutory relief of limitation of its liability.

In the Exchequer Court Thorson P. held that the Crown cannot claim limitation of liability under the Canada Shipping Act, basing himself on section 712 (section 721 of the 1952 revision), which reads:

> This Act shall not, except where specially provided, apply to ships belonging to Her Majesty.[13]

He did not accept the argument advanced by counsel for the Crown that section 712 was inapplicable when the section of the act invoked by His Majesty deals with the liability of shipowners and not with ships as such. Support for his view that the restriction suggested should not be placed on the application of section 712 he thought he had found in a statement of Kerwin J., in *The King*

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[12] [1953] 1 S.C.R. 480.

[13] " 'Ships belonging to Her Majesty' means all ships of war and other unregistered vessels held by or on behalf of Her Majesty in right of any part of Her Majesty's dominions", see s. 2(100) of the Canada Shipping Act, R.S.C., 1952, c. 29. "Crown ship" as defined in the Crown Liability Act means any ship belonging to the Crown, that is, "Her Majesty in right of Canada".

v. *Saint John Tugboat Company*,[14] that section 640 (now section 648), which provides for apportionment of liability in collision cases caused "by the fault of two or more vessels", did not apply to His Majesty because of section 712.

By a majority of six to one (Locke J. dissenting) the Supreme Court reversed the Exchequer Court on this aspect of the case and held that sections 649 and following of the Canada Shipping Act, 1934 (sections 657 and following of the 1952 revision) were available to the Crown for the purpose of a claim to limitation of liability. The decision means that to that extent section 3(4) of the Crown Liability Act is *nihil ad rem*.

Kerwin J. (Estey J. concurring) expressly approved the distinction urged by the Crown in respect of his statement in the *Saint John Tugboat* case:

> As the owner of the *Orkney*, the Crown would ordinarily be entitled to take advantage of this provision [section 649, now section 657] but it is said that s. 712 of the *Act* prevents this result.
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> In my opinion, this section has no reference to a claim for limitation of liability under s. 649, which can only be put forward by an owner. The President considered that in *The King* v. *Saint John Tugboat Co. Ltd.*, I had expressed a larger view of the operation of s. 712 but, there, I was considering s. 640 of the *Act* which deals with the fault of two or more vessels causing damage or loss to one or more of them, their cargoes or freight, or any property on board.

Though the reasons for judgment do not make the position any too clear, it would seem that in the opinion of four of the seven judges who heard the appeal, Kerwin J. (writing also for Estey J.) and Rand J. (writing also for Rinfret C.J.), the Crown could take advantage of the statute on the principle that it is entitled to the benefit of any statute though not named.[15] Without any reference to section 712, Rand J. said:

> It is a recognized rule that the Sovereign 'may avail himself of the provisions of any Act of Parliament': Chitty's Prerogatives, p. 382. Where liability, then, on the same footing as that of a subject, is established, giving a right to damages, I can think of no more appropriate enactment to which that basic rule of the prerogative could be applied than to a statutory limitation of those damages.

From the opening words of the passage quoted from Kerwin J.—"As the owner of the *Orkney*, the Crown would *ordinarily* be entitled to take advantage of this provision. . ." (second italics added)—it would seem a fair conclusion that he and Estey J. adopted the same basic position as Rand J. and the Chief Justice.

[14] [1946] S.C.R. 466, at p. 468.
[15] Halsbury (2nd ed.), Vol. 31, p. 521, no. 681.

The words incorporated by Rand J. in the passage just cited are from *A Treatise on the Law of the Prerogatives of the Crown and the relative duties and rights of the subject*, by Joseph Chitty, published in 1820. The full sentence reads:

> The general rule clearly is, that though the King may avail himself of the provisions of any Acts of Parliament, he is not bound by such as do not particularly and expressly mention him.

In support of the branch of this statement used by Rand J. Chitty refers to two old English decisions: the *Magdalen College* case, decided in 1615 and reported in 11 Coke's Reports 66, and *Buckberds* case decided in 1594 and reported in 1 Leonard 150.[16]

Kellock J., with Cartwright J. concurring, discussed this question of the Crown's right to avail itself of the limitation of liability provisions of the Canada Shipping Act at greater length than either Kerwin J. or Rand J. The negligence of a servant of the Crown having been established, and thus under the then section 19(1)(c) of the Exchequer Court Act the Crown's liability, it was the settled jurisprudence of the Supreme Court that that liability should be determined by the law "applicable as between subject and subject"[17] and, here is the development by Kellock J., the *extent* of that liability must be determined in the same way. Having placed the matter on this ground, Kellock J. said that section 712 became

[16] The comment made by Scrutton L.J. in *Cayzer, Irvine and Company Limited* v. *Board of Trade*, [1927] 1 K.B. 269, at p. 294, and referred to by Locke J. in his dissent at p. 502, is worth noting here: "The only remaining question, which is one of great historical interest and importance, is whether the Crown can successfully say: 'We are not bound by the statute but we are at liberty to take advantage of it.' At first sight such a statement appears somewhat strange. There is undoubtedly a long series of statements in text-books repeating each other for some centuries; but there is something to be said for the view argued by Sir John Simon that they start with a passage in an unsuccessful argument of a law officer which was not even relevant to the case before the Court, but which has been taken out by a text-writer and repeated for centuries until it was believed that it must have some foundation. Again, I have not heard the Solicitor-General on this point and therefore, I am not going to say more than this, that it will need careful consideration when that question arises in a case in which it has to be decided, whether there is any foundation for this confidently repeated statement of text-writers except the passage in the *Magdalen College* Case (11 Rep. 66b) and possibly a passage in 7 Rep. 32a, which is not the report of a case decided in the House of Lords, but the case of a private conference between the law officers and the Chief Justices of the Stuart Kings in a case in which the parties, the subjects affected by the decision which was given against them, were not present and were not heard. Which of the two is the more satisfactory foundation for the statement in the text-books I do not quite know, but the history of the story of the text-books will need to be carefully looked at when the question becomes material to be decided. It is not material in this case and therefore, I say nothing more than there is ample material for considering the question when it has to be decided."

[17] *Gauthier* v. *The King* (1918), 56 S.C.R. 176, at p. 190.

irrelevant. The reasoning here would be: the Exchequer Court Act has abolished Crown immunity from this damage action, the Crown is on the same footing as a private shipowner and the provisions of the Canada Shipping Act limiting liability in a proper case are available to the Crown as a shipowner, not because of any prerogative privilege, but under the law as determined by this court expounding the meaning and effect of section 19(1)(c) of the Exchequer Court Act.

Locke J. dissented specifically from this view as to the extent of the Crown's liability and, interpreting the Canadian decisions, held that the "extent" was not within their effective range and constituted a new question to be decided free of authority. He thought that section 712 prevented the application to His Majesty, as owner, of the provisions of the Canada Shipping Act permitting an owner to limit his liability. To interpret it otherwise would be to infringe section 15 of the Interpretation Act,[18] which provides that statutes are deemed to be remedial and are to be given the interpretation which will best ensure the attainment of their object. In his view the Canada Shipping Act is made "inapplicable to the Crown" by section 712, except where it is specially made applicable, and there is no special provision in the case of limitation of liability.

In the result we have a decision of the Supreme Court of Canada by a six to one majority that, even before the Crown Liability Act of 1953, the Crown could limit its liability, but no apparent agreement of a majority on the scope of section 712 (now section 721) of the Canada Shipping Act. Kerwin and Estey JJ. hold that section 712 does not preclude the Crown from limiting its liability, Locke J. (agreeing with Thorson P.) says that it does, Rand J. and Rinfret C.J. ignore section 712, and Kellock and Cartwright JJ., for reasons that command attention, say that section 712 is irrelevant.

Both by the decision in the *Nisbet Shipping* case and by section 3(4) of the Crown Liability Act, the liability of the Crown in Canada in a claim against it by a private shipowner may be limited, as it can be in the United Kingdom under section 5 of the Crown Proceedings Act. But what is the position of the private shipowner in Canada in a damage claim against him by the Crown? It seems that the Crown in Canada has consistently stood on its full legal rights and has refused to limit its claim to its proportionate share of the limitation fund. The decision of Demers D.J.A. in *Canada Steamship Lines Ltd.* v. *Emile Charland Ltd.* was that the Crown is

[18] R.S.C., 1927, c. 1; now R.S.C., 1952, c. 158, s. 15.

not bound by the limitation of liability provisions of the Canada Shipping Act.[19] Section 16 of the Interpretation Act, which is as follows, would seem to place the question beyond discussion:

> No provision or enactment in any Act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

No express provision in the Canada Shipping Act makes its limitation of liability provisions binding on Her Majesty and the Crown Liability Act is silent on the point. Indeed the required statutory provision perhaps should be made in the Canada Shipping Act rather than in the Crown Liability Act.

But in England the situation is different. There, in practice, the Crown does accept its pro rata share of the limitation fund in satisfaction of its claim, while in law the Crown's position is not clear beyond doubt. There is no statutory provision in England like section 16 of our Interpretation Act, although the common-law rule goes beyond what is stated in the passage from Chitty referred to by Rand J. in the *Nisbet Shipping* case and the Crown may be bound by a statute if by "necessary implication" it can be said to apply to the Crown.[20] The view is held in England that section 741 of the Merchant Shipping Act, 1894, as Kerwin J. interpreted the corresponding section 721 of the Canada Shipping Act in the *Nisbet Shipping* case, by making express reference to "ships belonging to Her Majesty", impliedly means that in other respects, *qua* shipowner or claimant against a shipowner, the statute applies to the Crown. Perhaps because of the practice in England, where the Crown does not insist upon its full claim when there is limitation of liability, few references to the question of limitation of liability to the Crown are to be found in the English textbooks. There is one in *Roscoe's Admiralty Practice*,[21] but the authorities cited in support hardly justify placing much reliance on it:

> The Crown is now usually willing to take the position of an ordinary claimant in a limitation action, though it is not bound by the Merchant Shipping Acts: '*The Zoe*' (1886) 11 P.D. 72; '*The Mineral*' (1919) 1 Ll.L.L. Rep. 289.

In *The Zoe* there was a motion by the Crown to be allowed to prove its claim pro rata after the time fixed by an order of the court for entering claims against a limitation fund. The value of the cargo belonging to the Crown substantially exceeded the amount

[19] [1933] Ex. C.R. 147.
[20] Halsbury (2nd ed.), Vol. 31, p. 521, no. 681.
[21] (5th ed.) p. 236, note (a).

of the fund calculated on the basis of the Zoe's tonnage, which had been held alone to blame for a collision with the Dannebrog, both vessels being lost. Counsel for the Crown is reported to have stated that, "Although in the opinion of the law officers of the Crown the Crown is not bound by the Acts regulating suits for limitation of liability, it proposes to exercise the same rights as other suitors, and claim against the fund in court". Counsel for the Dannebrog, representing other claimants against the fund and opposing the Crown's motion, argued that, since the Crown is not bound by the Merchant Shipping Acts relating to limitation of liability, conversely it cannot claim against the fund, for the acts affect only suitors who are bound by them. In support of this proposition they referred to the *Magdalen College* case[22] and *Ex parte Postmaster General, in re Bonham*.[23]

In other words, both counsel submitted that the Crown is not bound by the limitation of liability sections of the Merchant Shipping Acts. The experienced admiralty judge who sat in the case, Butt J., did not have to consider the point, but it is significant that he thought he should open his judgment with the words:

> I have some doubt whether the Crown is not bound to come in and claim pro rata with the other claimants against the fund in court. However, it is unnecessary to decide this point, because, assuming it not to be bound, it clearly may elect to come in and to claim rateably with other suitors, just as if this were a proceeding in bankruptcy. I hold that this may be done apart from the Admiralty Act, 1868, by which express power is in my opinion given to the Crown to come in and claim, like an ordinary suitor, against a fund paid into court in a suit for limitation of liability.

Later a claim against a limitation fund for loss of property belonging to the Crown was admitted on the authority of *The Zoe* in *The Winkfield*.[24]

The Mineral is a case of no greater assistance. Its owners claimed to limit their liability following a collision with the Myrtlegrove, which was loaded with cargo belonging to the Crown. Counsel for the Crown stated that, although the plaintiffs were not entitled to maintain an action against the Crown to limit their liability, the Treasury Solicitor had written in a covering letter when delivering the defence to the plaintiffs' solicitors:

> You are, I believe, aware that liability cannot be limited against the Crown under the Merchant Shipping Act, nor can the Crown be sued. As a matter of grace, however, the Crown usually accepts in satisfaction of its claim the proportion of the amount which the owners of the

[22] (1615), 11 Rep. 66b.
[23] (1879), 10 Ch. D. 595.
[24] [1902] P. 42.

> defaulting ship would have had to pay if they had been able to limit their liability under the statute, and that course will be adopted in this case.

Counsel for the Crown submitted therefore that, as a matter of form, there should be no order of limitation against the Crown as the cargo owner, although the claim for limitation was in order against the owners of the Myrtlegrove.

The following conversation then took place between the judge and counsel for the Mineral:

> Mr. Justice Hill: Do you accept that position, Mr. Cunliffe?
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> Mr. Cunliffe (for the 'Mineral'): Yes, my Lord; I cannot do anything else.
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> Mr. Bulloch (for the Crown) suggested that it was not necessary to be too technical about the form of the order, so long as it was made clear that the Crown's rights were preserved.
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> Mr. Justice Hill: I suppose this has happened before?
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> Mr. Bulloch said that two or three years ago there was a similar case.
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> Mr. Justice Hill said that there would be a decree of limitation, subject to this, that inasmuch as the cargo belonged to his Majesty, the rights of his Majesty must be preserved in the drawing up of the order.

Counsel for the claiming Mineral was of course getting what his clients wanted and it was unnecessary for him to contest the Crown's contention that it was not bound by the provisions on limitation of liability in the Merchant Shipping Acts.

In England, therefore, there is little legal authority on the question whether the Crown is or is not bound by a limitation order, but the practice has been for the Crown to accept in satisfaction of its claim a proportionate share of the limitation fund. In Canada, if only because of section 16 of the Interpretation Act, apart altogether from any possible support from section 721 of the Canada Shipping Act, there is no doubt that the Crown is not bound and in practice it does not accept a pro rata share.

In the provisions of the Crown Liability Act on admiralty matters we in Canada may have followed the Crown Proceedings Act of the United Kingdom without appreciating the differences in law and practice between the two countries. If the decision of the Supreme Court of Canada in *The Queen* v. *Nisbet Shipping Company Limited* is correct, then section 3(4) of the Crown Liability Act, in so far as it relates to limitation of liability, is superfluous. On the other hand, in the absence of anything in the United Kingdom corresponding to former section 19(1)(c) of our Exchequer Court Act, there was reason for the inclusion of section 5(1), corresponding to our section 3(4), in the Crown Proceedings Act.

The situations are reversed when we come to the private shipowner's right to limit his liability to the Crown. Probably in law, and certainly so long as the present practice of the Crown in England is followed, it would perhaps be unnecessary to enact an express provision limiting the private shipowner's liability to the Crown. On the other hand, in Canada section 16 of the Interpretation Act makes it clear that in law the Crown is not bound to limit its claim and the practice of the Crown is to accept no limitation. Here therefore an express provision in the Crown Liability Act, or perhaps more appropriately in the Canada Shipping Act, is necessary.

The purpose of the Crown Proceedings Act in England with regard to shipping matters was, in the words of Sir Thomas Barnes, to "place the Crown in the same position as a private shipowner with regard to liability for collisions at sea".[25] Though no such statement has been made of the shipping sections in the Canadian Crown Liability Act by anyone in authority, its general tendency is certainly to place the Crown on the same footing as a private person with respect to the matters dealt with in it. If that be so, there is no reason why the position of the Crown should differ depending on whether the claim to limitation is by or against it. In other words, if the Crown in right of Canada can claim limitation of liability in maritime matters, why should the private shipowner not equally be able to limit his liability to the Crown? The following resolution was adopted by the Canadian Bar Association on September 12th, 1953, at its annual meeting in Quebec:

> That the Canada Shipping Act be amended in order that Her Majesty shall be expressly bound by the provisions of sections 657 to 663 (limitation of liability), 546 and 655 (prescription), and 648 to 650 (apportionment of liability according to the degree of fault), of that Act.

LÉON LALANDE*

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ADMINISTRATIVE LAW—LABOUR RELATIONS BOARD—JURISDICTION — DISTINCTION BETWEEN ERROR IN REFUSING EVIDENCE AND REFUSAL OF JURISDICTION.— In the June-July number of the Review, Professor Whitmore commented on the case of *Toronto Newspaper*

[25] (1948), 26 Can. Bar Rev. 387, at p. 392.

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Guild v. *Globe Printing Co.*[1] before it was reported.[2] Now that the report is public, some further discussion may not come amiss, since the problems raised by the case have a great many facets. In this case the Supreme Court of Canada had to enter a field that provincial courts, especially in the West, had explored some thirty years ago with more zeal than discretion, though those provincial courts were dealing mostly with summary convictions, and the Supreme Court with a labour board's order.

A brief review of the *Globe* case is necessary. A union had applied to the Ontario Labour Board for certification as bargaining agent for a unit of employees. In order to qualify for certification the union had by statute to have a certain proportion of the employees in that unit as members; the board could not certify until it was "satisfied" that the union was so qualified. The board notified the employer of a hearing to consider the union's application; but in holding this the board seemed little inclined to make a hearing of it. It allowed the union to put in a sheaf of membership cards, which it would not let the employer's counsel see, and it refused to allow cross-examination on whether alleged members had resigned, ruling that this point was irrelevant. Later, in certifying the union, the board professed to base a finding that the union was qualified on the "documentary evidence" filed.

Gale J. quashed the certificate on certiorari, though the statute had a "no-certiorari" clause; and he was affirmed by the Court of Appeal, and by the Supreme Court of Canada, who divided five to two. Gale J. put his decision on grounds that the writer finds distinctly disturbing. Fortunately—or so it seems to the writer—the appellate courts pursued other lines of reasoning. Robertson C.J.O., who spoke for his court, did not differ markedly from the majority in the Supreme Court, but his reasoning seems a bit vague, over-simplifying difficulties that had to be explained away, if he was to find a convincing solution for a problem that was far from simple. The Supreme Court's reasons can be left till later.

All three courts found their reasons for quashing the board's certificate in questioning the board's jurisdiction, which they were bound to do in view of the no-certiorari clause in the statute.

Gale J. held that the board's order was bad for a "defect of jurisdiction"; and the phrase may well revive disturbing memories in those who have followed the history of certiorari practice in

[1] [1953] 2 S.C.R. 18.

[2] Administrative Law—Labour Relations—Certiorari—Wrongful Rejection of Evidence—Unfair Hearing and Absence of Jurisdiction—Privative Clauses (1953), 31 Can. Bar Rev. 679.

Canada. In this connection he relied on the case of *Rex* v. *Picariello*,[3] which most of us would have preferred to see remain buried in oblivion. In *Rex* v. *Picariello* a magistrate was held to have lost his jurisdiction by refusing the defendant an adjournment to obtain witnesses; and this decision is typical of many made around that time which show excessive judicial zeal to relieve hard cases. In their efforts to escape limitations on the certiorari to quash, judges tried to class nearly every error that an inferior tribunal could fall into as not mere error, but a "defect of jurisdiction". In this way they not only evaded statutory no-certiorari clauses, but also the principle that latent error could not be examined on certiorari. In brief, the line of reasoning followed in these cases was that any error produced a "defect of jurisdiction" when it could be classed as "disregard of the fundamentals of justice", "breach of natural justice", "violation of the essentials of justice", or the like. And the vagueness of these concepts made them able to include nearly anything that the conceiver wanted them to include.

The expression "defect of jurisdiction" comes from *Colonial Bank of Australasia* v. *Willan*,[4] a case where a judgment attacked on certiorari was upheld, but the Privy Council indulged in some loose dicta as to when certiorari could be used. The term "defect of jurisdiction" seems to have no intelligible meaning unless it denotes a partial want of jurisdiction, which only seems to be possible when a tribunal deals with a subject-matter severable in its parts. That is practically never the sense in which those who talk of "defects of jurisdiction" use the phrase.

Attempts to enlarge the class of errors that could be attacked on certiorari grew until they threatened to wipe out all distinction between the remedies by appeal and by certiorari. This situation was largely ended by the Privy Council's decision in the *Nat Bell* case,[5] a momentary revolt against which in Alberta proved short-lived. This was no small satisfaction to those who felt concerned with the rational development of the law: they had seen that zeal to remedy hard cases could be carried too far. Similarly, many who hoped that they had heard the last of "defects of jurisdiction" will feel relief at the appellate courts' disregard of that idea in the *Globe* case.

Gale J. relied on the decision in *General Medical Council* v. *Spackman*;[6] but the higher courts did not refer to it. Though this was a

[3] [1922] 2 W.W.R. 872; 18 Alta. 338.
[4] (1874), L.R. 5 P.C. 417.
[5] *Rex* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128.
[6] [1943] A.C. 627.

decision on the effect of a tribunal's refusing admissible evidence, and a decision of the House of Lords, the appellate courts seem to have had good reasons for their caution about relying on it; for it is very hard to say what the *Spackman* case decided, other than that the medical council erred in excluding certain evidence. This was a certiorari case; but neither the lower courts nor any of the law lords except Lord Wright adverted to that fact or discussed the scope of the remedy by certiorari. None of the reports indicate that there was any provision against the use of certiorari. Lord Wright ventured on the subject without any help from counsel, who throughout argued the case as if it were simply an appeal from the medical council. It may well be that the council purposely refrained from raising any technical points because they wished to get a comprehensive ruling on the kind of evidence that they ought to receive.

In the *Globe* case, Kerwin J. held that the board had exceeded its jurisdiction, Kellock and Fauteux JJ. that it had declined jurisdiction. However it seems clear on the facts that if the board did either, it did both, and that it would be the excess of jurisdiction that would make certiorari appropriate. If the board had merely declined jurisdiction, then there would have been no order to be quashed. But there was an order, and the employer's complaint was that the board, after declining to exercise the jurisdiction given to it, had then gone on and usurped powers not given to it.

Professor Whitmore's comment on the *Globe* case states:[7]

> The judgment of the Supreme Court is based on, and establishes, three propositions: (1) a failure to take into consideration material that is relevant to the question brought before the board for its decision results in an absence of jurisdiction; . . .

Presumably by "material" Professor Whitmore means "evidence". The writer cannot however agree that the passage quoted represents the view of any of the Supreme Court. The proposition Professor Whitmore states actually appears to express the effect of the old decisions that were discountenanced in the *Nat Bell* case. The Supreme Court in truth seemed to have been very careful not to say anything of the sort.

The Supreme Court instead can be said to have held: that a tribunal's refusal of proper evidence (which is ordinarily error) may in special circumstances go so far and change the scope of the hearing so much that it means the tribunal refuses to exercise its given jurisdiction; so that if, after excluding the evidence, it

[7] (1953), 31 Can. Bar Rev. 679, at p. 687.

still goes on to make an order, this will be made in the purported exercise of a jurisdiction not given.

This line of reasoning seems to avoid the sophistries pursued in the older decisions that tried to make nearly every serious procedural error go to jurisdiction. However in recalling those decisions, and the chaos that they threatened to produce, one may pardonably fall to wondering whether the *Globe* case does not set up a line of distinction between error and refusal of jurisdiction that is both hard to define precisely and hard to apply with certainty in practice. The Supreme Court itself was not too explicit on the dividing line.

Unless an intelligible dividing line can be found, the idea that error as to admitting evidence merges into loss of jurisdiction could very well lead to many abuses. Certainly no past discussions on the dividing line have been very illuminating. Yet it does not seem an impossible task to find a way of parting the sheep from the goats, even if practical application of the best test that can be evolved must always present some difficulty.

It cannot be too strongly emphasized that for a tribunal wrongly to exclude evidence is ordinarily nothing but error. There must be special circumstances to magnify that error into a matter of jurisdiction. But what circumstances are special? The answer to that involves analysis of just what "jurisdiction" and "error" are. On that subject there has been a great deal of vague thought. "Jurisdiction" has been said to mean at least a dozen quite diverse things; but the most rational authorities indicate that a tribunal's jurisdiction is a matter of its acting within its proper province, that is, its keeping within the *scope* of its given powers, and it errs when it makes mistakes within its proper province.

Every tribunal must rule upon receiving evidence relating to its proper subject-matters, and it does not leave its province by being wrong. But even after starting in its proper province, it can leave this; or equally it can act outside that province by simply failing to enter it. If it refuses to enter its proper field, but still professes to act as a tribunal and to make orders, then it offends in two directions, by refusing its duties and by grasping at powers it has not been given.

Refusal of proper evidence becomes more than error when the very refusal shows that the tribunal is not mistaken as to how it should do its proper duties, but mistaken as to what those duties are, so that it is refusing to enter on them. A tribunal's function is to hold hearings, and it goes beyond error when its refusal of

evidence shows that it misconceives the subject of a hearing, misconceives that which it is meant to investigate, not in mere details but in substance.

Although Cartwright J. dissented in the *Globe* case, he dissented only because he was ready to accept the board's explanations in court for excluding evidence on union membership, which explanations the majority rejected as contrary to the only affidavits filed. These affidavits showed the board as refusing to go into resignations from the union because they held that membership was not a matter that could be put in issue. They held in effect that their rôle was to take the say-so of the union; in other words membership was not a matter to be decided by them, but by the union.

Robertson C.J.O said in the Court of Appeal: "The Board made its certificate not knowing whether this was true or false". And this certificate contained a so-called "finding" of union membership. But the objection to the finding was not so much that it was made without knowledge of the facts as that it was made without any judicial inquiry into the subject. And the board held no inquiry because it could not see that its very function was to inquire into union membership. It seems to have thought that it was not acting as a tribunal at all, but in a merely ministerial capacity, recording in a mechanical way the effect of membership cards produced by the union, which had never even been verified by any oath.

The distinction between a tribunal's refusing to deal with its right subject-matter and its dealing with this, but wrongly, is a distinction not hard to grasp in the abstract. But it would be idle to pretend that it is altogether easy to apply in practice. The very admissibility of a particular question put to a witness is a subject-matter for decision; yet ordinarily the mistaken disallowance of a question is nothing but error. This is not hard to understand: we easily see the difference between a primary subject-matter and a minor one merely incidental to it, between a main issue and a dispute over a question put to a witness. But even when we have what would ordinarily be termed a primary subject, still it is often not entirely indivisible, but is made up of several more or less severable factors. Questions of damages, with their several elements, and questions of compensation for expropriated property, with multiple heads of loss, come to mind, together with conflicting decisions on when a tribunal does or does not decline or exceed jurisdiction when it sees one factor too few or one too many in making its assessments.

But in the *Globe* case these complications seem to have been eliminated by the board's having only one judicial function, namely, to satisfy itself that the union was qualified for certification. It seems to be generally considered in the profession that labour boards have a discretion about certifying even when satisfied on qualification, a discretion to be governed by policy and expediency. If so, they act administratively as to that, and judicially as to finding qualification, which is a pure question of fact. But if the Supreme Court's ruling in *Smith & Rhuland Limited* v. *Regina*,[8] that the Nova Scotia Labour Board was bound to certify any union that it found to be qualified as bargaining agent, equally applied to the Ontario board, still there would be only the one subject, qualification, to be decided judicially.

So when the board refused to investigate the one question that it was its function to investigate judicially, there was little room for the argument that it had not misconceived its jurisdiction and refused to exercise it, but had merely gone wrong in something incidental to it. It had rejected the whole substance.

D. M. GORDON*

* * *

CRIMINAL LAW — CRIME COMICS — SECTION 207 OF THE CRIMINAL CODE.—The case of *Regina* v. *Roher*[1] is important for two reasons: first, it is one of the few cases on the subject of so-called "crime comics" and the first to reach a provincial court of appeal; and, secondly, it gives an authoritative interpretation of the section of the Criminal Code dealing with the subject. The accused was charged that he "did unlawfully have in his possession for sale a crime comic contrary to the provisions of Section 207, subsection (1)(*b*) and (3) of the *Criminal Code*", and was convicted by the police magistrate at Winnipeg and sentenced to pay a fine of $5.00 and costs and, in default, to five days imprisonment. He appealed both conviction and sentence. The prosecution was brought as a test case under the section. As to the importance of the case, the Chief Justice of Manitoba, McPherson C.J.M., said: "The matter is one of considerable importance to the citizens of this country and for the purpose of informing the public of the views of the court in relation to such prosecution it is advisable to deal with the matter at length and in detail both as to the law and the facts".

[8] [1953] 2 S.C.R. 95.

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[1] (1953) 10 W.W.R. (N.S.) 309.

Section 207(1)(b) provides that "Every one is guilty of an indictable offence and liable to two years' imprisonment who . . . (*b*) makes, prints, publishes, distributes, sells or has in possession for any such purpose, any crime comic".[2] "Crime comic" is defined in subsection 3 as "any magazine, periodical or book which exclusively, or substantially comprises matter depicting pictorially the commission of crimes, real or fictitious", and the neat point for determination was whether the expression "the commission of crimes" in the definition includes not only the actual portrayal of the crime itself, but also of the events leading up to it, and presumably of subsequent events. In a similar case in Alberta, *Rex* v. *Alberta News Limited*,[3] Rose P.M. held that the word "commission" in the definition of "crime comics" was limited to the act of committing the crime or the performing or doing of it, and expressed the view that the evil intended to be corrected by the legislature is the publication pictorially of the crimes being perpetrated and not scenes showing the aftermath or investigation of crime. The Manitoba Court of Appeal in the instant case disagreed with this view. After reviewing the pictorial matter, which appears to have included all phases of crime, including events before and after the crime as well as the crime itself, the chief justice said: "I cannot arrive at any other conclusion than that the whole pictorial part of the exhibit depicts crime in its various phases, and I by no means eliminate those pictures which are explanatory of preparations made to commit the actual crime from being part of the crime itself".[4] He goes on to say almost immediately: "My interpretation of the section dealing with 'crime comics' is that the legislature wished to enact laws to protect the children of this country from the evil effects of being subjected to publications dealing with crime, and that the word 'commission' in the section is not restricted to the actual instantaneous act constituting the crime but includes the preparation for same and all factors which naturally arise in connection with such crime".

The decision virtually overrules the *Alberta News* case, although it does not expressly do so, since the publication in that case was not before the court and so, according to Beaubien J.A., "it is impossible to say to what extent the view of the learned police magistrate is justified".[5]

The court unanimously dismissed the appeal both as to con-

[2] Added to the Criminal Code by 13 Geo. VI, 1949, c. 13.
[3] (1951) 2 W.W.R. (N.S.) 691; 13 C.R. 18.
[4] (1953) 10 W.W.R. (N.S.) 309, at p. 312.
[5] *Ibid.*, p. 314.

viction and sentence. On the question of the propriety of imposing a fine in cases of this kind, the chief justice, after noting that this was a "test" case, made only the following pertinent observation: "my personal opinion is that, when crimes are committed on a commercial scale for the purpose of making profit, a fine is not the proper punishment, as that means only the equivalent of a tax, the severity of which depends upon the profit made by the offender on his whole business".[6]

E. PEPLER*

* * *

TRUSTS — CHARITABLE TRUSTS — "POOR RELATIONS" — EMPLOYEES AND DEPENDENTS OF COMPANY — VALIDITY. — How far can a testator, who wishes to keep the subject-matter of his benevolence within the intricate complexities of the law of charitable trusts, benefit the employees and dependents of employees of a company with which the testator and his family have had a life-long association? This was the neat question that came before the Ontario courts and the Supreme Court of Canada in *Baker* v. *National Trust Co. et al.*[1] The decision is certain to prove a leading case in the Canadian law on charitable trusts because of the important questions of principle involved.[2]

The case arose out of an identical clause in the wills of a testator and textatrix, whereby trustees were directed to hold residuary personal estate on trust. The actual terms of the trust, which proved to be of vital importance, read as follows:

> TO PAY the income thereof in perpetuity *for charitable purposes only;* the persons to benefit *directly* in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependents of such employees of said The Canada Life Assurance Company; subject to the foregoing restrictions, the application of such income, including the amounts to be expended and the persons to benefit therefrom shall be determined by the Board of Directors of the said The Canada Life Assurance Company, as they, the said Board of Directors, in their absolute discretion shall from time to time decide. The Trust Fund is to be known as 'The Cox Foundation' in memory of the family whose name has been long associated with the said Company.[3]

The validity of this bequest as a charitable gift was disputed by the next of kin and, because of the perpetuity rule, the trust could

[6] *Ibid.*, p. 313.

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[1] [1953] 1 S.C.R. 94, affirming [1951] O.R. 205 (*sub nom.*, *Re Cox*).

[2] An appeal to the Judicial Committee of the Privy Council is pending.

[3] Italics added.

be upheld only if the court found it to be charitable within the terms of the Statute of Elizabeth and the celebrated fourfold classification of Lord Macnaghten in *Pemsel*'s case.[4]

At first instance Wells J., in the High Court of Ontario,[5] held that the words created a valid charitable trust but that the application of the funds must be limited to the relief of poverty among the defined class. The Ontario Court of Appeal, in reversing this decision, was upheld by the Supreme Court of Canada by a majority of five to two, but, although the two superior courts came to the same conclusion, the several judgments reveal varying views on the validity in Canada of recent decisions of the English Court of Appeal concerning trusts for the relief of poverty.

Had the clause in question read "for charitable purposes only", without more, there is no doubt whatever that the gift would have been charitable. Well J. noted this and cited as authority dicta by Kelly J. in *In re Stewart*[6] and Sargant J. in *In re Eades*.[7] Unfortunately the donors were too specific in outlining the desiderata of their potential beneficiaries.

Both the trial judge and Roach J., who delivered the unanimous reserved judgment of the Court of Appeal, repeated the two cardinal tests which a charitable trust must satisfy: (i) the purpose of the trust must come within the spirit and intendment of the objects in the Statute of Elizabeth, as classified in *Pemsel*'s case; *and* (ii) the purpose must be for the public benefit, that is for the benefit of the community or of an appreciably important class (numerically) of the community.

It appears doubtful which of these two tests should be first applied. Lord Wrenbury in *Verge* v. *Somerville*[8] thought that the question of public benefit should be considered first, but Lord Simonds in *Williams Trustees* v. *I. R. C.*[9] observed that, *pace* Lord Wrenbury, the initial inquiry should be as to the satisfaction of the first test, since there is no need to apply the second test at all if the purpose of the gift is not charitable.

The point appears to be only academic, but it must be emphasized that *both* tests must be satisfied ultimately and that the satisfaction of the one is not ipso facto satisfaction of the other. Thus, although it has never been doubted that because a trust is for "public benefit" it is not necessarily within the spirit and intendment of

[4] [1891] A.C. 531, at p. 583.
[5] [1950] 2 D.L.R. 449 (*sub nom., Re Cox*).
[6] (1925), 28 O.W.R. 479, at p. 480.
[7] [1920] 2 Ch. 353.
[8] [1924] A.C. 496, at pp. 499-500. [9] [1947] A.C. 447, at p. 457.

the Statute of Elizabeth, the converse was never clearly enunciated by the courts. Recent cases, however, establish that, with the exception of trusts for the relief of poverty, each of the *Pemsel* categories requires the characteristic of public benefit.[10]

Thus in *In re Compton*[11] the English Court of Appeal held that trusts for the advancement of education are not charitable if they are directed to benefit certain persons defined by relationship to the donor or named families. In *Oppenheim* v. *Tobacco Trustees*[12] the House of Lords applied the same reasoning in invalidating a trust, also for the advancement of education, where the beneficiaries were defined by reference to employment in a particular commercial company. Trusts for the advancement of religion must likewise have the element of public benefit and the House of Lords was unable to find it in a gift to an order of cloistered Carmelite nuns who spend their time in prayer and meditation.[13] The last of the *Pemsel* categories requires public benefit by definition, namely: "trusts for other purposes beneficial to the community not falling under any of the preceding heads" and the cases of *In re Smith*[14] ("for my country England") and *Re Hobourn Aero Components*[15] (voluntary subscriptions of employees to company's Air Raid Distress Fund) are examples falling on either side of the line.

On the other hand, the English courts have been unable to apply this same rigid test of public benefit to trusts for the relief of poverty. In *In re Compton* (*supra*) the Court of Appeal observed that authorities from *Isaac* v. *De Friez*[16] to *Attorney-General* v. *Price*[17] establish that poor relations of the donor are valid charitable trusts. It was acknowledged that this line of cases created an anomaly which would not be extended to other categories of charities, for example, education. But if a man may relieve the poverty of a few necessitous relatives, may he not widen the scope of his bounty and define his beneficaries by reference to employment or past employment in a business enterprise? The English Court of Appeal has twice answered this question in the affirmative. In *Gibson* v. *South American Stores*[18] the trust was for necessitous dependents of past and present employees of the company, and this

[10] See S. G. Maurice, The Public Element in Charitable Trusts (1951), 15 The Conveyancer (N.S.) 328, and G. H. L. Fridman, Charities and Public Benefit (1953), 31 Can. Bar Rev. 537.
[11] [1945] 1 Ch. 123.
[12] [1951] A.C. 297.
[13] *Gilmour* v. *Coats*, [1949] A.C. 426.
[14] [1932] 1 Ch. 153 (C.A.).
[15] [1946] Ch. 194.
[16] (1754), 2 Amb. 595; 27 E.R. 387.
[17] (1810), 17 Ves. 371; 34 E.R. 143, 1189.
[18] [1950] 1 Ch. 177.

case was followed in *Re Coulthurst's Will Trusts*,[19] where the gift was to benefit widows and orphaned children of deceased officers and ex-officers of a bank.

In the instant case, Wells J. concluded that by the words "for charitable purposes only" the testator had intended to include all four of the *Pemsel* categories. However, since the class of potential beneficaries had been restricted by reference to a relationship with the Canada Life Assurance Company, the element of public benefit, necessary to charitable trusts for education, religion and general public purposes, was lacking. The only category of trusts remaining was that for the relief of poverty, where public benefit was not essential. He therefore held that the trustees might properly apply the trust moneys for that purpose. At the date of his judgment the *Coulthurst* case had not been decided, but the learned judge cited and followed the *Gibson* decision.

The Ontario Court of Appeal, in its unanimous judgment delivered by Roach J., disagreed with the learned judge in his finding that this particular trust could be upheld as a trust for the relief of poverty. They did so on two distinct grounds.

The first ground was on the narrow point of construction. The testator had not expressly stipulated the relief of poverty and the court could not imply a limitation for that purpose when the testator's words would equally have covered the other three categories. The court was thus able to distinguish the decisions of the English Court of Appeal, since in those cases the testator had expressly stipulated that the trust funds were to be applied to the relief of poverty among former employees and dependents of the company.

The second ground was more fundamental and may be stated thus: Trusts for the relief of poverty, like all other categories of charitable trusts, require the element of public benefit, but an exception exists in favour of a trust for the poor relations of a testator. This exception is anomalous but time-honoured in English and Canadian law. Canadian law, however, will not recognize any "extension" of this exception, for example, to validate a trust for the relief of poverty of poor employees of a company. Although English courts have refused to extend the exception from the requirement of public benefit to trusts for purposes outside the category for the relief of poverty, they have extended it to other trusts within that class. However the Canadian court would not recognize this "extension", and they did not follow Lord Morton of Henryton's deduction that such company cases "might possibly be described as the descendants of the 'poor relations' cases".[20]

[19] [1951] 1 All E.R. 774.

[20] [1951] A.C. 297, at p. 312.

With respect, it is submitted that it is unconscionably difficult to follow the reasoning of the Ontario Court of Appeal on this point. If the law of the horse and buggy could be adapted to the automobile age, why should a modern court find itself unable to recognize the changed structural organization of modern society? Is not the same human sentiment involved in relieving poverty by benefiting necessitous ex-employees of a firm as in donating money to one's poor relatives?

Moreover it is questionable whether the *Gibson* and *Coulthurst* decisions can properly be regarded as establishing a new exception. Are they not new in the instance rather than in principle? However the Ontario appellate court was categorical in this matter:[21]

> In this Province at least, and I should think also in England, the 'poor relations' cases as a class constitute a closed class and no other case not entirely identical with the 'poor relations' cases should be legally adopted into that class. . . . In my opinion this Court should hold that in this Province there is not such an exception to the general rule. The test as laid down in *In Re Compton* and applied in the *Oppenheim* case to an educational trust should also be the test to be applied in a trust for the relief of poverty.

A single hypothetical case will reveal the possible difficulty in this approach. "Steeltown" is a company town built and owned by a large business enterprise. Present or past employment in the company's undertaking is a necessary qualification for residence in the town.[22] Smith and Jones, two of the original founders of the company, both die testate. Smith leaves a large sum of money to the board of directors on trust to provide for needy and necessitous persons resident in Steeltown. Under existing authorities this gift would, it is presumed,[23] be charitable, since the residents of Steeltown form a section of the community and the gift is of public benefit. Jones makes a similar gift but his direction is that it should be used to relieve the poverty of employees and former employees of the company. According to the Ontario appellate court, this would not be charitable, though it would be in England.

On appeal to the Supreme Court of Canada, the appellants put forward a new argument based on the word "directly" in the

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[21] *Supra* at p. 224.

[22] It is believed that such "company towns" are increasing in number. Typical examples are Powell River in British Columbia, Canada, and Port Sunlight, near Liverpool, England. Although in the earlier stages of development residence is usually confined to employees of the company, they are often "opened up" ultimately to the general public.

[23] With some diffidence, since the courts might attach vital significance to the town's special relationship to the company.

clause under consideration.[24] This argument was that, notwithstanding that the trust in favour of direct benefits to employees might be invalid, the phrasing of the clause suggested that there was an "area of indirect benefit" which remained unaffected by the employee qualification; that the trustees could properly apply the trust funds to general charitable purposes, for example a hospital, which might benefit employees indirectly in their capacity as ordinary members of the public.

A more reasonable construction was adopted by Kellock J. (delivering judgment on behalf of himself, Taschereau and Fauteux JJ.). This was to the effect that the testator had in mind that, although a gift to a member of the specified class might confer indirect benefits on others, for example his relatives, the directors were only to have regard to persons who directly benefited in making their selection.[25] Their acceptance of the appellant's construction was one of the reasons for the dissenting judgments of Rand and Cartwright JJ.[26]

The judgment of Kellock J. offers no guidance on the validity of the *Gibson* and *Coulthurst* cases. Since the testator had used language which could only be construed as including heads of charity which could no longer be regarded as charitable when confined to company employees, the whole gift failed (at p. 105). Moreover, the language of the gift made it clear that no general charitable intention existed and so the *cy près* doctrine was inapplicable. On the other hand Kerwin J., like the Ontario appellate court, seems to have doubted the validity of the English "company poor relations" cases either in England or Ontario. The basis for this doubt is that dicta in *Re Compton*, to the effect that a trust for the benefit of the employees of a business is not charitable, were approved by Lord Greene and Lord Justice Morton (as he then was) in *Re Hobourn* and, since the *Compton* and *Hobourn* cases were approved by the House of Lords (in the *Oppenheim* case), "the matter would appear to be concluded" (at p. 100). In short the learned judge considered that two decisions of the English Court of Appeal have been overruled by dicta subsequently approved by the House of Lords.

Estey J. also regarded the *Gibson* and *Coulthurst* cases as being somewhat in doubt, but pointed out that in any event the fact that

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[24] *Viz:* ". . . the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company. . .".

[25] See also Estey J. to the same effect at p. 115.

[26] *Supra* at pp. 101 and 121.

they dealt with trusts specifically for the relief of poverty made them inapplicable to the instant case. Nevertheless he considered them to be a second exception to the public benefit rule and added, "even if this exception should ultimately become established in the law, it ought not to be so far extended as to include a trust for all charitable purposes such as that here under consideration" (p. 111). The implication, of course, is that such an "exception" is not yet established.

Finally, Cartwright J., while noting the doubt, did not find it necessary to comment further, since he too was satisfied that these cases were inapplicable to the case at bar where no specific gift for poverty existed. Rand J. did not comment on this point.

The remaining question was whether, having held the particular trusts to have failed, the court could still find in the language of the testator a general charitable intention whereby the *cy-près* doctrine could be invoked. Again Cartwright and Rand JJ. dissented from the majority, which, it is submitted, was correct on this point. It is difficult to see how a testator who has defined with such particularity the objects of his bounty could be held to have a general charitable intention once it had been decided that the specified class could not take.

To an English observer of the Canadian legal scene it seems strange that the Supreme Court of Canada should not adopt a more liberal approach to this vexing problem of deciding whether a charity is a legal charity. In England, practitioners, academic writers[27] and even members of the judiciary[28] have acknowledged the unsatisfactory state of the law relating to charities and one can only regret that in the instant case the Canadian courts, while striking out from English precedents with commendable independence, have done so in a manner which appears to out-Herod Herod.

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Of Law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world. All things in heaven and earth do her homage—the very least as feeling her care, and the greatest as not exempted from her power. (Richard Hooker (1553-1600), Ecclesiastical Polity, Book I)

[27] See G. W. Keeton, The Charity Muddle (1949), 2 Current Legal Problems at p. 86, and G. H. L. Fridman, *loc. cit.*, *supra*.

[28] "I take this opportunity of saying that I hope the legislature will soon embark on the task of giving a comprehensive statutory definition of 'charity'", *per* Lord Morton of Henryton in *Royal College of Surgeons v. National Provincial Bank*, [1952] 1 All E.R. 984, at p. 992.

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