Case and Comment

WILLS — MISTAKE — HUSBAND AND WIFE EXECUTING WILLS DRAWN FOR EACH OTHER — PROBATE OF HUSBAND'S WILL WITH SUBSTITUTIONS.— In the British Columbia case of *Re Brander*,[1] application was made in the estate of John Brander for probate of a will[2] signed by John Brander but drawn for his wife Margaret. The application was made by the wife, describing herself as "executrix of the estate of John Brander, deceased", and included a request that part of the words of the document be struck out (those referring to the husband John in the clauses appointing the executor and naming the sole beneficiary) and substituting in each instance words appropriately describing his wife Margaret. Wilson J. found that John and Margaret had had their solicitor prepare for each of them a will leaving all his or her property to the other and appointing the other executor, but that through an error John signed

[1] [1952] 4 D.L.R. 688; (1952) 6 W.W.R. 702 (Wilson J.).

[2] The will, as signed by John Brander, read as follows:

"THIS IS THE LAST WILL AND TESTAMENT of me MARGARET BRANDER of Langdon in the Province of Alberta (Married Woman) I HEREBY REVOKING all former Wills.

"I APPOINT my husband JOHN BRANDER of Langdon in the Province of Alberta (Farmer) to be the sole Executor of this my Will.

"I DIRECT my Executor to pay all my just debts funeral and testamentary expenses.

"I DEVISE AND BEQUEATH AND APPOINT all the real and personal estate which I am seized or possessed of or entitled to or over which I have any power of appointment to my husband JOHN BRANDER.

"IN WITNESS WHEREOF I have hereunto set my hand this Second day of December in the year of our Lord One Thousand Nine Hundred and Forty Three.

SIGNED PUBLISHED AND DECLARED by the above named Testatrix as and for her last Will and Testament in the presence of us both present at the same time who at her request and in her presence and in the presence of each other have hereunto subscribed our names as witnesses.

RALPH BULL
Barrister
JOHN S. MAVOR
Barrister — Calgary"

JOHN BRANDER"

the will drawn for Margaret and Margaret signed the will drawn for John. Affidavit evidence from one of the two witnesses to the wills was submitted to the court and apparently admitted. Both wills were also before the court.[3] Wilson J. granted the application, including the alterations mentioned.[4] His Lordship's reasons for judgment are based upon a New Zealand decision[5] where the same problem was before the court in the case of two sisters. Wilson J. says:

> Any difficulty I might have in grappling with this matter is solved by the judgment in *Guardian, Trust & Executors Co.* v. *Inwood*, . . . where the Court of Appeal for New Zealand was confronted with an almost identical problem and solved it by granting the relief here asked for.[6]

His Lordship then proceeds to quote with approval four paragraphs from the judgment in the *Inwood* case in which Fair J. sets out the facts of that case and notes that, if the document can be admitted to probate, the name of the sister (Jane) can be struck out as not referring to any sister of the testatrix (who was herself Jane), in which case evidence would be admissible to ascertain the identity of the sister to whom the gift was made. Fair J. also notes that words "inadvertently introduced into the will, contrary to the testator's intentions and instructions", words which are not his will, may be omitted from the probate. After these quotations from Fair J. in the *Inwood* case, Wilson J. then says "I order that the will be admitted to probate with the alterations mentioned".[7]

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[3] The wife's will was in form similar to the one signed by John, except that it, being drawn for John, left everything to Margaret and appointed her executrix. Apart from this and from the change of gender ("her" to "his" etc.) wherever appropriate, the wills were identical. The same two lawyers witnessed both wills.

[4] The operative clauses of the formal order are as follows:

"THIS COURT DOTH ORDER that the Will dated the 2nd day of December, A.D. 1943, prepared for execution by Margaret Brander but actually executed by John Brander be altered by inserting the word 'John' in place of the word 'Margaret' in Paragraph One thereof; and further that the said Will be altered by inserting the word 'Margaret' in the place of the word 'John' in paragraph Two thereof; and still further that the said Will be altered by inserting the words 'wife Margaret Brander' in the place of the words 'husband John Brander' in Paragraph Four thereof;

"AND THIS COURT DOTH FURTHER ORDER that the said Will be admitted to probate with the aforesaid alterations."

The words "married woman" might just as well have come out, if anything was taken out of the first paragraph of the will, and "husband" in paragraph two. As admitted, it is the will of "John Brander of Langdon . . . (Married Woman)" appointing "my husband Margaret Brander" as executor. There is a question whether the order requires actual physical alteration of the original will or merely a change in the copy issued with the letters probate.

[5] *Guardian, Trust, and Executors Company of New Zealand, Limited* v. *Inwood et al.*, [1946] N.Z.L.R. 614 (C.A.). Wilson J. quotes from p. 622.

[6] [1952] 4 D.L.R. 688; (1952) 6 W.W.R. 702.

[7] *Ibid.*, D.L.R. at p. 689; W.W.R. at p. 703.

The result seems eminently wise and sensible. There is no doubt as to the testamentary intentions of the testator. They were reduced to writing in proper form and he thought he was executing them as his will. He did execute a document in the form of a will, and he had it properly witnessed as his will. Alone, without any other documents or evidence, it was insensible. It purported to be the will of someone else who left everything to this testator who signed it. But with the production of the will drawn for this testator and signed by the other person, together with the affidavit of the witness, the obvious mistake becomes apparent. Is the mistake such as to invalidate the whole document? Is it fair to say that this piece of paper was not the one he intended to execute — was not his will? No. It is not the paper that matters: it is the substance — the document. If a testator had intended to execute his will and prepared to sign a paper in which his testamentary intentions were fully set out, at which point some one substituted without the testator's knowledge another paper with identical provisions (perhaps the original instead of a carbon copy), which substituted paper he executed, could it be said that the executed paper was not his will? No, it is submitted. It is his will. On the other hand, if someone had similarly substituted a mortgage, or even an entirely different will, no one would suggest that the execution of the substituted paper constituted a valid document. They are entirely different documents in substance. But what about this document signed by John Brander, purporting to be the will of Margaret Brander, intended by John as his will and carrying out his wishes, except that it is drawn for Margaret instead of John? He intended to give all to his spouse and appoint her the executrix. He signs a will doing just that, except that it is drawn for his spouse who intends to leave everything to her spouse and to appoint him executor, which intentions are carried into writing in the document John signs. What if, instead of switching the wills of husband and wife, after perusal and just before signature, the solicitor involved had, also unintentionally, substituted the will of John *Brown*, who also had intentions similar to those of John Brander and whose intentions had also been reduced into writing, which John Brander by mistake signed and by which John Brander left everything to his "wife Dorothy Brown" whom he appoints executrix?

This is the real hurdle of *Re Brander* and of the *Inwood* case. How can we get the document admitted at all as the will of John Brander? If it can be admitted, portions may be struck out as not

part of the will, and evidence admitted to clear up ambiguities. But it is this first hurdle which causes trouble. Why? Because the remedy of the *Inwood* case is not available if the will is not admissible at all. Thus the vital clause in the quotations by Wilson J. from the *Inwood* case: "If the document can be admitted to probate . . .", then equivocations and ambiguities can be cleared up. This "if" is not dealt with in the portions of the *Inwood* judgment quoted by Wilson J. But it is this branch of the attack which counsel opposing probate in the *Inwood* case emphasized:

> Jane Remington did not sign the paper with the intention of making the document her will. . . . There is no significance in the fact that the document signed by Jane contained similar provisions to the one she intended to sign. It was not her will, although it had some similar features. She intended to sign the will she had seen and read as her own will, but the document she intended to sign was not signed, and her mind did not go with her signature to the other document. Consequently, the mistake of the testatrix destroyed her *animus testandi*. . . . There must be an *animus testandi*, involving knowledge of the contents of the document and intention to make it the will. Intention is not sufficient. Mistake, like fraud or duress, invalidates a will by removing the *animus testandi*. The plaintiff has confused this with a mistake in some disposition, which may be rectified, but the mistake here goes to validity of the whole document. . . . This [the document signed] cannot be rectified, as it is not a will at all.[8]

Counsel also relied in the *Inwood* case upon three English cases, in each of which the same mistake had been made, in each of which the mistake was between two sisters, as in the *Inwood* case, and in each of which the court refused probate. Counsel seeking probate sought to distinguish these cases:[9] *Re F.S.*,[10] where "the gift was in terms of the whole estate to the testatrix, and not, as here, of a life estate to the testatrix"—"a manifest absurdity; and no Court could remedy the position"; *Re Hunt*,[11] where "the two wills were not exactly identical in terms, and, consequently, did not express the intention of the person signing it"; and *Re Meyer*,[12] where the case "was argued *ex parte*, and no authorities cited, and it was wrongly decided"—"a codicil only was in issue; a

[8] Hutchison, *arguendo*, *Guardian Trust* v. *Inwood*, [1946] N.Z.L.R. 614, at pp. 620-1. In this case, the two sisters, Jane and Maude Lucy, each intended to leave a life estate to the other, remainder over to their niece Kathleen Alice Boyd. Apparently no problem arose on Maude Lucy's death. The problem developed later on Jane's death, and it is Jane's will with which the Court of Appeal was dealing.

[9] Loughnan, *arguendo*, *ibid.* at p. 616; Brassington, *arguendo*, *ibid.* at p. 619.

[10] (1850), 14 Jurist 402 (Sir Herbert Jenner Fust).

[11] (1875), L.R. 3 P. & D. 250 (Sir James Hannen).

[12] [1908] P. 353 (Barnes P.)

consent was filed; and the earlier cases were not cited" (the consent was filed by the surviving sister who would take a larger share (the residue) under the will if the codicil were not probated). In the last case, Barnes P. said: "But it is quite clear that this lady, though her signature is on the document, never meant to sign this particular codicil at all. She meant to sign a totally different document." But different, according to the reporter's summary, only in the substitution of the name of one sister for that of the other wherever the sister's names appeared; the codicils provided identical bequests to strangers and made directions in case the surviving sister refused to take probate.[13]

Fair J., for the Court of Appeal in New Zealand in the *Inwood* case, deals with this argument fully and concludes that it lacks substance:

> True, the physical document was not the paper that the testatrix intended to sign, but it was a paper that contained everything that she wished included in the paper she intended to sign except the Christian names of her sister. She adopted it believing that it expressed her intentions in every respect. It does in most, and can be read as carrying out her intentions. It appoints the executor she intended to appoint in the exact terms she intended to appoint it. That in itself if it stood alone would be enough, apart from this formal objection, to entitle it to probate. . . . It also disposes of the residue after the life interest in the exact terms which the other will contains. The life estate is in correct terms except for the Christian name ["to my sister Jane Remington of 411 Hereford Street, Christchurch"; they lived together]. There is no doubt that she intended the document to which she put her signature to operate as her will.
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> If she had intended to sign the document in the original typewriting, and she had, by mistake, been given a carbon copy, she would have been executing a paper physically different from that which she intended to sign, but if it had contained a duplicate carbon copy it appears unarguable that document in carbon would be invalid on that ground. The present will seems to us to differ from such copy only in degree and not in substance. . . . The testatrix did really know and approve of the effective provisions contained in it.[14]

The court then turns to the three English cases, notes without comment what counsel says about the first two, purports to explain these two "on the ground that they were decided before more recent decisions referred to on the power of the Court to correct errors in the language of wills",[15] refers to Jarman's statement that the court "is always anxious to give effect to the testa-

[13] The summary of the facts in the Law Journal Reports is fuller than in the other reports: 77 L.J.P. 150.

[14] [1946] N.Z.L.R. 614, at p. 623.

[15] *Ibid.*, at p. 624.

tor's intention, even if vaguely expressed", quotes from the *Meyer* case, refers to the *ex parte* nature of the three cases and their apparent lack of importance to the individuals involved because of consents by those taking on intestacy or by residuary provisions under a valid will to do what the testator desired, and concludes that, although on first impression the view might be formed that the whole document be rejected as not that of the testator, that view was not in accordance with the real position and with the principles of law. The conclusion was that "the document does express, as it was intended to, the real intention of the testatrix except for the omission of the two words 'Maude Lucy' and the substitution for them of the word 'Jane' ".[15] The rule as to striking out or omitting from probate words introduced without the knowledge and approval of the testator had not been clearly established when the first two of the English cases were decided. The third, *Meyer*, is distinguishable: "the language and terms of the will in *Re Meyer* [not quoted in any of the four reports of the case] do not appear to have been the same as those of this will".[15] The court accordingly, as noted already, granted probate of the will signed by Jane with the omission of the word "Jane" from the body of the will.

This long summary of the problem as to the admissibility of the document at all, taken from the *Inwood* case, is the only real discussion of the problem in this type of mistake, and must of course precede any discussion of amendment of the will. The views put forth by Fair J. must have commended themselves to Wilson J. in the *Brander* case, though his Lordship is silent on the subject. They do seem eminently more suitable than the views put forth by Barnes P. in *Re Meyer*. But are they suitable to *Re Brander*? Can it be said, as easily as in the *Inwood* case, that the document signed was in substance the will of the testator? In the *Inwood* case, the appointment of the executor and the gift of the residue were exactly as wished by the testator. Even the other provision, the life gift to the sister, was just as the testator wished it except for one word, the sister's Christian name. But in the *Brander* case no provision is just as the testator wished it except the revocation clause and the direction to pay debts. He appoints himself executor and gives everything to himself — the "manifest absurdity" of the *Re F. S.* case. Or is this approach, in the language of Fair J., too "technical"? Does it "lack substance"? We can either approach this problem by endeavouring to ascertain whether, in substance, the language used contained the testator's

testamentary disposition, having regard to the actual directions and dispositions in the document (the approach suggested by Fair J. in his detailed discussion of Jane Remington's will in the *Inwood* case), or we can ask ourselves whether the document represents in substance the will of John Brander regardless of detailed language, and considered in the light of the other circumstances (two complementary wills of a husband and a wife, the obvious mistake by switching, and the obvious intention from a testamentary standpoint, leaving to a court of construction the meaning to be applied to the document). In either case, do we not get down to the distinction, in another form, put by Chafee[16] upon "error" and "mistake of expression"? If we have "error", the document is out, if "mistake of expression", it stands, though subject to "remoulding"— in the case of a will, to interpretation in the court of construction — after a court of probate has, possibly though not necessarily, deleted certain words.

Wilson J. referred to only the one case. "Any difficulty I have . . . is solved by the judgment in [the] *Inwood* [case] . . . with which I respectfully agree." That judgment compared the actual language with the intended language and found the two identical, in the body of the will, except for one word. Did Wilson J. use this approach to *Re Brander*? If so, he must have found them the same, in substance. He admitted John Brander's will to probate, subject to certain alterations. Much can be said against that solution to the initial problem.[17]

In the three English cases, all cases of two sisters, probate was refused; in the *Inwood* case in 1946, likewise one of two sisters, probate was granted with deletions. Wilson J. in the *Brander* case in 1952 was faced with a husband-wife switch. Throughout both recent cases, no reference is made to two United States

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[16] Z. Chafee, The Disorderly Conduct of Words (1941), 41 Col. L. Rev. 381, at p. 386.

[17] In addition to the views stemming from the three English cases discussed above, reference might be made to the two leading English texts on wills where the editors accept these English cases: Theobald on Wills (10th ed., 1947) p. 26; 1 Jarman on Wills (8th ed., 1951) p. 29. In the U.S.A., in Gray, *infra*, footnote 24, at p. 221, and in 1 Page on Wills (3rd ed., 1941) pp. 322-3 (s. 161-2), we also find an acceptance of the *Hunt* and *Meyer* cases. Likewise, 9 Wigmore on Evidence (3rd ed., 1940) s. 2421, footnote 2 (*Hunt* case seems "sound"). Jarman and Page also cite *Re Nosworthy* (1865), 11 Jur. N.S. 570, 4 Sw. & Tr. 44, but this is a different case involving signature by *T* on the same day to two wills, the second not containing her wishes, but signed in the belief that it was necessary to make the first valid. None of these writers (incl. 1947 Supp. to Page) cites the *Inwood* case. Wigmore seems to confuse this problem with the next — striking out, but not inserting, portions of a will included by mistake.

husband-wife cases where a similar situation arose. In *Alter's Appeal*[18] and in *Nelson* v. *McDonald*[19] husband and wife had signed each other's will in circumstances where each intended to sign a will leaving his or her estate to the other. In both, probate was refused. "The paper he signed was not his will, for it was drawn up for the will of his wife and gave the property to himself. It was insensible and absurd. It is clear, therefore, that he had executed no will." (*Alter*) "We are unable to preceive how it can be properly said that he executed his will. The evidence shows conclusively that he did not. . . . The fundamental error in this case was not in the employment in his will of language that was ambiguous, uncertain, or which did not correctly express the decendent's intention. It lies in the fact that the paper sought to be established as his will was never intended by him as such." (*Nelson* v. *McDonald*) Both cases treat the act of the husband as no different from his signature to a blank piece of paper. This latter point seems artificial — it fails to look at the whole transaction. But the former point, taken in both cases, is, although part of the same problem, a truer realization of the situation: he intended to sign his will and signed his name to a will, but that will did not fully express his intentions. Was it "error" to such an extent as to invalidate the whole document, or was it, in substance, mere mistake of expression which the combined efforts of the courts of probate and construction might remedy? The English and United States courts chose "error" and pronounced against the wills. The New Zealand Court of Appeal, in a case where it was very easy to say there was a mistake in expression—one word—pronounced in favour of the mistake of expression and granted probate. Which should Wilson J. do? It was more difficult, it might be argued, on the will before him because there was not merely a mistake in the name of a beneficiary who was correctly defined by relationship and surname (but not by Christian name) but a mistake in relationship as well as Christian name. But this is detail, not substance — a matter to be considered after admission, if admissible.

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[18] (1871), 67 Pa. 341, 5 Am. Rep. 433, affirming (1870), 7 Phila. 529. This case cites and quotes at length from the first of the three English cases, *Re F. S.* (1850), 14 Jur. 402.

[19] (1891), 61 Hun (N.Y.) 406, 16 N.Y. Supp. 273. The court noted that it was not bound to follow the earlier cases if satisfied that they were improperly decided, "but as the reasoning of the court, and the result in those cases, commend themselves to our judgment, and are in harmony with the views we entertain upon this subject, they serve to confirm our opinions". The summary of facts and the quotations from judgments in both U.S. cases are taken from 3 B.R.C. at pp. 341-3; the original reports are not yet available to the writer.

In the special circumstances of this type of case, no harm is done, no real violence to the Wills Act appears and the dangers which that statute sought to prevent by prescribing formalities are not present.[20] Admission is approved as reasonably sound and abundantly sensible. Whether, after the document is admitted, with or without alterations, a court of construction can interpret it is a totally different question, to be considered later.

Assuming, then, that the document, or part of it, can be admitted to probate, what can the court do about the words to which the testator gave no approval? The court of probate has long exercised jurisdiction to exclude from a will upon admission to probate words inserted by way of mistake,[21] within the limits mentioned by Lord Greene in *Re Horrocks* in 1939.[22] But although words may be struck out, there would appear to be no jurisdiction in the court of probate to insert what should have been there.[23] A court of construction will not strike out[24] or insert,[25] but will by way of construction ignore words actually present or imply additional words,[26] solely by way of construing the actual document before it, and without extrinsic evidence as to the mistake or as to the testator's intention. Where a court of probate strikes out, the court of construction can then construe what is left. Wilson J., in the *Brander* case presently under review, although exercising jurisdiction in probate, not only struck out but inserted. It would appear that that portion of the order in which words were inserted was granted, at least in part, in error.

[20] Thus it is submitted that this type of case is exempt from the following statement of principle taken from 57 Am. Jur., s. 376: "It is more important that the probate of the wills of deceased persons be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real mistakes. The latter a testator may by due care avoid in his lifetime. Against the former he would be helpless." White J. in *Re Gluckman*, L.R.A. 1918D 742, at p. 743 (N.J.C.A.).

[21] *Morrell* v. *Morrell* (1882), 7 P.D. 68 (Hannen P.); *Re Boehm*, [1891] P. 247 (Jeune J.); *Rhodes* v. *Rhodes* (1882), 7 App. Cas. 192, at p. 198 (J.C.P.C.).

[22] *Re Horrocks*, [1939] P. 198; [1939] 1 All E.R. 579 (C.A.)

[23] *Re Schott*, [1901] P. 190 (Jeune P.).

[24] See *Re Bywater* (1881), 18 Ch.D. 17, at p. 22 (C.A.), where during argument counsel sought leave to adduce evidence that part of a sentence had been included in the will by mistake during the copying of the altered draft of the will. James L.J. said, "That must be done by the Court of Probate". This case is referred to in an article by Roland Gray, Striking Words Out of a Will (1913), 26 Harv. L. Rev. 212, footnote 1.

[25] See article by Gray, *supra*; also Joseph Warren, Fraud, Undue Influence and Mistake in Wills (1928), 41 Harv. L. Rev. 309, at p. 329.

[26] *Re Fox*, [1937] 4 All E.R. 664 (C.A.); *Re Smith*, [1947] 2 All E.R. 708, [1948] Ch. 49, [1949] L.J.R. 765 (Vaisey J.); *Re Birkin*, [1949] 1 All E.R. 1045 (Harman J.); *Re Riggall*, [1949] W.N. 491 (Danckwerts J.). *Contra*, *Re Bailey*, [1951] 1 All E.R. 391, [1951] Ch. 407 (C.A.).

His Lordship purported to rely on the *Inwood* case "where the Court of Appeal for New Zealand was confronted with an almost identical problem and solved it by granting *the relief here asked for*".[27] But a check of the *Inwood* case shows that counsel for the executor and some of the respondents, in seeking probate, merely asked for probate of the will signed by Jane "with the omission of the word 'Jane' from the will" and that this is all the court granted.[28] Nowhere is there any request for insertion of the beneficiary's name, "Maude Lucy". Counsel in the *Brander* case apparently asked for rectification by insertion:

> I am asked . . . to reject words and clauses inadvertantly introduced into the will without the knowledge and instructions of the testator, and to strike out the word 'John' before the word 'Brander' in the clauses appointing the executor and naming the sole beneficiary *and to substitute the word 'Margaret' in each instance*.[29]

The expressed basis for insertion disappears—his Lordship thought he was doing what was done in the *Inwood* case. It was not done. Is there any basis for insertion? We have submitted not, earlier in this paragraph, and cited *Re Schott*.[30] It is true that in two cases[31] in England the court inserted. Of these cases, Sir Francis Jeune said in *Re Schott*:[32]

> Both of the cases cited were decided by the same learned judge. I am afraid that it must be admitted that upon this point of probate practice the late Sir Charles Butt was heretical. I find that a note has been put, in manuscript, in the margin of *In the Goods of Bushell* in my copy of the LAW REPORTS. It is in these words: 'By the President's direction this is not to be followed. Note of order of judge may be put in margin of probate.' The President at that time was Sir James Hannen, who, I am informed by the registrar, would not allow the order made by Sir Charles Butt to be carried into practice. Under

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[27] *Re Brander*, [1952] 4 D.L.R. 688 (italics added).

[28] *Guardian Trust* v. *Inwood*, [1946] N.Z.L.R. 614. Counsel, alternatively, asked for probate of the document drawn for Jane but signed by Maude Lucy on the ground that Maude Lucy had signed for and on behalf of Jane, and still further, alternatively, for probate of such of "both documents as the Court shall declare to constitute the will of the said Jane Remington, deceased" (at p. 616). The court did not discuss either of these alternative grounds in view of its ruling on the first of the three bases for application for probate.

[29] Wilson J. in *Re Brander*, *supra*, at p. 688 (italics added).

[30] *Supra*, footnote 23.

[31] *Re Bushell* (1887), 13 P.D. 7 (Butt J.); *Re Huddleston* (1890), 63 L.T. 255 (Butt J.). In the former the word "Bristol" was substituted for "British" in a legacy to the "British Royal Infirmary" (subject to the filing of an affidavit that there was no such institution as the British Royal Infirmary). In the latter, the word "including" was substituted for "excluding". Butt J. gave no reason for his order in either case. *Re Bushell* was also doubted eight years earlier by Jeune P. in *Re Walkeley* (1893), 69 L.T. 419.

[32] [1901] P. 190, at p. 192.

these circumstances, I think that those two decisions of Sir Charles Butt must now be said to be finally disposed of.

The report of this judgment in three other series of reports[33] uses the word "official" instead of "my" in referring to the marked copy of the Law Reports. In addition, two of the reports[34] show his Lordship as reading the initials of the author of the note, "H.W.L. (Registrar)". These same two reports also quote Jeune P. as saying, "As an authority the case of *In the Goods of Bushell* may be considered to be dead". The writers[35] and obiter in the English court of appeal[36] seem to be unanimous that a court of probate may strike out, but not insert. There was a time when some writers thought that the decisions of Butt J. would support a limited form of insertion: "clerical errors made in the engrossment have been corrected by substituting the right words".[37] But not apparently to-day.

All this sounds well as general principle. But English law grows differently. Can these statements be applied universally? What if the mistake, and therefore the words to be struck out, related to the name of the executor? Either the words that are left must be sufficiently clarified to allow a grant of probate of the will to the executor, or the grant must take the form of letters of administration with the will annexed, granted to the wife as nearest relative entitled upon the failure of the will effectively to appoint as executor. This is a matter which must be cleared up in the court of probate and not left for construction in the court of construction. To this extent, the court of probate must construe. This was part of the problem facing Wilson J. in *Re Brander*. His Lordship struck "John" out of the appointment of "my husband John Brander" (might "husband" have gone too?) and inserted "Margaret". Is this jurisdiction to construe to be exercised solely by declaration coupled with a grant of letters probate to the person decided upon, or is it to be exercised in addition by actually amending the probate copy of the will attached to the letters

[33] (1901), 70 L.J.P. 46; 84 L.T. 571; 17 T.L.R. 476.

[34] The Law Times Reports and The Times Law Reports.

[35] Jarman (8th ed., 1951) pp. 29, 592; Theobald (10th ed., 1947) p. 27; Widdifield on Surrogate Court Practice and Procedure (2nd ed., 1930) pp. 342, 344-5; 1 Page on Wills (3rd ed., 1941) s. 166 (pp. 329-32); 9 Wigmore on Evidence (3rd ed., 1940) s. 2421 (footnote 2) (Wigmore accepts the striking out, but says "perhaps inconsistently" omitted words may not be inserted); Gray, *supra*, footnote 24, at p. 215; Warren, *supra*, footnote 25, at p. 338; Henry Schofield, So-called Equity Jurisdiction to Construe and Reform Wills (1912), 6 Ill. L. Rev. 485, at pp. 491-2.

[36] *Re Horrocks*, [1939] P. 198, at p. 216, [1939] 1 All E.R. 579, at p. 584 (C.A.).

[37] Theobald (5th ed., 1900) p. 24.

probate and inserting *in the will* the name of the executor? A footnote in Jarman suggests the latter may be done "if the missing words bear on the question of probate".[38] The Irish case of *Re Morony*[39] is cited. In that case, Warren J. granted probate to James Clancy and Pat O'Connor, to whom the following reference was made in the will: "I herewith appoint and empower James Clancy, Spanishpoint, and Pat. O'Connor, Braiffa". They were not specifically named as executors by the will. But earlier in the will the testator had used the words "empower and authorize my executors [to manage the property]". Warren J. approached the problem as one, not of supplying the omitted words ["my executors"] to the will, but of construing the document, and upon construction his Lordship found that the last clause was incomplete by the omission of the words "my executors". "Accordingly I direct that Clancy and O'Connor shall be at liberty to apply for probate in common form as executors."[40] This is not an addition to the will but merely necessary construction in the court of probate in order to get probate. Probably that is all that the footnote in Jarman is intended to suggest: supplying by construction, not addition to the will itself, in the appropriate court. Perhaps Wilson J. went too far in *Re Brander* in actually inserting in the will, even in the case of naming the executor.

That leaves the question, Was Wilson J. acting within accepted principles when he struck out the words "husband John" in the material portion of the will? — the clause disposing of all the property. (The correction in the opening clause is immaterial: the opening words do not form any essential part of the will, "but, if inappropriate, would call for consideration and, if necessary, explanation".[41]) As previously noted, it has been accepted that such power exists for mistakes of a certain kind. In discussing the sorts of mistake which give rise to an exercise of the power, Gray and Warren[42] note that mistake as to matters that induce the disposition, or as to law, or as to the effect of words, is not sufficient if the testator knows the contents. But, asks Gray, when does he, in the eye of the law, *know* the contents. "[If] a copyist by a clerical error inserts words which were not in the draft, and

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[38] Jarman on Wills (8th ed., 1951) p. 502, footnote (b).
[39] (1878), 1 L.R. Ire. 483 (Warren J.).
[40] *Ibid.*, at p. 484.
[41] Fair J. in *Guardian Trust* v. *Inwood*, [1946] N.Z.L.R. 614, at p. 622, citing Lord Watson in *Whyte* v. *Pollock* (1882), 7 App. Cas. 400, at p. 424.
[42] *Supra*, footnote 24, at pp. 223-36. See also Warren, *supra*, footnote 25, at pp. 335-39.

the testator neglects to read the paper before executing it, there is a clear case for rejection of the words. The testator does not know of their presence, nor has he adopted them."[43] The other problems raised in these types of cases (signing without reading over wills drawn by others upon testator's instructions) and the caution raised in *Re Horrocks*[44] do not seem to be present in our case, with one exception. Most of the writers and higher courts emphasize the idea that, in striking out, the sense of the words that remain must not be altered. In *Re Horrocks*, Lord Greene M.R. (speaking for the court) said with respect to an attempt to strike out "or" in the phrase "charitable or benevolent":

> It appears to us that so to alter a will as, under the guise of omission, to affect the sense of words deliberately chosen by the testator or his draftsman is equivalent to making a new will for the testator, and on principle we do not consider that this is permissible.[45]

Assuming this qualification of the court's power to strike out exists, how does it affect the situation which arose in the *Inwood* and *Brander* cases? Is the sense of a gift to "Jane Remington" changed when it is discovered that the word "Jane" is a mistake for "Maude Lucy" and an application to strike out "Jane" is granted (*Inwood* case)? Or is the sense of a gift to "my husband John Brander" altered by striking out "husband John"? Lord Greene also deals with this point in *Re Horrocks*:

> A number of authorities were cited to us illustrative of the jurisdiction exercised by the Court of Probate in these matters. . . . It is sufficient to say of them that [they] have all been cases where the matter omitted was, so to speak, self-contained and its omission did not alter the sense of what remained.[46]

His Lordship then referred to two of these cases upon which the applicants had particularly relied: *Re Boehm*[47] and *Re Schott*.[48] In the former, the testator had apparently intended to make separate gifts to each of his two daughters, but by a draftsman's error the name of the daughter "Georgina" was inserted as beneficiary of both legacies. The court struck out the name of Georgina where it had been wrongly inserted, leaving a blank instead. In the latter, the residuary disposition spoke of the "net revenue of the said proceeds" instead of "net residue of the said proceeds". The court struck out the words "revenue of the said". Lord Greene declared

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[43] Gray, *op. cit.*, at p. 224.
[44] [1939] P. 198; [1938] 1 All E.R. 579 (C.A.).
[45] *Ibid.*, P. at p. 218; All E.R. at pp. 585-6.
[46] *Ibid.*, P. at p. 219; All E.R. at p. 586.
[47] [1891] P. 247 (Jeune J.).
[48] [1901] P. 190 (Jeune P.).

that in neither case was the sense of what remained altered. With respect to the action of Sir Francis Jeune in the *Boehm* case, Lord Greene said:[49]

> He realized the possibility that the effect of this might be to render the rest of the clause meaningless, as it would have been if a court of construction had proved unable to get over the difficulty, a matter with which he was not concerned. But it is one thing to strike out a word which leaves what is left devoid of ascertainable content and therefore inoperative; it is quite another thing to strike out a word when by doing so the meaning of what is left is qualified and cut down. It is clear from Sir Francis Jeune's reference to *Rhodes* v. *Rhodes*[50] that he did not conceive himself to be doing something which altered the sense of what remained.

If this was true in the *Boehm* and *Schott* cases, it is submitted the same thing should be true in the *Inwood* and *Brander* cases, in both of which the court struck out part of the name of the beneficiary. In neither was the point as to not altering the sense of what remained noted. It would appear, however, that the action was sound.

There remains one question. When the wills in the two cases —*Inwood* and *Brander*—are taken to a court of construction, can effect be given to the disposition? In the *Inwood* case, no necessity for such application arose. The inaccurately described sister was given a life interest only and she predeceased the testatrix. The gift over (identical in the wills of both sisters) therefore operated. In the *Brander* case, what would be the meaning of the gift to "my Brander" (with or without a blank space between the words)? Could a court of construction, from the document itself and such circumstances as we are allowed to look at (but probably not the mistake as such) give to Brander's wife the whole beneficial devise? It is possible, if the only "Brander" who was "my Brander" was his wife. We do not know if there were children, parents or other relations named Brander. But on the face of the document as admitted to probate (a) the court of probate would have inserted the name of the executrix (as in fact it did), or (b) the court of probate would have construed the clause in the will purporting to appoint an executor and then, without inserting anything in the will, made a grant to the widow as executrix "named" in the will (as was done in *Re Morony*[51] and probably should have been done here), or (c) the court of probate

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[49] [1939] P. 198, at p. 220; [1939] 1 All E.R. 579, at pp. 586-7.
[50] (1882), 7 App. Cas. 192, at p. 198 (J.C.P.C.).
[51] (1878), 1 L.R.Ire. 483 (Warren J.).

would have granted letters of administration with the will annexed to the widow as "next-of-kin", leaving to the regular court of construction the task of interpreting the balance of the will — the clause disposing of the testator's estate. In the first two cases an executor would have been named, in the third the will would contain the words "my husband Brander" purporting to appoint an executor. The last would on its face be insensible and the court of construction would probably say this meant his spouse — his wife —"my wife Brander". Thus by any of the routes, the identity of the executrix would be available from the will. Then it seems fair to say that the next clause by which he purports to give all his property to "my Brander" should be interpreted as meaning that Brander which is his wife. It would not be likely for him to appoint his wife executrix and leave all the property to some other relative. There is authority, so far as past decisions in will construction cases are authority for anything, for filling up by construction a complete blank in the clause of beneficial gift by reference to the clause appointing an executor: *Re Christenson*.[52] Here, in *Re Brander*, it is not a case of filling a total blank, but merely of identifying which Brander the gift to "my Brander" refers to. This seems to be a permissible use of the jurisdiction of the court of construction.[53]

In the result, Wilson J. reached in one proceeding (in probate) the result that would have eventually been reached by following the orthodox though somewhat artificial procedure of going both to the court of probate and to the normal court of construction. That result differs slightly in form but not in substance, in that Wilson J. names the beneficiary in the will. More regular procedure merely construes the will as meaning what Wilson J. inserted in it.

We have not in this comment considered certain possible other procedures in the *Brander* case. What about intestacy, assuming the will had been refused admission to probate? The widow, assuming Brander died domiciled in British Columbia, would have taken all in any event if there had been no issue alive at the "intestate's" death and the estate were under $20,000. Presumably the existence of difficulty on one or other of these conditions pre-

[52] (1915), 21 D.L.R. 354 (Alta., Harvey C. J.). Warren expresses serious doubts: a total blank cannot be filled; partial blanks should not be created by the court of probate to be filled by the court of construction, at least as was done in *Re Wrenn*, [1908] 2 I.R. 370: Interpretation of Wills — Recent Developments (1936), 49 Harv. L. Rev. 689, at pp. 689, 704-5.

[53] See cases collected in 1 Jarman, *op. cit.*, at pp. 528-9. Gray approves, *supra*, footnote 24, at pp. 234-6. See footnote 52 as to Warren's doubts.

vented use of this route to reach the same result. What about the Testator's Family Maintenance Act (Dependents' Relief Act or Family Provision Act in some jurisdictions)? If the court had been sufficiently certain as to the executrix to probate the will to that extent, but a court of construction were unable to ascertain the meaning of the clause of gift, then an application by the widow on the basis that the will did not make reasonable provision for the widow would have been possible. This is not the place to comment upon the extent of success, if any. A further possibility is constructive trust, whereby those taking upon an intestacy might be held to take upon trust for those who should have taken by will (the widow). But it is thought that in the total absence of fraud or undue influence, there might be difficulty in this approach.[54] What if the court of probate had probated the document signed by John Brander without any alteration at all? Could or would a court of construction, on the basis of *falsa demonstratio* or of insensibility, have construed the will similarly to the method suggested in the main body of this comment? It is quite possible, making the initial assumption that the court of probate decided that the whole document was this man's will, an unlikely assumption. None of these possibilities seems as satisfactory, if available at all, as the course taken by Wilson J. (with or without the suggested modification about not inserting in a court of probate). Consideration also has not been given to the two alternative bases for getting the will admitted to probate put forward by counsel, but not noted by the court, in the *Inwood* case.[55]

GILBERT D. KENNEDY*

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CRIMINAL CODE—PERJURY—REVISION OF CODE—WITNESS GIVING CONTRADICTORY EVIDENCE — CIVIL LIBERTIES — PRESUMPTION OF INNOCENCE — PROOF BEYOND A REASONABLE DOUBT.— For most people testifying in court is always an ordeal and now our legislators apparently propose to add new terrors to the experience. A change in the existing law of perjury proposed by the new Criminal

[54] Gray, *supra*, footnote 24, says, at p. 214, that although there is something to be said for this approach (see note (1908), 21 Harv. L. Rev. 434), "the law has not in fact proceeded this way". That was in 1913. No suggestion of change appears in a note on constructive trusts as applied to wills procured by fraud, undue influence, etc.: (1935), 48 Harv. L. Rev. 1162, at pp. 1178-80.

[55] See footnote 28.

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Code now being considered by Parliament[1] makes the mere giving of contradictory testimony in any judicial proceedings an offence punishable by fourteen years imprisonment, unless the witness, not the complainant, can establish that none of his evidence was given with intent to mislead. The new provision reads as follows:

> WITNESS GIVING CONTRADICTORY EVIDENCE
>
> 116. (1) Every one who, being a witness in a judicial proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence and is liable to imprisonment for fourteen years, whether or not the prior or the later evidence or either of them is true, unless he establishes that none of the evidence was given with intent to mislead.
>
> (2) Notwithstanding paragraph (a) of section 99, 'evidence' for the purposes of this section, does not include evidence that is not material.

Let us examine the practical effect of such legislation on the largest class of civil litigation that engages the attention of Canadian courts, the motor-vehicle accident. Many civil cases arising out of accidents have their preview in the police court, where the witnesses are placed in the box, often without preparation, and are asked a multitude of questions by the crown attorney, defence counsel and magistrate on such matters as speed, distances, skid marks, location of vehicles, statements of parties, presence of other witnesses and damage to vehicles. Months later the case comes up in the civil court. The same parade of witnesses appears again, this time to be questioned as, or even more, closely by counsel for the litigants. The witness tries to remember what he saw and heard at the accident and to keep in mind what he said in police court. He is faced with the evidence of other witnesses who tell a different story. Not realizing that no two people ever see an accident exactly alike, he is embarrassed, confused and soon begins to contradict himself. It is a rare case in which some witness leaves the box without contradicting himself on a material point. Today lawyers and judges recognize that as inevitable and make allowance for it. We know that an inexperienced witness, however honest, cannot appear in court on two separate occasions, possibly months apart, and give exactly the same evidence on the many details he will be asked in the usual motor vehicle case. Actually, the witness

[1] Bill 93, An Act respecting Criminal Law, had at the time of writing passed the Senate, received its second reading in the House of Commons and been referred to a special Committee on Criminal Law, of which Mr. D. F. Brown, M.P. (Essex West) is chairman.

who consistently gives identical testimony has probably been well schooled and his testimony is suspect merely because it is identical.

What will happen to the witness who has contradicted himself if the proposed legislation is adopted? Someone must lose every civil case. Does the losing party blame himself? No, almost invariably he blames the witnesses who have "let him down". Is it not likely that some disgruntled party, or his insurance adjuster, will straightway lay a charge of perjury against the witness to whose contradictions he attributes his failure? He believes that the witness's testimony is to blame and now finds that he can equal the score or, perhaps, he tells himself that by proceeding against perjury he is being a social benefactor.

What will be the position of the witness when charged with perjury? The transcript of his contradictory statements will be proven, the fact that they are material perhaps, and then the complainant rests his case. No proof is needed that one or other or both of the statements are untrue, no proof beyond a reasonable doubt, just the contradictory statements on some material point. Then the accused must "establish" that none of the evidence was given with intent to mislead and, if he fails to discharge the burden imposed on him by the section, he is guilty.

Every lawyer knows today the reluctance of witnesses to testify. We can all give instances where witnesses to motor vehicle accidents have refused to disclose their identity and cases have been lost as a result. This reluctance of witnesses is now, apparently, to be increased by the fear that any error in the testimony they give may be used as a basis for a charge of perjury. The proposed section will give dissatisfied litigants the right to put the criminal law in motion by mere proof of contradictory statements, and immediately the burden shifts to the accused. The traditional right in all British countries to have the charge proven beyond a reasonable doubt, and the presumption of innocence, disappears.

One of the most objectionable features of the proposed legislation is the shifting of the onus from the Crown to the accused. This is in keeping with the growing tendency to require the accused to exculpate himself once the prosecution has proven certain easily established facts. The hall-mark of our criminal law has been the traditional presumption of innocence until guilt is proven, and it is hard to understand how anyone would want to derogate from it. It may be, of course, that the draftsmen of this particular provision are prosecutors reacting to a few hard cases. If so, we should be exceedingly careful, because hard cases make bad law. Let this

dangerous tendency grow and soon it will appear in a host of places. If contradictory statements cast upon a man the onus of disproving perjury, then why not cast upon him the burden of disproving arson when he is over-insured, or of dangerous driving when he has had a drink or exceeds the speed limit?[2]

Our system of administering justice depends upon the willingness of citizens to go into the witness box and testify to facts that often do not affect themselves. Without their help justice cannot be done. The experience of testifying is already a terrifying ordeal for most people. Should we add new terrors?

EDSON L. HAINES*

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CRIMINAL LAW—PRINCIPAL IN THE SECOND DEGREE—ACTUS REUS AND MENS REA.—The decision of the Court of Criminal Appeal in England in *Regina* v. *Bourne*[1] raises a new and disturbing point in criminal law and it is to be regretted that the court appears to have attached little or no significance to it.

The accused was charged at Worcestershire Assizes on two counts of aiding and abetting his wife to commit buggery, two counts of incitement to buggery, and two counts of indecent assault on his wife. The counts were based on the same facts, namely, that on two occasions the accused had compelled his wife to submit to carnal connection with a dog. The wife gave evidence to show that she had been terrorised into submission by the accused. Hallett J. directed the jury to bring in a special verdict, leaving these questions to them: (1) "Did the prisoner . . . cause his wife . . . to have carnal knowledge of a dog?", to which the jury answered "Yes", and (2) "Are you satisfied that she did not consent to having such carnal knowledge?", to which the jury answered "Yes, we are satisfied that she did not consent". The prisoner was convicted and sentenced to eight years imprisonment for each of the offences, the sentences to run concurrently.

On appeal counsel for the appellant raised the point that, since the wife, on the jury's finding, could clearly not have been convicted

[2] For other examples of the shifting of the burden of proof, see proposed Code sections 50(1)(a)(ii), 80 and 162 and the comment by Alastair M. Watt, Q.C., at (1951), 29 Can. Bar Rev. 305, on the forfeiture provisions of the Excise Act, Customs Act and Foreign Exchange Control Act.

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[1] (1953), 36 Cr. App. R. 125.

of buggery, there was no principal felony committed to which the accused could be a principal in the second degree. As authority for this proposition, learned counsel referred the court to *Regina* v. *Tyler and Price*.[2] In that case the two accused had been disciples of a religious maniac, one John Thom, who had killed a constable. They were charged as aiders and abettors to murder. Denman C.J., who tried the case, said: "It seems to me, therefore, that if it appears in evidence that Thom was not, at the time of committing the act, of sound mind, you must acquit the prisoners . . . for there will be no foundation on which the accessory crime can rest". The part of the indictment which charged the accused as aiders and abettors accordingly failed. *Tyler's* case would seem to have been directly in point in *Bourne's* case, raising as it does the fundamental point that a felony must be shown to have been committed by someone as principal in the first degree before the accused can be convicted as principal in the second degree. The following quotation from Lord Chief Justice Goddard, reading the judgment of the court in *Bourne's* case, shows how the point was disposed of:

> The learned judge left no question to the jury on duress, but the jury have found that she did not consent. Assuming that she could have set up duress, what does that mean? It means that she admits that she has committed the crime, but prays to be excused from punishment for the consequences of the crime by reason of the duress, and no doubt in these circumstances the law would allow a verdict of Not Guilty to be entered. . . . I am willing to assume, for the purposes of this case, and I think my brethren are too, that if this woman had been charged herself with committing the offence she could have set up the plea of duress, not as showing that no offence had been committed, but as showing that she had no *mens rea* because her will was overborne by threats of imprisonment or violence so that she would be excused from punishment. But the offence of buggery . . . does not depend upon consent; it depends on the act, and, if an act of buggery is committed, the felony is committed.

It is submitted that this passage enunciates a novel and most dangerous doctrine. It is tantamount to saying that there is some difference between a verdict of not guilty where the accused has never done the *actus reus* of the crime and a verdict of not guilty where the accused has done the *actus reus* but lacked the *mens rea*. Surely there are, legally speaking, no degrees of innocence. There is a complete absence of criminal liability if the successful defence is either a denial of the *actus reus* or a denial of the *mens rea*. The whole trend of the judgment of the Court of Criminal Appeal is

[2] (1838), 8 C. & P. 616.

to contend that an accused who sets up a defence of lack of *mens rea* is admitting his guilt but praying that special circumstances shall excuse him. But *actus reus* and *mens rea* are integral and interdependent features of liability. If either is absent, there is a complete absence of criminal liability, except in those crimes of absolute prohibition, of which buggery is clearly not one. Indeed, the *actus* cannot truly be said to be *reus* if the *mens* is not *rea*.

It is submitted therefore that the conviction of Bourne as a principal in the second degree is a doubtful and dangerous decision. Furthermore, the Court of Criminal Appeal seems to have ignored the implications of the decision of the Divisional Court in *Walters* v. *Lunt*.[3] In that case goods had been taken by a boy aged seven. His parents received them from him, knowing that they had been taken without the consent of the owner. The court held that the parents could not be convicted of receiving stolen goods since there could not be said to be any crime of stealing committed by a child under the age of eight. If in *Walters* v. *Lunt* the Divisional Court were not prepared to make a subsidiary crime depend upon a non-existent principal crime, it is difficult to see why the Court of Criminal Appeal was ready to do so in *Bourne's* case.

Moreover there appears to have been no pressing social reason for Bourne's conviction as an aider and abettor. He was clearly liable for incitement, for which crime he could (since *Rex* v. *Morris*[4]) receive a punishment equal to the one which could be imposed for the principal felony. The decision in fact exemplifies the unfortunate tendency of the appellate criminal courts of England in recent years to twist the doctrines of the criminal law in order to convict prisoners who are presumably felt to be "morally" guilty.[5]

Finally, we should note that such cases as *Bourne's* must be distinguished from those where a crime is committed by an innocent agent, as where *X* employs a child under the age of eight to steal for him. Here *X* is liable as a principal in the first degree, as was pointed out in *Walters* v. *Lunt*.

G. B. J. HUGHES*

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[3] [1951] 2 All E.R. 645. [4] [1951] 1 K.B. 394.

[5] The worst example of this trend is perhaps the mangling of the doctrine of possession in *Hibbert* v. *Mckiernan*, [1948] 1 All E.R. 860.

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RESERVATION OF PETROLEUM IN TRANSFER UNDER LAND TITLES ACT —ALBERTA— FUGACIOUS MINERALS OWNED BY DIFFERENT OWNERS— RIGHT OF OWNER OF PETROLEUM TO WASTE GAS OWNED BY ANOTHER.—In *Borys* v. *Canadian Pacific Railway and Imperial Oil Limited*[1] the Privy Council had to deal with a variety of problems which are of interest, not only to the oil and gas industry, but also as to the effect of a reservation contained in a transfer registered under the Alberta Land Titles Act, which is based largely on the Torrens system. It appears that some time before 1906 the Canadian Pacific Railway obtained a grant from the Crown of an estate in fee simple comprising a quarter section of land in what is now the Leduc Oil Field. In the grant from the Crown there were no reservations. Subsequently the C.P.R. sold the land to one Simon Borys and in the transfer under the Land Titles Act of Alberta reserved to itself all coal, petroleum and valuable stone. By various similar transfers the appellant became the owner of the property transferred to Simon Borys and the C.P.R. subsequently leased to the other respondent, Imperial Oil Limited, all petroleum within, upon or under it. The appellant claimed that all the natural gas, whether it was found in solution in petroleum or in a free state, belonged to him and he asked for an injunction restraining the respondents from working the petroleum in such a way as to waste or interfere with his natural gas.

The facts applicable to those portions of the decision that are the subject matter of these remarks can best be taken from the judgment of Lord Porter for the Privy Council:

> The petroleum, in so far as is material to the present case, is found in a bed of porous rock underlying the plaintiff's land and the surrounding property, which contains at the bottom, water, then the petroleum and on top a layer of gas. The porous rock and the other substances are held in a container which is impervious and shuts them off from such of the surrounding land as lies outside it, but within the container itself they can move from place to place and therefore any withdrawal of water, petroleum or gas from one portion of the container normally results in the filling of the vacant space by one of these three substances. As has been stated, the bed stretches beyond the appellant's land and therefore any such withdrawal may cause the gap to be filled from those portions of the bed which lie outside the appellant's boundaries. On the other hand, the withdrawal of any of the contents may result in a partial filling of the space by the original substances under decreased pressure or partially in both ways. The

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[1] [1953] 2 W.L.R. 224, [1953] 1 All E.R. 451, 7 W.W.R. (N.S.) 546 [1953] 2 D.L.R. 65.

> substances are fugacious and are not stable within the container although they cannot escape from it.[2]

His Lordship went on to deal with the standard method of recovering the petroleum, and its results:

> The result, however, of tapping the reservoir in this way is to obtain with the oil the gas in solution, to turn it into gas on the surface and to appropriate it. A further result is that some of the gas in the gas cap emerges with the petroleum and the *gas owner* is thereby deprived of some of the *unreserved property*.[3]

The trial judge had concluded that petroleum and natural gas are two separate substances and that the appellant was the owner of all the gas whether free or in solution. He further held that the obtaining of the petroleum would interfere with the rights of the appellant in the gas and granted a permanent injunction. In the Appellate Division of the Supreme Court of Alberta the majority of the court agreed that petroleum and natural gas are two different substances but held that: (1) gas in solution in strata in the liquid petroleum was part of the petroleum and therefore one of the products reserved under the reservation; (2) the reservation of the substances included a right to work; (3) all petroleum reserved was the property of the respondents and all gas not included in the reservation was the property of the appellant; and (4) the respondents were entitled to extract all the substances belonging to them from the earth even if their action caused interference with and wastage of the gas belonging to the appellant.

The Privy Council upheld the decision of the Appellate Division and, while assuming that the free gas in situ was the property of the appellant, held that the owner of the petroleum, notwithstanding the absence of a right to work, was entitled to recover its petroleum and, in so doing, was under no obligation to prevent the escape or wastage of the appellant's gas.

In giving the decision of the board, Lord Porter states that "the main strength of the respondents' case is that they have a direct grant of the petroleum, whereas the appellant has merely such residual rights as remain in him subject to the grant to the respondents. In such circumstances their Lordships are not prepared to hold that the respondents are under an obligation to conserve the appellant's gas with the consequent denial of their right to recover the petroleum in the usual way."[4]

Although it may be true under the law of real property in

[2] (1953) 7 W.W.R. (N.S.) 546, at pp. 549-550.
[3] *Ibid.*, at p. 557 (italics added).
[4] *Ibid.*, at p. 560.

England that where there is a grant of land with a reservation the reservation is in the nature of a re-grant, it is respectfully suggested that this is not the case in Alberta where the property is transferred (as it was in this case) by a statutory form of transfer under the Land Titles Act. The original ownership of minerals underlying the Borys' land, whether fugacious or otherwise, was in the Crown. The Crown, by letters patent, granted all its interest in all such minerals to the C.P.R., who in turn transferred all its interest, except its interest in the coal, petroleum and valuable stone, to Simon Borys. It is submitted, therefore, that there was a direct grant of the gas to Simon Borys by the C.P.R., just as there was a direct grant by the Crown to the C.P.R. of the petroleum. The board, however, held that, although the C.P.R. had a direct grant of the petroleum, the appellant had merely residual rights subject to this grant. There was therefore attached to a transfer registered under the Land Titles Act containing a reservation the same rights which apply to a deed with a reservation duly signed by both parties. The effect of this conclusion may be far reaching having regard to the operation of the Land Titles Act.

In *Knight Sugar Company Limited* v. *Alberta Railway and Irrigation Company*,[5] the board had to deal with the question of whether or not an agreement for sale of land, which contained a reservation of coal only, was merged in a transfer under the Land Titles Act of Alberta, such transfer reserving all coal and other minerals. It was argued that the doctrine of merger could not apply to a case where the completion of the sale takes the form not of a deed of grant but of a transfer under the Land Titles Act, which it was contended was a mere direction to the registrar to cancel the existing certificate of title and issue a new one in the name of the purchaser. The board in that case, in holding that the doctrine did apply, said:

> It is the transfer which, when registered, passes the estate or interest in the land; and it appears, for the purpose of the application of the doctrine in question, to differ in no relevant respect from an ordinary conveyance of unregistered land.[6]

The decision of the board in the *Borys* case appears to extend the similarity between transfers under the Torrens system and conveyances of land under other systems of land holding, but it is submitted that in arriving at this conclusion the board was breaking fresh ground and construing the Land Titles Act in a

[5] [1938] 1 All E.R. 266, [1938] 1 W.W.R. 234.
[6] [1938] 1 W.W.R. 234, at p. 239.

way for which there has hitherto been no precedent. The only theory on which this conclusion may be justified is that the reservation of petroleum, being expressly set out *eo nomine*, constituted a dominant grant and that the right to the gas was subsidiary to this.

From the decision it appears to follow that, although a person may own a mineral underlying the surface of his land, if that mineral is fugacious his property right in it is a qualified one and gives him no status to maintain an action against a second person who, being the owner of a similarly fugacious mineral, in working his property destroys or wastes the property of the first.

Acton v. *Blundell*[7] was referred to in the decision of the Appellate Division of the Supreme Court of Alberta. There, the court was dealing with flowing water, which likewise is a fugacious substance, and Tindal C.J. held that, in regard to surface waters, the owner of the land over which the water flowed had no property interest in the water until he had reduced it to possession. Nonetheless, the owner did have a right to maintain an action against anyone who interfered with the natural flow of the water over his land. He said that the right "might not be unfitly treated . . . as 'an incident to the land; and that whoever seeks to found an exclusive use must establish a *rightful appropriation* in some manner known and admitted by the law' ".[8] In regard to subterranean waters, however, he held that the owner of the land through which the waters flowed in subterranean channels had no right to maintain an action against a landowner who in working his mines and minerals destroyed or damaged the waters.

Ballacorkish Silver, Lead and Copper Mining Company Ltd. v. *Harrison*[9] was a case dealing with underground springs and was also referred to in the Appellate Division. Lord Penzance applied the same principle Chief Justice Tindal had applied in *Acton* v. *Blundell*, but in his judgment he was careful to say: "Express grant of these springs for the use of the tenant, of course, there is none; and as these particular springs are not shewn to have been in existence at the time of the Act of 1703, it is not easy to see how it could be implied that they individually were then or at any previous time granted".[10]

On the other hand, in the case of *Whitehead* v. *Parks*[11] the

[7] (1843), 12 M. & W. 324; 152 E.R. 1223.
[8] 12 M. & W. 324, at p. 350 (italics added).
[9] (1873), L.R. 5 P.C. 49.
[10] *Ibid.*, at p. 62.
[11] (1858), 2 H. & N. 870; 157 E.R. 358.

court held that where there had been a specific grant of underground springs the owner, notwithstanding that the water in the springs was a fugacious material, could maintain an action against a mine owner who, in the working of his mine, interfered with or damaged the spring.

The courts in the *Borys* case having held or assumed that the appellant owned the gas in the gas cap underlying the surface of his land, it is difficult to understand why the owner of petroleum, which is a fugacious material, should be in any better position than the owner of coal or any other non-fugacious mineral, and yet this appears to be the result of their Lordships' decision.

The decision in its present form must inevitably lead to additional litigation to determine the respective rights of parties in other structures where the substance obtained is wet gas, and there will be the greatest difficulty in working out the respective rights of the parties in the present action. Perhaps the difficult problems that are bound to arise out of the ownership by different persons of such minerals as petroleum and natural gas can only be resolved by legislation.

C. ERIC STUART*

A Sense o fthe Need for Help

If, however, the crucial importance of individual will and individual action is recognized again, there can be no escape from the further problem of how men are to be persuaded to accept social responsibility and to become the conscience of the community. In other words, how can society guarantee that supply of good men on whose integrity, generosity, forbearance, and charity, the wholesomeness of the community depends? Bertrand Russell can say, on his eightieth birthday, looking back over a life spent in the vanguard of rationalist thought, 'What the world needs is more charity, more Christian compassion, more love'. But how are the springs of love to be unsealed? Self-interest is not the answer. Social conformity is not the answer. Education is only a part of the answer since, before you educate, you must know what principles are to be taught. Here is the last and fundamental break from nineteenth-century thinking. Neither material progress nor science nor environment automatically generates good men and women. How is it to be done? (Barbara Ward: The Illusion of Power. The Atlantic, December 1952)

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