Correspondence

The Mischief of "Lindal and Beattie"

TO THE EDITOR:

Professor G. W. Reed's comment on the British Columbia case of *Eager* v. *Elliot and Ruby General Insurance Co.* in the March issue of the Review at page 319 is particularly useful to practitioners in Quebec, because his summary, beginning at page 323, of the effect of the Canadian decisions on public policy as a defence to claims under public liability automobile insurance is still applicable to Quebec, where no remedial legislation whatsoever has yet been enacted.

It is regrettable that this was not judicially settled long ago in Canada with the awareness and good sense displayed in the English decisions of Bailhache J. and Roche J. as early as 1921, in the *Tinline* case, and 1927, in the *James* case, respectively. It was there decided that policies of insurance covering the liability of an insured automobile driver for damage caused by negligence, even though gross and followed by unintended criminal consequences, were not void as being against public policy. These decisions seem to have stood the test in England ever since: I submit, with all respect to Whittaker J. in the *Eager* case, that their correctness was not questioned in *Haseldine* v. *Hosken*, a 1933 decision of the English Court of Appeal involving indemnity to a solicitor for the consequence of a champertous agreement. In *Haseldine*, Scrutton L.J. said that *Tinline* and *James* were not applicable and he did not express any opinion upon them; Greer L.J. indicated, in an obiter, the basis of their good sense, namely, that it was intended by the law that automobile drivers should insure against all claims resulting even from their most negligent driving. Rather than questioning them, I should say that *Haseldine* v. *Hosken* fortifies the soundness of *Tinline* and *James*. This appears to be the view of Denning J. (as he then was) in *Askey* v. *Golden Wine Co.*, [1948] 2 All E.R. 35, at p. 38.

Roche J. in the *James* case put what to me is the gist of his decision in the following words:

> The principles of public policy, which I suppose are only a branch of the principles of ethics, are themselves unchanging, but their applications may be infinitely various from time to time and from place to place. . . . . .

And, one could add, "from subject matter to subject matter".

But in 1933 the Supreme Court of Canada, in *Home Insurance Company of New York et al.* v. *Lindal and Beattie*, [1934] S.C.R. 33, would have none of the facts of modern life: the increased risks caused by the general use of automobiles and the function of insurance in our society. It declared at page 38, Lamont J. delivering the judgment of the court (Crocket J. dissenting), that "the principle which [was] applicable" is the one stated by Kennedy J. in *Burrows* v. *Rhodes*, [1899] 1 Q.B. 816, at p. 828, when there were no automobiles on the highways. There could be no indemnity against liability resulting from an unlawful act, not only an act known to be unlawful by the doer, but also one that was "manifestly" unlawful. Beattie had been "manifestly" intoxicated and reckless in his driving, therefore, Lindal, who was injured as a result, could not recover from Beattie's insurer. The Supreme Court made no analysis of *Burrows* v. *Rhodes;* there was a mere automatic application of a statement of law without any apparent attempt to ascertain whether the principle implicit in it was still valid in the light of the facts of the case, of contemporary conditions and of the public policy in respect of the subject matter before the court. The whole context of *Burrows* v. *Rhodes* was foreign to the situation in *Lindal and Beattie*. Burrows was suing Rhodes and Jameson for damages suffered while he was serving in the troops of the British South Africa Company who had entered the territory of the South African Republic on defendants' fraudulent representations that the expedition was lawful. On a demurrer, the defendants submitted that there was no cause of action, because if the allegations were true the plaintiff would have committed an offence under the Foreign Enlistment Act and, under the principle *ex dolo malo non oritur actio*, could not recover damages. The demurrer was dismissed by Grantham and Kennedy JJ. The passage quoted by Lamont J. as the "principle applicable" to *Lindal and Beattie* is a statement of what Kennedy J. thought was the law he had to apply to the special circumstances of *Burrows* v. *Rhodes*. *Burrow* v. *Rhodes* did not compel the decision reached in *Lindal and Beattie* by the Supreme Court of Canada, which chose to apply a statement of law formulated as his guiding rule by a judge trying an entirely different kind of issue of public policy arising in another age.

There seems to have been no effort in *Lindal and Beattie* to get at the root of the principle, if principle it is. The root of it was enunciated, I suggest, by Lord Ellenborough in 1812 in *Gilbert* v. *Sykes:*

> When the tolerating of any species of contract has a *tendency* to produce

> a public mischief or inconvenience, such contract has been held to be void. [italics added.]

One can only assume that the Supreme Court must have thought that it should not enforce the public liability insurance policy held by Beattie because it was a type of contract that tended to produce a public mischief or inconvenience and harmed the public good by encouraging carelessness in the driving of automobiles. But the policy of governments, even when *Lindal and Beattie* was decided, was that automobile drivers should insure and, in this sense, the decision in *Lindal and Beattie* itself could be said to be contrary to public policy. Stare decisis would not have long endured in England if judges, like Bailhache J. and Roche J. for instance, had not been alert to feel the force of changing conditions and to give effect to them.

The effect of *Lindal and Beattie*, if carried to its logical conclusion, would be to make much of public liability insurance practically useless. Idington J. in *London Guarantee and Accident Co.* v. *Sowards*, [1923] 2 D.L.R. 495, at p. 497, had already said:

> I am strongly of the impression that in law an insurance company cannot legally insure the owner of an automobile against anything arising out of driving at a prohibited rate of speed.

The unsatisfactory situation created in Canada by *Lindal and Beattie* was soon recognized by the insurance superintendents and by most insurers, who agreed as early as 1940 that it should be remedied. After thorough study and discussion, draft legislation was approved at the meeting of the Superintendents of Insurance in 1947. We find it in section 63 of the British Columbia Insurance Act, as Professor Reed points out, and it has been enacted also in Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Prince Edward Island.

The situation had been already remedied in part by the standard statutory provisions relating to automobile insurance in force, I believe, in all provinces of Canada, except Quebec. Under these, no violation of the Criminal Code or of any other statute is available to an insurer as a defence with respect to the minimum statutory coverage, that is, five and ten thousand dollars for certain public liability claims. Therefore, in Nova Scotia and Newfoundland, *Lindal and Beattie* still appears to be the leading authority in cases outside the scope of the statutory coverage. As for Quebec, seemingly it must still live without any statutory protection against *Lindal and Beattie*.

The result in Quebec is that an insurer, by applying the pressure of *Lindal and Beattie* on the innocent victims of a criminally negligent driver, may pare down the liability he has contracted to bear for a premium he has himself decided is commensurate with the

risk. This result is injurious both to the public good and the sound administration of the law.

LÉON LALANDE*

A General Uneasiness

There was an announcement in the *Times* the other day of a playwriting contest sponsored by the office of Samuel French. One of the conditions was that the sponsor 'reserves the right at any time to declare ineligible any author who is, or becomes publicly involved in a scholastic, literary, political or moral controversy'. On first reading this, we thought it was a typographical error such as one finds once in a great while in the *Times*, but we searched and could find no sign of error, and so became aware that the sponsor's insistence on the contestants' intellectual inertness was indeed a condition of the contest. Controversy is now a naughty thing, a disqualifying thing. The act of disputing or contending is an unwholesome act. To disagree with anybody or anything is to run the risk of taking oneself out of the money. All this in a country that was born of controversy — a country that wrote controversy into its constitution, that set up its legislative bodies on the theory of controversy, that established its free press in the belief that controversy is vital to information, and that created a system of justice of which controversy is the heart and soul.

The Samuel French office would not have gone to the trouble of sterilizing its playwrights were not something wrong somewhere. What is this something? And how does it manage to infect every person and every business in the nation? The 'something' is a general uneasiness. Its immediate effect is a general clamming up. The spread of the disease is caused, quite largely, by the steady expansion of the investigations carried out by Congressional committees in the name of loyalty, plus the many special watch-dog activities of patriotic organizations that throw themselves about rather wildly in times of nervous strain. Alben Barkley, whose old eyes have looked upon many a session of Congress, spoke up recently in favor of a new code, a new set of rules, to govern investigations. In so doing, he took the words out of the mouths of many millions of Americans who are wondering how much longer they will have to wait for corrective measures. It is a problem of self-discipline, for Congress has a clear right to search for facts in whatever spheres may suit its fancy, and the committees make their own rules and write their own tickets. It is a problem in public responsibility, and it involves a basic question: Is a fact worth finding even if the harm done in discovering it is out of all proportion to the usefulness of the fact? The answer to this question by the committeemen has been a resounding Yes. (The New Yorker: The Talk of the Town, March 7th, 1953)

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Books Received

The mention of a book in the following list does not preclude a detailed review in a later issue.

Annual Report, Delinquency and Crime Division, The Canadian Welfare Council. 245 Cooper Street, Ottawa: The Canadian Welfare Council. 1953. Pp. 49. (No price given)

Chartered Banking in Canada. By A. B. JAMIESON. Foreword by W. A. MACKINTOSH. Toronto: The Ryerson Press. 1953. Pp. x, 394. ($5.00)

Coarse Papers: Investigation into an Alleged Combine in the Supply, Distribution and Sale of Coarse Papers in British Columbia. Ottawa: Report of Commissioner, Combines Investigation Act, Department of Justice. 1953. Pp. iii, 136. (No price given)

The Commercial Dictionary. By A. G. P. PULLAN and D. W. ALCOCK, A.S.A.A., A.A.C.C.A. Adapted from The Australian Commercial Dictionary by R. KEITH YORSTON, B.Com., F.C.A.(Aust.). London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1953. Pp. v, 316. ($4.75)

The Control of Delegated Legislation: Being a study of the doctrine of Ultra Vires in relation to the Legislative Powers of the Executive Government, with special reference to Great Britain, Australia, New Zealand and Canada. By D. J. HEWITT, LL.M. With a foreword by SIR CECIL T. CARR, K.C.B., Q.C., LL.D. Toronto: Butterworth & Co. (Canada) Ltd. 1953. Pp. xx, 195. ($7.50)

Current Law Year Book 1952: Being a Complete Statement of All the Law of 1952 from Every Source. General Editor: JOHN BURKE. Year Book Editor: CLIFFORD WALSH, LL.M. Assistant General Editor: Peter Allsop, M.A. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Company, Limited. 1953. Pp. 167, 3685 (paragraphs), 68. (£2 10s. net)

Family Law. By JACK HAMAWI, M.A., LL.B. (Cantab.). Consulting editor: W. A. FEARNLEY-WHITTINGSTALL, Q.C. With a foreword by THE RIGHT HONOURABLE SIR F. L. C. HODSON. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1953. Pp. lxxvi, 364. ($9.50)

A First Book of English Law. By O. HOOD PHILLIPS, M.A., B.C.L. (Oxon). Second edition. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1953. Pp. xxiv, 293. ($3.25 net)

Group Insurance and Employee Retirement Plans. By LOUISE WALTERS ILSE, Ph.D. New York: Prentice-Hall, Inc. 1953. Pp. x, 438. ($7.50)

The Immigration and Nationality Act: A Summary of Its Principal Provisions. By FRANK L. AUERBACH. With a foreword by READ LEWIS. New York: Common Council for American Unity. 1952. Pp. 103. ($1.50)

Law and Order in Canadian Democracy: Crime and Police Work in Canada. By THE ROYAL CANADIAN MOUNTED POLICE. Revised edition. Ottawa: The Queen's Printer. 1952. Pp. ix, 273. ($1.00)

Law Reform and Law Making: A Reprint of a Series of Broadcast Talks. By C. J. HAMSON, A. L. GOODHART, K.B.E., Q.C., THE RT. HON. LORD JUSTICE DENNING, E. C. S. WADE, D. R. SEABORNE DAVIES, G. L. WILLIAMS, SIR CECIL CARR, K.C.B., Q.C. Cambridge: W. Heffer & Sons Ltd. 1953. Pp. 91. (5s.)

Learning the Law. By GLANVILLE L. WILLIAMS, LL.D. (Cantab.). Fourth edition. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1953. Pp. xiv, 210. ($2.75)

Legal Essays in Honour of Arthur Moxon. Edited by J. A. CORRY, F. C. CRONKITE and E. F. WHITMORE. Published in co-operation with the University of Saskatchewan. Toronto: University of Toronto Press. 1953. Pp. xi, 262. ($10.00)

A Manual of Canadian Criminal Law. By LEWIS WHARTON, B.A., LL.M. London: The Fortune Press. 1951. Pp. 216. ($4.50)

Maple Products: Investigation into an Alleged Combine in the Purchase of Maple Syrup and Maple Sugar in the Province of Quebec. Ottawa: Report of Commissioner, Combines Investigation Act, Department of Justice. 1953. Pp. iii, 44. (No price given)

The Meaning of Income in the Law of Income Tax. By FRANCIS EUGENE LABRIE. Sponsored by the Canadian Tax Foundation. Toronto: University of Toronto Press. 1953. Pp. xi, 380. ($15.00)

The Psychopathic Delinquent and Criminal. By GEORGE N. THOMPSON, M.D., F.A.C.P. Springfield, Illinois: Charles C. Thomas, Publisher. Toronto: The Ryerson Press. 1953. Pp. xv, 157. ($5.00)

Salmond on the Law of Torts. Eleventh edition by R. F. V. HEUSTON, M.A. London: Sweet & Maxwell Limited. 1953. Pp. lx, 794. ($8.00 net)

The Sex Paradox: An Analytical Survey of Sex and the Law in the United States Today. By ISABEL DRUMMOND. New York: G. P. Putnam's Sons. 1953. Pp. x, 369. ($5.00)

Social Meaning of Legal Concepts: No. 5, Protection of Public Morals through Censorship. Edited by BERNARD SCHWARTZ. An annual conference conducted by the New York University School of Law in association with the Division of General Education. New York: Law Center Publications Office, New York University. 1953. Pp. iii, 88. ($1.50)

Stroud's Judicial Dictionary of Words and Phrases. Third edition. General editor: JOHN BURKE. Assistant General Editor: PETER ALLSOP, M.A. Volume 3: M-R. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1953. Pp. xviii, 1697-2638. ($13.50)

The United Nations and the Egyptian Blockade of the Suez Canal. A Study Sponsored by the Lawyers Committee on Blockades. 76 Beaver Street, New York: Lawyers Committee on Blockades. 1953. Pp. 27. (No price given)

The Year Book of World Affairs 1953. Published under the auspices of the London Institute of World Affairs. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1953. Pp. xi, 427. (No price given)