Case and Comment

CONVEYANCING—TITLE SEARCH UNDER A DOCUMENT REGISTRY SYSTEM—ONTARIO EXPERIENCE.—A number of recent decisions in the Ontario courts have pointed up problems of title search of considerable significance in the combined operation of Ontario's Registry Act[1] and Investigation of Titles Act.[2] An Act like the Registry Act, dealing only with registration of instruments creating or evidencing interests in land, and requiring registration to protect holders of such interests against subsequent purchasers or mortgagees for value who have no actual notice, does not, of course, solve for any purchaser or mortgagee the vital problem whether he will get a good marketable title. Although it ensures (subject to some exceptions, as for example dower interests[3] or easements arising by implied grant[4]) that outstanding interests in or claims against the land will be shown on the abstract, the purchaser or mortgagee must still satisfy himself by title search on the legal effect or reach of registered instruments. It is the Investigation of Titles Act that answers the question how far back in the chain of title he must carry his search.

This Ontario Act, which prescribes a "forty year period" (as elaborated later) dates only from 1929.[5] Before its enactment, it was usual to search for sixty years, in accordance with the rule of conveyancing practice established in England, or to go back to the Crown grant or to a certificate quieting title.[6] The sixty year rule, for which various reasons of convenience were advanced (as, for example, that it coincided with the duration of human life[7]), required that the period begin with a good root of title, which meant,

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[1] R.S.O., 1950, c. 336.
[2] R.S.O., 1950, c. 186.
[3] See *Fries* v. *Fries*, [1950] O.W.N. 661.
[4] See *Israel* v. *Leith* (1890), 20 O.R. 361; *Donaldson* v. *Lapp*, [1953] O.R. 178.
[5] 1929 (Ont.), c. 41.
[6] Armour on Titles (3rd ed.) p. 32.
[7] *Barnwell* v. *Harris* (1809), 127 E.R. 901; *Moulton* v. *Edmonds* (1859), 45 E.R. 352.

in practice, that the point of commencement would be beyond an exact period of sixty years preceding the contract of sale in respect of which a good title had to be made.[8] In the English practice, in which the vendor supplies an abstract, it would then be necessary to carry it forward from that point. "Wherever he begins the root of title", says Sugden, "he ought to abstract every subsequent document."[9] When a forty year period was adopted in England under the Vendor and Purchaser Act, 1874,[10] the same routine was followed. Under a system of registration of documents, as in Ontario, this would involve taking notice of every instrument on the register from the root of title forward to the date of the contract of sale.

The foregoing considerations may be tested by reference to *Re Layton and Yankou*[11] in which a purchaser, under a contract of sale made in November 1949, submitted a requisition in respect of an undischarged mortgage against the land registered in July 1904 and given by the then owner of the land whose title derived from a deed registered earlier in 1904. This deed was the vendor's root of title in the present proceedings. Wells J. held, without written reasons (and perhaps because conveyancing practice in the area supported the conclusion) that because the mortgage was not noted on the register within the period of forty years preceding the contract date (November 1949) it was ineffective against the purchaser even though it was within the "root of title" period. With respect, it appears to be illogical to require a purchaser to go back to a root of title beyond the exact forty year period preceding the contract of sale and then to rule out any encumbrances shown on the register intermediately between the date of the commencement of the root of title and the beginning of an exact forty year period. The argument can be put both on principle and on statute interpretation. As a matter of principle, the prime reason for finding a good root of title is to require the vendor to measure up to his obligation to give a marketable title. If the search back to a good root discloses existing encumbrances within the root period, surely they must be taken into account, because otherwise it is impossible to bring the good title forward to the commencement of a forty year period. Or, to put the matter another way, how can a vendor show a marketable title if he can only bring it forward to the commencement of the forty-year period encumbered

[8] *In re Cox* v. *Neve's Contract*, [1891] 2 Ch. 109.
[9] Sugden, Vendors and Purchasers, p. 432
[10] 1874 (Imp.), c. 78.
[11] [1950] O.W.N. 337.

by a mortgage? The Investigation of Titles Act in terms also supports the argument. After speaking in section 2(1) of the necessity of showing a good title "during the period of forty years", and so forth, which means forty years and as far back as it is necessary to go to find a good point of commencement, it goes on to say that no unregistered claim "which has been in existence longer than *the forty year period*" shall affect the land.[12] Surely the reference is to the root of title period. The best that can be said for the ruling in *Re Layton and Yankou* and the conveyancing practice which it exemplifies is that it facilitates land sales. A better method would be to shorten the prescribed period of search, something which was done in England in 1925 when the period was reduced from forty to thirty years.[13] A shorter period would not, of course, obviate the ruling in *Re Layton and Yankou*, but it is one which, to this writer, is quite illogical.

A more difficult problem is raised by the judgment of the Ontario Court of Appeal, reversing Judson J., in *Algoma Ore Properties Ltd.* v. *Smith*.[14] The decision turns partly on the particular terms of the Ontario Investigation of Titles Act, but it also raises a fundamental question about the nature of an instrument which is regarded as a sufficient root of title. The facts in the *Smith* case were these. One Holden received a patent of land in 1885. He devised the land to his daughter, Mrs. Braden, subject to a reservation of all mines and minerals (with accessory rights), which he devised to four other children. The will was registered against the land in 1886. Mrs. Braden granted the land to John Arnott in fee simple in 1900, and Arnott in turn granted it in fee simple to Walter Smith, the vendor in this case, in 1917. The instruments of grant were registered, and neither referred to the mining rights but each purported to be a conveyance of the fee simple in the land. The neat question was whether Smith could give a good title to both mining and surface rights to a proposed purchaser, the Algoma Ore Properties Ltd., in 1952. Descendants of the devisees of the mining rights (which had not been dealt with in any way, so far as appeared from the register, since the registration of the will in 1886) asserted that they had subsisting interests in the min-

[12] It should be pointed out that in s. 2(1) of the Investigation of Titles Act, as it appeared in R.S.O. 1937, c. 171, the phrase quoted in the text contained the word "said", so that it read "which has been in existence longer than the *said* forty year period". The word "said" was dropped in the 1950 revision, probably to improve the draftsmanship. Its deletion does not affect the argument in the text.

[13] Law of Property Act, 1925 (Imp.), c. 20, s. 44.

[14] [1953] 3 D.L.R. 343, rev'g [1953] 2 D.L.R. 543.

ing rights. Judson J. and the Ontario Court of Appeal were in agreement that the effect of the will was to create separate fees simple in the surface rights and in the mining rights. But although Judson J. held that section 2(2) of the Investigation of Titles Act preserved the fee in the minerals despite the want of subsequent recordation of notice, the Court of Appeal held that failure to record notice of the fee within the "forty year period" as required by section 2(1) of the Act resulted in expiry or loss of the fee in the minerals as against the vendor Smith.

The general purpose of the Investigation of Titles Act to facilitate the marketability of titles is promoted by denying legal efficacy to claims against land unless they appear in instruments or are asserted by a notice registered within the forty year period, and by requiring re-registration to keep the claim alive against intermediate registered dealings. This policy is sufficiently disclosed in section 2(1) of the Act, reading as follows:

> 2.-(1) From and after the 1st day of June, 1930, no person in dealing with land shall be required to show that he is lawfully entitled to such land as owner thereof through a good and sufficient chain of title, save and except during the period of forty years immediately preceding the date of such dealing as aforesaid, and no claim which has been in existence longer than the forty year period shall affect such land, unless such claim shall have been acknowledged or specifically referred to or contained in an instrument registered against such land within the forty year period or unless a notice is registered against such land as provided in subsections 5, 6, 7 and 9.

This subsection, if it stood alone, might well support the conclusion of the Court of Appeal in the *Smith* case. The root of title for this purpose would be the fee simple deed of 1900 from Mrs. Braden to Arnott; and if, on its face, it was an instrument purporting to deal with both the legal and beneficial interest in the land and to be a conveyance thereof by a grantor capable of conveying that interest, there could be no quarrel with the result. To be such a root of title, it may be suggested that it would not be enough that the deed should simply disclose on its face a conveyance in fee simple but should also indicate that the grantor was seised in fee simple in possession free from incumbrances.[15] In his judgment in the *Smith* case, F. G. MacKay J. A. (speaking for himself and for Pickup C.J.O.) stated that "The purchaser is entitled to rely on the form of the instruments registered and is not bound to inquire into their substance and if the instrument on

[15] See Walford, Twenty Years' Title (1944), 8 Conv. & Prop. Lawyer (N.S.) 135; Williams, Vendor and Purchaser (4th ed.), p. 124.

which he relies as the root of the title prior to the forty-year period is on its face sufficient to convey the fee, including the mineral rights, he is entitled to rely upon it".[16] Subject to the qualification I have indicated as to what the face of the deed should disclose, this statement is unassailable. One can, of course, conjecture the case of a person who, without any right, purports to make a conveyance in fee simple. Apart from the Investigation of Titles Act or other provision limiting the period for title search, such an instrument would be worthless even if registered; the effect of legislation like the Investigation of Titles Act is to give efficacy in certain circumstances to registered instruments beyond what they would otherwise have; but, at least where a fee simple interest is concerned and where a root of title is involved, it is not unreasonable to require disclosure on the face of the root instrument that the grantor has a right to make the conveyance. The frailty of this guarantee against a determined defrauder need not be emphasized. The justification for the requirement lies in the stringent effect of the Investigation of Titles Act.

The difficulty with the Ontario Court of Appeal's judgment lies in the fact that section 2(1) of the Act does not stand alone. It is supplemented by section 2(2) reading as follows:

> (2) Where a person is shown by the books of a registry office to be the owner of a freehold or leasehold estate in land or of an equity of redemption therein prior to any forty year period and is continuously shown on the books from time to time during the forty year period and thereafter as the owner of either a freehold or leasehold estate in the same land or of an equity of redemption therein or any of them, such person's claim to the land shall not be affected by failure to register the notice as required by subsection 1.

In his judgment F. G. MacKay J.A. made only brief reference to this provision but without giving it meaning unless meaning can be found in his assertion that on the registration of the deeds from Mrs. Braden to Arnott in 1900 and from Arnott to Smith in 1917, the owners of the minerals "were no longer shown 'continuously' on the books as being the owners and unless they . . . filed a notice of their claim as provided by s. 2(5) they lost their rights . . .".[17] Hogg J.A., the third member of the Court of Appeal, expressed a similar view in stating that section 2(2) "deals with a freehold or leasehold estate in land prior to and during the forty-year period".[18] If, as both judges indicate, the owners of the fee in the minerals

[16] [1953] 3 D.L.R. 343, at p. 350.
[17] *Ibid.*
[18] [1953] 3 D.L.R. 343, at p. 346.

are required to re-register a notice of their claim before they can be "continuously shown on the books from time to time during the forty-year period and thereafter" (to use the words of section 2(2)), then this subsection accomplishes nothing by way of exception from the general obligation of keeping claims alive by registration. The result is to read it out of the statute.

Neither of the two judges gave any clue as to the operation of section 2(2). Nor do their judgments disclose the history or basis of the Investigation of Titles Act. So far as this writer has been able to ascertain, its origin is obscure. Although it may have been motivated by the English Vendor and Purchaser Act, 1874, and by section 44 of the English Law of Property Act, 1925, it is not couched in similar terms. Some American writers have referred to the Ontario Act as a pioneer in its field, preceded only by a comparable Iowa enactment in 1919.[19] Although the main outlines of the Ontario Act are clear enough, the intent of the exception in section 2(2) is something that begs discovery. Does this mean, however, that it should be ignored? Judson J. in the original proceedings in the *Smith* case thought not. But F. G. MacKay J.A. contended that "if the judgment appealed from were correct the Investigation of Titles Act would have no application whatever to the estates or interests in land referred to in s. 2(2), namely a freehold or leasehold estate or an equity of redemption, and the Act would apply only to other interests in land. This would make it necessary, notwithstanding the statute, to search all titles back to the Crown in respect of all freehold or leasehold estates or equities of redemption. I do not think that can be the meaning of the legislation."[20]

The reasoning of the learned justice is, administratively, hardly open to objection, and its eminent practicality is supported by his view that the "Act requires a search only to the first root of title prior to the forty-year period".[21] Thus, in the present case, the first root of title under the forty-year rule would be (subject to qualifications already mentioned) the deed to Arnott in 1900. It hardly seems credible that a purchaser of the fee in 1952 should have to go back of this root if any effect at all is to be given to the Investigation of Titles Act.

A different kind of case is the more recent judgment of the Ontario Court of Appeal in *Re Headrick and Calabogie Mining Co.*

[19] See Aigler, Clearance of Land Titles: A Statutory Step (1945), 44 Mich. L. Rev. 45; Note (1948), 33 Minn. L. Rev. 54.
[20] [1953] 3 D.L.R. 343, at p. 349.
[21] *Ibid.*, at p. 350.

Ltd.[22] Here too a surface fee simple co-existed with an underground fee simple in different persons. A deed of the minerals in favour of the respondent mining company was last registered in 1899 and the register showed no further dealings with the minerals thereafter. In 1938, the municipality in which the land lay conveyed it (without any reservation of minerals) to one *C*. For present purposes it may be assumed that the municipality was not entitled to make the conveyance in so far as minerals were included. In 1940 *C* conveyed to *N*. It is clear, and so the court held, that the Investigation of Titles Act would not help *N* in his claim to the minerals. *N*'s claim necessarily depended on his predecessor *C* having a good forty-years title and this was not so on the facts. If the municipality's conveyance to *C* had been registered in late 1899 (after the registration of the fee simple deed of the minerals), then on *C*'s further conveyance to *N* in 1940 there would be a basis for invoking the Act in *N*'s favour so far as the minerals are concerned.

Where then does all this leave section 2(2) of the Act? It is conceivable that section 2(2) may have some application in relation to claims against the land by persons who assert interests less than a freehold or leasehold or an equity of redemption. If section 2(2) is intended as a caution that the subsequent recordation of inferior interests does not affect the continuing validity of superior interests recorded before the forty-year period, it is only declaratory, and if that is its only value it might well be repealed or at least clarified to this end. How to deal with different horizontal fees in the same land raises a different problem, but one which surely can be solved by appropriate organization of the register. Apart from this, the *Smith* case brings home emphatically that the Investigation of Titles Act gives us another instance of those cases where a person may confer a better title than he has. It invites vigilance with respect to the register, a vigilance which will be even more demanding if the root of title period is reduced.

BORA LASKIN*

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LEGAL PROFESSION—DESIGNATION OF MEMBERS—QUEBEC—ADVOCATE, COUNSEL, ATTORNEY, SOLICITOR AND BARRISTER.—"D'où venons-nous? Que sommes-nous? Où allons-nous?" Where do we come from? What are we? Where are we going? Anyone to whom

[22] [1953] 4 D.L.R. 56.

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the French impressionist school of painting appeals will readily recall the foregoing interrogatories, which serve as the title of one of Paul Ganguin's masterpieces depicting a group of sombre-faced Tahitians pondering the eternal enigma of the universe on the shore of their beautiful island. It is not my object in this commentary to pose an enigma, but I have borrowed the title of the painting because it does describe "the thoughts that arise in me" as I sit far removed from coral reefs, or even the "cold grey stones" of northern seas, and ponder the vagaries of legislators and practitioners in their diverse designations of the members of the legal profession in the province of Quebec.

Is it not strange that, after almost two hundred years, a professional group ever and necessarily concerned with the correct use and interpretation of words should still be unable to arrive at uniformity in the designation of its members? An examination of professional cards discloses an unconformity that suggests the question: Does the Quebec lawyer really know what he is? Here are some examples taken from a current law list: "Advocate", "Advocate and Solicitor", "Advocate and Barrister", "Advocate, Barrister and Solicitor", "Barrister and Solicitor", "Barrister and Solicitor, etc." and "Attorney-at-Law". It is useless to turn to the Bar Act, R.S.Q., 1941, c. 262, to clarify the description of ourselves, for it contains no interpretative provisions that are of help. Section 2 of the act merely says: "Under the name of 'The Bar of the Province of Quebec', the advocates, barristers, counsel, attorneys and solicitors of the Province, in this act called advocates, shall form a corporation herein called 'The General Corporation of the Bar' ", unlike section 2, subsection 11, of the Quebec Pharmacy Act, R.S.Q., 1941, c. 267, which with admirable forthrightness says: "The words 'druggist', 'chemist', 'apothecary, 'pharmaceutist', 'pharmacist', 'pharmaceutical chemist' or 'dispensing chemist' mean a person having a right to sell and compound drugs and poisons in this Province".

Article 1732 of the Quebec Civil Code says in part: "The profession of advocate and attorney [*avocat* and *procureur*] is regulated by the provisions contained in an act intituled: An Act respecting the Bar of Lower Canada . . .". The Code of Civil Procedure, too, mentions only advocates and attorneys, and the latter term, and its French equivalent *procureur*, is favoured by practitioners when signing pleadings.

Authority for the use of "advocate and attorney" is derived, not only from the two codes, but also from the language of ordi-

nances and statutes that antedate their promulgation. If the two terms stood alone, our interrogatories would be idle; and if the mere mention in a statute of a term denoting a professional capacity is all that is needed as authority, then other terms may be said to have become more or less hallowed, if not by mention in our principal codes, then at least by their occurrence in the same ordinances and statutes and in the diplomas awarded by the bar.

The form of diploma first adopted in 1924, and still in vogue as I write, confers upon the recipient the right to practise as an "Advocate, Counsel, Attorney, Solicitor and Barrister". In the French form, these words are now written *Avocat, Conseil, Procureur, Avoué et Practicien en Loi.* But it was not always so, and a glance at the French and English texts of the statutes shows that the translator has been bedevilled more than once in his search for coincident terms to describe the profusion of capacities with which the Quebec practitioner has been endowed from time to time.

Since the *avocat* was considered dispensable, if not undesirable, during the French regime, the legal profession may be said to have come into existence in Canada only after the English conquest, and an ordinance issued by the governor in the year 1785 may be considered to be its birthright, for until then lawyers were commissioned functionaries rather than practitioners engaged in a calling for which they necessarily possessed any special qualifications. The ordinance, which mentions "Barristers, Advocates, Solicitors, Attorneys and Proctors at Law", is of interest, not only for its prescriptions on indentureship and legal training, but also because it put an end to the somewhat piebald phase of practice as then carried on in the province by ordaining ". . . that these several occupations of practising the law in His Majesty's Courts in this Province, and of being a Clerk therein; and of Notary; and of Land Surveyor; shall be held and exercised separately; and by different persons, to the intent and purpose that the functions and duties of the one may not interfere with the other . . .".

Appended to the statute 12 Vict., c. 46 (1849), incorporating the Bar of Lower Canada, is a schedule containing a form of diploma which adheres to the language of the ordinance of 1785 by conferring the right to practise as an "Advocate, Barrister, Attorney, Solicitor and Proctor at Law". From the French version, which reads "Avocat, Conseil, Procureur, Solliciteur, et Practicien en Loi", it is evident that Barrister is here paired with *Conseil*; Solicitor with *Solliciteur*; and Proctor at Law with *Practicien en Loi.* Although these capacities were left unchanged in the consolidation

of 1861, all but two were excised from the form appended to 49 Vict., c. 34, enacted in 1886, with the result that graduate lawyers were granted the right to practise as "Advocates and Attorneys" only, which they did for almost forty years without, it seems, feeling in any way inhibited in the effective exercise of their calling by being denied the right to practise as barristers, solicitors and proctors at law as well.

The term "Proctor at Law" was permanently interred in 1886, but *Practicien en Loi*, its opposite number for a hundred years, was exhumed in 1924 and inserted among the capacities listed in the form of diploma authorized, as I have mentioned, in that year, but this time as the French counterpart of Barrister, displacing *Conseil*, which is now more fittingly employed as the French equivalent of Counsel. It is also to be noted that Solicitor is now translated in the diploma as *Avoué*. But in the general provisions of the statute as it appears in the revision of 1925 (R.S.Q., 1925, c. 210, now R.S.Q., 1941, c. 262) both *Solliciteur* and *Avoué* are used.

It is hard to say which is the more surprising: this casual shuffling, effacement and restoration of terms and capacities, or the unconcern with which they are accepted by the members of a profession who spend much time studying (and more expounding) the precise meaning of words, and asseverating that the legislator does not put words in a statute without intending to give them meaning; this last proposition being often urged with optimistic zeal as amounting almost to a presumption *juris et de jure*.

The *procureur* was recognized during the French regime, and the term has remained with us, as our codes and written pleadings attest. Moreover it is included in the title of the minister charged with the administration of justice in Quebec, the Attorney-General, who is the law officer of the Crown and the official legal adviser of the Lieutenant-Governor (Executive Power Act, R.S.Q., 1941, c. 7, and Attorney-General's Department Act, R.S.Q., 1941, c. 46). As to the advocate, no picture of the development of the profession in Lower Canada and Quebec would be authentic without him as its central figure. The number of statutes in which the recital of the various capacities is followed by the words, "in this act called advocates", or some such phrase; associations like the *Communauté des Avocats*, a legal society which flourished before the incorporation of the bar as an autonomous body, and others; the certificate of admission to study the profession of advocate in the province of Quebec; the diplomas awarded, and other evidences, all point to the word "advocate" as a primal designation. That members of

the bar of Quebec may designate themselves as least as advocates and attorneys seems beyond serious dispute.

But what, if anything, do designations like barrister and solicitor signify in the province of Quebec? It will not, I am sure, come as a revelation, even to those who profess no intimate knowledge of legal organization and practice in England, to be told that barristers and solicitors form separate and dissimilar branches of the legal profession in their country; that barristers alone are members of the bar and enjoy an unrestricted right of audience before all courts; that the education and training of the barrister is not the same as the solicitor's; that disciplinary control of each branch is vested in a different body; and, finally, that these and other distinctions are not of recent origin but have existed for some centuries. The history of the legal profession[1] in Quebec reveals nothing analogous to these distinctions. The profession is and always has been undivided; the system of education and training, the same for all students; the diplomas awarded to successful candidates, likewise the same; and admission to the bar as well as the right to plead, open to every practitioner without restriction.

I do not suggest that the reference to barristers, solicitors and proctors at law in the ordinance of 1785 should be attributed only to the governor's predilection for the use of terms then current in the homeland without regard to their applicability in the province. *Avocat* and *procureur* are also mentioned among the "several occupations", and the insertion of a miscellany of capacities at a time when the profession was just being organized is understandable, particularly since it then included practitioners from England as well as the province, which incidentally had not yet been divided into Upper and Lower Canada. But the inclusion of these English terms should not be taken to mean that the image and likeness of the profession as it was then organized in England had been recreated in the province of Canada by a stroke of the pen. Through centuries of development and the influence of practice and institutions, English lawyers had evolved into barristers, solicitors, and the rest. Here they had not, and have not, notwithstanding the dutiful repetition of "these several occupations" in the statutes even to this day.

Moreover, the aptness of the terms, "barrister" and "solicitor", may be questioned on linguistic grounds, which are not without importance in an officially bilingual province. There is no satisfactory French term corresponding to barrister other than *avocat*,

[1] Notaries in Quebec form a separate profession, R.S.Q., 1941, c. 263.

which serves very well to translate "advocate" in all its connotations; and to render "solicitor" as *solliciteur* is to introduce a seemingly faithful but actually makeshift translation of a foreign word used in a special sense, of dubious origin at that,[2] which adds nothing not adequately comprehended by *procureur* and *avoué*, and is devoid of any valid association with the legal profession as it is practised in Quebec, or even in France, where the term is not now and never has been used.

However relevant these neologic observations may be, the fact remains that in 1950 the government of Quebec decided to revive the long extinct Department of the Solicitor-General (*solliciteur général*) and, following custom and tradition in England, where the Solicitor-General is never a solicitor but always a barrister of outstanding ability, appointed a lawyer with a distinguished record of advocacy before the courts as its head. The office was re-established by 14 Geo. VI, c. 16, amending the Executive Power Act (R.S.Q., 1941, c. 7) by adding the following section:

> 5 (a) The Lieutenant-Governor in Council may appoint a member of the Executive Council who has been practising the profession of advocate for a period of fifteen years to fill the office of the Solicitor-General of the Province.
>
> The functions of the Solicitor-General shall be to act as attorney and counsel and to appear before the courts at the request of the Attorney-General in any legal matter or judicial proceeding the conduct of which belongs to the Attorney-General. . . .

Unless there are objections of which I am unaware, one could have wished, particularly since the minister must be an advocate and plead, that the government had chosen the term "Advocate-General" (which would not have been an innovation, for the office of Advocate-General existed in Lower Canada), thus making appropriate and official use of the two terms that have been most closely identified with the profession in Lower Canada and Quebec.

I should be ill-advised, I realize, to venture a forecast of the evolution of the profession in Quebec. But the indifference of the average Quebec lawyer to the number of capacities with which he is now endowed, or perhaps his gratification upon finding himself so abundantly endowed, suggests an answer of sorts to the third and final interrogatory. So long as he has the right to practise as

[2] R. M. Jackson, The Machinery of Justice in England (1942) p. 85: "The rise of the Court of Chancery led to the need for a class of men corresponding to the common law attorneys; the counterpart of the attorneys were the solicitors of the Chancery Court, whose chief work was perhaps to 'solicit' (worry or bribe) the officials so that the customary delays of Chancery proceedings were reduced as far as possible. The ecclesiastical and admiralty courts had a similar class of men called proctors."

an advocate, counsel, attorney, solicitor and barrister, the Quebec lawyer has nothing to lose by proclaiming these capacities, and will probably continue to proclaim them on his professional card and stationery, whether or not all of "these several occupations of practising the law" exist or ever existed in the province.

FRANK M. GODINE*

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WILLS — CONSTRUCTION — POSSIBLE ADEMPTION — SOUND COMMON SENSE IN PARTICULAR CIRCUMSTANCES. — Inevitably comments in this Review often take the form of a critical analysis of the result or the reasoning in a particular case, with the suggestion that either or both might have been different. It is refreshing, particularly in the area generally known as the construction of wills, to read the short judgment of Roxburgh J. in *Re Heilbronner*,[1] where his Lordship went directly to the fundamentals of the problem without allowing himself to be sidetracked by the literal application of one or two rules of construction. Rules of construction are designed to aid in the interpretation of a will, that is, in finding, from what the testator has said in the circumstances in which he said it and in which he died, the testamentary intention. They are, therefore, subject to such intention as may be made apparent in the will. Too often, they are applied literally to defeat the intention (whether it be a positively indicated intention or one it is apparent the testator would have formed had the problem been posed to him). Thus we have the rule that a will speaks, with respect to the property described in it, as of death. This is a statutory rule of construction contained in the Wills Act.[2] We also have a rule of construction, developed by the courts, that a gift of property by will is adeemed if the property has not remained *in specie* as described in the will. As a rule of construction this is subject to a contrary intention appearing in the will. Around this rule have developed certain detailed rules of application, some of them somewhat artificial. Most of them in substance boil down to the question: Is the property substantially the same as that described in the will? It may be questioned whether this is a sensible analysis of the problem: it accepts the ademption rule as a necessary pro-

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[1] [1953] 2 All E.R. 1016 (Roxburgh J.). Other problems were also involved in the issue before the court, but they do not bear upon the point here under discussion.

[2] S. 24 (U.K.).

cess in itself, to be applied or not according to the present condition of property specifically given by will. But the ademption rule is not valuable in itself—it should only be a guide in the court's determination of the testator's intention in each individual case.

In *Re Heilbronner*, the testator had given by will to *K* "my bank deposit at the Midland Bank". At the date of the will Heilbronner had a considerable credit balance in an account at a branch of the Midland Bank. At his death he had no deposit of funds at any bank. But shortly before his death (on May 10th) he had, because of illness and to facilitate payment of his household expenses, issued a cheque to a cousin *N* (one of the persons named as executors) for £100 (April 20th) and had instructed the bank to pay the balance to *N* a few days later (May 3rd). *N* made no claim to keep beneficially the balance (£235) of the money left after payment of the household expenses up to death, but claims were made by *K* and by those taking the residue of the estate. The position of those taking the residue would be that, as there was no money on deposit in any branch of the Midland Bank (or for that matter in any bank) at the testator's death, *K* could get nothing under the gift to her. His Lordship, very shortly, and in a very refreshing tone, did not discuss ademption, though he hinted at it by looking to one of its rules of exception, and granted the balance in *N*'s hands to *K*, saying that the testator intended to give *K* some money—the money in the Midland Bank. The withdrawals were for a temporary purpose—to pay household expenses. This money, though in *N*'s hands at *T*'s death as trustee for the testator, "must be deemed to have been on current account at the bank and, therefore, to pass under the bequest to [*K*]". In substance, his Lordship is saying that the testator wanted to give certain money to *K*, which he described as on deposit at a certain bank. The money, or what remained of it, was still available and identifiable in substance through the description given in the will. He was giving that money. The description of it was to identify it, not to limit the gift literally to such money only as should be on deposit. On the other hand, such portion as was withdrawn over three years before death and changed into a different asset (savings bonds) was not in substance part of the gift. She was to get what was on deposit at the bank. What was on deposit with *N* as trustee for a temporary purpose, even though it might never get back to that bank, but go to another, at the termination of the temporary purpose, was "deemed to have been" on deposit at the bank and thus for *K*—was in essence what the testator could still be con-

sidered, if asked, as indicating what he wanted to go to *K.* Might the same reasoning not equally apply to the same money if it had been moved from the local branch of the Midland Bank, which had for some reason or other closed, to the branch across the street of another bank? All the circumstances must be looked to in each case, and not just the technical or mechanical change in form.

Attention is drawn to this decision, in this short way, merely to emphasize the directness of the court's approach to the real problem and the sense of the result, without getting bogged down with rules, the acceptance and application of which may too often lead to a neglect of the original purpose behind the rule and to an improper decision. The same approach as that taken by Roxburgh J. was noted, in another field, in the Court of Appeal's decision in *Travers* v. *Holley* earlier this year.[3] It is a pleasure to draw attention to it.

GILBERT D. KENNEDY*

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ADMINISTRATIVE LAW — LABOUR RELATIONS — CERTIORARI — "PERSON EMPLOYED IN A CONFIDENTIAL CAPACITY" — POWER OF COURT TO EXAMINE EVIDENCE. — The judgments of the Supreme Court of Canada and the British Columbia courts in *The Labour Relations Board (B.C.) et al.* v. *Canada Safeway Limited*[1] interpret the expression "employed in a confidential capacity", which is used in labour relations legislation for the purpose of describing a class of employees who are not to be included in collective bargaining arrangements. The judgments also touch, sometimes most explicitly, on the right of a superior court to consider the evidence presented to an inferior tribunal, the distinction between an error on the merits and an abuse of jurisdiction and the contrast between collateral questions and substantive questions. These topics play a prominent part in delineating the exact scope of the supervisory powers that the courts can exercise through the prerogative writs of certiorari and prohibition.

The proceedings started with an application by a union to the Labour Relations Board of British Columbia for certification as the bargaining authority for the office employees of Canada Safe-

[3] [1953] 2 All E.R. 794 (C.A.); 31 Can. Bar Rev. 799.

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[1] [1953] 2 S.C.R. 46; (1953) 7 W.W.R. (N.S.) 145; (1952) 6 W.W.R. (N.S.) 510.

way Ltd. at its distributing warehouse in Vancouver. Among the employees whom it sought authority to represent were a number of comptometer and power machine operators. The application was made under the Industrial Conciliation and Arbitration Act.[2]

In denial of the union's right to represent the operators the company relied on the definition section (section 2), which provides:

> 'Employee' means a person employed by an employer to do skilled or unskilled manual, clerical or technical work, but does not include:—
> (a) A person employed in a confidential capacity or a person who has authority to employ or discharge employees.

The company contended that the operators were employed in a confidential capacity and therefore could not be included in a unit appropriate for collective bargaining.

At the hearing before the board the parties submitted a substantial volume of evidence and a number of intricate exhibits for the purpose of informing the board as to the capacity in which the operators were employed. The board apparently listened to and considered everything that the company sought to advance as to the interpretation of the expression "employed in a confidential capacity" and its application to the facts of the case, and so avoided any duplication of the problems that came before the courts in *Re Toronto Newspaper Guild, Local 87, and Globe Printing Company*.[3]

On March 24th, 1952, the board issued a certificate certifying the union as the bargaining authority for a unit of the company's employees. The salient feature of the board's decision was its ruling that the operators were not employed in a confidential capacity and consequently were to be included in the bargaining unit represented by the union. That they were included in the unit was sufficiently clear from the certificate itself. The board's reasons for its ruling, including its interpretation of the words "a person employed in a confidential capacity", were contained in a letter written by the board and stapled to a copy of the certificate.

The company commenced certiorari proceedings to quash the certificate. Farris C.J.S.C. dismissed the application. The company's appeal to the British Columbia Court of Appeal was successful, resulting in the allowing of the appeal and the quashing of the certificate. On a further appeal by the union the Supreme Court of Canada reversed the Court of Appeal, restored the judgment of Farris C.J.S.C. and reinstated the board's certificate. Rinfret C.J. and Kellock J. dissented.

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[2] R.S.B.C., 1948, c. 155.
[3] [1953] 2 S.C.R. 18; commented on in (1953), 31 Can. Bar Rev. 679.

Were the operators persons employed in a confidential capacity? This is the issue on which, in the view of the Supreme Court of Canada, the case hinged. It is difficult to collect from the judgments either a definition or a complete exegesis of the expression "person employed in a confidential capacity". Those judges who dealt with the question confined themselves to explaining the operation of the phrase in relation to the facts before them. The following synopsis is compounded from a number of sources—the reasoning of various members of the Supreme Court, their rejection of the views of the Court of Appeal, the judgment of Farris C.J.S.C. and the reasoning of the board which, on the whole, had the approval of the Supreme Court. It is not the intention of this comment to apportion the credit among the various contributors, but rather to seek a sort of common denominator.

The expression must be approached in the light of modern business practice and the emergence of large office organizations. That an employee has incidental access to confidential information is not decisive. That condition applies to nearly all employees in such an office and, indeed, is present more or less in every business. In the present case the taint was said to disqualify even the clerks who handled the mail. What the expression requires is that there exist between the employer and the particular employee a relation of a character that stands out from the generality of relations and bears a special quality of confidence. A confidential capacity does not exist unless the employee is entrusted with information on special matters which is of a nature out of the ordinary and is kept within a strictly limited group instead of being disclosed to any member of any group or body of the generality of the employees.

In ordinary parlance we would not say that a person is an employee with a confidential relation if he is employed primarily because of his skill in operating an office machine and is presumably so fully occupied with the work of transcribing or consolidating figures that the figures in general mean little to him. There is an element of confidence between an employer and all his employees. It progresses upon an ascending scale up to those whose relation does take on a "confidential capacity". The point at which that is reached is a matter of judgment to be formed by weighing all the circumstances. In the case of these employees of Canada Safeway Limited there is little beyond the relation sustained by the multitude in clerical work today. The effect of denying to such a group the privilege of being represented by a certified union must be taken into account. The conclusion is that the operators are not employed in a confidential capacity.

The most complete presentation of the opposite view is found in the judgments of Kellock J. in the Supreme Court of Canada and O'Halloran J.A. in the Court of Appeal. The conclusion reached by Kellock J. is that a person is employed in a confidential capacity if, possibly for reasons of convenience or necessity on the part of the employer in the conduct of his business or affairs, the employee is put in possession of material which the employer regards, from his standpoint, as secret or private. If the exigencies of a business, conducted on a large scale, necessitate the disclosing of private or secret matters to a large number of employees, the consequence is that a large number of the employees are employed in a confidential capacity.

This is not the place to indulge in a long discourse on the canons of statutory interpretation for the purpose of deciding which is the correct view. If the number of judges who espoused each side is any criterion, the issue is quite evenly balanced. Whether one seeks to expand or to contract the scope of the exception probably depends on one's predilections towards the desirability of collective bargaining. For either view, once intuitively accepted, can be devised arguments. The only comment that need be made is that, if it had been found necessary to accept the construction advanced by the minority, the confidential group excluded from the Act might easily, both in this and in other cases, have outnumbered those who were covered. Surely all the hue and cry on both sides about collective bargaining legislation has proceeded from the tacit assumption that the great majority of employees are within the statute and that the excluded groups are relatively small in number.

The other interesting feature of the case is that, with the possible exception of Kellock J., all the judges in the various courts apparently felt at liberty to examine the evidence submitted to the board for the purpose of ascertaining whether it was justified in concluding that the operators were not employed in a confidential capacity.

Subsequent cases may be able to hold that the present decision is not a firm precedent on the right of the court to examine the evidence. The circumstances were unusual. It is probable that even if the reviewing of the evidence was originally invited only by one party it was eventually acquiesced in by all. The examination of the evidence may have had no causal effect on the final outcome because each judge could have reached his own particular result by relying on other theories. Some of the judgments do not ex-

pressly refer to the right of the court to consider the evidence. The judges disagreed among themselves as to the effect of the evidence: some thought that it provided no support for the board's judgment; others thought it provided some support. Those who thought that it provided some support were not unanimous as to the measure of support required, some applying an "any evidence at all" test and others a "sufficient evidence" test.

Yet, with one possible exception, they undertook an appraisal of the weight and effect of the evidence without expressing any doubt about their right to do so. It would not be difficult to assert that, when the judgments are read as a group in the light of each other, they countenance the right of the court in certiorari proceedings to examine the evidence if only for the purpose of discovering whether it contains anything at all on which the inferior tribunal could come to its conclusion. The remainder of this comment will be devoted to a consideration of this by-product of the judgments.

Under section 12 of the Industrial Conciliation and Arbitration Act the broad questions for the board to decide were whether the proposed unit of the company's employees was appropriate for collective bargaining and whether a majority of the employees in the unit were members in good standing of the applicant union. In the circumstances this would necessitate the board answering a subordinate question: whether the operators included in the proposed unit were employees within the meaning of the Act or, on the other hand, were persons employed in a confidential capacity. The subordinate question might involve at least one question of law and one question of fact—a question of law as to the meaning of the words "employed in a confidential capacity" and a question of fact as to the exact capacity in which the operators were employed. The board answered both the subordinate question and the broader questions in favour of the union.

The burden of the company's contention in the certiorari proceedings is that the board had given an erroneous decision on the subordinate question. As one explanation of the error it is suggested, for example, by Kellock J., that the board had placed a wrong construction on the words "employed in a confidential capacity". As another explanation it is suggested, for example, by the Court of Appeal, that the board had completely misjudged the evidence and reached a conclusion absolutely unsupported by any evidence. Assume that the company's contention is correct and that the subordinate question should have been answered in its favour.

What is not to be forgotten is that regardless of how the mistake was made, it consists of giving an erroneous decision on a question submitted to the board for consideration and determination.

The rule that did not receive sufficient attention as this case progressed through the courts is that, except in cases where the error is apparent on the face of the record, if an inferior tribunal has decided a question that is within its jurisdiction certiorari cannot be used to ascertain whether its decision is right or to quash the decision on the ground that it is erroneous. Certiorari cannot be used for the purpose of retrying or reviewing the decision on the merits. This rule applies where the decision is contrary to the evidence and even in the extreme case where it is alleged that the evidence does not contain anything to warrant the decision.[4]

The principle set forth in the preceding paragraph can be traced at least as far back as *Regina* v. *Bolton* in 1841.[5] It was approved by the Privy Council in *The Colonial Bank of Australasia* v. *Willan*[6] and reiterated, with a clarity and insistence equalled in few judgments, by Lord Sumner in *Rex* v. *Nat Bell Liquors Ltd.*[7] It was the basis of the decision in *Re Robinson*,[8] where McRuer C.J.H.C. in a carefully reasoned judgment held that certiorari does not enable the court to look at the evidence before the inferior tribunal for the purpose of considering whether there is anything in it to support the tribunal's findings. The Supreme Court of Canada has recognized it on more than one occasion.[9]

The question to be considered is whether the error assumed to have been made by the board was apparent on the face of its record. This raises an ancillary question: What constitutes the board's record? The two questions can be considered simultaneously.

The board's certificate of March 24th, 1952, certainly constitutes part of the record because it sets forth in formal fashion the board's adjudication on the question before it.[10] That part of the record was inscrutable, sphinx-like and unspeaking. No one suggested that it disclosed any error. The record may also include

[4] Halsbury (Crown Practice), Vol. 9, par. 1493, approved in *Rex* v. *Minister of Health*, [1939] 1 K.B. 232.

[5] (1841), 1 Q.B. 66, relying on *Brittain* v. *Kinnaird* (1819), 1 B. & B. 432, the famous *Bum-boat Act* case, to show how rigorously these principles are applied.

[6] (1874), L.R. 5 P.C. 417, at pp. 442-446.

[7] [1922] 2 A.C. 128, at pp. 142-165.

[8] [1948] O.R. 487.

[9] See, for instance: *McKenzie* v. *Huybers*, [1929] S.C.R. 38, at p. 42; *Segal* v. *The City of Montreal*, [1931] S.C.R. 460, at pp. 471-477; and *Vaaro et al.* v. *The King*, [1933] S.C.R. 36, at p. 43.

[10] *Rex* v. *Northumberland Compensation Appeal Tribunal*, [1952] 1 K.B. 338, at p. 352.

the board's reasons for its decision—the letter written by it to the company's solicitor and stapled to a copy of the certificate. The cases[11] intimating that the record includes not only the tribunal's formal adjudication but also its reasons for the adjudication, even though the two are actually comprised in separate documents, become even more persuasive when the reasons contain the tribunal's answer on the most controversial issue and the two documents are physically attached to each other. It is submitted that Kellock J. was resorting quite correctly to a traditional certiorari technique when he examined that part of the record to ascertain whether it disclosed any error on the part of the board.

The only conceivable error appearing from the contents of the letter was the one noted by Kellock J.—an error as to the effect of the words "employed in a confidential capacity". Had the board been wrong in giving the expression a "large office organization" construction, as it did in its reasons, that would have been the end of the matter. The board would have erred, its error would have been apparent from the face of part of the record and the error on the face of the record would have entitled the company to have the certificate quashed. When the majority held that the board had placed the correct construction on the definition, however, they denied the existence of the alleged error. That which might have been wrong was declared to be right and ceased to be material.

The Court of Appeal found that the board was wrong, palpably so, in its decision on issues of fact. Their judgments make it apparent that in doing so they examined all the evidence placed before the board. My contention is that they were not entitled to follow that course. The record that can be examined in certiorari proceedings consists of the formal adjudication and, possibly, the reasons for the adjudication and nothing more. The authorities, as they stand at present, hold that the notes of evidence taken by an inferior tribunal do not form part of the record for purposes of certiorari.[12]

If the contrary is ever decided it may be a boon to those who seek certiorari. It will bring more material before the supervising court and provide an opportunity to detect errors not displayed by the meagre record in use at present. It would, where applicable,

[11] *Rex* v. *Northumberland Compensation Appeal Tribunal, supra*; *Kent* v. *Elstob et al.* (1802), 3 East 18; *Champsey Bhara & Co.* v. *Jivraj Balloo &c Ltd.*, [1923] A.C. 480.

[12] *Rex* v. *Northumberland Compensation Appeal Tribunal, supra; In re College of Physicians and Surgeons and Mahood*, [1929] 2 W.W.R. 461, at p. 464; *In re Carney and Provick and Board of Review*, [1941] 2 W.W.R. 273, at pp. 281-282.

reverse much that was accomplished in the case of subordinate criminal tribunals by the Summary Jurisdiction Act, 1848,[13] and by various provisions of the Criminal Code. The contrary has not yet been decided and the instant case does not profess to be a decision in that direction, even though parts of the judgments proceed as if the evidence were available.

Even if the evidence is made part of the record the floodgates will not be opened to their widest. The power of the superior court to review the evidence will still be substantially restricted by the rule propounded in *Rex* v. *John Smith*,[14] that even where the evidence is subjected to its scrutiny the court can only inquire whether there is any evidence at all, however slight, to establish the point at issue. The weight of the evidence will still be entirely for the lower tribunal.

Two cases mentioned in the British Columbia courts require individual mention. *Lee* v. *Showmen's Guild of Great Britain*[15] was relied on by Sloan C.J.B.C. as authority for the rule that the court is permitted to inquire whether the facts adduced before the lower tribunal were reasonably capable of supporting its decision. One feature of *Lee's* case is that the court was concerned, not with a decision of a judicial or quasi-judicial tribunal exercising a statutory jurisdiction, but with action taken by an executive committee in alleged pursuance of consensual powers of expulsion. *Kuzych* v. *White et al.*[16] illustrates the courts' unwillingness to equiparate their control of expulsion proceedings by members' clubs, trade unions and similar bodies with their control of statutory tribunals exercising judicial or quasi-judicial powers. The other feature of *Lee's* case is that the matter was brought before the court, not by certiorari, but by an action for a declaratory judgment and an injunction. A comparison of the judgment of Denning L.J. in *Lee* with the certiorari cases mentioned in this comment may warrant the belief that the courts can exercise more intensive powers in actions for declaratory judgments and injunctions than in applications for certiorari. Possibly we have resorted to the prerogative writs only to fail in cases where we could have succeeded had we sought the other remedies. Those who claim that they have been treated unjustly by subordinate tribunals might be wise to reflect more carefully before they make their final choice of remedies. However, to

[13] 11 & 12 Vict., c. 43.

[14] (1800), 8 Term Rep. 588. See also: *Rex* v. *John Reason* (1795), 6 Term Rep. 375; *Rex* v. *Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128, at p. 144.

[15] [1952] 2 Q.B. 329.

[16] (1951) 2 W.W.R. (N.S.) 679; discussed in (1952), 30 Can. Bar Rev. 1 & 137.

dismay those who might prefer equitable remedies to the prerogative writs and to add emphasis to the distinction between *Lee's* case and the instant case, there is a perceptible body of authority for the proposition that the supervisory powers of the courts over subordinate tribunals can be exercised only through the writs of certiorari, prohibition and mandamus.[17] That may still be a moot question, but, in any event, it is difficult to recognize *Lee* v. *Showmen's Guild* as an authority on the problems of the present case.

The other case is *Rex* v. *Thompson*.[18] Farris C.J.S.C. used it to establish his right to examine the board's proceedings to ascertain whether there was any evidence before it. *Thompson*'s case may be a valid authority for the principle that the court is entitled to examine the evidence in the case of certiorari directed against a committal made by a magistrate under the preliminary inquiry procedure of the Criminal Code. In the case of a preliminary inquiry it can readily be contended that the depositions taken by the magistrate must, from the very nature of the proceedings, be regarded as part of the record. But a preliminary inquiry is a type of proceedings that is almost *sui generis* and, in view of the *Bolton, Willan, Nat Bell* and *Robinson* cases, it is difficult to agree that the same result obtains in the case of proceedings before non-criminal tribunals. Indeed the *Nat Bell* case itself demonstrates that the rule in *Rex* v. *Thompson* does not apply even to all criminal proceedings; for example, to use the precise point of the *Nat Bell* case, it does not apply to summary convictions.

The British Columbia Court of Appeal argued that in reaching a wrong decision on the issue of confidential capacity the board was acting without jurisdiction. The court failed to appreciate the well established doctrine that an erroneous decision on a substantive issue, whether it has its origin in a mistake over the construction of a statute or over the effect of evidence, does not give rise to an absence or excess of jurisdiction and, unless it is apparent on the face of the record, is not a ground for quashing the proceedings. This principle, based on the essential difference between a want of jurisdiction and an error made in deciding a substantive issue (including, in particular, the making of a decision that is not supported by the evidence), is convincingly demonstrated by the *Regina* v. *Bolton* line of cases.

Among the questions to be decided by the board was the sub-

[17] *Hollinger Bus Lines Ltd.* v. *Ontario Labour Relations Board*, [1952] O.R. 366; *Credit Foncier Franco-Canadien* v. *Board of Review*, [1939] 3 W.W.R. 632. Cf. (1953), 31 Can. Bar Rev. 821, at pp. 827-830.

[18] (1951) 1 W.W.R. (N.S.) 66.

ordinate question already mentioned: Were the operators employees within the meaning of the Act or, on the other hand, persons employed in a confidential capacity? Section 2(4) provides:

> If a question arises as to whether a person is an employee within the meaning of this Act, the question shall be determined by the Board, and the decision of the Board shall be final.

Section 58(1) provides:

> If a question arises under this Act as to whether:—
>
> (a) a person is an employer or employee:
>
> (g) a group of employees is a unit appropriate for collective bargaining: or
>
> (i) a person is a member in good standing of a trade union,—
>
> the board shall decide the question, and its decision shall be final and conclusive for all the purposes of this Act except in respect of any matter that is before a court.

It is not necessary to decide whether these two sections are privative provisions of such efficacy that they serve, of themselves, to protect the board against certiorari. What is material is that they make it clear that the board has jurisdiction to decide whether the operators are employees within the meaning of the Act or are excluded from the meaning of the word "employee" by being employed in a confidential capacity.

The question of jurisdiction depends on whether the board had authority to consider and determine the questions submitted to it, not on the effect of the evidence adduced by the contestants, the accuracy of its appraisal of the evidence or the correctness of the decision eventually made by it. Had its ultimate decision been right, both on the meaning of the definition section and on the effect of the evidence, no one would have considered suggesting that it had acted without jurisdiction. The *Rex* v. *Bolton* line of cases discountenances a theory that the tribunal retains its jurisdiction as long as it proceeds unerringly in the direction of the correct conclusion but loses jurisdiction the moment it veers towards a wrong conclusion. The board may have misconstrued the definition section and have misjudged the weight of the evidence on the capacity in which the operators were employed. If so, it has admittedly done something that it ought not to have done, but it did so in the process of exercising its jurisdiction and it was not usurping a jurisdiction it did not possess. Want of evidence on which to base a finding of fact does not go to the tribunal's right to enter on the case and is not the same thing as an absence of authority to take evidence at all. Even a complete misconception of the evidence is not to be tortured, by some doctrine of

relation back, into a loss of jurisdiction. Jurisdiction to consider and decide a question includes, undoubtedly, though perhaps unfortunately, the power to give the wrong answer.

Sloan C.J.B.C. resorted to the theory that the question on which the board erred—the question of the capacity in which the operators were employed—was a collateral or jurisdictional question of the type dealt with in *Bunbury* v. *Fuller*.[19] Farris C.J.S.C. had apparently shared the same view. The general rule is that an inferior tribunal cannot clothe itself with jurisdiction by an erroneous decision on a collateral issue and that the superior court can, on certiorari, inquire into the correctness of the lower decision on that kind of issue even though the error is not apparent on the face of the record. The tribunal's decision loses its impregnability if it relates to a jurisdictional point.

A collateral question is a preliminary question as to the presence (or absence) of some circumstance which must be present (or absent) before the board can deal with the main or substantive part of the case.[20] *In re Hudson's Bay Company and Peters (No. 2)*[21] contains a simple illustration of a collateral question. The differences between the two types of question in point of significance are well defined, but it is often a difficult matter to classify a particular question.[22]

A question as to whether the company and its employees were within the jurisdiction of British Columbia tribunals, for example, by reason of their place of business, place of employment or otherwise, might be a jurisdictional question because section 78 provides that the Act shall apply only to matters within the legislative jurisdiction of the province. It could readily be argued that the board has no authority to deal with the substantive issue (for example, whether the applicant union should be certified as a bargaining authority) until the preliminary question (whether the place where the company carried on its business and the employees were employed was in British Columbia) had been decided, and decided correctly, in the affirmative.

But the question whether the operators are employees within the meaning of the Act, with particular reference to the question

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[19] (1853), 9 Ex. 111, at pp. 140-141.

[20] *Regina* v. *Income Tax Commissioners* (1888), 21 Q.B.D. 313, at p. 319.

[21] [1938] 2 W.W.R. 412.

[22] *Re Lunenburg Sea Products Ltd.*, [1947] 3 D.L.R. 195, which might be regarded as supporting Sloan C.J.B.C., should be compared with *Rex* v. *Weston-Super-Mare Justices*, [1944] 1 All E.R. 747, *Rex* v. *Ludlow*, [1947] 1 K.B. 634, and *Regina* v. *St. Olave's* (1857), 8 E. & B. 529.

whether they are employed in a confidential capacity, appears, especially under sections 2(4) and 58(1), to be one of the very questions into which the board is to inquire after any preliminary questions have been disposed of. That question may be ancillary to the decision of broader issues, for example, whether the proposed unit is appropriate for collective bargaining and whether a majority of the employees in the unit are members in good standing of the union. The board cannot decide either of the broader issues without determining whether the operators are employed in a confidential capacity. But, under the Act as framed, the ancillary question is a component part of the issues to be considered by the board, not a separate question that must be decided before the board will have any right to enter upon its inquiry. So far as the jurisdiction of the board and the finality of its decision are concerned, the questions of appropriateness for collective bargaining, majority membership, employee status and confidential capacity appear to stand on an equal footing as integral and co-ordinate parts of a more comprehensive issue. Together they constitute the substantive issues to be decided by the board.

Another explanation that leads to the same result is that the Act intended the issue of confidential capacity to be conclusively decided by the board even if it is to be classed as a collateral issue.[23]

Though the Supreme Court disagreed with the Court of Appeal on the effect of the crucial definition they voiced no incisive disapproval of the general views on certiorari expressed in the lower courts and even shared with them a willingness to scrutinize the evidence. There is every possibility of an argument being advanced that the views of the Court of Appeal, some of which were also held by Farris C.J.S.C. and Rinfret C.J., remain unchallenged. It was the possible use of the case as a precedent on certiorari principles that evoked the second branch of this comment.

The writer of this note has no desire to represent that the rules relating to certiorari are so sacred and fundamental to our legal system that they should not be changed, or so perfect that they produce undoubted justice in every case. They may be technical in the extreme and founded on a rationale that has no place among modern legal concepts. They may be more appropriate to convictions by magistrates in summary proceedings than to a powerful body like a labour relations board or immigration board. They

[23] *Regina* v. *Income Tax Commissioners, supra* at pp. 319-320; *Rex* v. *Ludlow, supra.*

have a strange savour of things that are past and gone. But in their very rigidity and technicality they are tenacious, and merely to misconceive them, as it is respectfully submitted they were misconceived in the present case, does not alter them.

Unless they are made the object of a most direct assault they will survive, ready to be applied in their full vigour in some future case when a court following the course charted in *Rex* v. *Nat Bell Liquors Ltd.*[24] applies once more the ancient unyielding doctrines. Until that happens we are surrounded by confusion and uncertainty and are led to believe that the power of the courts to supervise administrative bodies is far greater than it actually is.

E. F. WHITMORE*

The Title Deeds of Freedom

. . . It has been said that the price of freedom is eternal vigilance. The question arises, 'What is freedom?' There are one or two quite simple, practical tests by which it can be known in the modern world in peace conditions, namely:

Is there the right to free expression of opinion and of opposition and criticism of the Government of the day?

Have the people the right to turn out a Government of which they disapprove, and are constitutional means provided by which they can make their will apparent?

Are their courts of justice free from violence by the Executive and from threats of mob violence, and free of all association with particular political parties?

Will these courts administer open and well-established laws which are associated in the human mind with the broad principles of decency and justice?

Will there be fair play for poor as well as for rich, for private persons as well as Government officials?

Will the rights of the individual, subject to his duties to the State, be maintained and asserted and exalted?

Is the ordinary peasant or workman who is earning a living by daily toil and striving to bring up a family free from the fear that some grim police organization under the control of a single party, like the Gestapo, started by the Nazi and Fascist parties, will tap him on the shoulder and pack him off without fair or open trial to bondage or ill-treatment?

These simple, practical tests are some of the title-deeds on which a new Italy could be founded. . . . (Sir Winston Churchill, to the Italian people on August 28th, 1944, from *The Second World War: Triumph and Tragedy*)

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[24] [1922] 2 A.C. 128.

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