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The Honourable Horace Harvey, Chief Justice of Alberta

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I

"Who is going to run this country, the Chief Justice or the Government?" On July 11th, 1918, an army officer named Major R. B. Eaton put this question to John McCaffary, a deputy sheriff. McCaffary had come to Victoria Barracks at Calgary to execute a writ of attachment against Lieutenant-Colonel Philip Moore for declining to obey an order by way of habeas corpus that directed him to bring before the Supreme Court of Alberta twenty conscripts in his battalion. Colonel Moore had been told by his military superiors at Ottawa to absent himself and the deputy sheriff had been unable to find him. Major Eaton's rhetorical question was really an accusation that Horace Harvey, Chief Justice of Alberta, was trying to obstruct the Canadian government in its prosecution of the war.

This incident requires explanation. In the early years of the First Great War Canada's military forces were raised entirely by voluntary enlistment. By August 1917 the government had decided that conscription was necessary and asked Parliament to pass the Military Service Act, which provided for conscription, but exempted persons in essential occupations. By the spring of 1918

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it had become apparent that reinforcements were still inadequate. The cabinet could have asked Parliament to amend the Military Service Act by removing the exemptions, but instead in April 1918, while Parliament was in session, the Governor in Council made two orders in council under the War Measures Act, which gives the Governor in Council wide powers to make orders in the interest of national safety during war. In this case the orders removed exemptions in the Military Service Act and provided that exempt persons could be called for military duty. Both houses of parliament approved the orders. The reason why the government acted by means of orders rather than by amendment to the Military Service Act was that the need for soldiers was urgent and an amendment would have taken considerable time.

One of the persons who had been exempted was an Alberta farmer named Lewis. A few weeks after the orders were made, Lewis found himself in the army at Sarcee Camp near Calgary, training for overseas service. On June 21st, his counsel, R. B. Bennett, K.C., applied to the full court, sitting at Calgary, for his release by way of habeas corpus. Stuart, Beck, Simmons and Hyndman JJ. agreed that there was no power under the War Measures Act to cancel exemptions granted by the Military Service Act. Harvey C J. dissented on the ground that the War Measures Act confers on the Governor in Council the widest authorization to take measures in the interest of national safety, provided of course that those measures are taken "by reason of the existence of . war".[1]

The judgment ordering the release of Lewis was delivered on June 28th and there is a note by the Chief Justice in his judge's book that the court agreed to a stay for two weeks on condition that Lewis "be not removed from the province". On July 5th the Dominion cabinet responded to the *Lewis* judgment by making a further order in council. After referring to the judgment and then reciting the urgent military situation, it directed that the orders of April 1918 be given effect "notwithstanding the said judgment and notwithstanding any other judgment or any order that may be made by any court" and then directed that instructions be sent accordingly to the officers commanding the military districts of Canada.

A conscript named Norton, along with nineteen others at Sarcee Camp, promptly applied by way of habeas corpus for dis-

[1] *Re Lewis* (1918), 13 Alta. L.R 423, 41 D.L.R. 1, [1918] 2 W.W.R. 687.

charge from military custody. Stuart J., before whom the application for habeas corpus came, ordered that they were not to be removed from the province. The application was directed to Lieutenant-Colonel Moore and was returnable on Wednesday, July 10th, before Harvey C.J., Stuart and Beck JJ. Instead of Moore, an army officer named Major Carson appeared on behalf of the Adjutant General and stated that Moore had stayed away on the instructions of the Adjutant General. Counsel for the conscripts thereupon applied for and obtained an order for a writ of attachment against Lieutenant-Colonel Moore.

The next day, July 11th, the sheriff and his officers searched for but failed to find Colonel Moore. It was during this search that Major Eaton put his indignant query to the deputy sheriff. Not only had the authorities at Ottawa instructed Moore to evade the writ but, as the Chief Justice said in court the next day, "the sheriff has been met by armed military resistance in his effort to execute the writ". The situation was described in vivid detail by a newspaper dispatch of the same day:

> Victoria Park Barracks, headquarters of Col. Phil Moore, Commanding Officer of the First Alberta Depot Battalion, has been turned into an armed camp. The Strathcona Horse has been brought in from Sarcee Camp to guard headquarters. Armed guards have been placed at every vantage point, and the Arts Building in which Col. Moore has his office is patrolled with a strong guard. Partitions have been torn down and two machine guns placed that will sweep the open space in front of the building.

That afternoon James Muir, K.C., applied on behalf of the Minister of Justice for a stay of the habeas corpus proceedings until the Supreme Court of Canada could rule on the validity of the original orders. Counsel for the conscripts was willing to agree to a stay if the government would undertake not to remove them from the province. This was by now the main issue, for Major Carson admitted in court that some of the twenty applicants had already been sent out of the province. In the hope that the government would give the undertaking, the hearing was adjourned until the morning of the next day, Friday, and then again until the afternoon. When the hearing was finally resumed, Mr. Muir read a telegram from the Minister of Justice declining to agree to hold conscripts in their own provinces until the legality of the orders was finally decided. To do so "would paralyze general operations".

Thereupon the Chief Justice delivered judgment in open court. "The military authorities and the executive government have set

at defiance the highest court in this province", he said. The court could either abdicate its authority and functions or else continue to perform its duties and not prove false to the oath of office each member had taken. It would be of little use to put Lieutenant-Colonel Moore in jail. Since he refused to produce the applicants, the court must find someone else to do it. "The order should therefore go directing the sheriff to obtain the persons of the applicants or such of them as may be within the jurisdiction of the Court and to bring them before the Court and that there they be discharged from military custody without further order". It is clear that the court anticipated that the sheriff would need the aid of a *posse comitatus*.

The judgment added that the court was not unmindful of the urgent need for soldiers but that it should not substitute expediency for law as the basis of judicial decision. "It is also apparent to us that without doubt there is enough might though not right behind the military authorities to prevent this Court's officers from performing their duty, and even to destroy both the members of the Court and its officers, but while the Court remains it must endeavour to perform its duty as it sees it." Then follows the comment that the court had tried, consistent with its duty to the applicants, to do nothing to hinder the army or the government but had "met with little success"—an understatement to be sure.[2]

Excitement was high and the Calgary city council feared violence. Present in court that afternoon was H. P. O. Savary, K.C., representing the council. He asked that the order not issue until noon of the next day, and the court agreed. The same evening Mr. Frank Freeze (who was acting mayor) met with Colonel McDonald, the District Officer Commanding, Major Carson and the sheriff. On his own responsibility Colonel McDonald undertook not to move the applicants from the Calgary judicial district until after twenty-four hours notice to the sheriff. The Chief Justice was invited to the meeting and instructed the sheriff not to execute the court's order unless notice was given. The acting Minister of Militia, Mr. Burrell, wired Colonel McDonald that the Militia Department would honour the undertaking. At last the government had capitulated.

Exactly a week later the Supreme Court of Canada ruled on a

[2] *Re Norton* (1918), 13 Alta L R. 457, [1918] 2 W.W.R. 865. In each report the editor's summary of the facts contains inaccuracies as to dates. The writer has relied on the Chief Justice's judge's book and on newspaper accounts in the Calgary Herald and Edmonton Bulletin from July 10th to 13th, 1918.

similar application for habeas corpus made on behalf of an Ontario farmer, Edwin Gray. The court held valid the orders in council, and so over-ruled *Re Lewis*.[3] The crisis was over. The dissenting opinion of Harvey C.J. on the validity of the orders was vindicated. Yet in the meantime he had enforced the law as his colleagues had declared it. Throughout the crisis he was calm, restrained, anxious to conciliate, and yet unflinching when it appeared that the government of Canada would persist in defying the court's order. For their part the chief military authorities on the spot acted too with restraint, in their dilemma doing all they could to avoid an open clash and the further inflaming of public opinion.

The incident is reminiscent of a similar one that occurred in the United States during the Civil War, but with a different result. President Lincoln suspended the writ of habeas corpus in 1861, though it is doubtful whether he had the power. One of the many alleged sympathizers with the Confederacy taken into custody by the military authorities was a man named Merryman, who was held in a military fort in Maryland. When he petitioned for a writ of habeas corpus, Roger Taney, Chief Justice of the United States, went to Baltimore to receive it. The Chief Justice ordered the army general having custody of Merryman to produce his prisoner. Instead, the general sent an aide, taking the position that he would not obey the order unless the President told him to. The Chief Justice directed a writ against the general, but the marshal was unable to find him. At this point, acknowledging that the force of the military was greater than that of the writ, the Chief Justice took no further step, save to send a copy of his opinion to the President.[4]

II. *Early Career*

The *Lewis* and *Norton* judgments are among hundreds that Horace Harvey wrote during his forty-five years on the bench. He delivered his first at Regina on October 18th, 1904, on behalf of the Supreme Court of the North-West Territories en banc. It was a dispute over the right to the "land scrip" the Dominion government issued to half-breeds. This scrip entitled the holder to select a parcel of land. Frequently it was bought and sold, and in this case two persons claimed to be buyers of the same scrip. The judgment

[3] *Re Gray* (1918), 57 S.C.R. 150, [1918] 3 W.W.R. 111.

[4] Fairman, The Law of Martial Rule and the National Emergency (1942), 55 Harv. L. Rev. 1253, at pp. 1278-81; Swisher, Roger Taney (1936) pp. 548-560.

is short, confident and a clear analysis of the rights of a holder of scrip.[5] His last judgment was delivered in June 1949, less than three months before his death, when he was almost eighty-six years old. A notorious drug peddler had appealed from a conviction on the ground that Crown counsel had asked prejudicial questions, and the Chief Justice, speaking for a majority of the Appellate Division of the Supreme Court of Alberta, allowed the appeal. This judgment too is clear and convincing.[6]

The forty-five years separating these two judgments mark one of the longest, if not the longest, terms of office of a superior court judge in Canadian history. It was surpassed by the late Chief Justice J. E. P. Prendergast of Manitoba, who was a member of the judiciary for forty-seven years, from 1897 to 1944, but for the first five years he sat as a county court judge.

We propose to attempt an assessment of Horace Harvey's part in the development of the law and the administration of justice in Alberta, but, before doing so, should say something about his early career. Born in 1863 on a farm near Aylmer, Elgin County, in what is now Ontario, he was graduated from the University of Toronto in 1886 and a year later received the degree of Bachelor of Laws. The Law Society of Upper Canada admitted him as a student at law in 1886. At this period Osgoode Hall had no law school, but students did have to pass examinations set by the law society. These covered all basic subjects, the required reading including parts of Blackstone, Story's *Equity*, *Pollock on Contracts*, *Best on Evidence*, *Byles on Bills* and O'Sullivan's *Government of Canada* A student with a Bachelor of Arts degree had to spend only three years instead of five under articles.[7] On passing the last examinations, Mr. Harvey, in Easter Term 1889, was called to the bar of Ontario and admitted to practise as a solicitor.[8]

He practised in Toronto for four years. In 1893 he was married to Miss Louise Palmer of Toronto. The same year the young couple went west to Calgary where Mr. Harvey became the partner of Peter McCarthy, Q.C. Calgary became a city that year, with a population of 4,000. Indeed the whole population of the North-West Territories was less than a hundred thousand. The great migration of settlers was to take place in the next fifteen years.

The Law Society of the North-West Territories did not yet

[5] *Patterson* v *Lane* (1904), 6 Terr. L.R. 92.
[6] *R.* v. *Byrnes*, [1949] 2 W.W.R. 209, [1949] 4 D.L.R. 39.
[7] The requirements appear in various issues of the old Canada Law Journal, *e.g.* (1885), 21 Can. L.J. 202-204.
[8] (1889), 25 Can. L.J. 18-19.

exist, the rolls being kept by the Lieutenant-Governor in Council. The official North-West Territories Gazette records that Mr. Harvey was enrolled as an advocate on May 22nd, 1893. He was in private practice for three years and his name appears as counsel in two reported cases. In December 1896 he became Registrar of Land Titles at Calgary. Under the Australian (Torrens) system of land registration, which Parliament had established in the Territories in 1886, the registrar is in charge of the government land titles office and is responsible for the issuing of titles and the recording of all charges on the title—good training for a man who as a judge was to decide many problems under the Land Titles Act. This position he held for three years.

In January 1900 the Gazette carried notice of the appointment of "Horace Harvey, Esq. of Osgoode Hall, Toronto, Barrister-at-law and an advocate of the Territories to be deputy of the Attorney-General, *vice* Hugh Amos Robson, resigned". When the Hudson's Bay Company in 1869 ceded its vast territories to Canada, the Dominion created out of them the province of Manitoba and the North-West Territories, both of which came into existence on July 15th, 1870.[9] Until 1888 the Territories were ruled by a lieutenant-governor in council. Orders in council issued under the various North-West Territories Acts of the Parliament of Canada gave the council power to make ordinances on many, but not all, of the subjects that are within the jurisdiction of a province. After 1888 an elected assembly replaced the council as the law-making body. In 1900, when Mr. Harvey went to Regina as deputy attorney-general, the minister under whom he was to serve was Mr. F. W. G. Haultain, who was "premier" as well as attorney-general. Haultain led the movement for provincial status and his part in the creation of Alberta and Saskatchewan was that of a great statesman.

His deputy was of course concerned with administration rather than policy. Although the name "H. Harvey" appears occasionally in the reports as Crown counsel both in civil and criminal cases, his most important work was undoubtedly in the drafting of ordinances. The law-making process had to keep step with immigration and the problems that came with it. In Mr. Harvey's four years as deputy, the legislature passed almost one hundred

[9] A useful memorandum of statutes, orders in council and ordinances relating to legislative powers and the administration of justice in the Territories from 1867 to 1898 appears in (1885-1893), 1 Terr. L.R. vii-xxiv. See also Harvey, Formerly Rupert's Land, Part II, in Obiter Dicta, 1948, Fall Issue, p. 37, for an account of the courts of the North-West Territories from 1880.

and fifty public ordinances. Many were amendments or revisions of earlier enactments—on municipalities and schools, regulation of the professions, administration of justice, prairie fires and control of liquor. New acts during his period of office concerned fire and hail insurance, brands, incorporation of companies by registration of a memorandum of association instead of letters patent, succession duties, trustees. Obviously many of the ordinances were borrowed from other jurisdictions, but to say this is not to detract from the magnitude of the task that fell to the early assemblies. There was no time to let the law grow as it did in the older colonies. It had to be transplanted, and in those circumstances the deputy attorney-general probably had a greater responsibility than anyone else for deciding what laws should be introduced, and for settling the details.

After four years as deputy attorney-general, Mr. Harvey was appointed by the Laurier administration a puisne judge of the Supreme Court of the North-West Territories. In this year, 1904, the courts had not been long in existence. They had been established by Parliament in 1876, with stipendiary magistrates as the first judges. The magistrates however had a wider jurisdiction than we should expect today: a stipendiary magistrate, for example, sitting with a justice of the peace and a jury of six, convicted Louis Riel of high treason in 1885.[10]

The year 1886 was an important one for the Territories, because in that year was passed a new organic act, which established the Supreme Court of the North-West Territories with five judges, as well as the act creating the Torrens system. Judicial districts were already in existence. In the same year the assembly also made an ordinance regulating procedure, the forerunner of the provincial rules of court.

In 1887 the administration of Sir John A. Macdonald appointed the first judges: Hugh Richardson, James F. Macleod, Charles B. Rouleau, Edward L. Wetmore and Thomas H. McGuire. The first three had been stipendiary magistrates and Macleod, whose name survives in Fort Macleod in southern Alberta, had been as well a commissioner of the North-West Mounted Police. Wetmore was a barrister from New Brunswick and McGuire a barrister from Ontario. Many years later Horace Harvey made the following comment on the court of 1887:

> . . . In little more than a decade, the Judicial machinery of the Terri-

[10] *R.* v. *Riel (No. 2)* (1885), 1 Terr. L.R. 23, 2 Man. R. 321; leave to appeal refused (1885), 10 App. Cas. 675.

> tories had developed from its primitive beginning to become as complete in general character as, and equal in dignity and authority to, that of the Provinces.
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> Speaking with a personal knowledge of its first members, with all but one of whom I was brought frequently in contact, and with one of whom I was subsequently a colleague, I feel no hesitation in stating that in this respect there was no inferiority to the personnel of the Superior Courts of the Provinces. This is also apparent from a perusal of its reported decisions.[11]

In 1900 Parliament provided that one of the judges should be chief justice and four years later authorized appointment of a fifth puisne judge. It has been said that the Laurier government planned originally to name Haultain as the fifth judge but that he decided to remain in politics to continue the campaign for provincial status. In any case the appointment went, on June 27th, 1904, to Horace Harvey. He joined Chief Justice A. L. Sifton and Justices Wetmore, Scott, Prendergast and Newlands, and was assigned to the Judicial District of Southern Alberta, which meant that he moved from Regina to Fort Macleod. All the judges sat together en banc to hear appeals, usually at Regina though occasionally at Calgary, but from 1904 the judge appealed from could not sit save in exceptional circumstances. When the two provinces of Alberta and Saskatchewan were formed from the Territories in September 1905 the court continued to act for both. In 1906 T. C. Johnstone and C. A. Stuart were added to the court.

Then in 1907 each province created its own Supreme Court. The first Saskatchewan judges were Wetmore C. J., Prendergast, Newlands and Johnstone JJ., and the Alberta judges, Sifton C.J., Scott, Harvey and Stuart JJ. Later in 1907 N. D. Beck, K.C., was added to the Alberta court. The organization of the new provincial courts was like that of the old. In Alberta appeals were heard from the beginning at Calgary and Edmonton. Harvey J. moved from Macleod to Calgary in 1905 and to Edmonton, the new capital, in 1907. At this time court in Edmonton was held upstairs in the Sandison block, which stood on Jasper Avenue immediately east of the MacDonald Hotel. The Court House was built some six years later.

In 1910 Chief Justice Sifton resigned to become premier of Alberta in place of the Hon. A. C. Rutherford, and Horace Harvey was made Chief Justice of Alberta. The vacancy on the court was filled by the appointment of W. C. Simmons. In 1912 William L.

[11] Harvey, The Early Administration of Justice in the North West (1934), 1 Alta. L Q. 1, at p. 15.

Walsh, K.C., was appointed a sixth member of the court. In 1913, the legislature made a change in the constitution of the court, effective in 1914, which Chief Justice Harvey once explained as follows:

> . . by 1914 it was thought that the inconvenience of completely stopping trial work for sittings in banc and the increase of work called for a change and provision was made for three additional judges, making nine in all, and for an Appellate Division of four, which would sit for the hearing of appeals, the other five continuing as trial judges The provision called for the judges themselves making the assignment each year for the following year with changes of personnel as desired.[12]

The three members added to the court in 1914 were M. S. McCarthy, W. C. Ives and J. D. Hyndman.

The "Appellate Division", it is to be noted, was not a separate division and it consisted of four members rather than an odd number. Chief Justice Harvey, writing in 1948, said that he still thought that "it is an advantage for a trial judge to have some experience as an appellate judge, as it is for an appellate judge to have experience at trials". He also stated that he had felt "that in the case of judges of co-ordinate jurisdiction, an equal division in the Appellate Division which left the judgment of the trial judge unaffected was fairer than a setting of it aside by a majority of three to two or two to one". He conceded that on this point there was a difference of opinion.[13]

In any event the provincial legislature decided in 1919 to create two distinct divisions. The Appellate Division was to consist of the Chief Justice of Alberta and four justices of appeal and the Trial Division of the Chief Justice of the Trial Division and five other judges. Statutes to this end were passed in 1919 and 1920 and proclaimed as of September 15th, 1921. The Meighen administration, which was in power at the time, appointed Scott J. as Chief Justice of Alberta, and the justices of appeal were Stuart, Beck, Hyndman and J. A. Clarke, the last named being a new appointment to the court. Chief Justice Harvey was made Chief Justice of the Trial Division, the other justices being Simmons, Walsh, McCarthy, Ives and T. M. Tweedie, a new appointee. The constitution of the court remained the same until 1954 when an additional trial judge was provided.

When Ottawa appointed the two chief justices, Harvey C. J. took the position that the statutes creating the two divisions did

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[12] Harvey, *supra*, footnote 9, at p. 41.
[13] *Ibid*

not in fact abolish the old Supreme Court of Alberta, so that he was still Chief Justice of Alberta, rather than Chief Justice of the new Trial Division. On a reference to the Supreme Court of Canada his contention was upheld but on appeal to the Privy Council in 1923 it was rejected.[14] However, Chief Justice Scott died in July 1924 and Horace Harvey was then made Chief Justice of Alberta. Mr. Justice Simmons became Chief Justice of the Trial Division at the same time.

III. *Contribution to Criminal Law*

Although Chief Justice Harvey's decisions extended over the whole of the law, and although he handled with equal care all problems coming before him, he had a particular interest in criminal law and procedure. In this field his judgments came to be regarded as especially authoritative, and it was perhaps here that he made his greatest single contribution to sound development of the law. He had the advantage of an intimate knowledge of the special procedure which the Northwest Territories Act established and the province of Alberta inherited. For example, there never has been a grand jury and the petty jury has always had six members instead of twelve. As the Chief Justice once pointed out, an indictable offence may be tried in Alberta by any one of four tribunals of fact—a jury of six, a Supreme Court judge (if the accused consents), a district court judge under the procedure for speedy trials, and a magistrate. He added that "jury trials are very few; trials by Supreme Court and District Court Judges alone much greater and trials by Magistrates probably many times more than all other trials".[15] It may come as a surprise to some persons to learn that the Criminal Code has a special provision, applicable to Alberta alone, which states that a charge of *any* indictable offence may be tried by a Supreme Court judge sitting without a jury, if the accused consents.

Sitting often on appeals until 1921, and continually from 1924 until his death, Chief Justice Harvey was always careful to see that the fundamentals of "due process of law" were observed. For example, he was always scrupulous in insisting that guilt be proved. As he once said, "conjecture and surmise cannot be substituted for legal evidence".[16]

[14] *Scott* v. *A.-G. for Canada*, [1923] 3 W.W.R. 929, [1923] 4 D L.R. 647, 40 T.L.R. 6 (P.C.), rev'g (1922), 64 S.C R. 135, [1922] 2 W.W.R. 289.

[15] *R.* v. *Joseph*, [1939] 2 W.W.R. 69, at p. 72, [1939] 3 D L.R 22, at p. 24.

[16] *R.* v. *Constable*, [1936] 2 W.W.R. 273, at p. 277; [1936] 3 D.L.R.

Under the Code an appellate court must decide whether errors made at the trial constitute a "miscarriage of justice". The Chief Justice took the generally accepted position that the verdict stands if the appeal court is convinced that any reasonable jury *must* have found as it did even though no error had been made at the trial. In applying this rule the Chief Justice kept a good balance between extremes. He insisted on fairness to the accused while avoiding the tendency to hold trivial mistakes fatal to the conviction. As he said in one of his last judgments, on an appeal from a conviction for murder:

> . . . careful as a trial Judge may be and as this trial Judge was, it would be practically impossible to conduct such a lengthy trial completely free from anything which could be criticized, for Judges like other human beings have limitations, but I am not satisfied that anything to which objection has been taken caused any substantial prejudice to the appellant.[17]

On the other hand, he would order a new trial where he felt the jury *might* have acquitted the accused had the error not occurred.[18]

Several times he spoke out against improper police methods. For example, he quashed a conviction where the accused had been arrested on a blank warrant.[19] In another case he wrote a judgment for the court reversing an acquittal of police officers on a charge of assault. They had treated a prisoner with brutality—an offence which he said was, happily for the respect for law and order, of the rarest occurrence.[20] By the same token he sometimes protested against what he felt were attempts by an accused to abuse the machinery of the criminal law—it is not to be turned into a joke or farce[21] or a game.[22]

He wrote many judgments on other points of criminal procedure, interpreting the statutes and settling the practice. Many of these decisions concerned every-day technical matters of no dra-

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391, at pp. 394-5. See also *R.* v. *Diamond* (1921), 16 Alta. L.R. 302, [1921] 2 W.W.R. 45, 59 D.L.R. 109.

[17] *R.* v. *McLaren*, [1949] 1 W.W.R. 529, at p. 538, [1949] 2 D.L.R. 682, at p. 690. See also *R.* v. *Melyniuk*, [1930] 2 W.W.R 179, [1930] 4 D.L.R. 462, 24 Alta. L R. 545; *R.* v. *Olstad*, [1943] 1 W.W.R. 565, [1943] 2 D.L.R. 710.

[18] *R.* v. *Brand*, [1928] 3 W.W.R. 641, [1929] 1 D.L R. 815, 24 Alta. L.R. 5; *R.* v. *Barrs*, [1946] 1 W.W.R. 328, [1946] 2 D.L.R. 655.

[19] *R* v. *Bottley*, [1929] 2 W W.R. 76, [1929] 3 D.L.R 766.

[20] *R.* v. *McDonald*, [1932] 3 W.W.R. 418, at p. 425, [1933] 1 D.L.R. 46, at p. 53, 26 Alta L.R. 460, at p. 467.

[21] *R.* v. *Lombard* (1914), 7 Alta. L R. 270, at p. 272, 5 W.W.R. 1089, at p. 1089, 15 D L.R 613, at p. 614.

[22] *R.* v. *Scown*, [1945] 1 W.W R. 686, at p 692, [1945] 4 D L.R 202, at p 206

matic interest, but yet of the first importance to the due administration of justice. After all, it is fairness and certainty in procedure as much as anything else that we have in mind in speaking of British justice, a tradition that goes back to Magna Carta.

Many judgments relate to admissibility of evidence. Early in his career, on a reserved case after a conviction for murder, he wrote an important judgment holding admissible a statement of the victim as forming part of the *res gestae*, and a further statement as showing the state of mind of the victim.[23] Frequently he had to rule on the admissibility of confessions. Generally he scrupulously followed the principles laid down in the leading cases, such as *Ibrahim* v. *R.*[24] and *Sankey* v. *R.*,[25] and never fell into the error of treating an exculpatory statement as a confession or subject to the same rules governing admissibility.[26] However, his judgment in *R.* v. *Deagle*[27] in 1947 goes rather far in excluding a confession. The accused was arrested on one charge and, in the course of making a confession, admitted guilt of an entirely different offence. The confession was held inadmissible on the trial of the latter offence. This judgment applied and perhaps extended the well-known case of *R.* v. *Dick* in Ontario.[28]

In two or three instances his judgments in matters of criminal evidence have not prevailed.[29] On the other hand, many others

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[23] *Gilbert* v. *R.* (1907), 38 S.C.R. 284, 12 C.C.C. 127. Both reports include the judgment of the court en banc and of the Supreme Court of Canada. In affirming the admissibility of both statements, the Supreme Court held the second admissible on the ground that it was made in the presence of the accused.

[24] [1914] A.C. 599.

[25] [1927] S.C.R. 436, [1927] 4 D.L.R. 245.

[26] *R.* v. *Hurd* (1913), 6 Alta. L.R. 112, 4 W.W.R. 185, 10 D.L.R. 475. See *R.* v. *Mandzuk*, [1946] 1 D.L.R. 521 (B.C.C.A.).

[27] [1947] 1 W.W.R. 657, [1947] 2 D.L.R. 659. For criticism of the judgment, see Macdonald and Hart, The Admissibility of Confessions in Criminal Cases (1947), 25 Can. Bar Rev. 823, at pp. 847-849

[28] [1947] O.R. 105, [1947] 2 D.L.R. 213

[29] (1) *R.* v. *Hamlin*, [1929] 3 W.W.R. 258, [1930] 1 D.L.R. 497, 24 Alta. L.R. 296; overruled by *Paige* v. *R.*, [1948] S C.R. 349, 92 C.C.C. 32. The latter case holds that unsworn evidence of a child cannot be corroborative in a charge to which section 1002 of the 1927 Code applies. Incidentally it approves a judgment of Harvey C.J. in *R.* v *Whistnant* (1912), 5 Alta L.R. 211, 8 D.L.R. 468, which says that unsworn evidence of a child cannot be corroborative in a charge to which section 1003 of the 1927 Code applies.

(2) *R.* v. *Searle*, [1929] 1 W.W.R. 491, 51 C C.C. 128, 24 Alta. L.R. 37, on the effect of an explanation by the accused on a charge of receiving stolen goods. This decision appeared to have the approval of the Supreme Court of Canada in *Richler* v. *R.*, [1939] S.C.R. 101, [1939] 4 D.L.R. 281, but was adversely criticized in *Ungaro* v. *R.*, [1950] S.C.R. 430, [1950] 2 D.L.R. 593. See comment by W. J. Stainton on *Ungaro* (1951), 29 Can. Bar Rev. 885.

(3) *R.* v. *Ambler*, [1938] 2 W.W.R. 225, [1938] 3 D.L.R. 344. Harvey

have been followed by courts outside Alberta, and the writer has noted one case in which the Supreme Court of Canada approved one of his decisions as against a judgment of the Court of Appeal of Ontario. The Alberta court had said that a person accused of attempted rape may be convicted of indecent assault as an offence that is included in a charge of attempted rape. The Ontario Court disagreed but on appeal the Supreme Court ruled that the Alberta view was correct.[30]

Before referring to decisions on substantive criminal law, we will mention a series of important cases relating to the power of a superior court on certiorari from a conviction at a trial before a police magistrate. In 1916 the Chief Justice was faced with the argument that the conviction should be quashed if it appears that there is no evidence to support the finding of the magistrate. Stating that he had for several years doubted the sufficiency of this objection to the conviction, he decided "to examine carefully the authorities to settle the point definitely in my own mind as being of value for future cases". He concluded that he might not look at the facts to see whether there was evidence to support the conviction.[31] Some of his colleagues took a contrary view.[32] Then in 1921 came the leading case of *R.* v. *Nat Bell Liquors Limited.* A magistrate had convicted the company for unlawfully keeping liquor for sale contrary to the Liquor Act, 1916, and made an order for forfeiture of the stock of liquor worth $50,000. On certiorari Hyndman J. quashed both conviction and order. The Crown appealed. Harvey J., dissenting, would have restored the conviction and forfeiture. He reiterated that on certiorari the court or judge has no power to weigh the evidence. The other two judges, Stuart and Beck JJ., examined the evidence and held that the conviction was not justified. On the Crown's appeal, the Judicial Com-

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C.J. concurred in a judgment holding that a conviction must be set aside where the trial judge sitting without a jury has failed to declare that he had in mind the rule that it is dangerous to convict on the uncorroborated evidence of an accomplice. He restricted *Ambler* in *R.* v. *Joseph*, [1939] 2 W.W.R. 69, [1939] 3 D L.R 22, and in *R.* v *Kagna*, [1943] 1 W.W.R. 33, [1943] 1 D.L.R. 289. Cases in other provinces which appear to be inconsistent with *Ambler* are cited in Tremeear, Criminal Code (5th ed , 1944) pp. 1273-74. In *Ungaro* v. *R.*, *supra* this footnote, the Supreme Court of Canada found it unnecessary to resolve the conflict In *R.* v. *Perensky*, [1950] 1 W W R 1090 (Alta.), Boyd McBride J. applied *Ambler* while expressing his disagreement.

[30] *R.* v. *Quinton*, [1947] S C.R. 234, 88 C C C 231. The Alberta case is *R.* v. *Stewart*, [1938] 3 W.W.R. 631, [1939] 1 D.L.R. 233.

[31] *R.* v. *Carter* (1916), 9 Alta. L R. 481, 10 W.W.R. 602, 28 D L.R 606; cf. *R.* v. *Clarke* (1918), 13 Alta. L.R. 468, 41 D.L.R 713.

[32] *R.* v. *Emery* (1916), 10 Alta L R. 139, 33 D L.R.. 556.

mittee upheld the dissenting view.[33] In later cases, in which the Chief Justice did not take part, the Alberta court tended to restrict the application of *Nat Bell*.[34] Moreover, some courts have reduced its scope in the judicial review of the decisions of administrative bodies. The noteworthy fact here is that Harvey C.J. anticipated it against the views of most of his brethren.

On substantive criminal law, there is a number of judgments on difficult and important points to note, first on *mens rea*. In one case he held a man guilty of bigamy even though the man thought he had a valid divorce.[35] In two others, the question whether the absence of *mens rea* is a defence under the liquor laws had to be considered. It is an offence, for example, to permit a person apparently under the age of twenty-one to remain in a beer parlor and, further, it is an offence to supply liquor to a person under twenty-one. Must the Crown prove guilty knowledge in these cases? In the former case the answer is yes, in the latter, no; on a charge of permitting the Chief Justice said "knowingly" must be implied, for one cannot "permit" something of which one does not know, but on a charge of supplying, "knowingly" should not be implied. These conclusions were reached after a searching examination of the statute and of cases from England and the other provinces.[36]

The age of the motor car brought new problems for the substantive law. An important case in 1939 involved a charge of having the "care or control of a motor vehicle" while intoxicated. The accused was seated behind the wheel of his car unconscious from drink, with the car keys on the seat. The Chief Justice took the view that in these circumstances the accused could not be said to have the care or control of the car.[37] Judicial opinion in Canada is far from unanimous on this point. Another controversial decision is *R.* v. *Nickle* in 1920. Here the Chief Justice concurred in a judgment of Stuart J. holding the accused, who had been intoxicated and driving his car faster than the legal speed limit, guilty of manslaughter. He had killed the victim in the course of commit-

[33] [1922] 2 A.C 128, [1922] 2 W.W.R. 30.

[34] *R.* v. *Oakes*, [1923] 1 W.W.R 1220, 39 C C.C. 329; *R.* v. *McMicken*, [1923] 3 W.W R 879; 41 C C.C 156; *R* v *Kramer*, [1924] 1 W.W.R 714, 41 C.C.C. 403 Compare *R* v. *Fodor*, [1938] 1 W.W.R. 497, [1938] 2 D.L R. 290. This was a case of a writ of prohibition, and Harvey C J. took part.

[35] *R.* v. *Bleiler* (1912), 4 Alta L.R. 320, 2 W.W.R. 5, 1 D.L.R. 878.

[36] *R.* v. *Stokes*, [1924] 3 W W.R. 869, [1925] 1 D.L.R 274, 21 Alta. L.R. 51; *R* v. *Mainfroid*, [1926] 1 W.W.R. 465, [1926] 1 D.L.R. 1013, 22 Alta. L.R. 17.

[37] *R.* v. *Butler*, [1939] 3 W.W.R. 433, [1939] 4 D.L.R. 592. See now Code section 285(4c), enacted in 1951

ting unlawful acts and so was guilty of manslaughter whether negligent or not.[38] Then in 1940, in a dissent, he said that *Nickle* was still good law, though the majority held that gross negligence must be shown.[39]

The two world wars gave rise to several noteworthy cases. In World War I the public and the authorities too were most sensitive to anything that seemed to indicate a pro-German sentiment. However understandable this may be, the question for the courts remained whether the statements complained of were seditious. In most cases the accused was a person of German descent who had made some such remark as that he hoped Great Britain would lose or he was glad that the Lusitania had been sunk. In the first case that came before the Appellate Division, *R.* v. *Felton* in 1915,[40] the question arose squarely whether the Crown must prove seditious intent. After a careful examination of the English authorities, which he found difficult to reconcile, the Chief Justice concluded that the Crown need not prove actual intent; the judge or jury may infer it from the words and the circumstances. Stuart J. had misgivings but agreed with the result.

The next year a similar case came before the court in *R.* v. *Trainor*.[41] Harvey C.J. did not sit. The judgment of Stuart J. is a forceful protest against the notion that every bit of irresponsible bar-room talk is seditious. The law does not forbid disloyalty of the heart, nor the utterance of a word or two which merely reveal the existence of such disloyalty. Seeking a test, he used the following words, ". . . I think something is due to the dignity of the law and that the courts should not, *unless in cases of gravity and danger*, be asked to spend their time scrutinizing with undue particularity the foolish talk of men in bar rooms and shops or a word or two evidently blurted out there impulsively and with no deliberate purpose". In the phrase the writer has put in italics, Stuart J. in effect enunciated a test very close to the "clear and present danger" test which Holmes J. later formulated in the Supreme Court of the United States.

One would like to know whether Chief Justice Harvey agreed with his brother judge. Perhaps not, for his judgment in *Felton*

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[38] (1920), 16 Alta. L.R. 1, [1920] 3 W.W.R. 1016, 34 C.C.C. 15. See also *R.* v. *Field* (1928), 23 Alta. L.R. 621, [1928] 3 W.W.R. 757, [1929] 1 D.L.R. 739.

[39] *R.* v. *Wilmot*, [1940] 2 W.W.R. 401, [1940] 3 D.L.R. 358.

[40] (1915), 9 Alta. L.R. 238, 9 W.W.R. 819, 28 D.L.R. 372. See also *R.* v. *Cohen* (1916), 9 Alta. L.R. 329, 10 W.W.R. 333, 28 D.L.R. 74.

[41] (1916), 10 Alta. L.R. 164, [1917] 1 W.W.R. 415, 33 D.L.R. 658.

shows that he took a strict view against the accused, and an earlier judgment of his on an analogous charge points the same way. A storekeeper had put up a notice to say that he was selling out and leaving Canada because Americans were not wanted in Canada. The unusual charge of uttering false news was laid against him. The Chief Justice, then sitting in the trial court, found as a fact that the government wanted Americans to settle here and convicted the accused.[42] Perhaps one can agree with Professor F. R. Scott that this judgment "seems to verge on harshness".[43]

The last case of interest in World War I is *R.* v. *Bleiler*, in which the accused was convicted of attempted treason in trying to sell the Kaiser an invention for use in the war. The Chief Justice held that the conviction could not stand because there is no such offence as an attempt to commit treason.[44]

The second world war furnished no reported case on seditious utterance, possibly because the Defence of Canada Regulations, issued under the War Measures Act, had wide provisions making almost every criticism of the war effort an offence and the power to intern without trial could be used to curb seditious statements. The two cases of interest are of a different kind. In the first, escaped prisoners of war were charged with stealing a car; and in the second, prisoners were charged with the murder of a fellow prisoner. In both the accused argued that the Geneva Convention of 1929 as well as the common law permitted them to attempt escape and that anything done during an escape or attempted escape is beyond the jurisdiction of the ordinary courts. The Chief Justice examined the contention thoroughly and rejected it.[45]

We shall now refer briefly to the subject of contempt of court. At common law a superior court has power to punish summarily for criminal contempt. This may take various forms, but the one of particular interest here is comment on pending trials. Courts in this country have adhered generally to the English view that biased comment on a case pending in the courts may influence the result of the trial and hence is unfair to one of the parties and punishable as contempt. The power to punish should of course be exercised "with extraordinary care".[46]

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[42] *R.* v. *Hoaglin* (1907), 12 C.C.C. 226.

[43] Scott, Publishing False News (1952), 30 Can Bar Rev. 37.

[44] (1917), 10 Alta. L.R. 520, [1917] 1 W.W.R. 1459, 35 D.L.R. 274.

[45] *R.* v. *Kaehler*, [1945] 1 W.W.R. 566; [1945] 3 D.L.R. 272; *R.* v. *Perzenowski*, [1946] 3 W.W.R. 678, [1947] 1 D.L.R. 705.

[46] *Re Campbell and Cowper*, [1934] 3 W.W.R. 593, [1935] 1 D.L.R. 633, *per* McGillivray J.A. On the distinction between criminal and civil contempt, see *Tony Poje* v. *A.-G. B.C.*, [1953] 2 D.L.R. 785 (Can.).

In 1911 a newspaper published an article on a pending civil jury trial, which tended to create sympathy for one of the parties, and the full court imposed a fine. The Chief Justice said: "This subject is a comparatively new one in this province, and the purpose which it is hoped this case will serve is to extinguish in its inception any possible tendency towards what has been termed 'trial by newspaper', rather than to punish purely for the offence committed".[47] The writer of a note in the Yale Law Journal in 1950 cites this as an example of cases in which "judges have sometimes gone to absurd lengths in warding off fancied dangers to justice".[48] We do not propose to debate the point here, but suggest that Canadians who read the leading United States cases[49] may well conclude that Chief Justice Harvey's view is preferable to one that deprives a judge in a state court of power to punish summarily a radio station that has broadcast the most damaging statements against a negro just arrested for a brutal murder.[50]

On such important questions as punishment, juvenile delinquency and rehabilitation of criminals, there is little in the reports, perhaps not surprisingly, to indicate the social views of the Chief Justice. He was generally stern in passing sentence at trials, and on appeal did not readily interfere to reduce a heavy punishment. For example, in upholding a sentence of twenty years and thirty lashes for robbery, he said:

> There is no doubt the sentence is a severe one, but we all know that of late years there seems to have been almost an epidemic of crimes of this character, and under such circumstances we cannot be guided by rules that would be applicable in normal conditions [51]

He did address himself seriously to the problem of relating sentences to previous convictions, the age of the accused, and the like.[52] Once in discussing suspended sentences he commented that there

[47] *Hatfield* v *Healy* (1911), 3 Alta. L.R. 327, at p 332, 18 W.L.R. 512, at p 518 In 1915 Harvey C J. concurred in a judgment holding that the rule on comment on pending cases is not confined to jury trials, for a judge in his anxiety to remain uninfluenced may lean the other way: *Re Whiteside* (1915), 9 Alta. L R 232, 9 W W R 846, 26 D L R. 615.

[48] Note, Contempt by Publication (1950), 59 Yale L.J. 534, at p 540.

[49] *Bridges* v. *California* (1941), 314 U.S 252; *Pennekamp* v. *Florida* (1946), 328 U.S 331; *Craig* v *Harney* (1947), 331 U S. 367.

[50] *Maryland* v. *Baltimore Radio Show* (1950), 338 U S. 912. The Supreme Court refused to grant certiorari with the result that the decision of the highest Maryland court setting aside a summary punishment for contempt was left standing.

[51] *R* v. *Melyniuk* (1930), 24 Alta. L.R. 545, at p 551, [1930] 2 W.W.R. 179, at p. 184, [1930] 4 D L R. 462, at p. 467. See also *R.* v. *Boardman* (1915), 9 Alta. L R. 83, 6 W.W.R. 1304, 18 D L.R 698.

[52] *R.* v. *Scheer* (1932), 26 Alta. L.R. 489, [1932] 3 W.W.R. 555, [1933] 1 D.L.R. 310.

had been very few cases of the breach of a recognizance, which "speaks well for the principle of suspended sentence".[53]

IV. *Constitutional Law*

"Constitutional law" in Canada means principally the provisions of the British North America Act as interpreted by the courts. The main problems that come before the courts concern the division of legislative powers between the federal parliament and the provincial legislatures or, to put it another way, the limitations on central and local powers.

During his judicial career, extending over practically the first half of the present century, the Chief Justice had to consider many attacks on legislation, most often on provincial legislation but sometimes on federal. The primary question is whether the statute in issue is *in relation to* one of the heads of subject matter alloted to the legislature enacting it. Chief Justice Harvey decided several cases where an attack on a federal act was met by the argument, sometimes that it was in relation to the "Peace, Order, and good Government of Canada", sometimes to the "Regulation of Trade and Commerce", or to "Agriculture" or "Criminal Law". An amendment in 1919 to the Canada Temperance Act, for example, involved the application of the opening words of section 91. Years before, Parliament had passed the Canada Temperance Act, prohibiting the sale of liquor in any municipality that had voted in favour of prohibition. The Privy Council, in *Russell* v. *R.*,[54] upheld the act under the peace, order and good government clause. The 1919 amendment extended the provisions of the act so as to prohibit the importation of liquor into a whole province that voted for prohibition and the Chief Justice, affirmed by the Supreme Court, held it valid too.[55]

Under the commerce clause, the question once arose as to the validity of a provision in the Canada Grain Act requiring a grain buyer to take out a licence. The Chief Justice held that the Dominion's jurisdiction over trade and commerce does not permit it to regulate contracts in a particular trade in a province.[56] On the other hand, a later case held valid the Live Stock Pedigree Act, which for-

[53] *R.* v. *Abbott*, [1940] 3 W.W.R. 289, [1940] 4 D L.R. 478.

[54] (1882), 7 App. Cas. 829

[55] *Gold Seal Ltd.* v. *Dominion Express Company*, [1921] 1 W.W R. 804, 58 D.L.R. 51, 16 Alta L.R. 113; aff'd (1921), 62 S C.R. 424, [1921] 3 W.W.R. 710, 62 D L.R. 62. See *A.-G. for Ont.* v. *Canada Temperance Federation*, [1946] A.C. 193, [1946] 2 W.W.R. 1, [1946] 2 D.L.R. 1.

[56] *Trimble* v. *Capling* (1927), 22 Alta. L.R. 536, [1927] 1 W.W.R. 188, [1927] 1 D.L.R 717.

bids a person to make a false statement about an animal when he applies to register it. This act relates to agriculture — improving the breed of animals — and is competent under section 95 of the British North America Act.[57] These two cases show what fine distinctions are sometimes drawn in this area. The writer would have thought that the grain trade, by reason of its national and international aspects, is properly a subject for Dominion regulation, even if the legislation incidentally affects contracts that are intra-provincial. Yet the Supreme Court of Canada had in 1925 held not,[58] and the judgment of Harvey C.J. on the Canada Grain Act is merely an application of that decision.

The last important case on Dominion legislation is one in which the validity of a section of the Criminal Code, barring a civil action for assault where the defendant has been convicted of the crime of common assault, was questioned. The Chief Justice pointed out that, two years before, the full court had upheld the section.[59] True, a recent Privy Council decision had held that the federal Industrial Disputes Act was invalid because it was in relation to property and civil rights in a province. Nevertheless, the section in the Code appears to be properly ancillary to valid criminal legislation and, besides, the court should not refuse to follow an earlier decision of its own merely because it thinks that a higher court might decide differently.[60]

By far the greatest number of constitutional cases coming before any provincial court concern the validity of provincial acts. Does the act in pith and substance relate to one of the heads of subject matter that section 92 allots to the provinces or is it, on the other hand, a colourable attempt to invade Dominion jurisdiction? Is the purpose or effect of the act the controlling test? Does the subject matter of the act have a double aspect, so that provincial and federal legislation on the same subject can both stand? Lastly, assuming that a provincial act is within one of the heads of section 92, and so within provincial jurisdiction, does it conflict with valid Dominion legislation, or, even if there is no direct conflict, has Parliament occupied the field?

A few examples from cases in which Chief Justice Harvey took part will show the difficulties. For instance, the province has jurisdiction over solemnization of marriage, but not over the subject of

[57] *R.* v. *Davenport* (1928), 23 Alta. L.R. 525, [1928] 1 W W.R. 876, [1928] 2 D L R. 852.

[58] *R.* v. *Eastern Terminal Elev. Co.*, [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

[59] *Trinca* v. *Duleba*, [1924] 2 W.W.R. 1177, 20 Alta. L.R. 493.

[60] *Dowsett* v. *Edmunds*, [1926] 3 W.W.R. 447, [1926] 4 D.L.R. 796, 22 Alta. L.R. 292.

marriage and divorce, which is allotted to Parliament. May a province provide in its Solemnization of Marriage Act that the parents'. consent to the marriage of a minor is a condition precedent to the validity of the marriage? The Chief Justice concurred in a judgment of McGillivray J.A. holding that the provision relates to capacity to marry and hence is beyond the power of the province; but the Supreme Court held it in relation to formalities of marriages in the province and so valid.[61]

Again, the province passes a prohibition act. Does the statute operate to prevent a wholesale liquor company from exporting liquor from the province? Harvey C.J. and Stuart J. held that the act was in relation to property and civil rights in the province, and so valid, even though it incidentally affected trade and commerce, a head of Dominion jurisdiction. The majority, however, held it invalid to the extent that it prohibited export.[62]

What then of a provision in the Government Liquor Control Act making it an offence to be intoxicated in a public place? The Criminal Code prohibits the making of a disturbance in a public place by being drunk. In one case the accused contended that the provincial enactment in reality created a crime, and moreover a crime already covered by the Code. The Chief Justice, for the majority, held that the province may pass laws respecting the control and use of intoxicants and that the section in question is properly ancillary to that subject. The province has dealt with intoxication in a public place as an aspect of controlling the consumption of liquor, not from the aspect of controlling public morals.[63]

Many cases have arisen over the applicability of provincial laws to railways, banks or the like, or to Dominion companies generally. The British North America Act of course specifically gives the Dominion exclusive jurisdiction over banks and interprovincial railways; "the Incorporation of Companies with Provincial Objects" is a head of provincial power under section 92, but there is no analogous head under section 91 giving the Dominion power to establish companies with Dominion objects. Early in his career Horace Harvey had to face the niceties of interpretation resulting from this constitutional position.

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[61] *Neilson* v. *Underwood*, [1934] S.C.R. 635, [1934] 4 D.L.R. 167, rev'g [1933] 2 W.W R. 609, [1933] 4 D.L.R. 154.

[62] *Gold Seal Ltd* v. *Dominion Express Co.* (1920), 15 Alta. L.R. 377, [1920] 2 W.W.R. 761, 53 D.L.R. 547 In the later case between the same parties, footnote 55 *supra*, the Supreme Court judgment contains dicta supporting the view of Harvey C J. and Stuart J.

[63] *R.* v. *Osjorm*, [1927] 2 W.W.R. 703, [1927] 3 D L.R. 1018, 22 Alta. L.R. 582.

While still deputy attorney-general he had drafted the Prairie Fires Ordinance, which required the taking of precautions to prevent fires, among them the use of proper smoke stacks and the erection of fire guards. In 1905 the Canadian Pacific Railway was charged with a breach of the ordinance.[64] Mr. Harvey was now Mr. Justice Harvey and declined to sit, a note in his judge's book explaining, "I had been interested in this as D.A.G.". The same point came up again in 1907, however, and this time he took part, doubtless considering that the earlier decision upholding the act had altered his position. Was the ordinance in relation to interprovincial railways or not? The Chief Justice thought not, but the Supreme Court of Canada disagreed, holding it invalid as against the railway.[65]

In these cases the statute applied to interprovincial railways. There were other cases in which provincial legislation purported to apply to ordinary trading companies, many of which are incorporated under federal law. Can such companies be required to register before carrying on business in a province? While deputy attorney-general, Horace Harvey had drafted an ordinance of this type. The Massey-Harris Company, a farm-implement manufacturer incorporated under Dominion law, promptly contended that the ordinance could not apply to it. Harvey J. again disqualified himself and the court en banc, sitting without him, upheld the ordinance.[66]

During the next fifteen years or so the implement companies led the attack against laws of this kind, which all the western provinces had. By 1921 the Privy Council had made it clear that a province may not require a Dominion company to register as a condition of carrying on business or bringing action.[67] Then the dispute shifted to the validity of provincial sale of shares acts, which forbade the sale of a company's shares without the permission of a provincial board. In 1929 the Judicial Committee held these statutes, too, invalid as applied to Dominion companies.[68]

The next year Alberta followed Ontario's lead and passed a Security Frauds Prevention Act framed to avoid the infirmities of the Sale of Shares Act. The new act applied to all securities, not

[64] *R.* v. *Canadian Pacific Railway Co.* (1905), 7 Terr L.R. 286, 1 W.L.R. 89.

[65] *C.P.R.* v. *The King* (1907), 39 S.C.R. 476, rev'g (907), 6 W.L.R. 126.

[66] *R.* v. *Massey-Harris Company* (1905), 6 Terr. L.R. 126, 1 W.L.R. 45, 9 C.C.C. 25.

[67] *John Deere Plow Co.* v. *Wharton*, [1915] A.C. 330, 7 W W.R. 706, 18 D.L.R. 353; *Great West Saddlery Co.* v. *The King*, [1921] 2 A.C. 91, [1921] 1 W.W.R. 1034, 58 D.L.R. 1.

[68] *Re Sale of Shares Act*, [1929] A.C. 260, [1929] 1 W.W.R. 136.

merely to shares in companies; securities could be sold only by registered brokers; a special power was given the attorney-general to investigate companies and to apply to the court to enjoin persons who engage in fraudulent acts from trading in securities. The attorney-general immediately investigated a transaction among several Dominion companies. They sued to enjoin him. The Chief Justice ruled the act invalid on the ground that the legislature has but limited power to require Dominion companies to furnish information and therefore cannot delegate to the attorney-general unlimited power. On the attorney-general's appeal to the Judicial Committee, the companies attacked the whole act, including the registration requirement. Some constitutional lawyers, including Mr. Wegenast,[69] thought that the new statute would not be sustained because it could not be distinguished from acts the Privy Council had held invalid. It was an attempt to do indirectly what the province could not do directly. Lord Atkin said, however, that the Security Frauds Prevention Act is legislation in relation to the carrying on of a business within the province. Once this has been decided, it is clear that the act is not invalid merely because it incidentally affects matters within the Dominion's power. The act, to adopt the wording of the earlier cases, does not destroy or sterilize or substantially impair the powers and capacities of Dominion companies, at least of honest ones. Lord Atkin did agree with Chief Justice Harvey that one section of the statute making any fraudulent act not covered by the Criminal Code an offence was invalid as being criminal law.[70] This case ended some twenty years of litigation, and securities acts of this kind are now an integral part of corporate financing throughout Canada.

Another field in which the provinces have found it hard to frame valid statutes is that of taxation. The power they possess is in relation to "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes". Many tax laws have been attacked on the ground that they impose an indirect tax. For example, a succession duty may be indirect because it is imposed on the personal representative of the deceased in the expectation that he will recoup himself from the estate or the beneficiaries. In 1915 the Chief Justice ruled that the Succession Duty Ordinance was free of this vice, that it did not in fact impose liability on the executor for

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[69] Wegenast, Canadian Companies (1931) pp. 692-699.

[70] *Lymburn* v. *Mayland*, [1932] A.C. 318, [1932] 1 W.W.R. 578, [1932] 2 D.L.R. 6, rev'g (1931), 25 Alta. L.R. 310, [1931] 1 W.W.R. 735, [1931] 2 D.L.R. 698.

duty, but was a direct tax on the property of the estate.[71] Eighteen years later the Privy Council overruled this case,[72] and the act was then reframed.

A sales tax is usually regarded as indirect, but. where the province imposed on mine owners a tax of two per cent of gross revenue, the Chief Justice held the tax to be direct and so valid. Although the burden of such a tax is usually shifted to the purchaser of the product, it could not be shifted here because of competition in the industry. The Privy Council held the tax indirect: its general tendency rather than its incidence in a particular case is the test.[73]

The next requirement is that the tax must be "within the Province". The province of Alberta at one point claimed income tax on income paid outside the province to a resident who never brought it in. The Chief Justice, dissenting, thought that this tax was on income outside the province and therefore invalid, but the prevailing view of the court was that it was imposed on the person and hence valid.[74]

Not only tax laws but provincial legislation generally must be intra-provincial. For example, an act relating to property and civil rights outside the province is unconstitutional. The leading case is *Royal Bank* v. *R*, which arose out of the difficulties between the government and the Alberta and Great Waterways Railway, a company formed in 1909 to build and operate a railway. At the same time the province passed an act guaranteeing payment of the railway's bonds, which were sold in England and the proceeds paid to the Royal Bank in New York. The bank's head office in Montreal credited the amount of the proceeds to an account in its Edmonton branch, in the provincial treasurer's name. Within a few months public criticism of the government's transactions with the railway brought about the appointment of a royal commission to investigate, and forced the resignation of the cabinet. This was the occasion on which Sifton C.J. resigned to become premier. In

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[71] *Re Cust* (1915), 8 Alta. L R. 308, 7 W.W.R 1286, 21 D.L.R. 366. In this case Harvey C J suggested that a succession duty might not be a tax at all but an appropriation by the province of a portion of the estate. On this point compare *Re Agricultural Land Relief Act.* [1938] 3 W.W.R. 186, [1938] 4 D.L R. 28.

[72] *Provincial Treasurer of Alberta* v. *Kerr*, [1933] A.C. 710, [1933] 3 W.W.R. 38, [1933] 4 D L.R. 81.

[73] *The King* v *Caledonian Collieries, Limited*, [1928] A.C. 358, [1928] 2 W.W.R. 417, [1928] 3 D L R 657, aff'g [1927] S C.R 257, [1927] 2 D.L R. 70, rev'g (1926), 22 Alta L R 245, [1926] 2 W.W.R. 280, [1926] 2 D.L.R. 1070

[74] *Kerr* v. *A.-G. for Alberta*, [1938] 3 W.W.R 740, [1938] 3 D.L R. 23: aff'd [1942] S.C.R 435, [1942] 4 D.L.R 289.

the meantime the railway had made default in payment of interest on its bonds, and when the legislature met in special session in November 1910 it passed an act declaring that the proceeds belonged to the province and requiring the bank to pay them over. The bank refused and the province brought action, the issue being whether the 1910 statute was valid.

The Chief Justice upheld the act. It was in relation to property and civil rights in the province, even though it incidentally affected rights outside—in this case the right of the bondholders to sue the bank in Montreal for the return of their money. The Judicial Committee reversed on the ground that, from the moment the 1910 act was passed, the bondholders were entitled to claim from the bank at its head office in Montreal the money they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province and the province could not validly legislate in derogation of it.[75]

During the depression of the thirties various provinces, including Alberta, restricted creditors' rights by requiring a permit to sue, by staying actions for debt, or by reducing the principal. Many mortgages on property in the prairie provinces are payable in eastern Canada, so that one ground of attack on these acts was that they related to property and civil rights outside the province, within the principle of *Royal Bank* v. *R.* As we shall see later, the Chief Justice accepted this argument, though it has always seemed to the writer that the province is not stripped of legislative power over a mortgage on Alberta land merely because the mortgage debt is payable outside the province.

The constitutional cases of greatest importance during the last twelve years of the Chief Justice's life arose out of the legislation of the Social Credit government, which came to power in 1935 when the depression was at its worst. The Social Credit party was anti-creditor, its economic theories calling for "debt-free" money and control of credit by the people. The first few years of its tenure of office were stormy. The legislature extended the Debt Adjustment Act, which required a permit from a board before suing for debt, passed an act to reduce the amount owing on debts, restricted the remedies of mortgagees and vendors of land, enacted various temporary moratorium laws, reduced the interest payable on the bonds of, or guaranteed by, the province, and passed legislation designed to give the province control over banks.

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[75] *Royal Bank* v. *The King*, [1913] A.C. 283, 3 W.W.R. 994, 9 D.L.R. 337, rev'g (1912), 4 Alta. L.R. 249, 1 W.W.R. 1159, 2 D.L.R 762.

In the six-year period from 1937 to 1943, the Governor-General in Council disallowed eleven statutes or amendments, as compared with one in the preceding thirty-two years of the province's existence.[76] In 1937 the Lieutenant-Governor invoked a power rarely used and reserved his assent to three bills. The province argued that the power of disallowance and reservation no longer subsisted, but the Supreme Court rejected this contention;[77] and, incidentally, the three reserved bills were held ultra vires on a reference.[78]

These issues of course never came before the Alberta courts, but many other important constitutional problems did. In 1936, a Reduction and Settlement of Debts Act reduced the amount owing on large classes of debts, forbade collection of interest, and extended time for payment. Chief Justice Harvey held the act invalid on several grounds. He applied the principle of *Royal Bank* v. *R.* to hold that the province cannot legislate in derogation of civil rights outside the province, and many mortgages on Alberta land were payable in eastern Canada. Then, the Dominion's Bankruptcy Act and Farmers' Creditors Arrangement Act already covered the matter of relief to distressed debtors. Finally, the provincial act is in relation to interest, a subject reserved to Parliament.[79]

The legislature passed no more acts of this type, but there was already on the statute book a Debt Adjustment Act, which required a permit from a Debt Adjustment Board before actions of debt could be brought. The act had been passed in 1933, but after 1935 the board used its powers to force creditors to agree to reduction of debts and extension of time. The first serious attack on the act was made by the holder of a promissory note. Negotiable instruments are within the jurisdiction of Parliament, and the Bills of Exchange Act gives the holder the right to sue on the note and to recover from any party liable on the note. The Chief Justice concurred in a judgment holding that the province cannot abridge these rights and the Supreme Court sustained it.[80]

[76] The writer has relied on Schedule I, R.S.A., 1922, p. 2996, S A. 1942, p. 337, S.A. 1954, p 659.

[77] *Re Power of Disallowance*, [1938] S.C.R 71, [1938] 2 D.L.R. 8.

[78] *Re Alberta Legislation*, [1938] S C.R 100, [1938] 2 D.L.R. 81. The Privy Council declined to consider the validity of two of the bills, the Credit of Alberta Regulation Bill and the Publication of Accurate News and Information Bill, and upheld the judgment of the Supreme Court on the third, respecting the taxation of banks: [1939] A.C. 17, [1938] 3 W.W.R 337, [1938] 4 D.L R. 433.

[79] *Credit Foncier Franco-Canadian* v. *Ross*, [1937] 2 W.W.R. 353, [1937] 3 D.L.R. 365.

[80] *A.-G. for Alberta and Winstanley* v. *Atlas Lumber Co. Ltd.*, [1941] S.C.R. 87, [1941] 1 D.L.R. 625, aff'g [1940] 2 W.W.R 437, [1940] 3 D.L R. 648.

In 1941 the Governor in Council referred to the Supreme Court the question whether the Debt Adjustment Act was ultra vires in whole or in part. The ultimate decision of the Privy Council on this reference held the act invalid on the ground that it was an invasion of Parliament's power in relation to bankruptcy and insolvency, and moreover that it interfered with and obstructed actual legislation of Parliament.[81] But before this decision, though after the Supreme Court had ruled the act invalid, the legislature, in 1942, enacted that all actions to which the Debt Adjustment Act applied should be stayed until the Privy Council's decision. Chief Justice Harvey, writing for the majority, held that the act providing for the stay was invalid on the ground that it is for the courts to determine whether the legislature has exceeded its powers, and "the legislature should recognize and observe that determination".[82] This decision was never appealed to a higher court, but its soundness may be doubted in the light of the Privy Council's decision in *Montreal Trust Co.* v. *Abitibi Power and Paper Co.*[83]

Another statute of 1942 amended the Judicature Act by fixing a one-year period of redemption in actions for foreclosure, with power in the court to decrease or extend the period. Harvey C.J. for the majority ruled that this amendment, like the act last discussed, had the effect of nullifying the Supreme Court judgment holding invalid the Debt Adjustment Act. The Supreme Court reversed, sustaining the amendment.[84]

In addition to its many efforts to aid debtors, the legislature took steps to relieve the province of its burden of debt. It did this, in 1936, by enacting statutes that reduced by one half the interest payable on bonds issued or guaranteed by the province. A holder of both provincial bonds and bonds of an irrigation district guaranteed by the province decided to try to enforce payment. The resulting litigation was in the courts for years. The moves and counter-moves were these The bondholder sued the irrigation district for arrears of interest. The trial judge found that the statute reducing interest was in relation to interest, a head of Dominion jurisdiction, and gave judgment for the bondholder.[85] The legislature responded by en-

[81] *A.-G. for Alberta* v. *A.-G. for Canada* (Debt Adjustment Act), [1943] A.C. 356, [1943] 1 W.W.R. 378, [1943] 2 D L.R. 1, aff'g [1942] S.C.R. 31, [1942] 1 D.L.R. 1.

[82] *Re Legal Proceedings Suspension Act*, [1942] 2 W.W.R. 536, [1942] 3 D.L.R. 318.

[83] [1943] A.C. 536, [1943] 2 W.W.R. 33, [1943] 4 D.L.R. 1

[84] *Roy* v. *Plourde*, [1943] S.C.R. 262, [1943] 3 D.L.R. 81, rev'g [1942] 2 W.W.R. 607, [1942] 3 D.L.R. 646.

[85] *Independent Order of Foresters* v. *Leth. Nor. Irrig. Dist*, [1937] 2 D.L.R. 109, [1937] 1 W.W R. 414.

acting that actions on guaranteed bonds could not be taken or continued without the consent of the Lieutenant-Governor in Council. The effect of this statute was of course to take from the plaintiff the fruits of the judgment. The bondholder started again. In holding the last act ultra vires, Ewing J. said at the trial, "If either the Dominion or the Provinces be at liberty to invade at will the legislative jurisdiction of the other and give practical effect to that invasion by denying the Courts jurisdiction to declare such invasion to be unlawful, then the division of powers as contained in the B.N.A. Act is a futility". On appeal, the Chief Justice stressed the purpose as well as the effect of the act and concluded that it was auxiliary to the statute reducing interest and so, like it, was unconstitutional.[86] The next year the same bondholder brought a petition of right with respect to arrears of interest on provincial bonds. The Chief Justice did not sit when the court held invalid, as being in relation to "Interest", the statute reducing interest on provincial bonds.[87]

On an appeal to the Privy Council from both decisions of the Appellate Division, the judgments below were sustained. Had the legislation only incidentally touched the subject of interest it might have been valid, but it was in pith and substance interest legislation and did not come under any of the heads of section 92.[88] The bondholder's victory was an empty one, however, for the province continued to pay the reduced rate of interest until it refunded the bonds in 1945.

The efforts of the province to interfere with and control banking in the province are largely outside the scope of this article, for few of them came before the Chief Justice. At the peak of the political turmoil in the summer of 1937, a Credit of Alberta Regulation Act and a Bank Employees Civil Rights Act were passed. These remarkable efforts to bring banks under provincial control were disallowed eleven days after their enactment. Two months later a new bank control bill was passed, together with a bill imposing a crushing tax on banks. These were two of the three bills to which the Lieutenant-Governor reserved assent.[89] After a lull during the war, the legislature in 1946 made its last attempt to regulate banks in a statute entitled the Alberta Bill of Rights Act.

[86] *I. O. F.* v. *Leth. Nor. Irrig. Dist.*, [1938] 3 D.L.R. 89, [1938] 2 W.W.R. 194, aff'g [1937] 4 D.L.R. 398, [1937] 3 W.W.R. 424

[87] *I. O. F.* v. *The King*, [1939] 2 D.L.R. 671, [1939] 1 W.W.R. 700, aff'g [1939] 2 D.L.R. 53, [1939] 1 W.W.R. 275.

[88] *The King* v. *I. O. F.*, [1940] A C. 502, [1940] 2 D.L.R. 273. For later unsuccessful efforts by the province to prevent I. O. F. from collecting its judgment against *Leth Northern*, see [1944] 1 D.L.R. 660 and [1945] 1 D.L.R. 298. Harvey C.J. took part in both these cases, but they are not of constitutional interest

[89] See footnote 78 *supra*

Part I of this unusual legislation contained a loosely drawn list of freedoms and economic rights of citizens, together with a declaration of the duty, spelled out in some detail, to be a good citizen. Part II set up an elaborate scheme to implement the act, which included a board to control lending by "credit institutions", a term that covered banks. Chief Justice Harvey delivered the judgment holding Part II to be a measure to control the banking business and so incompetent. He was prepared to sever Part I, but the Judicial Committee held that it must fall with Part II.[90]

This concludes the account of the Chief Justice's important cases on the distribution of powers between Parliament and the provinces. It remains to mention two other possible restrictions on legislative competence: first, in connection with delegation of legislative power; and, secondly, with the appointment of provincial tribunals and boards with judicial functions.

Long ago the Judicial Committee, in *Hodge* v. *The Queen*, rejected the argument that the provincial legislatures may not delegate their powers. They are in no sense delegates of the Imperial Parliament and their authority is as plenary and ample within the limits prescribed for them as that of the Imperial Parliament.[91] In spite of this decision, however, attacks on legislation are sometimes based on the argument that the legislature has made an improper delegation of its powers, in that it has purported to delegate wider powers than it possesses or that, in delegating, it has abdicated its function. These contentions are usually unsuccessful.[92]

Chief Justice Harvey in his dissent in *Re Lewis*, subsequently upheld by the Supreme Court of Canada in *Re Gray*, supported the widest delegation in wartime by Parliament to the Governor-General in Council, yet, when he came to deal with the power of the Alberta legislature to delegate to the Lieutenant-Governor in Council, he held that a delegation of power to fix fees payable by foreign companies and to require information from them is invalid as applied to Dominion companies. The legislature itself has but limited power over Dominion companies and cannot delegate an unlimited power to the executive.[93]

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[90] *A.-G. for Alberta* v. *A.-G. for Canada* (Alberta Bill of Rights Act), [1947] A.C. 503, [1947] 2 W.W.R. 401, [1947] 4 D.L.R. 1, aff'g in part [1947] 1 D.L.R. 337.

[91] (1884), 9 App. Cas. 117.

[92] There is an exception where a province purports to delegate its powers to Parliament. See *A.-G. for N.S.* v. *A.-G. for Can.*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369, but compare *P.E.I. Potato Marketing Board* v. *Willis*, [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146.

[93] *Re Royalite Oil Company Limited* (1931), 25 Alta. L.R. 206, [1931] 1 W.W.R. 484, [1931] 2 D.L.R. 418.

Again, in 1936, the legislature passed the Reduction and Settlement of Debts Act, already referred to, one provision of which said that the act would not apply to a debt declared by the Lieutenant-Governor in Council to be a debt to which the act did not apply. The Chief Justice held that this provision purported to delegate a legislative function which could not validly be conferred on the executive,[94] a view that seems to be akin to the American doctrine of separation of powers as it stood before the United States Supreme Court modified it by permitting delegation within broad limits. In any event, the Privy Council in 1938 approved a judgment of Chief Justice Martin of British Columbia that is inconsistent with the position taken by Chief Justice Harvey.[95] Indeed, the narrow scope Chief Justice Harvey gave to the province's power to delegate is hard to reconcile with his reasons in *Re Lewis*, even though he sought to distinguish that case on the ground that the statute there was a war measure.

Provincial legislatures frequently seek of course to confer judicial functions on tribunals and boards. Persons attacking the constitution of these agencies contend that they purport to exercise the powers of a superior, district or county court, whereas under section 96 of the British North America Act the judges of superior, district and county courts are to be appointed by the Governor-General.

In 1917, Harvey C.J. considered an act giving justices of the peace jurisdiction over claims for debts up to $50.00 in value. A detailed examination of the history of section 96 and of the various colonial courts in existence at Confederation led him to the conclusion that the B.N.A. Act recognizes tribunals other than those mentioned in section 96 and that a justice's tribunal is outside the section.[96] What then of an act giving magistrates jurisdiction in family matters, such as family maintenance and custody of children? The Chief Justice held such a statute invalid as being contrary

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[94] *Credit Foncier Franco-Canadian* v. *Ross*, [1937] 2 W.W.R. 353, [1937] 3 D.L.R. 365.

[95] *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] A.C. 708, [1938] 2 W.W.R. 604.

[96] *Re the Small Debts Recovery Act* (1917), 12 Alta L.R. 32, [1917] 3 W.W.R. 698, 37 D.L.R. 170. Earlier cases on the same constitutional problem were:

(1) *Colonial Investment and Loan Company* v. *Grady* (1915), 8 Alta. L.R. 496, 8 W.W.R. 995, 24 D.L.R. 176. The court held invalid a statute giving to the master in chambers a jurisdiction as unlimited as that of a supreme court judge in mortgage actions.

(2) *Polson Iron Works* v. *Munns* (1915), 9 W.W.R. 231, 24 D.L.R. 18. The court held valid rules of court conferring certain powers on the master in chambers

to section 96[97] and cases in at least two other provinces followed his opinion;[98] but in 1938 the Supreme Court of Canada disapproved them.[99] A mere increase of jurisdiction does not apparently change an inferior tribunal into a superior court under section 96, though it is hard to say where the precise line between the two is to be drawn.

The proliferation of administrative agencies during recent years gives rise to a similar problem. Here too the party attacking the jurisdiction of the provincial agency frequently argues that it is a court as contemplated by section 96. The decisions of some provincial courts have gone far in upholding this ground of attack, but the Privy Council has tended in the other direction.[100] The Chief Justice had already held that a provincial act giving to a board the power to fix milk prices is valid: the board is not a court under section 96.[101]

The task of passing on the validity of statutes, which of course does not fall to English courts, is one of the most difficult duties of judges under a federal system. So many doctrines have been evolved since 1867 to assist in determining validity, and the distinctions are often so fine, that it is sometimes hard for a judge to know which rules to apply. Certainly if one were to adopt in Canada the popular American practice of keeping a score of a judge's rulings, showing their fate at the hands of higher courts, no trial judge or judge of an intermediate court of appeal would have a perfect record. We do not propose to assess Chief Justice Harvey's contribution to constitutional law on any such basis as this. It can be said that his judgments show a good grasp of principles and an earnest effort to apply them. It has always seemed to the writer that some of his reasons for holding against the province's debt legislation went too far, but this is a matter of opinion, and even here the Supreme Court and Judicial Committee upheld him on a number of important issues.

V. *Domestic Relations*

When Mr. Harvey first went to the bench in 1904, the law of domes-

[97] *Roskiwich* v. *Roskiwich* (1931), 26 Alta. L.R. 137, [1931] 3 W.W.R. 614, [1932] 1 D.L.R 135. See also *Kazakewich* v. *Kazakewich*, [1936] 3 W.W R. 699, [1937] 1 D.L R. 548.

[98] *Clubine* v. *Clubine*, [1937] O.R. 636 (C.A.); *Krassman* v. *Krassman*, [1937] 3 W.W.R. 349 (Sask.).

[99] *Re Adoption Act*, [1938] S.C.R. 398, [1938] 3 D.L.R. 497.

[100] *Toronto* v. *York*, [1938] A.C. 415, [1938] 1 W.W.R. 452, [1938] 1 D.L.R. 593; *Labour Relations Board of Saskatchewan* v. *John East Iron Works, Limited*, [1949] A.C. 134, [1948] 2 W.W.R. 1055, [1948] 4 D.L.R. 673.

[101] *Board of Public Utility Commissioners* v. *Model Dairies*, [1936] 3 W.W.R. 601, [1937] 1 D L.R. 95.

tic relations was still undeveloped; by the time of his death in 1949, a large body of decisions, to which he had made a substantial contribution, and a variety of statutes had brought a great measure of certainty into the law. One of the first important problems was that of the court's jurisdiction to grant a decree of divorce. During the era of the old North-West Territories, and for the first thirteen years of Alberta's existence, no one attempted to bring an action for divorce. It was generally assumed that the courts had no jurisdiction and that the only way an aggrieved spouse could obtain a dissolution of marriage was by a private bill in Parliament.

In 1918, however, there came before the court a petition for divorce. The Chief Justice, in dissent, thought that the court had no jurisdiction. He noted that neither the North-West Territories Act of 1886 nor the provincial act of 1907 creating the Supreme Court of Alberta gave the Supreme Court of the Territories or its successor, the Supreme Court of Alberta, the jurisdiction the English Court of Divorce and Matrimonial Causes had exercised from 1857. He concluded that the omission of any reference to the English Court of Divorce and Matrimonial Causes in the Dominion and Alberta acts, which did specifically mention the other English courts, was intentional and that "no jurisdiction in matters of divorce was ever conferred on this Court". The majority, on the contrary, were agreed that the court had jurisdiction. Their argument went like this. The Dominion statute of 1886 provided that the laws of England as of July 15th, 1870, were to be in force in the Territories so far as applicable. The Privy Council had held in 1908 that the Matrimonial Causes Act, 1857, in so far as it established a substantive law of divorce, was in effect in British Columbia and this decision was applicable by analogy in Alberta. Once it is accepted that the law of divorce is part of Alberta law, then the Supreme Court of Alberta has jurisdiction to administer it. The Privy Council affirmed.[102]

Soon after, the court had to decide whether the parties to a divorce action must have an Alberta domicile, or whether a Canadian domicile is sufficient, to confer jurisdiction. The Chief Justice laid down the rule, which has been followed ever since, that an Alberta domicile must be shown.[103] He took no part, however, in the leading case of *Cook* v. *Cook*, in which the Privy Council ultimately held that the court of the husband's domicile has exclusive jurisdiction

[102] *Board* v. *Board*, [1919] A.C. 956, [1919] W.W.R. 940, 48 D.L.R. 13, aff'g (1918), 13 Alta. L.R. 362, [1918] 2 W.W.R. 633, 41 D.L.R. 286.

[103] *McCormack* v *McCormack* (1920), 15 Alta. L.R. 490, [1920] 2 W.W.R. 714, 55 D.L.R. 386.

to dissolve the marriage, even though the wife has secured a decree of judicial separation.[104]

On the question of the standard of proof of adultery in divorce actions, he concurred in a decision that the preponderance of evidence rule applies, but that the evidence should perhaps be stronger than in the ordinary civil case.[105] Yet, when the question came up again in 1948, he wrote a dissent in which he stated that adultery must be proved beyond reasonable doubt.[106] Doubtless he was influenced by the English decisions that say the higher standard is necessary. The confusion, and it is a confusion that has prevailed throughout the common-law jurisdictions of the Commonwealth, now appears to have been settled at least for this country by the Supreme Court of Canada. The requirement of the Matrimonial Causes Act, 1857, that the court must be "satisfied" that adultery has been committed means that the standard is the same as in any civil case.[107] If the Chief Justice fell into error, it was out of the great respect he had for English authority and his ever-present desire for uniformity.

Two of his judgments are of interest not only because they settled important questions so far as the province is concerned, but because of the parallel they furnish with later decisions of the highest English court. The facts in the Alberta case of *H* v. *H* differ from those in *Baxter* v. *Baxter*,[108] but in the former the Chief Justice held, like the House of Lords in the latter, that sterility differs from impotence and is not a ground of nullity.[109] In another divorce case[110] the wife obtained a decree nisi, but on her application for a decree absolute the King's Proctor intervened to show cause why the decree should not be granted, producing evidence that she had herself committed adultery. Since the plaintiff's adultery creates a discretionary rather than an absolute bar, the question was whether the discretion should be exercised in favour of a plaintiff who has failed to disclose it. The Chief Justice examined numerous English cases indicating the difficulty of giving a clear-cut answer. The practice in England was to require the plaintiff to disclose his adultery in the pleadings and then to furnish a statement of particulars to assist

[104] [1926] A.C. 444, [1926] 1 W.W.R. 742, [1926] 2 D.L.R. 762, *sub nom.*, *A.-G. for Alberta* v. *Cook*.

[105] *Leboeuf* v. *Leboeuf* (1928), 23 Alta. L.R. 328, [1928] 1 W.W.R. 423, [1928] 2 D.L.R. 23.

[106] *Molnar* v. *Molnar*, [1948] 2 W.W.R. 1165, [1949] 1 D.L.R. 263.

[107] *Smith* v. *Smith*, [1952] 2 S.C.R. 312, [1952] 3 D.L.R. 449

[108] [1948] A.C. 274.

[109] *H* v. *H* (1927), 22 Alta. L.R. 565, [1927] 2 W.W R. 366, [1927] 3 D.L.R. 481.

[110] *Sherman* v. *King's Proctor*, [1936] 2 W.W.R. 152, [1936] 3 D.L.R. 90.

the court. Although the inference could be drawn that failure to take this course would result automatically in refusal of a decree, the Chief Justice thought that even in England the trial judge must still exercise his discretion as the Matrimonial Causes Act requires him to do. Seven years later the House of Lords in *Blunt* v. *Blunt*[111] addressed itself to the question of the nature and proper exercise of the discretion. The Lord Chancellor, Viscount Simon, confirmed the view that a plaintiff is under a duty to disclose his own adultery, but added that non-disclosure is not necessarily fatal. The difference between the views of Viscount Simon and Harvey C.J. is that in England, unlike Alberta, there remains a duty to disclose. The Chief Justice did not however go so far as McGillivray J.A., who said in the same case that, where both spouses have committed adultery and are anxious to part, it is not in the public interest to keep them together.

A number of miscellaneous, though important, cases on the substantive law of domestic relations can be grouped together at this point. In 1944 came an important case on the subject of collusion. The defendant wife had paid the costs of the husband's action, which was brought under arrangement with her and for her benefit. After a long review of the cases, the Chief Justice held that collusion exists where the suit is procured by agreement or bargain between the parties and rejected certain decisions to the effect that something more is needed—improper motive or dishonest purpose.[112] In another case the wife of a husband who was domiciled in Alberta went to the United States and secured a divorce, not of course recognized here. Then, when the husband died, she claimed a share of his estate as widow. The Chief Justice recognized that the "divorce" did not affect her status as wife but held that, in so far as it was a judgment *in personam*, it bound her and she could not be heard to impugn the jurisdiction of the court she had invoked.[113] In still another case, a "wife" brought an action for alimony and alternatively for compensation for services rendered her "husband", who already had a wife. The majority maintained the action on the latter basis, with the Chief Justice dissenting on the ground that the parties had never contemplated that she would be compensated.[114]

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[111] [1943] A.C. 517. For a discussion of the whole subject, in particular of the effect of *Blunt* v *Blunt* in Canada, see Power, The Law of Divorce in Canada (1948) pp. 67-81.

[112] *Shaw* v. *Shaw*, [1944] 2 W.W.R. 243, [1944] 4 D.L.R. 9.

[113] *Re Plummer Estate*, [1941] 3 W.W.R. 788, [1942] 1 D.L.R. 34.

[114] *Sheaser* v. *Sheaser* (1926), 22 Alta. L.R. 261, [1926] 2 W.W.R. 389, [1926] 3 D.L.R. 196

The problem of incapacity to enter into the marriage contract by reason of insanity came before the court in 1929. A husband brought action to annul a marriage on the ground that his wife was insane at the time of the ceremony. Later she became hopelessly insane. The test of *Durham* v. *Durham* was applied: Did she have the capacity at the time of the marriage to understand the nature of the contract and the duties and responsibilities it creates? After holding that the wife had been sane under this test, Harvey C.J. remarked:

> It is, no doubt, a hardship that this plaintiff, a comparatively young man, should be doomed to live without a mate while the defendant lives, but that is a matter for the consideration of Parliament, not the Courts, and it may be said it is the second part of the 'better or worse' for which he took her for life.
>
> It must not be overlooked also that as regards policy rather than law a judgment that would bastardize an innocent child for the benefit of the father who had been instrumental in bringing it into the world could have little to be said in its favour.[115]

The last noteworthy case has to do, not with divorce or other actions between the spouses, but with a dispute between a wife and a third party. The question was whether a husband may be joined in an action by or against the wife. There the plaintiff had joined the husband in an action against the wife for slander. The Chief Justice held that a provision in the North-West Territories Act, 1875, meant that the husband was no longer a necessary or proper party.[116] Shortly afterwards the House of Lords held by a bare majority that a similar provision in the Married Women's Property Act, 1882, did not have this effect: although the husband is no longer a necessary party, he is still a proper party to an action in tort against the wife.[117]

VI. *Real Property*

One of the features of land law in Alberta is the Torrens system of land registration, which we have mentioned earlier in connection with Chief Justice Harvey's position as Registrar of Land Titles at Calgary. The unsettled Territories were well suited to receive the system because the Crown had granted but very small portions of the land in the Territories by 1886, when the Territories

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[115] *Chertkow* v. *Chertkow* (1929), 24 Alta. L.R. 188, at p. 199, [1929] 2 W.W.R. 257, at pp. 266-7, [1929] 3 D.L.R. 339, at p. 348. The judgment was affirmed, [1930] S.C.R. 335, [1930] 1 D.L.R. 137.

[116] *Quinn* v. *Beales* (1924), 20 Alta. L.R. 620, [1924] 3 W.W.R. 337, [1924] 4 D.L.R. 635.

[117] *Edwards* v. *Porter*, [1925] A.C. 1.

Real Property Act was passed, and it was easy to bring under the statute Crown grants made after it came into operation.

The typical land titles act has a number of basic provisions. The registrar issues a certificate of title to every parcel of land and the original title is kept at the land-titles office; all mortgages and other charges are registered against it and have priority according to time of registration; the certificate of title is indefeasible; until registered an instrument creates no interest in the land and knowledge of an unregistered interest is not of itself fraud in a person acquiring the land or an interest in it; and, lastly, an assurance fund is established to compensate persons who have suffered damage through a mistake of the registrar.

It would serve no good purpose to list the large number of the Chief Justice's judgments on these topics. A few important decisions that have helped to shape the province's land law will, however, be mentioned. In 1918 the full court had to decide whether foreclosure of a mortgage extinguishes the debt. A Torrens mortgage, unlike a common-law mortgage, is merely a charge on the land, but a mortgagee obtaining foreclosure acquires legal title. Chief Justice Harvey held that the mortgagee takes title in full satisfaction and the debt is extinguished. The Supreme Court of Canada reversed,[118] but the legislature promptly amended the Land Titles Act to conform to the Chief Justice's opinion.

This was in 1919 and the same year a mortgagee attempted to avoid the result of the judgment. The land was worth $6,500 and the mortgage debt was $20,500. The resourceful mortgagee took action and, instead of applying for foreclosure, asked the court's approval of its offer to buy the land for $6,500 and also a "deficiency judgment" for $14,000. The mortgagor, naturally enough, argued that the sale to the plaintiff was tantamount to a foreclosure order and so extinguished the debt. This case, *Security Trust Co.* v. *Sayre and Gilfoy*,[119] went to the Supreme Court, where the six judges divided evenly, and in the result the opinion of Harvey C.J. prevailed. In his view the order approving a sale to the mortgagee was not the same as a foreclosure, so the deficiency judgment was proper.

After this case, mortgagees whose security was worth less than the debt often followed the same course. However, when the de-

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[118] *Mutual Life Assurance Co* v. *Douglas* (1918), 57 S.C.R. 243, rev'g [1918] 1 W.W.R. 690, 39 D.L.R. 601, 13 Alta. L.R. 18

[119] (1920), 61 S.C.R. 109, 56 D.L.R. 463, aff'g 3 W.W.R. 634, 49 D.L.R. 187, 15 Alta. L.R. 17.

pression came, the value of mortgaged land frequently fell far below the amount of the debt so that many judges felt it unfair to give deficiency judgments, and refused. Then in 1939 and 1940 the legislature put an end to any possibility of obtaining such a judgment by abolishing altogether the right of mortgagees (and of vendors of land) to obtain judgment for the debt. The only remedy left was sale and, if the sale was abortive, foreclosure. This remains the law today, save for minor changes and exceptions in the legislation, the most important being loans made under the National Housing Acts. The continued trend of restricting mortgagees' rights may be contrasted with a comment of the Chief Justice in *Sayre*. He there observed that the various acts to protect debtors had been induced by the special conditions of World War I and that a change might soon be made to restore creditors' remedies. This prediction never came true. The depression, and possibly World War II, caused a further curtailment of a mortgagee's and vendor's remedies, as our brief account has indicated.

The only other cases we shall mention on the Land Titles Act throw light on the Chief Justice's attitude toward the judge's rôle in interpreting statutes. Over and over again he stated that the courts are not concerned with the fairness or wisdom of legislation and must give effect to it even though the result is unjust. For example, he held in 1914,[120] and the Appellate Division agreed in 1921,[121] that, contrary to general belief and the spirit of the act, the assurance fund provision in the Land Titles Act was not effective to provide compensation to a claimant in all cases where he had been damnified by a mistake or misfeasance of the registrar. In 1937 a claimant against the fund argued for a wider construction of the assurance fund provisions, but the Chief Justice replied that the legislature had had many years notice of the two decisions and had done nothing; it was unfortunate that the act did not give full protection, but "the responsibility to see that the statute law is just is on the legislature and not on the courts".[122]

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[120] *Setter* v. *Forbes* (1914), 8 Alta L.R. 191, 6 W W R. 116, 18 D.L.R. 789, *per* Harvey C.J. at trial.

[121] *Teel* v. *Forbes* (1924), 20 Alta. L.R. 559, [1924] 2 W.W.R. 996, [1924] 3 D.L.R. 670. Harvey C.J. did not take part

[122] *Richert Co* v. *Forbes*, [1937] 3 W.W.R. 632, at p. 635, [1937] 4 D.L.R. 540, at p. 543. The assurance fund provisions were widened in 1935, but the registrar's error in this case occurred before 1935. In 1949 an important restriction was placed on the right to claim against the fund where the mistake relates to minerals. The claimant is entitled only to the amount he paid out plus a maximum of $5,000. In cases arising since the Chief Justice's death some companies have lost oil rights worth many thousands of dollars as the result of mistakes in the Land Titles Office.

Yet he took a different position when he had to deal with the Dower Act of 1917. The nature of that act can be explained in his own words:

> When the Torrens system was introduced into the North-West Territories in 1886 the wife's right to dower as well as the husband's estate by the curtesy, was abolished as being in conflict with what was supposed to be an inherent principle of that system as regards freedom of transfer and the ability to ascertain every interest in the land by reference to the face of the current certificate of title That principle has been departed from in many respects and the Legislature has provided in lieu of the old dower, right to a life estate in a third of all the husband's lands, the right to a life estate in the whole of the homestead. . . [123]

Moreover, the Dower Act, as it stood in 1939, said that where the husband disposed of the homestead without the wife's consent, given in a prescribed manner, the disposition was null and void. A situation could arise where the wife's consent was given irregularly, or where the husband swore falsely that he had no wife or that the land was not his homestead. Then, after the buyer had acquired title in good faith, the wife, or even the husband, might bring action against him for a declaration that his title was null and void. If the action were successful, the Dower Act would become a device to enable the vendor to escape from an honest bargain, and security of title would be undermined. In a case in 1939 the wife did bring action against the transferee, after the husband had falsely sworn that the land was not his homestead. The Chief Justice felt bound to say that the disposition was null and void as against the wife's possible life interest, but refused to hold that it was entirely void. Then he observed:

> If the legislature intended to give [the section] a different meaning one would have looked for such words as 'absolutely' or 'for all purposes'.[124]

Three years after this decision the legislature took the Chief Justice's hint and provided that a disposition without consent is "absolutely null and void for all purposes". Four years later a case arose in which the husband, in transferring the homestead, falsely swore that he had no wife. The transferee gave a further transfer and both were registered at the same time. The Chief

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See *Imperial Oil Co. Ltd.* v. *Turta*, (1954) 12 W.W.R. (N.S.) 97 (Sup. Ct. of Can.).

[123] *Re McLeod* (1929), 24 Alta. L.R. 565, [1929] 2 W.W.R. 252, [1929] 4 D.L.R. 659.

[124] *Spooner* v. *Leyton*, [1939] 2 W.W.R. 237, [1939] 3 D.L.R. 148. To appreciate fully the judgment, one should examine the history of the section and the earlier decisions on it.

Justice held that, although the first transfer was null and void, the second was not, and the second transferee obtained title free of any claim of the wife.[125] At this point the legislature gave up and passed a new Dower Act, which does not in terms make the disposition null and void. The Chief Justice did not live long enough to help unravel the problems created by the new act.[126]

Important parts of the law of real property remain outside the Land Titles Act. For example, an agreement for sale is not a registerable document, and the right of either party to sue for specific performance and the purchaser's right of rescission are governed largely by the general law. These subjects are of importance in any locality, particularly when prices of land fluctuate rapidly.

In a time of land speculation and rising prices the tendency is for vendors to try to escape from their obligations under contracts of sale, with the result that purchasers' actions for specific performance or damages come increasingly before the courts. When prices fall the trend is reversed, and it is the purchaser who tries to escape from his agreement. In the period from 1910 to 1912 Alberta had a spectacular land boom, which collapsed just before the beginning of World War I. In the next few years the court was occupied with cases in which a purchaser owing the vendor large sums of money on land of little value refused to pay and in some cases repudiated the agreement. Sometimes the purchaser could show that the vendor was merely a purchaser on time from the registered owner and did not himself have title to the land. The cases established that on these facts the vendor could not maintain an action for the purchase price.[127] In other cases the purchaser, casting about for some ground or other on which he could escape from his agreement, found that the vendor did not have the mineral rights or the coal rights. Although the purchaser had probably not had the slightest interest in coal rights when he entered into the agreement, nevertheless he could obtain rescission of the agreement, though in one case the Chief Justice found that the purchaser had waived his right to rescind by accepting a transfer of portions of the land.[128]

The Chief Justice's attitude toward the conduct of a defendant

[125] *Essery* v. *Essery*, [1947] 2 W.W.R. 1044, [1948] 1 D.L.R. 405.

[126] See *Pinsky* v. *Wass*, [1953] 1 S.C.R. 399, [1953] 2 D.L.R. 545; *McColl Frontenac Oil Co.* v. *Hamilton*, [1953] 1 S.C.R. 127, [1953] 1 D.L.R. 721.

[127] *Kromm* v. *Kaiser* (1915), 8 W.W.R. 239, 8 Alta. L.R. 287, 21 D.L.R. 700; *Greene* v. *Appleton* (1915), 8 W.W.R. 867, 9 Alta. L.R. 36, 25 D.L.R. 333.

[128] *Franco-Belgian Investment Co.* v. *Duggan* (1920), 15 Alta. L.R. 243, [1920] 1 W.W.R. 728, 51 D.L.R. 602.

who raised the defence that the vendor did not have title to the minerals appears in a 1926 case:

> I have no sympathy with the act of a purchaser who after years of occupation and use of the lands and after having prevented the vendor from making any other sale out of which he might have secured his full purchase-price takes advantage of something which he never considered of any importance to escape from a contract which has become burdensome by reason of depreciation in land values or some other cause and throw the burden back on his vendor.[129]

In that case an agreement for farm lands was made in 1920 with the purchase price payable over a long period. The buyer took possession and, becoming financially involved in 1925, consulted a solicitor, who discovered by search of the title that the minerals were reserved to a third party. Then the buyer sued for rescission of the agreement. The Chief Justice held the law to be settled that an agreement to sell land entitles the buyer to the minerals, so that when the buyer discovers that the vendor has no title to them, he may rescind and recover the instalments paid the vendor.

Most of the cases on this subject were in the decade beginning in 1915 and not many have arisen since. It is true that prices fell again during the depression, but most purchasers on time in the nineteen twenties did not buy as a speculation but rather because they wanted to settle on the land. It may be, too, that agreements for sale were more carefully drawn than in the early years. In any event the leading cases are still those that arose out of the land boom before World War I.

VII. *Torts*

As might be expected, the Chief Justice was called upon during his many years on the bench to deal with most branches of the law of torts. From the period of World War I, negligence actions were frequent. In many of them the plaintiff was a careless driver who was hit by a train or a careless pedestrian struck by a car. He always alleged that the other party had the last clear chance or, on the doctrine of *B.C. Electric Railway Co.* v. *Loach*,[130] that, but for his prior incapacitating negligence, would have had it. Typical of

[129] *Stankievich* v *Armacost*, [1926] 1 W.W.R. 758, [1926] 2 D.L.R. 401, 22 Alta L R. 56 See also *Chekaluck* v *Sallenback*, [1948] 1 W.W.R. 510, [1948] 2 D L R 452 Where the agreement reserves coal, but the title reserves to a third party all coal "and the right to work the same", a special problem arises see *Fuller* v *Garneau* (1921), 61 S C.R. 450, 58 D L.R 642; *Knight Sugar Co.* v. *Webster*, [1930] S.C.R. 518, [1930] 4 D.L.R. 343.

[130] [1916] 1 A.C 719; 8 W.W R. 1263

these difficult cases was one in which a man on a bicycle rode over a railway crossing and was hit by a train, which he had seen coming. The Chief Justice, presiding at the trial, thought that if a watchman had been present as required by law the accident might have been prevented. Although the railway's negligence was prior in time to the plaintiff's, it was prior incapacitating negligence within the *Loach* case: the plaintiff's position was like that of the famous donkey in *Davies* v. *Mann*.[131] The Appellate Division agreed, but the Supreme Court reversed on the ground that the plaintiff's contributory negligence was clear and in part at least was the direct cause of the accident.[132] This decision is of interest because Duff and Anglin JJ. both expressed regret that the law did not permit apportionment of responsibility and it was only a year later, in 1924, that Ontario passed the first contributory negligence act in any common-law province.

Alberta did not have the act until 1937, and in the meantime the Chief Justice took part in many cases where the issue was whether the plaintiff's contributory negligence was fatal to his claim. These cases are of historic interest for their fine distinctions and for the lengths to which the judges sometimes went to save a plaintiff from the consequences of his carelessness. We shall not, however, examine them in detail. Most of them were tried by a judge alone, and the Chief Justice sat on the appeal. Sometimes his view prevailed, sometimes not.[133] It seems probable that his decisions were influenced by his concept of the rôle of an appellate court in reviewing findings of fact. In the early years he considered that an appeal court had no greater liberty to interfere with the findings of fact of a trial judge than with the findings of a jury. Later, in 1921, he pointed out that the more recent authorities hold that, except as to matters in which the trial judge has an advantage derived from observing the witnesses, not only are the judges of the Appeal Court free but they are bound to express their own opinion.[134] For a number of years he freely reversed the

[131] (1843), 10 M. & W. 546.

[132] *Grand Trunk Pac. Ry. Co.* v. *Earl*, [1923] S.C.R. 397, [1923] 2 W.W.R. 123, [1923] 2 D.L.R. 741, rev'g [1922] 3 W.W.R. 406, 69 D.L.R. 436, which affirmed [1922] 3 W.W.R 27, 66 D.L.R. 401.

[133] Principal cases are *Harnovis* v. *Calgary* (1913), 6 Alta. L. R. 1, 4 W.W.R. 263, 11 D.L.R. 3, aff'd (1913), 48 S C.R. 494, 5 W.W.R. 869, 15 D.L.R 411; *Critchley* v. *Can. Nor Ry*, [1917] 2 W.W.R. 538, 12 Alta. L.R. 522, 34 D.L R. 245; *Scott* v. *Calgary* (1927), 22 Alta L.R. 467; *Root* v *McKinney*, [1930] S.C.R. 337, [1930] 2 D.L R. 984, aff'g [1929] 2 W.W.R. 340, [1929] 4 D.L.R. 138; *Green* v. *C.N.R.*, [1932] S.C.R. 689, rev'g (1931), 26 Alta. L.R. 49; *Jeremy* v. *Fontaine* (1931), 26 Alta. L.R. 499.

[134] *Royal Trust Co.* v. *C.P.R.*, [1921] 2 W.W.R. 712, 16 Alta L R. 523,

findings of fact of a trial judge, but the Supreme Court frequently restored them, and by 1936 we find him saying that an appeal court should not disturb a trial judge's findings unless satisfied that he is clearly wrong.[135]

A special problem that often arises in this era of traffic signals and through highways is whether a car driver having the right of way is entitled to assume that others will yield to him. It is obvious that he is not entitled to run down everyone he sees in his path; but, on the other hand, if he were always obliged to anticipate that others would not grant him his right of way, traffic would scarcely move. This problem came before the court in 1939, when a car came onto a main highway without first stopping as the law required. Analyzing a number of English cases, the Chief Justice, in dissent, said that the driver on the main highway is entitled to assume that other cars will stop before entering the highway. The majority held, however, that he still owed a duty toward the other vehicle and both drivers were to blame.[136]

The Alberta Contributory Negligence Act states that liability shall be proportioned to degree of fault, but in addition has special sections providing that the doctrine of last clear chance shall not be applied against a party unless his negligent act was "clearly subsequent to and severable from" the negligent act of the other party. In the leading case of *Foster* v. *Kerr*[137] a car driver struck a man walking, contrary to statute, on the right side of the road. The court might have decided that the driver had the last clear chance and so was solely to blame. Both parties, however, were held equally to blame and the plaintiff recovered one half of the damages suffered. Harvey C.J. concurred in the opinion of Frank Ford J.A., who said that in deciding whether both parties were at fault the "broad common sense" rule should be applied: the party who is last negligent is not solely to blame unless his negligence is clearly subsequent and severable. This approach to the act means that

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60 D.L.R. 379; varied [1922] 3 W.W.R. 24, 67 D.L.R. 518 (P.C.). This was a case on quantum of damages, but the Chief Justice's statement applied to findings of fact generally.

[135] *Wandeleer* v. *Dawson*, [1936] 3 W.W.R. 473.

[136] *Arcand* v. *Kaup*, [1939] 1 W.W.R. 615, [1939] 2 D.L.R. 456. See *London Passenger Transport Board* v. *Upson*, [1949] A.C. 155, where the comments on this point tend to support the view of the majority in *Arcand*.

[137] [1940] 1 W W R. 385, [1940] 2 D.L.R. 47. The action was under the Fatal Accidents Act. Harvey C.J. stated that, notwithstanding his concurrence in the main with the reasons for judgment of Ford J.A., he did not wish to bind himself to the view that the statute is a complete and exact adoption of the admiralty rule in all respects. The writer is not clear what Harvey C.J. meant by this reservation.

courts will tend to apportion fault unless, in the words of Lord Tucker in *Sigurdson* v. *British Columbia Electric Railway Company*, "the dividing line is clearly visible".[138] We know of no decision of the Chief Justice tending to whittle down the decision in *Foster* v. *Kerr*.[139]

This is a convenient place to refer to the cases on the "onus" section in the Vehicles and Highway Traffic Act, which puts on the driver or owner of a motor vehicle the burden of proof that the loss or damage did not arise through the driver's negligence. Several provinces, including Alberta, had this provision before World War I, but its full significance does not appear to have been recognized until some time later. For example, plaintiffs continued to plead particulars of negligence and it was not until 1930 that the Appellate Division, with Harvey C.J. concurring, held that a plaintiff need not do so.[140] The main question, however, was whether the section placed on the defendant the burden of persuasion or merely the lesser burden of adducing evidence in the first instance that his negligence had not caused the accident. In 1921 in *Carnat* v. *Matthews*[141] Harvey C.J., without expressly distinguishing the two burdens, indicated in one passage that only the secondary burden need be discharged. In the leading case of *Winnipeg Electric Co.* v. *Geel*,[142] the defendant relied on this passage, but the Judicial Committee held that it did not accurately state the effect of the section: the burden of disproving negligence rests on the defendant throughout. Curiously, the judgment compares the effect of the section to that of *res ipsa loquitur*, as Harvey C.J. had done in the rejected passage. The better opinion is that in cases of *res ipsa loquitur* the burden of persuasion remains on the plaintiff.[143]

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[138] [1952] 4 D.L.R. 1 (P.C.). A number of cases in the last five years hold one of the parties solely to blame where one might think that blame might have been apportioned under the statute In other words, there appears to be a tendency to cut down the scope of the act. See, for example, *Bechthold* v. *Osbaldeston*, [1953] 4 D.L.R. 783 (Sup. Ct. of Can.).

[139] *Jones* v. *Shafer*, [1948[S C.R. 166, [1948] 4 D.L.R. 81, rev'g [1947] 2 W.W.R. 49, [1947] 4 D.L.R. 294, is a case in which the Chief Justice, for the majority, held the defendant solely to blame and the Supreme Court found him not negligent at all. The case is not important on the Contributory Negligence Act

[140] *White* v. *Henton*, [1930] 2 D L.R. 959, 24 Alta. L.R. 423, [1930] 1 W.W.R. 685.

[141] [1921] 2 W.W.R. 218, 59 D.L.R. 505, 16 Alta. L.R. 275; see also *Turpie* v. *Oliver*, [1925] 3 W.W.R. 687; [1925] 4 D.L.R. 1023, 21 Alta. L.R. 508.

[142] *Winnipeg Electric Co.* v *Geel*, [1932] A.C. 690, [1932] 3 W.W.R. 49, [1932] 4 D.L.R. 51.

[143] See the comment of Duff C.J. in *United Motor Services* v. *Hutson*,

These cases on onus are not mentioned for the sake of showing that the Privy Council disapproved a statement in one of the Chief Justice's judgments, but rather because they illustrate the fact that he dealt in a forthright manner with novel issues and, although his opinions did not always prevail, yet they always canvassed the problem carefully and often were accepted in other courts, as was his judgment in *Carnat* before the *Geel* case.

The last interesting problem in motor-vehicle law is also a puzzling one—whether the plaintiff's action partakes of a claim in trespass or on the case. In 1924, in *Burd* v. *Macaulay*, an action against a car driver was brought just under six years after the accident. The Statute of Limitations of 1623 was pleaded, under which actions on the case had to be brought within six years and for trespass, assault and battery, within four years. The Chief Justice at trial examined the old decisions at length, and the Appellate Division sustained his opinion that the action was one of trespass.[144] The point is academic in Alberta to-day, for a one-year period is now provided in the Vehicles and Highway Traffic Act, but in at least two other provinces *Burd* v. *Macaulay* has been recently discussed at length.[145]

In negligence cases generally, the attitude of Harvey C.J. deserves mention because it showed a commendable tendency not to be hasty in finding negligence on the part of the defendant. For example, he once remarked:

> . there is a tendency amongst Judges sitting in the calm atmosphere of the Court and looking at the case from behind rather than from before to demand from defendants in negligence actions rather more than should be expected from a reasonably prudent person and to hold them liable unless they have been excessively prudent and have taken precautions which only after-events suggest.[146]

The Chief Justice usually refrained from explicit criticism of the common law, answering the argument that the law is harsh by saying that it is for the legislature and not the courts to change it, but he was by no means lacking in human sympathies. In one

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[1937] S.C.R. 294, [1937] 1 D.L.R. 737; also the editorial note to *Scrimgeour* v. *American Lutheran Church*, [1947] 1 D.L.R. 677, [1947] 1 W.W.R. 120.

[144] *Burd* v. *Macaulay* (1924), 20 Alta. L.R. 352, [1924] 2 W.W.R. 393, [1924] 2 D.L.R. 815.

[145] *Eisener* v. *Maxwell*, [1951] 3 D.L.R. 345, 28 M.P.R. 213 (N.S.C.A.), where *Burd* was not followed; *Mantey* v. *Spanks*, [1952] 3 D.L.R. 783 (B.C.C.A.), where *Burd* was followed.

[146] *Turpie* v. *Oliver* (1925), 21 Alta. L.R. 508, at p. 511, [1925] 3 W.W.R. 687, at p. 690, [1925] 4 D.L.R. 1023, at p. 1025; see also *McLean* v. *Y.M.C.A.* (1918), 14 Alta. L.R. 58, [1918] 3 W.W.R. 522.

case we find him appealing to the defendant's generosity. A fire had broken out in a mine and a workman had been injured in trying to save property when some dynamite exploded. The mine owner was not liable because *Rylands* v. *Fletcher* did not apply and the workman was the author of his own injuries; but, said the Chief Justice, "I cannot avoid expressing the view that since what he was doing was purely and simply the expression of his better nature when he was assisting in trying to save his employer's property, a reciprocal expression on the part of the defendants would be becoming".[147] A measure of understanding and sympathy also appears in a case in which a railway appealed from a jury's award of $27,000 to an employee who had suffered a head injury:

> If it were a Superior Court Judge who had lost a leg which would in no way interfere with his performance of his regular duties and whose pecuniary loss would, therefore, be insignificant, I think that we at least would consider a verdict of $10,000 or $15,000 to err if at all on the side of being too small It would not be surprising if laymen jurors might consider their pain and suffering of equal worth to that of a Judge, and so long as we recognize the right of juries to determine damages we must attribute to them as much as to Judges the characteristics of reasonable men.[148]

One of the most complicated and uncertain parts of the law of negligence is of course the liability of occupiers of premises to persons injured. There are few reported judgments of the Chief Justice in this field. In one of the few, where a guest after a banquet fell down the shaft of a service-elevator, it was held that he was not an invitee at the time and place of the injury and the defendant succeeded. In the course of his judgment the Chief Justice said:

> The 'impulse of compassion' is no doubt a most commendable attribute on grounds of common humanity but . . . it is not merely an unsafe, but even a wrong, foundation upon which to base the determination of a legal right.[149]

Later he concurred in a judgment of McGillivray J.A. applying *Addie* v. *Dumbreck*[150] to the case of a child trespasser who was killed by a cave-in of earth at an excavation.[151] In other words, the

[147] *Strapazon* v. *Oliphant Munson Colleries* (1920), 15 Alta. L.R. 470, at pp. 472-73, [1920] 2 W.W.R. 793, at p. 795, 53 D.L.R. 124, at p. 126.

[148] *Jackson* v. *C.P.R.* (1915), 9 Alta L.R. 137, at p. 140, 8 W.W.R. 1043, at p. 1044, 24 D.L.R. 380, at p. 381.

[149] *Knight* v. *Grand Trunk Pacific Development Company* (1926), 22 Alta. L.R. 237, at p. 244, [1926] 2 W.W.R. 557, at p. 562, [1926] 4 D.L.R. 87, at p. 92; aff'd [1926] S.C.R. 674, [1927] 1 D.L.R. 498.

[150] [1929] A.C. 358.

[151] *Haines* v. *Brewster*, [1938] 2 W.W.R. 285, [1938] 3 D.L.R. 246.

court adopted the "Draconian" rather than the "humanitarian" view toward the child trespasser.

Another subject on which there has been uncertainty and conflict is the liability of a public hospital for the negligence of its professional staff. In 1926 Harvey C.J. concurred in a judgment relieving a hospital from liability for its nurse's negligence when a patient was burned by a hot-water bottle. The basis of the decision was that a hospital is not liable for its nurse's negligence when it is related to her professional duties. The court purported to follow *Hillyer* v. *St. Bartholemew's Hospital*,[152] but on appeal the Supreme Court of Canada held that *Hillyer* does not apply to a nurse's ordinary duties.[153] As late as 1938 the Chief Justice was still not questioning *Hillyer*. In a case of that year, where the plaintiff had received X-ray injuries through a nurse's negligence, the hospital escaped because the negligence was in the performance of professional duties.[154] More recently the trend, both in England and Canada, has been to make the hospital liable in cases of this kind.

The rule in *Rylands* v. *Fletcher* engaged the attention of Chief Justice Harvey many times. Some judges have tended to expand the doctrine and apply it to cases where the basis of liability ought really to be negligence, but the Chief Justice was not among them. He even held that explosives kept by a coal mine are outside the rule. They are not like water, gas and electric current, which must be kept confined to prevent injury, for without the intervention of some other agency they will not cause injury.[155] Of course a person keeping explosives must exercise great care and therefore negligence is easier to establish in the case of explosives than of ordinarily harmless chattels.[156] A city that drills a gas well under statutory authority is not strictly liable for an explosion,[157] and likewise an irrigation company whose water escapes.[158]

The question of strict liability came up again in the leading case of *London Guarantee and Accident Co.* v. *Northwestern Utilities Limited*. Gas had leaked from a break in the gas company's

[152] [1909] 2 K.B. 820.

[153] *Nyberg* v. *Provost Municipal Hospital Board*, [1927] S.C.R. 226, [1927] 1 D L.R. 969; rev'g (1926), 22 Alta. L.R. 1, [1926] 1 W.W.R. 890, [1926] 2 D.L.R. 563.

[154] *Abel* v. *Cooke and Lloydminster and District Hospital Board*, [1938] 1 W.W.R 49, [1938] 1 D.L.R. 170.

[155] *Strapazon* v *Oliphant Munson Collieries, Limited* (1920), 15 Alta L R. 470, [1920] 2 W.W.R 793, 53 D L.R. 124.

[156] *Pietrzak* v. *Rocheleau* (1928), 23 Alta. L.R. 337, [1928] 1 W.W.R. 428, [1928] 2 D.L.R 46.

[157] *Purmal* v. *Medicine Hat* (1908), 1 Alta. L.R. 209, 7 W.L.R. 437.

[158] *Maunsell* v. *Lethbridge Northern Irrigation District* (1925), 21 Alta L.R. 499, [1925] 3 W.W R 202, [1925] 4 D.L.R. 70.

main into a nearby hotel and caused a fire. At the trial the principal defence was that the main had subsided and cracked because of excavations dug by the City of Edmonton near the main, while the plaintiff's case was that the main was improperly constructed. The defendant was successful on the issue of fact and won in the trial court. On appeal, Harvey C.J. agreed that *Rylands* v. *Fletcher* did not apply because the company had statutory authority to carry gas in its mains; the company's employees, however, were or should have been aware of the city's activity near the main and, since gas is highly dangerous, the company was under a duty to take steps to protect its main. Thus was a favourable finding of fact at trial turned into a finding of negligence on appeal. The company appealed to the Judicial Committee, but without success. Lord Wright, speaking on behalf of their lordships, agreed that the company was negligent for the reason given by Harvey C.J.[159] The practical effect seems to be that the gas company was in a worse position than it would be under the doctrine of strict liability, for the act of the city was the conscious or deliberate act of a third person, one of the exceptions to liability under *Rylands* v. *Fletcher*.

Turning now from the field of negligence to other torts, we find a number of novel issues, in which the Chief Justice showed a willingness to break new ground, at least in the absence of binding authority. Where there was no precedent in Canada or England he never hesitated to cite and rely on American authorities. One of his favourite American source books was *Lawyers' Reports Annotated.*

On an unusual set of facts he held it defamatory to say of an affianced man that he is married, and he who utters the original slander may be liable for its repetition by another.[160] In another case a woman sued the father of her former fiancé for inducing his son to break the engagement. To the defendant's argument that the law knows no cause of action for inducing a breach of promise to marry, the Chief Justice answered:

> It is urged that there is no precedent to be found for an action for inducing the breaking of a promise of marriage but it may be answered that there never is a precedent until one is made, but one naturally

[159] *Northwestern Utilities Limited* v. *London Guarantee and Accident Co.*, [1936] A.C. 108, [1935] 3 W.W.R. 446, [1935] 4 D L.R. 737, aff'g [1934] 3 W.W.R. 641, [1935] 1 D.L.R. 135. For Lord Wright's own discussion, see The Northwestern Utilities Case, in Lord Wright of Durley, Legal Essays and Addresses (1939).

[160] *Bordeaux* v. *Jobs*, [1913] 6 Alta. L.R. 440, 5 W.W.R. 481, 14 D.L.R. 451.

> hesitates to make a new legal precedent at this stage of the history of the law on a point of such comparatively common occurrence.

Then, after referring to the principle of *Lumley* v. *Gye*,[161] he continued:

> Though there appears to be no decided case where the principle has been applied to a contract to marry there seems no good reason why it should not be, as it is expressed, absolutely general in its application though the consideration of what would be 'sufficient justification' in such a case might take one over a much wider field than in many other classes of cases.[162]

In yet another case a husband sued a funeral director who permitted an autopsy on the body of the wife after the husband had refused consent. The Chief Justice reasoned that the husband had a duty to bury his wife's body, and hence the custody and control of the body until burial. The defendant's act was an unauthorized interference with these rights, and actionable. Moreover, damages for mental anguish may be awarded in such circumstances. The reasoning may be open to criticism, but the case does show that the Chief Justice did not blindly follow old dogma —in this case the rule that there can be no property in a dead body. This is one of several instances in which he cited and followed an American case.[163]

A case decided in 1930 shows that he could treat the law of tort as a subject to be moulded to the needs of the times rather than as static rules to be applied mechanically. A moving van caught fire and the contents were burned. The owner of the contents sued the van company and recovered. Although the majority of the Appellate Court upheld a finding of negligence, the Chief Justice was inclined to think that the van company was under the strict liability of a common carrier:

> While I would think it not safe on the evidence to hold that the defendant is a common carrier, I am by no means satisfied that it should not be considered subject to the same liability as a common carrier . . .
>
> . . . with the advances made in the last quarter of a century in regard to road motor transportation and the assumption by motor vans and lorries of the ordinary business of common carriers, it is clear that the question is likely to come up for decision in the not distant future. .[164]

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[161] (1856), 2 El. & Bl. 216

[162] *G* v. *B and B* (1926), 22 Alta. L.R. 126, at p. 130, [1926] 1 W.W.R. 324, at p. 327, [1926] 1 D.L.R. 855, at p. 857.

[163] *Edmonds* v. *Armstrong Funeral Home Ltd* (1930), 25 Alta. L.R. 173, [1930] 3 W.W.R. 649, [1931] 1 D.L.R. 676. See also *Miner* v. *C.P.R.* (1911), 3 Alta. L.R. 408, 18 W.L.R. 476.

[164] *Crum* v. *Big 4 Transfer & Storage Co. Ltd.* (1930), 25 Alta. L.R. 35, [1930] 2 W.W.R. 337, [1930] 4 D.L.R. 486. In *Watkins* v. *Cottell*, [1916]

Since that case was decided the legislature has put commercial vehicles in the class of common carriers.

With torts must come to an end this discussion of Horace Harvey's contribution to the substantive law of his province and of his country. One could catalogue in addition a list of cases in which he passed on important points of contracts, insurance law, passing-off, creditors' remedies, fraudulent conveyances, estoppel,[165] and the interpretation of statutes ranging from the Accidental Fires Act, 1774, to those, like the Farm Machinery Act, protecting farmers against importunate salesmen. In administrative law his most important case is *Board of Public Utility Commissioners* v. *Model Dairies*, in which he dealt with the power of a court to review the decisions of an administrative agency. Finding nothing in the proceedings before the board to indicate any departure from the elementary principles of justice, he showed no inordinate zeal to set aside the board's order suspending the licence of a dairy company, and upheld it.[166] In labour law he had to consider the old question of the legal status of a trade union,[167] picketing[168] and the position of a worker who has been expelled by a trade union[169] or dismissed by his employer.[170] But the cases that have been discussed on criminal law, constitutional law, domestic relations, real property and torts will sufficiently indicate his contribution to substantive law and something of his concept of the judicial function.

(To be concluded)

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1 K B. 10, Avory J. held that a carrier cannot be strictly liable, unless the contract so provides or unless he is a common carrier.

[165] Estoppel is of course often classed as a rule of evidence, but this is a convenient place to mention it. The interesting point about the Chief Justice's judgments on this subject is that in three important cases he found an estoppel to be raised against a party to the action, but in all these was reversed when the case went to a higher court. See *Home Assurance Co* v. *Lindal*, [1934] S.C R 33, [1934] 1 D.L.R. 497; *Imperial Bank* v. *Begley*, [1936] 3 D.L.R 1 (P.C.); *Keyes* v. *Royal Bank of Canada*, [1947] S.C.R. 377, [1947] 3 D.L R 161.

[166] [1936] 3 W.W.R 601, [1937] 1 D L.R 95 See *Re Securities Act*, [1948] O.R. 70, where the court adopted the interpretation of Harvey C J. of a statutory provision that the board "shall not be bound by the technical rules of legal evidence"

[167] *Williams* v *Local Union 1562, U M.W.A* (1918), 14 Alta. L R. 251, [1919] 1 W W R 217, 45 D.L.R. 150, rev'd in part (1919), 59 S.C.R. 240, [1919] 3 W.W R. 828, 49 D.L.R. 578

[168] *R.* v. *Reners* (1926), 22 Alta. L.R. 81, [1926] 2 D L.R. 236, aff'd [1926] S.C.R. 499, [1926] 3 D.L R. 669. This case was decided before section 501(g) was inserted in the Criminal Code. Nevertheless it may still be good law on the facts, See *Williams* v. *Aristocratic Restaurants*, [1951] S.C.R. 762, [1951] 3 D.L.R. 769, *per* Kerwin J.

[169] *Corbett* v. *Canadian National Printing Trades Union*, [1943] 2 W.W.R. 401, [1943] 4 D L.R. 441.

[170] *Wright* v. *Calgary Herald*, [1938] 1 W.W.R. 1, [1938] 1 D.L.R. 111.