Case and Comment

POLICE—USE OF FIREARMS—CRIMINAL CODE—JUSTIFIABLE FORCE IN PREVENTING ESCAPE BY FLIGHT—POLICE REGULATIONS.—A number of important questions are raised for Canadian lawyers by several recent incidents in which the use of firearms by the police has resulted in death or injury.

The most disastrous incident, and for that reason the one which attracted the greatest public attention, occurred on August 1st in Toronto. A police constable, in pursuit of a stolen car along a busy suburban street, fired on the driver, wounding him and causing him to lose control. The stolen car swerved and killed two nurses who were waiting for a bus, severely injured a third and narrowly missed hitting four children playing in front of a house. The police constable had been with the force only a few months and was twenty-six years old. He was charged with criminal negligence, tried in the ordinary courts and acquitted.

The other recent occurrences that have come to my attention occurred in Montreal. Less than two weeks after the death of the nurses in Toronto, a Montreal police constable fired a shot at a car driver who, the constable alleged, had committed a breach of the traffic regulations. The disciplinary board of the Montreal police suspended the constable from duty for three days; the driver was later acquitted of a charge of reckless driving. Early on the morning of August 22nd, again in Montreal, two constables chased a stolen car along a downtown street at 90 m.p.h. and brought it to a halt by firing shots from their revolvers. The disciplinary board suspended the men from duty for three days. On September 8th, another Montreal constable, this time off-duty, fired shots at a loiterer who was trying to escape after having been discovered acting in a suspicious manner. The suspected man was gravely wounded in the abdomen and thigh. The disciplinary board suspended the constable from duty for seven days. Lastly, only the other week, in the hours of darkness, two Montreal policemen fired at and wounded a fleeing man suspected of burglary and the theft of an automobile.

There is no lack of sympathy for the police in the difficulties and dangers of their duties.[1] Nevertheless the death or injury of innocent bystanders is a terrible price to pay for the capture of an automobile thief. Should the young and inexperienced Toronto recruit ever have been given the power to exact that price? And what, in the incident last cited, if the fleeing suspect, instead of being merely wounded, had been killed, as he might well have been, during the chase in the dark? Is not the death, even of the suspect himself, too high a price to risk paying for his capture in view of the nature of the offence? As for shooting at a traffic offender, it is difficult to find words strong enough to condemn it.

These incidents raise the question whether the police should carry guns at all. Those who favour disarming policemen remind us of the example set by the police in Great Britain. Those who favour the retention of firearms are not slow, however, to point out the indisputable differences of outlook and tradition that exist between Great Britain and Canada. There is a world of difference between, on the one hand, a small, densely populated, highly centralized island long settled by a homogeneous people and, on the other, Canada's vastness still only partially settled, for the most part comparatively recently, by scattered communities of diverse origins. Here, the frontier spirit still lingers and most of the populated centers are never far from the United States border, across which violent criminals escape in one direction or the other. It must be conceded, however, that automobile thieves are not unknown in Britain, yet her police, unarmed, appear to deal with them efficiently enough.

Apart from this general question, to what extent are the police in Canada empowered to use force and, in particular, firearms? While the constable who fired the shot in the Toronto incident was charged with a criminal offence, the Montreal constables were merely disciplined by an internal administrative tribunal. Moreover, if one can judge from the strength and nature of the protests made by representatives of the Montreal Police Brotherhood at the sentences of suspension from duty, there would appear to exist among the members of this force the dangerous belief that they are safe provided they act within the scope of their own administrative regulations.

The right to employ firearms is merely one aspect of the right under the law to employ force. This right is by no means exclu-

[1] For example, an officer of the Vancouver Police was recently murdered while on duty. Even more recently a Toronto policeman was brutally shot and gravely wounded while on duty.

sively reserved to the police. Everyone has the right to employ force in order to defend himself or a person under his protection;[2] to defend his dwelling[3] and other property;[4] to prevent the commission of certain offences;[5] to arrest certain offenders;[6] and to prevent breaches of the peace.[7] Moreover, the Criminal Code, like the common law, constantly emphasizes that, once the use of force is justified, the force actually employed, whether by the ordinary person or by a peace officer, must be no more than is reasonably necessary for the purpose. The law can only maintain a strict control over the use of force by the all-pervasive test of reasonableness and not by the minutiae of specific rules. As a general principle, all force in excess of what is reasonable entails criminal responsibility, as section 26 of the code provides:

> Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

The degree of force permitted a peace officer is broader than that allowed the ordinary person. The general rule governing the degree of force allowed both ordinary persons and peace officers is laid down in section 25(1):

> Every one who is required or authorized by law to do anything in the administration or enforcement of the law
> (*a*) as a private person,
> (*b*) as a peace officer or public officer,
> (*c*) in aid of a peace officer or public officer, or
> (*d*) by virtue of his office,
> is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

It is mainly in the prevention of escape from arrest that the degree of force permitted a peace officer goes beyond that allowed the ordinary person acting on his own.[8] The ordinary person's right to use "as much force as is necessary", permitted by section 25(1), is restricted by subsection (3) of the same section, which provides:

> . . . a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm *unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.*[9]

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[2] Criminal Code, ss. 34-37.
[3] *Ibid.*, s. 40.
[4] *Ibid.*, ss. 38, 39.
[5] *Ibid.*, s. 27.
[6] *Ibid.*, ss. 434, 436, 25(1) and (3).
[7] *Ibid.*, ss. 30, 32(4).
[8] A peace officer has wider powers of arrest without warrant than the ordinary private person. See Criminal Code sections 434 and 436 (ordinary person) and section 435 (peace officer).
[9] The italics here and elsewhere in this comment are my own.

But, in the case of a peace officer, an exception is made in subsection (4) to this restriction. Section 25(4) states:

> A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, *in using as much force as is necessary to prevent the escape by flight*, unless the escape can be prevented by reasonable means in a less violent manner.[10]

Thus, once it is established that the escape cannot "be prevented by reasonable means in a less violent manner", the only limit to the degree of force allowed a peace officer lawfully effecting an arrest for which no warrant is required is that the force must not exceed that "necessary to prevent the escape by flight". For example, under this subsection, the degree of force that may be employed is in no way governed by the gravity of the offence suspected or committed, not to mention such considerations as whether the fugitive shows violence or is armed. At this point the test of reasonableness does not enter, and the implications are startling.

To take an extreme case, a police constable patrolling a deserted street at dead of night finds an unknown man stealing a bottle of milk from a doorstep. Undeniably the constable has the right to arrest him without a warrant. But the man, seeing the constable, starts to run away. The constable gives chase but soon realizes that he is being left behind. Unless he succeeds in halting the man immediately, all chances of an arrest will be lost, so he draws his gun and fires, mortally wounding the fugitive. In this hypothetical case the constable would certainly be censured and very probably punished by his own superior officers for a breach of the regulations of his force governing the use of firearms. Yet it would appear that he is guilty of no criminal offence.[11]

It is difficult to see any sound reason why the degree of force permitted a peace officer in lawfully effecting an arrest should not be equated with that allowed the ordinary private person. This, of course, is not to deny that a peace officer should have wider powers of arrest, but, apart from those wider powers, he should be in exactly the same position, with respect to the law, as anybody else. Alternatively, some *legal* distinction should be

[10] Section 25(4) is the same, except for textual changes, as section 41 of the old code.

[11] See the cases cited in Tremeear's Criminal Code (5th ed., by A. B. Harvey) under section 41 of the old Criminal Code, pp. 76-77, particularly *R.* v. *Smith* (1907), 13 Can. C. C. 326, and *R.* v. *Purvis* (1929), 51 Can. C. C. 273.

made between the degree of force permitted a peace officer lawfully arresting a person suspected of having committed or of being about to commit a crime of violence and the degree of force permitted him where no violence is involved.[12] A corresponding distinction based on the element of violence is even more necessary in the case of a person found actually "committing a criminal offence".

How far, if at all, do internal police regulations circumscribe the wide power given peace officers by the Criminal Code? I recently undertook an inquiry into the nature and scope of these regulations among several of our police forces. Those approached were the Royal Canadian Mounted Police, the Ontario Provincial Police, the Quebec Provincial Police, and the police forces of the cities of Vancouver, Winnipeg, Toronto and Montreal.[13] Inquiries were also made of the Metropolitan Police Force in the United Kingdom (Scotland Yard).[14]

Though the R.C.M.P. did not reveal the actual text of its regulations, it provided information on the nature of the instruction given its members in the use of firearms. It appears that an R.C.M.P. constable is very properly taught that he must be prepared to justify his use of firearms under the law and that no administrative order can of itself protect him from the consequences of illegal use. He is taught that firearms should never be used in respect of offences which are non-indictable, and that the fact that an offence is of a most serious nature does not in itself justify their use.

The corresponding order of the Ontario Provincial Police[15] refers to the appropriate sections of the Criminal Code already quoted and includes the following paragraph:

> If firearms must be drawn in the performance of duty, the officer must be certain that it is in the defence of his life or the lives of others, or in the apprehension of a *dangerous* criminal, and that only after every known method has been used as a last resort to prevent an escape.

[12] The Second Report of the Fourth (Imperial) Commission on the Criminal Law (1845) recommended at p. 31 a limitation of the common law by confining the justification for causing death in the prevention of escape, where there is no resistance, to cases where the fugitive "lies under a capital charge". The 1878 draft criminal code of the United Kingdom, upon which the original Canadian Criminal Code was based, did not embody this suggested limitation. See annotation to *R.* v. *Purvis* (1929), 51 Can. C. C. 273.

[13] I wish to express my appreciation of all the information supplied by these forces.

[14] I am most grateful for the full information so readily and courteously provided by the Metropolitan Police Force.

[15] Order No. 6 (1955), The Use of Firearms.

The Ontario Provincial Police regulations governing the use of firearms are also issued to the Toronto City Police.

The order of the Quebec Provincial Police,[16] dated January 24th, 1945, refers to the relevant sections of the old Criminal Code, and then makes, among others, the following points:

> . . . les officiers de police portent des armes . . . pour revêtir ces agents de la paix d'une autorité dont ils ne doivent se servir *qu'en cas d'absolue nécessité.* Ils en ont le droit, pourvu que l'acte qu'ils posent en s'en servant *ne soit pas disproportionné au but à atteindre. . . .*

The last eight words restrict the policeman's right under the Criminal Code to use *as much force as is necessary*, irrespective of the gravity of the offence, to prevent the escape by flight of a person whom he may lawfully arrest without warrant. This wholesome restriction is emphasized in the following passage taken from the same order:

> Et pour expliquer davantage, il faut savoir distinguer entre les offenses qui relèvent du 'Felony' qui implique des actes criminels graves et les offences qui relèvent du 'Misdemeanour' qui, lui, n'implique pas des actes criminels reconnus comme graves et dans ce dernier cas, alors même que l'on est en possession d'un mandat, *il ne faut pas tirer, même pour éviter l'évasion,* à moins évidemment que l'on soit soi-même à son corps défendant, ou que l'on ait à protéger une autre personne qui le soit.

One might possibly criticize the reference to the distinction between felony and misdemeanour, which of course no longer exists in Canadian criminal law, but the purpose of the reference is sound enough.

The instruction book of the Vancouver City Police Department appears to add little or nothing to the provisions of the Criminal Code. It does, however, emphasize the necessity of using a revolver only in the last extremity and only if the offender could not have been apprehended by any other means.

The Rules and Regulations of the City of Winnipeg Police Department deal with the whole subject of the use of firearms in one short section:

> Members of the Force shall not use their revolvers except in defence of their own or other persons' lives.

Clearly this considerably restricts the powers granted under the law. The Acting Chief Constable of Winnipeg points out that, since his men may use their revolvers in defence of their lives, they are permitted to draw them from holsters if they are confronted by a wanted man whom they believe to be armed. Never-

[16] Order 243, Emploi de la force et usage des armes à feu.

theless, it would appear from the regulation that a policeman is not authorized to use his revolver if the wanted man is merely escaping without offering violence. The Acting Chief Constable also states that it is not his force's policy to allow the use of firearms in stopping stolen cars or cars in which there are wanted men unless the recklessness of the driver endangers other persons' lives, when of course the use of firearms is permitted under the regulation. This ignores the fact that it is very often the police chase which prompts the wanted person to drive in a dangerous manner. It is questionable whether the police, knowing the probable reaction of the wanted person, should be allowed in all cases, and irrespective of the gravity of the offence, to chase a wanted person driving a car, for example, in a crowded city street. Further reference will be made to this particular problem later.

On August 4th of this year, following the calamitous Toronto incident of August 1st, the City of Montreal Police Department issued the following order of the day:

> The service revolver issued to the officers and men of this department is a dangerous weapon which must be handled with the greatest of care and used only as a last resort such as in protecting one's life or when an arrest must be made in the case of a person suspected of having committed murder, rape, theft with violence *or another such grievous offence*. Similar procedure must be followed when pursuing a criminal who is trying to evade justice.
>
> A policeman is not justified in shooting in the direction of a fugitive in order to effect his arrest if said fugitive has committed only an offence against a Provincial law or a Municipal by-law.
>
> The policeman must always remember that, in shooting in the direction of a fugitive, there is always present the risk of not only injuring or even killing this person but also other persons who may be in line with the trajectory of a bullet.
>
> Every time a policeman makes use of his service revolver, a complete report of the incident must be made as soon as possible.[17]

It is clear that here too the powers granted under the Criminal Code are considerably restricted. The use of firearms is certainly excluded in the case of the pursuit of a fleeing loiterer suspected of theft and even in the pursuit of an automobile thief. There is, however, an undesirable vagueness in the words "or another such grievous offence" and, oddly enough, although the policeman's right to defend himself (which is of course equally the right of every private person) is specifically mentioned, his right to defend the life of a person under his protection is not.

The Metropolitan Police in England issues firearms to officers

[17] A Montreal Police translation of the original French.

trained in their use in cases of necessity, that is, when armed criminals or others are known to be at large, or on specially dangerous protection duty. In addition, some plain clothes officers, mainly those attached to Special Branch, carry automatic pistols on particular protection duties.

The actual written orders concerning the use of firearms, once issued, are as follows:

> Weapons will not be taken out of holsters or pockets *except in defence*. Every officer to whom a weapon is issued must be strictly warned that it is only to be used in case of absolute necessity, e.g. if he or the person he is protecting is attacked by a person with a firearm or other deadly weapon, and he cannot otherwise reasonably protect himself or give protection, when he (*as well as a private person*) may resort to a firearm as a means of defence.

This regulation has much to commend it. Revolvers are in fact seldom issued to members of the Metropolitan Police and, when they are, their use is limited to defence, it being made clear that, in this respect, the police enjoy no greater right than that of any private person in the country.

The Metropolitan Police regulations governing the pursuit of wanted persons in cars also merit study. In the belief that they will be of interest to readers, they are reproduced here:

> A chase at speed is only justified when it is really important to arrest the occupants of the pursued car. A minor crime, traffic offence, or even the sighting of a stolen car, does not justify a chase at speed. In traffic offences, the number should be taken if the driver fails to stop. In ordinary stolen car cases where other more serious offences are not suspected, the car can be followed, but when it becomes clear that the driver knows that he is pursued and means to get away, it is usually better to let him go, as in any case the car is almost certain to be recovered. Even when chasing is necessary, drivers must pay proper regard to road conditions, and must slow down if undue risk is involved, e.g. on greasy surfaces or in crowded streets.
>
> In tailing at speed it is dangerous to keep too close to the pursued car, and the directions as to the use of the gong, driving against traffic lights, etc. are to be carefully observed.
>
> Stopping should be adopted only as a last resort. Usually it is better to tail the suspect in the hope that he will be held up by traffic, run out of petrol or make a mistake, which will enable the arrest to be made. *It is far preferable to let a criminal escape than to kill or injure innocent people.*
>
> Stopping obviously involves risks to both cars and their occupants. If real need arises this risk must be accepted, but it is essential that the right place and moment should be chosen, so that no one else shall be endangered. Here again it is a question of the skill and discretion of the driver.

The considerable variations revealed in the regulations governing the use of firearms in effect among the various police forces across Canada are undesirable. All Canada is subject to the same criminal law. With the possible exception of minor variations to take account of local conditions, it is as sensible as it is logical that the police should be subject to uniform regulations governing the manner in which that law is to be enforced. In addition to the amendment of the Criminal Code earlier suggested, the uniform regulations might well limit the use of firearms to self-defence and to the defence of a person under a policeman's protection. Some sensible provisions governing the chasing of automobiles at speed, along the lines of those in effect in the Metropolitan Police Force, might also be introduced.

Finally, where there is any suggestion that a peace officer in the use of force, whether by firearms or otherwise, has committed an offence under the Criminal Code, it is desirable that he should be tried, at least in the first instance, by the ordinary courts rather than by an internal police tribunal.

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ADMINISTRATIVE LAW—DISCOVERY AGAINST CROWN IN RIGHT OF CANADA WHEN DEFENDANT IN CIVIL PROCEEDING—INTER-DEPARTMENTAL COMMUNICATIONS, AS SUCH, PRIVILEGED FROM PRODUCTION.—In *Reese* v. *The Queen*[1] Mr. Justice Cameron of the Exchequer Court was faced with a situation about which even the most enthusiastic supporter of the rights of the government against the ordinary citizen is likely to feel uneasy. A claim against the Canadian government for breach of contract failed at the outset because the government—the party claimed against—refused, and was held to be justified in refusing, to produce from its files the documents required to prove the claim against it.

A veteran who had entered into an agreement with the Soldier Settlement Board for the purchase of certain lands brought a petition of right against the Crown alleging a contract by the Crown to convey to him the mineral rights in those lands. In order to succeed in this proceeding it was apparently necessary for him to prove that the minerals in the lands had passed from the Superintendent of Indian Affairs to the Soldier Settlement Board and that the local official of the board who had offered

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[1] [1955] Ex. C.R. 187; [1955] 3 D.L.R. 691.

to sell him the mineral rights had the requisite authority to do so. Whatever arrangements there may have been with respect to the passage of the minerals to the board were contained in an exchange of six letters between the Commissioner of the Soldier Settlement Board and the Deputy Superintendent of Indian Affairs. Whatever authority may have been given to the local official in connection with his offer was contained in written instructions given by the board to the official, in written instructions given by the Deputy Minister of Veterans Affairs to the board and in a letter written by the Secretary of the Cabinet to the Department of Veterans Affairs. The suppliant veteran moved for an order directing the Crown to produce these documents, documents essential to the proof of his case against the Crown, but the Crown objected to producing them on the ground that they consisted of inter-departmental correspondence and that it is contrary to public policy to produce inter-departmental correspondence. Mr. Justice Cameron upheld the objection.

This is the first case in which the effect of the recent decision of the Supreme Court of Canada in *R.* v. *Snider*[2] on the general law relating to the Crown's privilege against production of documents has been considered. In that case Mr. Justice Rand (with whom Chief Justice Rinfret concurred) broke new ground by taking a position mid-way between the well-known decision of the House of Lords in *Duncan* v. *Cammell, Laird & Co.*[3] (holding that a head of a government department's objection to produce a document on the ground that its disclosure would prejudice the public interest is conclusive and cannot be controlled by the courts) and the equally well-known decision of the Privy Council in *Robinson* v. *State of South Australia*[4] (holding that the court had the right to inspect the document in order to determine for itself whether production would prejudice the public interest). Rejecting on the one hand the total abnegation of judicial control over executive discretion called for by the House of Lords case and, on the other hand, the total assertion of it called for by the Privy Council case, he held that the court had over the department head's determination that the production of the document would prejudice the public interest a limited right of control roughly similar to that commonly exercised by courts of appeal over the findings of juries. The importance of Mr. Justice Rand's holding requires the relevant part of his decision to be set out in full:

[2] [1954] S.C.R. 479; [1954] 4 D.L.R. 483.
[3] [1942] A.C. 624.
[4] [1931] A.C. 704.

> Once the nature, general or specific as the case may be, of documents or the reasons against its disclosure, are shown, the question for the court is whether they might, on any rational view, either as to their contents or the fact of their existence, be such that the public interest requires that they should not be revealed; if they are capable of sustaining such an interest, and a minister of the Crown avers its existence, then the courts must accept his decision. On the other hand, if the facts, as in the example before us, show that, in the ordinary case, no such interest can exist, then such a declaration of the minister must be taken to have been made under a misapprehension and be disregarded. To eliminate the courts in a function with which the tradition of the common law has invested them and to hold them subject to any opinion formed, rational or irrational, by a member of the executive to the prejudice, it might be, of the lives of private individuals, is not in harmony with the basic conceptions of our polity.[5]

If it had not been for the *Snider* case, Mr. Justice Cameron would have followed his own previous unreported decision in *Miller* v. *The King* and held, following *Duncan* v. *Cammell, Laird*, that a department head's objection to produce a document on the ground of prejudice to the public interest is conclusive.[6] Relying on Mr. Justice Rand's judgment in the *Snider* case, however, counsel for the suppliant veteran appears to have argued that the ground assigned by the various department heads for refusing to produce the documents he wanted, namely, a mere blanket assertion that the production of any inter-departmental correspondence, whatever its contents and whatever its nature, would prejudice the public interest, was incapable of being supported on any rational view of the public interest and that the objection based on it must, therefore, be overruled. Mr. Justice Cameron rejected this argument and held that there is a clearly discernible public interest in protecting from production correspondence and memoranda passing between members of one or more departments of government to the extent that the head of the department considers that they should not be disclosed. This clearly discernible public interest he found, not in the contents of the documents in question (the disclosure of which would not have

[5] At p. 485, S.C.R.; p. 489, D.L.R. It has been drawn to my attention that in my comment on the *Snider* case (1955), 33 Can. Bar Rev. at pp. 354-355, I innocently misrepresented Mr. Justice Rand as holding that "if the minister states his ground for declaring that non-disclosure is required by the public interest and those grounds do not, in the opinion of the court, show the existence of such an interest the court will order production". As will be seen from the passage in his judgment just quoted, Mr. Justice Rand did not claim for the court a power of control as extensive as I said he did.

[6] At p. 192, Ex. C.R.; p. 696, D.L.R.

affected the safety of the state to any degree), but in the fact that public policy requires that such official communications between officers of the state should be completely unreserved:

> If they were made with the knowledge that they might later be subject to disclosure in the courts, they would in many cases be shorn of that candour, completeness and freedom of expression which is desirable in such matters. They would tend to become more cautious and reserved and expressions of opinion would be affected by the possibility of subsequent public disclosure. The officials of the state would be hampered in the performance of their proper functions.[7]

In so holding, Mr. Justice Cameron adopted the reasoning and paraphrased the wording of Viscount Simon in the *Duncan* case. But is that reasoning still valid in Canada? In the *Snider* case Mr. Justice Rand in effect dissented from so much of the *Duncan* case as held that the minister's determination of public interest was conclusive and immune from review by the courts. May not the Supreme Court dissent in the future from Viscount Simon's ground of justification for the privilege of non-disclosure attaching to documents as a class, namely, "that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation?"[8] As H. A. Street asks in his article on State Secrets, "Is it true that Government servants are reluctant to put their observations into writing if they are likely to be produced in a court of law?"[9]

May not the Supreme Court be particularly inclined to dissent from Lord Simon's ground of justification in a case where, as here, the government makes its claim of privilege in an action where it is the party defendant and so torpedoes the plaintiff's case at the very outset by refusing to make available to him the evidence on which his case depends? In *Ellis* v. *Home Office*, Lord Justice Morris said: "When considering the public interest and when considering what might be 'injurious to the public interest', it seems to me that it is to be remembered that one feature and one facet of the public interest is that justice should always be done and should be seen to be done".[10] In a case where the Crown is a party and the result of a successful claim of privilege by it is to shut off the plaintiff's case without any decision of the merits, the public interest which says that "justice should always be done and should be seen to be done" conflicts with and might be held

[7] At p. 197, Ex. C.R.; p. 701, D.L.R.
[8] [1942] A.C. at p. 635.
[9] (1951), 14 Mod. L. Rev. at p. 130.
[10] [1953] 2 Q.B. 135, at p. 147.

to override the public interest in maintaining the secrecy of documents where that secrecy is necessary for the proper functioning of the public service. The case for judicial review of a department head's refusal to produce documents is clearly much stronger in situations where, as here, the government is a party to the litigation than those in situations where, as in the *Snider* case, it is not a party.

The common law does not, it is true, take that view; it is, at common law, one of the prerogatives of the Crown that in a suit to which it is a party the Crown cannot be compelled to give discovery at all. But this prerogative rests on historical considerations which have nothing to do with the conditions of today and has recently been swept away in England by the Crown Proceedings Act and in those provinces of Canada which have passed similar legislation.[11] It should be noted that the Dominion counterpart of that legislation, the Crown Liability Act,[12] has nothing to say about discovery against the Dominion Crown, and the Dominion Crown may still possess, indeed probably does still possess, this common-law immunity.[13]

In the *Reese* case counsel for the Crown so argued, but Mr. Justice Cameron, although mentioning the argument, did not, because he decided in favour of the Crown on the public interest point, have to give a ruling on it. It should, therefore, be remembered that if the Dominion Crown still possesses the absolute common-law immunity from discovery in actions to which it is a party, the discussion of the public interest question in this comment is purely academic. In these days when litigation with the government is a commonplace, the extent of the Crown's power to shut off claims by withholding the evidence on which the claims depend is a very important question indeed, and ought to be settled in the modern manner by legislation passed after full discussion in Parliament.

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MARITIME LAW—LIEN—WHETHER MARITIME LIEN CAN ARISE INDEPENDENTLY OF OWNER'S LIABILITY—DEMISE CHARTERER DEEMED

[11] *E.g.*, Ontario, Proceedings against the Crown Act, Stats. Ont., 1952, c. 78, s. 10; Nova Scotia, Proceedings against the Crown Act, R.S.N.S., 1954, c. 225, s. 10.

[12] Stats. Can., 1952-53, c. 30.

[13] See *Crombie* v. *R.*, [1923] 2 D.L.R. 542; 52 O.L.R. 72.

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AN OWNER.—The case of *Goodwin Johnson Limited* v. *The Ship (Scow) AT & B No. 28 et al.*[1] raises once again the vexed question of the nature of the maritime lien. Whether a maritime lien can arise apart from the owner's personal liability has not been answered consistently, the main difficulty being where the vessel is under the control of charterers who would be regarded at common law as independent contractors.

In the *Goodwin Johnson* case an action in rem for damage was brought against each of the respondent vessels. The scow *AT & B No. 28* was under a demise or bareboat charter and the scow *E S M No. X* was in control of an independent contractor. The action brought against the Marpole II was taken in error as the damage alleged to have been done was done by the Marpole XI, a scow belonging to the same owners.

In regard to the *AT & B No. 28* there was a prima facie case of negligence against the charterers of the vessel, which was unanswered, and it was held that negligence in the navigation of a ship for which the charterer is liable subjects the ship to a maritime lien for the damage caused thereby and that she was therefore liable. The learned judges cite the opinion of Gorell Barnes J. in *The Ripon City:*[2] "As maritime liens are recognized by law, persons who are allowed by those interested in a vessel to have possession of her for the purpose of using or employing her in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment, unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such presumed authority".

The true principle would seem to be that enunciated by Gorell Barnes J.[3] What is implicit in *The Ripon City* should be made explicit, namely, that the transfer by the registered owner of the possession and control of his ship to a charterer is *voluntary*. Where the owner transfers voluntarily he is liable in admiralty. If it were not so no owner would ever be liable to have his ship arrested to enforce a claim importing a maritime lien or even a mere right in rem, for every owner would at once charter his ship from time to time or voyage by voyage or in perpetuity to another company which would be himself in another guise. The matter would be different if the transfer were compulsory as in *The Sylvan Arrow*,[4]

[1] [1954] S.C.R. 513.
[2] [1897] P. 226, at p. 244.
[3] See Locke J. (concurred in by Rinfret C. J.), [1954] S.C.R. 513, at p. 520.
[4] [1923] P. 220.

or where the fault is that of a pilot compulsorily in charge (the kind of plea happily no longer available in England). It follows from what has been said that so far as the *AT & B* scow is concerned the Supreme Court appears to have come to a right conclusion, and one to which the English Admiralty Court would have come, thus upholding in regard to chartered vessels the "personification" theory of the maritime lien.

It is tempting to plunge into a dissertation on the subject, but it will be sufficient to say that the cases which are said to support the "procedural" theory are all special cases and that the ratio decidendi in each of them does not affect the principle laid down in *The Ripon City*, and if the various dicta be related to the facts of the particular case, the conflict is not so marked as it might at first be thought. In *The Druid*[5] Dr. Lushington felt himself bound by some common-law decisions and indulged in some dicta which he probably regretted later, but, as Hill J. once said, Dr. Lushington spoke with many voices.

The action brought against the *E S M No. X* was dismissed on the ground that, as the negligence causing the damage done by the scow was solely that of the independent contractor, no liability attached to her. It is difficult to say what the English Admiralty Court would do in such circumstances, but it seems very doubtful whether the tug owner is an "independent contractor" so as to relieve the scow owner of liability. In *The Ruby Queen*[6] it is counsel, not the judge, who speaks of an "independent contractor". It may well be that the tug owner is really an agent entrusted by the shipowner with the performance of a particular job in relation to his ship, and that the shipowner is liable in rem for the faults of his agent. Thus the principle of *The Ripon City* would again operate.

J. GRIFFITH PRICE*

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EVIDENCE—PRESUMPTION OF DEATH—DISAPPEARANCE FOR SIXTEEN YEARS.—*Chard* v. *Chard* (*otherwise Northcott*)[1] affords a striking example of circumstances where the presumption of death has no application despite the complete disappearance of the alleged deceased for a period longer than seven years. In the action a decree of nullity was sought on the grounds that a marriage which the parties had contracted in 1933 was null and void be-

[5] (1842), 1 Wm. Rob. 391. [6] (1861), Lush. 266; 167 E.R. 119.

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[1] Times Newspaper, November 19th, 1955.

cause at the date of the marriage the husband's first wife was still alive. The first marriage took place in 1909 and the evidence was that the 1909 wife had last been heard of in 1917. She had no known relatives; the two children of the marriage had not been traced; the husband had spent most of his life in prison and there seemed to be good reason why the wife might make no effort to keep in touch with her husband or his family. There was no affirmative evidence pointing either to her death before 1933 or to her continued existence up to 1933 (when she would have attained the age of 44).

In the absence of affirmative evidence, Sachs J. was invited to determine the issue on the basis of presumptions. Was there a presumption of law as to the continuance of life? His lordship accepted the view of *Phipson* that such a presumption was merely a so-called presumption of fact, an inference which might be drawn according to the different circumstances of each case. What of the unexplained disappearance for the sixteen years between 1917 and 1933? His lordship felt that there was no magic in an unexplained absence standing alone and proceeded to set out those basic facts which must be affirmatively established before the presumption of death comes into play and death *must* be presumed. If it could be proved affirmatively in relation to a person who had disappeared for seven years

(1) that there were persons who would have been likely to have heard of him over that period,

(2) that those persons had not heard of him, and

(3) that all due enquiries had been made appropriate to the circumstances,

then, in the absence of "acceptable affirmative evidence" that the missing person was alive during the period, he would be presumed to have died at some time within the period. It is of rare occurrence to find the application of a presumption being considered with such care. Did the presumption apply in *Chard* v. *Chard?* The evidence did not show that there was anyone who would have been likely to hear from the 1909 wife in the years 1917 to 1933 or to the date of trial. Requirement (1) was not satisfied and the presumption of death did not arise. In the absence of presumptions to assist it, the court held that on the evidence it would infer that the 1909 wife was alive at the date of the second marriage and decrees nisi of nullity were pronounced. Would that all presumptions were so carefully dealt with.

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SERVITUDES—DRAINAGE DITCH—LIMITATION ON RIGHT TO BUILD. —Two[1] cases on which decisions of the Quebec Court of Queen's Bench sitting in appeal have been reported in 1955, though markedly different as to facts, have these common elements which render them both of interest and suitable for consideration and comment together: in each case (a) the owner of one immoveable property has sought a recourse against the owner of a contiguous property, alleging that the existence of a servitude should be inferred from the facts presented; and (b) the court has declined to draw any such inference in the absence of a writing establishing explicitly all the essentials of a servitude as laid down in the Civil Code of the province of Quebec.

In *Létourneau* v. *Giguère* the facts were these. The litigants were owners of contiguous lands on the Island of Orleans. Since 1917 there had existed a drainage ditch serving both properties, parallel and close to their common boundary line, but wholly on Létourneau's property. After vainly attempting to obtain from Giguère his consent to the making in common of a ditch on the boundary line, Létourneau sought to obtain from the rural inspector, if it was his right, a ditch which would not be entirely on his land. The inspector, after visiting the ground following legal notice, made and registered according to law an ordinance calling for the creation within a stated delay of a ditch of which one-half the width would be on each side of the boundary line. Failing compliance within the delay by Giguère, the inspector caused the new ditch to be dug.

Giguère thereupon took an action against Létourneau asking that (a) the latter be condemned to fill in the new ditch, (b) Giguère's land be pronounced free from any servitude towards Létourneau's land as regards a boundary-line ditch, and (c) the court further ruled that the location of the ditch to serve both properties had already been determined as on Létourneau's land alone by a certain agreement entered into in 1917, but not registered, alleging that a servitude had been created as to the other ditch. The action succeeded in the lower court but, Létourneau having appealed, the decision was reversed on appeal. The appeal court's reasoning may be summarized as follows.

Giguère, in order to avoid the obligation, which the Quebec Municipal Code would have laid upon him, of accepting a boundary ditch if his neighbour asked for it and the rural inspector

[1] *Létourneau* v. *Giguère*, [1955] B.R. 13; *Leduc* v. *Dame Sauvé*, [1955] B.R. 85.

concurred, needed to establish that a right existed either against Létourneau personally or against his property, by which the drainage ditch which might otherwise be on the boundary line should be entirely on Létourneau's property. The agreement referred to was the sole alleged source of any such right and it

(a) was not binding against Létourneau, since the obligations contracted under it had not been contracted by him but by his late father, of whom he was not the universal legatee or heir or the legatee by general title;

(b) did not create a servitude, since it was verbal, and hence was never registered as is required in the case of a conventional servitude under article 2116B of the Civil Code.

The attempts by Giguère to assimilate the obligations of neighbours as to a ditch not on the boundary line to the reciprocal servitude contemplated in articles 509 and following of the Civil Code in respect of a mitoyen ditch were rejected by the appeal court, as were also his attempts to equate by analogy an owner's obligation with respect to such a non-mitoyen ditch with his obligations towards property which is *enclavé*. The concept of a legal servitude resulting from *enclave* was rightly held not to be susceptible of extension by any such analogy.

It should be added that Rinfret J. in a dissenting judgment accepts as a fact that a servitude was created but does not say how. Since it was not a legal servitude, and was not registered (nor indeed was ever even reduced to writing) as is required of a conventional servitude, if it is to be successfully invoked against a later owner, it is difficult to understand how he reached this conclusion.

The propriety or otherwise of the course followed by the rural inspector is a side-issue which we do not need to consider here.

In the *Leduc* v. *Dame Sauvé* case the facts were these. Leduc and Dame Sauvé were the owners of two contiguous pieces of land, being Subdivisions 66 and 65, respectively, of Lot 147 of the Cadastre of the Parish of Ste. Cecile, Valleyfield. At an earlier stage in the chain of title both lots had been bought together by a deed under which the purchasers, who acquired the two subdivisions in indivision, bound themselves towards the vendor not to build any building whatever on the land closer than twelve feet from Jacques Cartier Street, which bounded the land in front. The chain of title later forked, Leduc acquiring one subdivision and Dame Sauvé the other. Leduc sued Dame Sauvé in an action by which he asked the court to declare that her property was

charged with a servitude in favour of his, forbidding the erection of buildings within twelve feet of the street line and asked further that she be condemned to demolish the facade of her shop built closer than twelve feet to the street. The only document in which it was claimed that a servitude had been created was the deed of sale referred to.

The trial court dismissed the action and the appeal court confirmed its judgment. In both courts the attempt of Leduc to prove the existence of a servitude failed. Harking back to the definition (article 499 C.C.) that "A real servitude is a charge imposed on one real estate for the benefit of another belonging to a different proprietor", the court of appeal held that no dominant land had been indicated and that accordingly no servitude had resulted. A suggestion that a servitude had been created in favour of the street was rejected, with the *obiter dictum* that, even had it been, only the municipal corporation which owned the street could have invoked it. It was also argued that when Gauthier and Courcelle made a partition of the two subdivisions, by which each became the exclusive owner of one, a servitude on each subdivision in favour of the other in respect of the building restriction was to be inferred, though not specifically stated. This argument was likewise rejected by the court. The court was firm that the deeds themselves must reveal a clear and unambiguous stipulation which would leave no doubt that a servitude was created. In support of this Demolombe[2] was quoted by St. Jacques J., to the effect that "La servitude *non aedificandi aut altius non tollendi* doit être clairement établie; et elle ne peut en général résulter de simples inductions".

As the rights of the earlier vendor, in whose favour the obligation referred to was created, had not conveyed his rights and recourses to Leduc, the latter was held to have no claim in damages in the absence, as in the other case, of a *lien de droit* between plaintiff and defendant. In any case, no damages had been asked for in the action. In the judgment rendered by Bertrand J. he seems to have overlooked this absence of legal link when he hints that if damages had been sought he would have given them. While inclining to the view that no servitude had ever existed, he held that, even if it had at one time, it had been lost by thirty year prescription, as Dame Sauvé's building had contravened the alleged servitude for more than thirty years, during which no negatory action had been taken. The loss by prescription of servitude

[2] Droit civil français (1926), Vol. 3, No. 897, p. 834.

rights can, of course, take place, though they can never be acquired by prescription (see article 549 C.C.).

The judgments in these two cases can hardly be said to have created new law, but they point up the inadmissibility of inference as a means of establishing in law the existence of a conventional servitude. As such they will be useful in discouraging similar inferential contentions being brought before the courts in matters of conventional servitudes.

E. C. COMMON*

Others Are Doing It

A welcome change in climate also is noticeable at home. Only a year ago the cloud of McCarthyism still hung above the land and the excesses of an inflexible security program caused some citizens to fear for democracy's future.

There are some fresh and heartening signs that the old American trait of fair play is stronger than ever. . . .

Over the years, two U.S. Government agencies which often seemed the most arbitrary and highhanded in their actions have been the Immigration Service and the State Department's Passport Office. If an immigrant's papers were not in order, he was held like a criminal at Ellis Island, often for months; aliens served with deportation notices were put under automatic arrest, and the examiner acted as judge, jury and prosecutor. In the Passport Office, what had once been the birthright of any citizen to travel freely—a right as old as the Magna Carta—had been gradually abridged until some applicants could wait years without getting either a passport or the particulars for its refusal.

But the Immigration Service had been gradually reforming its practices: only suspected criminals or subversives among immigrants are now detained. Now it announces that it will stop the automatic arrest of deportation cases. Moreover an examining officer will present the government's case but somebody else will judge it. The Passport Office also has been changing its habits ever since several federal court decisions recently forbade it to deny passports without due process of law—in other words, grant the individual a hearing, produce the evidence, and give him the right to appeal. As a result, the Passport Office has been issuing many previously pigeonholed passports, including one for the head of the Independent Socialist League, which, though anti-Soviet, has been listed as subversive. Thus democracy works to patch its flaws. Undoubtedly it still has others, but we welcome all these signs of its inherent vigor. (From an editorial in "Life" for August 22nd, 1955)

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