Case and Comment

REAL PROPERTY—TORRENS SYSTEM OF LAND TITLES—OMISSION OF PETROLEUM RESERVATION FROM TRANSFEREE'S TITLE—THEORY OF THE INDEFEASIBLE TITLE—CONFLICTING CERTIFICATES OF TITLE—MISDESCRIPTION.—*Canadian Pacific Railway Company Ltd. et al.* v. *Turta*,[1] decided by the Supreme Court of Canada in May 1954, reiterates what, in one form or another, has been called the cardinal principle of the Torrens system of land registration. A person who, bona fide and for value, takes a transfer of a parcel of land from the registered owner acquires, upon the registration of the transfer, an indefeasible title valid against the entire world, notwithstanding that the transferor's title could have been avoided at the instance of a third person.[2] Subject to a few exceptions expressly specified in the Land Titles Act, the transferee's title is absolutely free from any estates, interests or claims which were not registered against the transferor's title.

The particular significance of the case is that it applies that principle to a new, but possibly not uncommon, situation which, in conventionalized form, is as follows. The registered owner of a parcel of land expressly reserves the ownership of the minerals when he transfers the remainder of his interest in the land. When the Land Titles Office registers the transfer it erroneously cancels the transferor's title in its entirety and issues to the transferee a certificate of title which, as a matter of its own interpretation, includes the minerals. A subsequent purchaser purchases the land in good faith and for value from the transferee and registers a transfer. *Turta*'s case holds that the subsequent purchaser obtains an unimpeachable title to the minerals in spite of the fact that, as a matter of conveyancing, the original owner never transferred the minerals to the first transferee. The title of the first transferee

[1] [1954] S.C.R. 427; [1954] 3 D.L.R. 1; (1954) 12 W.W.R. (N.S.) 97. It is one of the few Supreme Court decisions reported in the Western Weekly Reports since the publication of the Canada Law Reports commenced in 1923.

[2] *Fels* v. *Knowles* (1906), 26 N.Z.L.R. 604, at p. 620.

was infirm and could have been avoided at the suit of the original owner. But the title of his successor is indefeasible and free from infirmity. This result is not precluded by the fact that the ultimate transferee purchased the land for farming purposes only, did not consciously intend or expect to acquire the minerals, did not have them in mind and did not search or examine his vendor's registered title before completing his purchase of the land.

It is implicit in every judgment delivered in this action that the result would have been the exact opposite if the land had not been subject to the Land Titles Act.

The decision also examines possible exceptions, especially the case of conflicting certificates of title and the case of titles containing misdescriptions of land or boundaries. It stops far short of saying that they could never protect the original owner but it does display a pronounced inclination to curtail their scope and to relegate them to a subordinate position whenever they impinge upon the interests of a bona fide purchaser. Even in dealing with the statutory power of the registrar to correct his own mistakes the case shows an undeniable tendency to interpret the act for the benefit of the person who, bona fide and for value, deals with the person who is registered as owner.

On every pertinent issue the case holds, in effect, that the Land Titles Act sacrifices the certainty and stability of the title of the earlier owner to the object of simplifying proof of title and facilitating dealings with land in such a way that, in the absence of actual fraud on his part, the transferee for value, who registers in the manner prescribed by the act, prevails against an earlier owner of the land even in the absence of any negligence or inequitable conduct on the part of the latter.[3]

II

Just as this comment tends to slip over the less prominent issues, so the following narrative of the facts omits some events and simplifies the details of others. It is believed to contain, however, everything pertinent to the main issues and to avoid carrying simplification to the point where it becomes distortion.

Before June 19th, 1908, the Canadian Pacific Railway Company was the registered owner of a parcel of land described briefly as N.W.¼ of sec. 17, tp. 50, rge. 26, W. 4th M., Province of Alberta, including all mines and minerals. The certificate of title—No.

[3] *Katene te Whakaruru* v. *Public Trustee* (1893), 12 N.Z.L.R. 651, referred to by Egbert J. in (1952) 5 W.W.R. (N.S.) 529, at p. 571.

424—issued to it under the Land Titles Act of the province of Alberta[4] also included several other parcels of land. On that date the company executed a transfer transferring to Podgorny the N.W.¼ of sec. 17 "excepting and reserving unto the Canadian Pacific Railway Company all coal and petroleum which may be found to exist within, upon or under the said land".

The transfer was registered in the Land Titles Office at Edmonton on July 13th, 1908, whereupon the registrar issued to Podgorny a certificate of title describing the land as N.W.¼ of section 17 "reserving to the Canadian Pacific Railway Company all coal on or under the said land". Though the transfer made it abundantly clear that the C.P.R. had not transferred the petroleum to Podgorny, the new title issued to him made absolutely no mention of the reservation of petroleum. In spite of some opinion to the contrary voiced by Rinfret C.J., it is impossible to avoid the conclusion that, on the proper interpretation of his title, Podgorny was the registered owner of the petroleum as well as all other incidents of the land with the sole exception of coal. The failure of his title to record accurately the reservation contained in the transfer and to specify that the petroleum as well as the coal was reserved to the C.P.R. was due to an error on the part of the registrar.

At the same time the registrar endorsed the following words on the C.P.R.'s title: "This certificate of title is cancelled as to the N.W.¼ of section 17". The failure to keep this title alive for petroleum was due to the same error on the part of the registrar. It may prove to be of prime importance. The failure to keep the title alive for coal is not directly material.

The plaintiff, Anton Turta, who became the registered owner of the N.W.¼ of section 17 on March 12th, 1918, can be regarded as having acquired it by transfer from Podgorny. The transfer to Turta and the ensuing certificate of title issued in his name described the land as the N.W.¼ of section 17 "reserving to the C.P.R. all coal under the same land", thereby indicating that his interest in the land included the petroleum, though not the coal.

The sections of the Land Titles Act relied on by Turta contained exceptions which would have deprived him of their protection if he had participated or colluded in a fraud on the C.P.R. but, even if there was a fraud on the railway company, he was not privy to it and those exceptions had no application. He purchased

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[4] The statute referred to in this comment, except where otherwise noted, is the Land Titles Act, Statutes of Alberta, 1906, 6 Edw. VII, c. 24.

the land bona fide, for valuable consideration and without being aware of the mistake made in 1908.

In January 1943 the officials of the Land Titles Office detected the mistake made in 1908. They then amended the memorandum of cancellation on the C.P.R.'s title to make it read: "This certificate of title is cancelled as to the N.W.¼ of section 17 *except petroleum and coal*". At the same time they amended Turta's title by adding the words "and petroleum" to the reservation, thus making it read, "reserving to the C.P.R. all coal *and petroleum* on or under the said land". These alterations made the titles read as they should have read if the proper entries had been made on all occasions.

In March 1951 the C.P.R. granted to Imperial Oil Limited a lease of the petroleum in the land.

Evidence adduced at the trial showed that the land was in the Leduc Oil Field, a few miles south of Edmonton, Alberta, was practically surrounded by producing oil wells and was almost certain to contain oil in commercial quantities.

III

This chain of events led to the commencement of the present action by Turta against Canadian Pacific Railway Company and Imperial Oil Limited.

The trial judge, Egbert J., gave judgment for the plaintiff.[5] He held that the plaintiff was entitled to (1) a declaration that the alterations made by the Land Titles Office in the plaintiff's title in 1943 had been wrongfully made and were void and of no effect, that the defendants had no interest in the petroleum and that the plaintiff was entitled to the possession thereof, (2) a declaration that the C.P.R.'s title to the land was wholly cancelled on July 13th, 1908, and had not been in force or effect since that date, and (3) an order directing the Land Titles Office to issue to the plaintiff a certificate of title for the petroleum.

The trial judgment was affirmed by the Alberta Appellate Division, Clinton J. Ford J.A. dissenting.[6] On a further appeal it was affirmed by the Supreme Court of Canada, Rinfret C.J., Locke and Cartwright JJ. dissenting.

IV

Two of the issues decided in favour of the plaintiff will receive only a minimum of attention in this comment, not because they

[5] (1952) 5 W.W.R. (N.S.) 529. [6] (1953) 8 W.W.R. (N.S.) 609.

are unimportant, but because they are not essential to the main theme of the case.

The long intervals of time involved naturally suggested a defence of the Limitation of Actions Act.[7] The minority of the Supreme Court did not consider it necessary to decide whether the act barred the plaintiff's claim because they decided against him on other grounds. The majority were unanimous in holding that his claim was not barred by the act, but were not unanimous in their reasoning. The question is interesting, but it has a readily discernible existence of its own and its possible ramifications would frustrate any attempt to combine it with an examination of Torrens system problems.

The other minor issue relates to the changes made in the titles in 1943 when the mistakes made in 1908 were discovered. With the possible exception of the Chief Justice, the court had no hesitation in holding that the changes made in 1943 should be ignored. They were made under the alleged authority of section 114(2). The section applies whenever it appears to the satisfaction of the registrar that any instrument has been issued in error or contains any misdescription, that any entry or indorsement has been made in error on any certificate of title or other instrument, or that any such certificate, instrument, entry or indorsement was wrongfully obtained. It authorizes the registrar to cancel or correct the error. It can be assumed that, so long as the land was registered in the name of Podgorny, the section would have enabled the registrar to correct the mistake by which the petroleum was included in his title. But the section empowers the registrar only to cancel or correct errors "so far as practicable without prejudicing rights conferred for value". It is plain that the registrar can correct mistakes only when rights conferred for value will not be prejudiced. Because the land had been conveyed to Turta for value and the corrections would prejudice his rights, the registrar's power to correct the mistake came to an end in March 1918.

The corrections attempted in 1943 consequently had no effect on the rights of the parties and must be ignored. On this point the case does little but express the court's approval of the main current of the authorities.[8]

But the disposition of this issue in favour of Turta does not of

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[7] The Limitation of Actions Act, R.S.A., 1942, c. 133, especially ss. 5(1)(j) and 18.

[8] For instance: *In re The Land Titles Act and A Certain Certificate of Title*, (1952) 7 W.W.R. (N.S.) 21.

itself result in judgment for him. It holds merely that the powers of amendment entrusted to the registrar do not enable him to restore the petroleum to the C.P.R. It is implicit in the Torrens system that the registrar's powers are stringently circumscribed and available only for the solution of relatively simple cases, but that the powers of the court are greater and more widely applicable than those of the registrar. Though Locke and Cartwright JJ. agreed that the corrections made by the registrar were ineffectual, they held that the court was able to restore the petroleum to the Canadian Pacific.

V

This comment now reaches the central problem of the case—the interpretation of several of the most distinctive sections of the Land Titles Act and their application to the facts. Originally the petroleum was owned by the railway company. The company never transferred the petroleum either to the plaintiff or to his predecessor in title. Apart from the Land Titles Act, the company would still own the petroleum. On these points all the judges agree. When Podgorny's title was issued in 1908 it should not have described the subject matter of his ownership in such a way as to indicate that his interest in the land included the petroleum. Nor should the C.P.R.'s title have been cancelled to such an extent as to indicate that it no longer owned the petroleum. If the proper proceedings had been commenced while the land was still registered in the name of Podgorny, the error could have been corrected, his title cancelled *pro tanto* and the railway company again shown as the owner of the petroleum. On these points also all the judges agree. Whether we justify that result by describing the registrar's acts as ultra vires, unauthorized and contrary to the act, and by asserting that Podgorny was guilty of fraud according to the civil law, or by using more neutral language is, for the moment, beside the point. As between the transferor and transferee the doctrines of equity as to mistake, accident, rectification and constructive trusts are operative and Podgorny is not entitled to continue as the registered owner of the petroleum.[9] At the very least, the C.P.R. has, in the language of section 135, "an unregistered interest in the land".

Yet the result of the case is to hold that the C.P.R. has been completely deprived of its ownership and that the petroleum is owned, not by it and its lessee, but by the plaintiff.

[9] *Ott* v. *Lethbridge Brewing and Malting Co. Ltd.* (1910), 3 A.L.R. 210.

The fact that changes the result, defeats the C.P.R. and deprives it of the petroleum is the transfer to Turta by Podgorny. Turta, the transferee, was a bona fide purchaser for valuable consideration who did not participate or collude in any fraud on the railway company. Podgorny, the transferor, was still the registered owner of the petroleum at the time of the transfer even though he should not have been and even though the fact that he was so registered was not due to any fault on the part of the C.P.R.

Under sections 23 and 41 the transfer from Podgorny to Turta, as soon as it was registered, became operative according to its tenor and intent and transferred to Turta the land mentioned in it. It transferred, not the land of which Podgorny should have been registered as owner, but the land actually registered in his name and mentioned in the Podgorny-Turta transfer—the quarter-section in its entirety with the sole exception of coal. The effect of these sections was, prima facie, to enable Podgorny to transfer to his transferee everything that he was recorded as owning in spite of the fact that he should not have been recorded as the owner of all of it.

Section 42 deals with the effect of the issue of a title in the name of Turta. Turta, as the owner of land for which a certificate of title has been granted, holds the land subject to such encumbrances, liens, estates and interests as are notified on his title and absolutely free from all other incumbrances, liens, estates or interests whatsoever.

Section 44 is similar to section 42 but emphasizes the evidentiary effect of a certificate of title. It provides that every certificate of title shall, so long as it remains in force and uncancelled, be conclusive evidence in all courts and as against all persons whomsoever that the person named therein, namely, Turta, is entitled to the land included therein for the estate or interest therein specified.

Section 104 reinforces sections 42 and 44. It declares that no action of ejectment or other action for the recovery of any land for which a certificate of title has been granted shall lie or be sustained against the owner in respect thereof. To this general principle it admits several exceptions. The vital question whether the instant case falls within any of the exceptions will receive attention later in this comment. The section concludes by declaring that in any other case the production of the certificate of title shall be an absolute bar and estoppel to any such action against the person named in the certificate of title as owner of the land therein described.

A court order rectifying Podgorny's title, made under the powers conferred by sections 116 and 139, might have been a registerable instrument within the definition of "instrument" contained in section 2(k), but it would be unavailing against the transfer to Turta. Under section 23 instruments registered in respect of or affecting the same land are entitled to priority the one over the other according to the time of registration. Any court order made after the Podgorny-Turta transfer was registered on March 12th, 1918, and purporting to revest the petroleum in the railway company must be subject to the transfer of the petroleum to Turta. To express the same idea more directly—under the rule that priority depends on the time of registration the registration of the transfer to Turta prevents the rectification of the title.[10]

Lest the sections already discussed leave any room for doubt, section 135 completes the legislative scheme of enabling Turta, the bona fide transferee for value, to obtain a valid and unimpeachable title from Podgorny, whose title was admittedly infirm. It provides that no person contracting or dealing with or taking or proposing to make a transfer from the owner of any land for which a certificate of title has been granted shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which that owner or any previous owner of the land was registered. Nor is such person to be affected by notice, direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding.

The strength of Turta's position is due to the fact that he contracted and dealt with and took his transfer from the person who, according to the contents of his certificate of title, was the registered owner of the petroleum. An inquiry into the circumstances under which Podgorny became the registered owner of the land would undoubtedly include an examination of the transfer from the railway company and thus disclose the defect in his title and give notice of the C.P.R.'s unregistered interest in the petroleum. But, by section 135, Turta is absolved from inquiring into those circumstances and is not affected by the notice that might otherwise be implied from the fact that those circumstances are apparent from the contents of a series of instruments recorded in a public office. Consequently he is not bound to examine the transfers under which his vendor or his vendor's predecessors had re-

[10] The effect of an order for rectification after the acquisition of an interest by an innocent third person was considered in *Imperial Oil Ltd.* v. *Conroy et al.*, (1954) 12 W.W.R. (N.S.) 569.

ceived title for the purpose of discovering whether the vendor's title as recorded was actually warranted by the transactions leading to it. The transferee is not required, either by duty or self-interest, to examine anything more than his vendor's certificate of title. He need not even examine other documents on file in the Land Titles Office.

The foregoing analysis of the act entitles Turta to judgment. Podgorny, whose title includes the petroleum, is able to transfer the ownership of the petroleum. As soon as it is registered the transfer operates as a transfer of the petroleum to Turta. The new title issued to Turta is conclusive evidence, even against the C.P.R., that he is entitled to the land described in it, namely, N.W.¼ of sec. 17, including all mines and minerals except coal. His title serves as an absolute bar and estoppel to any action against him for the recovery of any part of the land. These results follow notwithstanding that Podgorny was not entitled to retain the petroleum and the railway company could have succeeded in an action against him for its recovery. Turta is not bound to investigate the validity of Podgorny's registered title.

This reasoning—it can be called the indefeasible title theory—is in perfect accord with earlier cases on the validity of a title derived through a transfer from a person who had a defective title.[11] It is in accord with the reasoning of Lord Watson, who delivered the judgment of the Judicial Committee in *Gibbs* v. *Messer*:[12]

> The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

The actual result in *Gibbs* v. *Messer* differed, but only because the McIntyres, who claimed the protection of similar legislation, had

[11] The more conspicuous of the earlier cases are: *Gibbs* v. *Messer*, [1891] A.C. 248; *Assets Co. Ltd.* v. *Mere Roihi*, [1905] A.C. 176; *Brown* v. *Broughton* (1915), 8 W.W.R. 889; *Hudson's Bay Insurance Company* v. *Creelman et al.*, [1919] 3 W.W.R. 9; *Dobek* v. *Jennings*, [1928] 1 W.W.R. 348; *In re F. C. Richert Co. Ltd.*, [1935] 1 W.W.R. 345; *Dallas* v. *Toronto General Trusts Corporation et al.*, [1936] 3 W.W.R. 219; *de Lichtbuer* v. *Dupmeier et al.*, [1941] 3 W.W.R. 64; *Essery* v. *Essery*, [1947] 2 W.W.R. 1044; *Boyczuk* v. *Perry et al.*, [1948] 1 W.W.R. 495; *In re The Land Titles Act and A Certain Certificate of Title*, (1952) 7 W.W.R. (N.S.) 21; *In re The Land Titles Act and Yukon Oils Ltd.*, (1952) 7 W.W.R. (N.S.) 46.

[12] [1891] A.C. 248, at p. 254.

not dealt with the registered owner as required by section 135 of the Alberta statute.[13]

VI

We turn next to the attempt of the Canadian Pacific to escape the impact of the indefeasible title theory. Two main possibilities were open to them. One was to challenge its position as a cardinal principle of the act. The other was to establish an exception appropriate under some aspect of the facts before the court.

It was Rinfret C.J. who went farthest in denying the general validity of the indefeasible title theory. He felt that its acceptance would create an intolerable situation and do away with all the traditional principles of law and equity. He restricted its applicability by relying on a doctrine of ultra vires. Because the transfer from the C.P.R. to Podgorny did not purport to transfer the petroleum, its inclusion in Podgorny's title and its removal from the railway company's title were contrary to the act, done without authority and consequently ultra vires and completely ineffectual. Podgorny, in accepting a title with the petroleum included in it, was acting fraudulently according to the civil law, even if he did not have the *mens rea* necessary to brand him as a criminal. He had no right to the petroleum. His registered title to it was utterly null and void.

This reasoning can, possibly with some modifications, be accepted as determining the rights of the Canadian Pacific and Podgorny. The railway company could clearly have had the petroleum revested in it if it had taken proceedings before Podgorny transferred the land to Turta.[14] On that point no one disagrees.

The next conclusion reached by the Chief Justice was that the sections relied on by Turta could not apply because the title from which he claimed was not one authorized by the act; if a title is a complete nullity, as Podgorny's was, it can never become the root of a valid title in the hands of a subsequent transferee. The principle that the certificate of title is everything must be confined to certificates which the registrar has the right to issue. This is the point on which the other members of the court disagreed with Rinfret C.J.

To accede to the view held by Rinfret C.J. is to hold that, although section 135 states that a transferee is not bound to inquire

[13] A similar explanation may be applicable to *Re Adams and McFarland* (1914), 6 W.W.R. 1076, and *Watson* v. *Ogilvie*, [1924] 1 W.W.R. 837.
[14] *Ott* v. *Lethbridge Brewing and Malting Co. Ltd.* (1910), 3 A.L.R. 210.

into or ascertain the circumstances under which the previous owners of the land were registered, yet he must inquire into the actual contents of the transfers leading to their titles. Furthermore, though sections 23 and 41 declare that a transfer, when registered, is to become operative according to its tenor and intent, we would have to concede that it can operate only to the extent permitted by the instruments culminating in the transferor's title. And, in spite of sections 44 and 104, it would be necessary to regard an owner's certificate of title not as conclusive evidence that he is entitled to the land included in it, but only as conclusive evidence that he is entitled to whatever had been transferred to his predecessors in title. Finally, even the twentieth successor in title to Podgorny would, at least in the absence of unusual circumstances, acquire nothing more than was transferred to him in June 1908.

Little would be gained by a more exhaustive examination of the arguments in support of the conflicting theories. As a matter of stare decisis, the decision establishes the indefeasible title theory as the normal doctrine, to which, however, there may be exceptions. In doing so it accords closely with earlier cases[15] and with the commonly accepted view of the purpose and effect of the act.

In the view of the majority, concurred in by other cases, the policy of the act is to sacrifice certainty and security of title to the object of simplifying proof of title and facilitating dealings with land.[16] The act does so to such an extent that, in the absence of actual fraud on his part, the purchaser for value who complies with the registration procedure prescribed by the act prevails against an earlier owner even in the absence of any negligence or inequitable conduct on the part of the latter. Even if we are tempted to describe Podgorny's title as unauthorized and consequently null and void, we must yet recognize that it is not so utterly null and void that it cannot form the root of a perfect title in the hands of his transferee. The scope of the maxim *nemo dat quod non habet* is curtailed; a transferee can acquire what his transferor does not own.

That Torrens system theories, including the theory of the indefeasible title, disregard traditional principles of law and equity cannot be denied. But, in sharp contrast with the underlying premise of the Chief Justice's reasoning, there are cases where this

[15] A number of them are referred to in footnote 11, *supra.*

[16] *Katene te Whakaruru* v. *Public Trustee* (1893), 12 N.Z.L.R. 651, referred to by Egbert J. in (1952) 5 W.W.R. (N.S.) 529, at p. 571.

feature of the legislation has been accepted with complete equanimity.[17]

VII

The other dissenting judges preferred a different approach. Instead of denying the general validity of the indefeasibility theory advanced by the plaintiff, they sought to bring the case within the scope of statutory exceptions to it. Section 104(1) contains six clauses each providing for an exceptional situation where, in spite of the primary rule contained in the section, an action for the recovery of land can be sustained against the registered owner. Of the six exceptions only two were regarded as being potentially relevant.

One of the exceptions deals with the case of conflicting certificates of title. It arises under clause (f), reading in substance as follows:

> (f) The case of an owner claiming under an instrument of title prior in date of registration under this Act, . . . in any case in which two or more certificates of title . . . are registered under this Act . . . in respect to the same land.

It deprives the present registered owner of land of the benefit of the statutory estoppel in a case where the action for the recovery of the land is brought by a person who claims under an earlier certificate of title. Sections 42 and 44 restate the same exception in somewhat different language, but with the same substantive effect.

In the Alberta Appellate Division, Clinton J. Ford J.A., who dissented, thought that clause (f) necessitated the dismissal of the action.

In the Supreme Court the majority experienced no difficulty in holding that this exception did not assist the C.P.R. Clause (f) contemplates the contemporaneous existence of two certificates of title for the same parcel of land and does not apply unless the certificate on which the earlier claimant relies is still in existence. If the earlier certificate of title has been cancelled, it does not entitle the claimant to the benefit of the clause, even if it should not have been cancelled.[18] The C.P.R. lost the benefit of clause (f)

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[17] The acceptance is explicit in *Union Bank of Canada* v. *Boulter Waugh Ltd.* (1919), 58 S.C.R. 385, and [1919] 1 W.W.R. 1046. It is implicit in many of the cases supporting the indefeasible title theory.

[18] This branch of the judgment may require a careful reconsideration of some of the implications of *Wallbridge* v. *Steenson et al.*, [1918] 2 W.W.R. 801, at p. 805.

when its certificate of title to the petroleum was completely cancelled in July 1908. The question did not arise, but it is apparent from the general tenor of the judgments that the railway company's chances would have been immeasurably greater if its title had been left alive as to the petroleum even though the petroleum had also been included in Podgorny's title.

The dissenting judges did not find it necessary to develop any theory on the scope and effect of section 104(1)(f). Their view of other sections enabled them to decide for the defendants without placing any direct reliance on this exception.

VIII

The other exception relied on by the defendants came remarkably close to justifying a judgment in their favour. It applies where a person has been deprived of land by misdescription and has its most compelling form in section 104(1)(e), which reads:

> No action of ejectment or other action for the recovery of any land . . . shall lie or be sustained against the owner . . . except in any of the following cases, that is to say:
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> (e) The case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries, as against the owner of such other land.

Section 44 contains the same exception. In contrast with the exception referring to conflicting certificates of title, this exception is mentioned in section 106, but not in section 42.

The railway company's argument on this exception took the following form. Petroleum is a mineral and is, therefore, "land" under the definition contained in section 2(a). The transfer to Podgorny divided the quarter-section into two distinct parcels of land. The first parcel consisted of the petroleum under the quarter-section. It falls within the words "any land" as used in clause (e). The second parcel consisted of the quarter-section with the exception of the petroleum. It falls within the words "other land" as used in clause (e). The two separate parcels should have been recorded in two separate certificates of title. One parcel (the petroleum) was included in the certificate of title to the other parcel, but it was included by a misdescription of the second parcel, though not of its boundaries. The misdescription arose from a mistake in copying the contents of the transfer into Podgorny's certificate of title. The railway company is, consequently, a person claiming and deprived of land (the petroleum) which was, by misdescription,

included in the certificate of title of other land (the second parcel). Clause (e) applies and the company is not prevented by section 104 from bringing an action for the recovery of the petroleum.

The argument involves the contention that where the owner of a single parcel of land transfers the land with the exception of the petroleum there are thereafter two distinct parcels of land, one consisting of the petroleum and the other consisting of the remainder of the land. It also involves the contention that the situation is the same as if the C.P.R. had owned Blackacre and Greenacre and had transferred only Blackacre to Podgorny, but the registrar had cancelled the railway company's title in its entirety and had issued a new title to Podgorny for both parcels. In that case, so the argument contends, Greenacre would have been included in the title to Blackacre by a misdescription of Blackacre and, because of the exception contained in clause (e), the Canadian Pacific would not be prevented from bringing an action for the recovery of Greenacre.

This reasoning might well result in a victory for the C.P.R. as long as the title to the second parcel was still in Podgorny's name.

Does clause (e) continue to apply even after the second parcel has been transferred to Turta? That is the issue on which the division in the Supreme Court was most pronounced and on which the disposition of the action finally depends. It is worth remarking that in the lower courts not even Clinton J. Ford J.A., who dissented and decided in favour of the railway company, had regarded clause (e) as operating in its favour. He had relied on clause (f).

There is much to be said for the minority view. The corresponding legislation in other jurisdictions, such as Manitoba and Victoria, made it clear that the exception contained in clause (e) of section 104 would cease to apply if the owner of the second parcel was a purchaser for value or a transferee from a purchaser for value. The Alberta statute did not impose any such express limitation on the scope of the exception.

Instead of expressly limiting the scope of the exception, the Alberta statute actually went a long way in specifically denying the existence of any limitations. Section 106 of the Alberta statute, so far as material, provided that:

> Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages as aforesaid, or to action of ejectment, or to deprivation of land in respect to which he is registered

> as owner, any purchaser or mortgagee bona fide for valuable consideration of land under this Act on the plea that his transferor or mortgagor has been registered as owner through fraud or error . . . *except in the case of misdescription as mentioned in section 104.*

Section 106 thus declares, as a general rule, that the fact that his predecessor in title was registered as owner through fraud or error shall not subject a bona fide purchaser for valuable consideration who has registered his title to the deprivation of the land. In this way it buttresses the theory of the indefeasible title. But it recognizes that there is an exception to this normal result and provides almost directly that the purchaser is not to be protected where it was by misdescription of land or its boundaries that the land in question was included in his transferor's certificate of title.[19] There are other jurisdictions, notably Manitoba, where every phrase in the section corresponding to section 106 seems carefully designed to avoid this possible inference.

The absence from sections 104(1)(e) and 44 of explicit restrictions on the scope of the exception, assisted by the inferences so easily deducible from section 106, especially when contrasted with other forms of the Torrens system, led the minority to hold that the misdescription exception continued to apply even after the quarter-section had been registered in the name of the plaintiff.

If sections 44, 104(1)(e) and 106 are taken by themselves, the minority probably have the better of the argument. That was virtually conceded by Kellock J. Rand J. doubted whether the in-

[19] A curious change has been made in section 106. In the 1942 revision (R.S.A., 1942, c. 205) it became section 159. If no possible change had been made in its effect, the last clause of section 159 would read "except in the case of misdescription as mentioned in section 171". It actually reads "except in the case of misdescription as mentioned in section 157". The change can be traced back to Statutes of Alberta, 1935, c. 15, s. 11. Section 157 is designed to deal with the case of "any person deprived of land . . . by an error, omission or misdescription in a certificate of title, and who by the provisions of this Act is barred from bringing an action for the recovery of the land . . .". The anomalous feature is that section 159 (formerly section 106) now refers to a section which recognizes that a deprivation which is so complete that the previous owner is barred from bringing an action for the recovery of the land may have been caused by a misdescription in a certificate of title. Furthermore, instead of referring to a section which imposes limitations on the theory of the indefeasible title, it refers to a section which deals with claims against the assurance fund. The result may be the same as if the original section 106 had referred to section 108, instead of to section 104. The substitution of the reference to section 157 for a reference to section 171 passed unnoticed in the instant judgments, and perhaps properly so, but the railway company's argument based on the misdescription exception might have had much less weight if the mistake had been made, not in 1908, but in 1938 after the alteration in section 106.

clusion of the petroleum in Podgorny's title was misdescription of any kind, but it is questionable whether any other member of the court shared his view, and, after mentioning his doubts, he proceeded on the assumption that they were faced with a true case of misdescription.

IX

How did the majority escape the ostensible effect of sections 44, 104(1)(e) and 106? They apparently felt, perhaps intuitively, that if the exception was so construed as to justify a judgment for the previous owner against the bona fide purchaser, then those sections, particularly section 106, would be at variance with the fundamental scheme of the act as exemplified in sections 23 and 135. To accept the railway company's argument would ascribe too much weight to provisions that were patently enacted only as exceptions. The tail would be in danger of wagging the dog. Alberta's land registration system would cease to be a Torrens system.

This reaction leads to an examination of the entire act, with particular attention to sections 23, 41, 42, 44, 104, 105, 106, 108, 121 and 135.[20] These sections are fraught with inconsistencies and ambiguities, but they lead compellingly to the belief that the act contemplates more than one kind of misdescription. There may even be two meanings for the expression "person deprived of land", or, possibly, varying degrees of deprivation. One kind of misdescription does not completely deprive the former owner of the land; it leaves his rights unaffected even against a bona fide purchaser. Against that kind of misdescription the bona fide purchaser is not protected by sections such as 23 and 135. But there is another kind of misdescription. Against the second kind the bona fide purchaser is protected. It completely deprives the former owner of the land and leaves him with nothing but a claim for compensation against the assurance fund.[21] It is sufficient to analyze section 108 as an example of this reasoning. Section 108 deals with the case of a person who, by any error, omission or misdescription in any certificate of title, is deprived of any land and who, by the provisions of the act, is barred from bringing an action of eject-

[20] This list of sections is intended to be illustrative rather than exhaustive.

[21] The assurance fund is a fund established on a contributory basis for the purpose of providing compensation for persons sustaining loss or damage through any omission, mistake or misfeasance on the part of a land titles office. It is an almost indispensable concomitant to the indefeasible title theory.

ment or other action for the recovery of the land. The section is designed to provide a remedy for such a person by permitting him to bring an action for the recovery of damages against the registrar as nominal defendant and thereby to obtain compensation from the assurance fund. The salient feature of the section for present purposes is that it recognizes that the degree of deprivation caused by a misdescription in a certificate of title may be so complete that the previous owner is barred from bringing an action for the recovery of the land. It may not be possible to define with precision the line between the two kinds of misdescription, but it is clear that there are two kinds and that the mistake made in 1908 (if it can be termed a "misdescription") is a misdescription of the second kind.

X

The misdescription exception presented the defendants with an argument far more persuasive than many had thought possible. Their counsel made the most of it and must be given credit for the utmost in diligence and for an ingenuity that never degenerated into sophistry. A literal reconciliation of the provisions pertaining to misdescription with those pertaining to the theory of the indefeasible title might well be out of the question. The act was far from clear. It was replete with ellipses and tacit assumptions. Some of its provisions were barely intelligible, let alone consistent with others. When a statute of the vintage of 1886 or 1906 is examined in the light of the knowledge and experience available in 1954 it is almost bound to disclose uncertainty, ambiguity and inconsistency.[22]

The decision solved the dilemma, not by demonstrating that verbal inconsistencies do not exist, but by allotting to each group of sections a suitable place within a legislative scheme. In ranking them it elected to accord pre-eminence to the theory of the indefeasible title and to subordinate the exception. The most serious charge against it is that it appears to disregard the literal strength of the exceptive provisions. Yet it has the merit of preventing what was patently designed to be nothing but an exception being promoted almost to the rank of a co-ordinate rule.

[22] The difficulties of reconciling sections 42, 104 and 106 with section 108 were so formidable that Locke J. was led, at page 474, to suggest that the only alternatives were to ignore the first three sections or to treat part of section 108 as meaningless. The solution proposed by the dissenting judges entails regarding section 108 as partially meaningless. The majority, while realizing that some of the sections must be curtailed, preferred to select sections 42, 104 and 106 as the ones to be restricted.

It may be argued that, even if the result of the instant case had been exactly the opposite, the cases where existing titles could be set aside would be infrequent. But that would be because the number of misdescriptions is correspondingly small and not because of any statutory protection afforded to a bona fide transferee from a registered owner. In spite of what was said in *Gibbs* v. *Messer*,[23] it would be necessary for a prospective transferee to incur the trouble and expense of going behind the register in order to investigate the history of his author's title and to satisfy himself of its validity. In spite of section 135, he would be bound to inquire into the circumstances in which each previous owner was registered and, with that end in view, to examine every transfer and title in a long series back to the original grant from the Crown, if only for the purpose of discovering whether any preceding title contained a misdescription caused by an error in transcription from a transfer into a certificate of title. Even if the inquiry need be made only for two or three specific purposes, it would have to be made in every case. The fact that the inquiry must be made for any purpose introduces exceptions into section 135, and that section loses most of its efficacy as soon as it is made subject to exceptions. If clause (e) applies to this case, then it seems to follow that, no matter how long the chain of transfers from the original transferee, the title of the existing registered owner is always liable to attack on the ground of misdescription. This contruction runs directly counter to the basic scheme of the act—long investigations into the history of a title are to be unnecessary, a transferee from a registered owner can acquire a title as good as the transferor's appears to be and is not concerned with anything not disclosed on the transferor's certificate of title.

After nearly seventy years of the Torrens system it is almost impossible to completely discard predilection in favour of a rigidly objective analysis of the language of the statute. The predilection that prevailed may involve two premises: (1) under what might be described as a standard type of Torrens statute the theory of the indefeasible title is so free from exceptions and qualifications that judgment would be given for Turta, and (2) the Land Titles Act of 1906 is a standard type of Torrens statute. The logic of these premises, especially of the second, is open to question. They endeavour, if only unconsciously, to assimilate the statute to the corresponding legislation of other jurisdictions where the language is sometimes different. In ascertaining the scheme and purpose of

[23] [1891] A.C. 248, at p. 254.

the non-Alberta legislation they may be influenced, though only indirectly, by amendments clarifying the purpose and effect of the legislation but not introduced until after 1906. Yet, even if this technique relies on extraneous material and the decision consequently fails to reflect the so-called expressed intention of the Alberta legislature, it does, in a case where the registered title to property is in question, succeed in conforming with what by 1954 is commonly believed to have been the legislative intention and with conveyancing practices founded on that belief. *Communis error facit jus.* If the monetary loss to the former owner and the fortuitous gain to the present owner had been of more ordinary dimensions, the facts had not fallen so tantalizingly close to two excepted situations and the subject matter had been of less intimate concern to a major industry, the decision might have been regarded as little short of inevitable.[24]

XI

Turta's case must not be regarded as providing a universal solution for cases where there is a mistake by a Land Titles Office over the effect of a transfer, Crown grant or other instrument, and as a consequence a certificate of title contains land that should not have been included. There may be cases where the original owner is entitled to recover the land even from a bona fide purchaser for value.

The fundamental theory of the indefeasible title is not entirely free from qualifications. Circumstances will arise where the misdescription exception, the conflicting title exception or some other specialized exception occasions a judgment in favour of the original owner. Much will depend on the exact nature and extent of the mistake. As an instance of this, it is interesting to speculate on what the decision would have been if, on the registration of the 1908 transfer, the registrar had issued to Podgorny a title which (on its own interpretation) included the petroleum and yet, instead of completely cancelling the C.P.R.'s title, left it to certify that the company was still the registered owner of the petroleum. In that case, where the petroleum is recorded in two titles, one is tempted to hazard the opinion that the conflicting title exception would entitle the railway company to the ownership of the petro-

[24] In *Imperial Oil Ltd.* v. *Conroy et al.*, (1954) 12 W.W.R. (N.S.) 569, an oil company was benefitted by the decision in *Turta's* case. The facts of the case do not include either misdescription or an earlier conflicting title and there are therefore fewer obstacles to the application of the indefeasible title theory.

leum. What would the decision have been if an error similar to that made in 1908 had been made, not in the registration of a transfer from one private owner to another, but in the registration of an original grant from the Crown?[25] And, if the theory of the indefeasible title ever operates to defeat a reservation or exception of mines and minerals contained in an original grant from the Crown, does it come into play merely because one of the titles that follows the registration of the Crown grant contains the words "minerals included".

Moreover, the most careful consideration must be given to the legislation in force at all material times. If sections 44, 104 and 106 had followed the Manitoba and Victoria forms more closely, they would have deprived the railway company of any substantial basis for its contentions. As a contrast, a slight strengthening of the exceptive clauses would have ensured a judgment in its favour. The argument of the railway company and the dissenting judgments of Locke and Cartwright JJ. are sufficient to demonstrate that Torrens system legislation is not immutable. It varies from province to province.[26] It has varied from time to time within a province.[27] Variations or amendments apparently designed to relate only to collateral matters may be found to assist in establishing either a fundamental principle or an exception.

It cannot even be predicted that the Statute of Limitations will be irrelevant in every case.

[25] *District Registrar* v. *Canadian Superior Oil of California Ltd.*, [1954] S.C.R. 321, and *Reference re Title to Mines and Minerals etc.*, (1954) 13 W.W.R. (N.S.) 58, deal with the effect of reservations and exceptions in Crown grants. In each case it was held that under the relevant legislation the original disposition by the Crown reserved the mines and minerals and that the reservation was effective against a subsequent transferee who acquired the land bona fide and for value. The facts did not clearly raise the issue of mistake on the part of the land titles office. Though the ultimate transferees did to some extent rely on aspects of the indefeasible title theory, the cases must be regarded as dealing primarily, not with the possible scope of that theory, but with legislation prescribing the reservation and exceptions to be contained in Crown grants and declaring the effect of such reservations and exceptions after the Crown grant is registered. The second case contains comments on the procedure to be followed by the ultimate transferee of the land if he wishes to contest the effect of the reservations and exceptions.

[26] Differences between the legislation of Alberta and Manitoba have already been mentioned briefly. They are examined in greater detail by Locke J. One more instance is sufficient: the corresponding Saskatchewan section (The Land Titles Act, Statutes of Saskatchewan, 1906, c. 24, s. 149) never was quite as precise as section 106 of the Alberta statute. Furthermore, it was discarded when the Saskatchewan statute was revised by Statutes of Saskatchewan, 1917 (Second Session), c. 18.

[27] A change in the contents and possible effect of section 106 is mentioned in footnote 19, *supra*. The disappearance of the analogous Saskatchewan section in 1917 is mentioned in footnote 26.

Where a registered title results from a mistake made by a Land Titles Office *Turta*'s case will be useful, but not decisive. It establishes that, as a prima facie principle to be applied for the benefit of the holder of the subsisting title, the theory of the indefeasible title is to be accorded a paramount position and the apparent exceptions are to be curtailed. It has the further value of applying a fairly typical set of provisions to what may prove to be a common situation. Beyond that it does not go.

E. F. WHITMORE*

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CONSTITUTIONAL LAW—INJUNCTIONS AND LEGISLATIVE PROCEEDINGS—COURT OVER LEGISLATURE.—In *Ducharme and Berthiaume* v. *Du Tremblay et al.*, Mr. Justice Challies of the Quebec Superior Court granted an interim injunction to restrain defendants in pending litigation from proceeding with a petition to the Quebec legislature for a private act.[1] Thus, he asserted for the first time in Canada a jurisdiction to which English courts have, over the past 100 years, paid considerable lip service but have never finally exercised.[2] The judgment raises a number of important questions that deserve exploration.

First, is it open to a superior court to enjoin the enactment of legislation? Secondly, does it make any difference if the proposed statute is a private act or a public act? Thirdly, does it make any difference whether the court's process is directed against private promoters of a statute or against members of the legislature or other functionaries whose duties involve implementation of the legislative process? Fourthly, does it make any difference if the proposed statute is designed to affect the outcome of pending litigation?

At first blush, it seems incongruous that a court should assert an inherent jurisdiction to enjoin the functioning of a superior

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[1] January 17th, 1955, S. C. M. 345,455, as yet unreported. The hearing before Mr. Justice Challies was *ex parte* and his order was valid only until argument on the petition for an interlocutory injunction could be heard.

[2] See Holdsworth, History of English Law, vol. XI (1938) pp. 395ff. There are three cases in which an injunction was granted in the first instance but in each case it was dissolved on appeal. See *Stockton and Hartlepool Ry.* v. *Leeds and Thirsk Ry.* (1848), 2 Ph. 666; *Heathcote* v. *North Staffordshire Ry.* (1850), 2 Mac. & G. 100; *Re London, Chatham and Dover Railway Arrangement Act* (1869), L.R. 5 Ch. App. 671.

organ of government. The blush deepens the more that the matter is considered. Apart from constitutional considerations of legislative power (and there were none in the case at bar), a provincial legislature stands in no different position from the Parliament of Great Britain so far as enacting authority is concerned. The legislature like Parliament (whether of Canada or of Great Britain) is master of its procedure and its proceedings.[3] It is engaged in a high political process for whose results it is responsible only to the electorate. The position of any organ or unit of the legislature, for example, the legislative assembly, is no different from that of the composite body. There has never been any doubt that courts cannot interfere with the enactment of a public act.[4] Why should there be any difference in the case of a private act? Historically, private bill proceedings grew out of popular claims to petition for a redress of grievances.[5] This historic political right is basic to parliamentary institutions, and thus inseparably connected with ultimate political authority and the legal principle of legislative supremacy.

It is an interesting reflection that the very courts which will not and cannot entertain an action to enjoin proceedings pending in a superior court assert a jurisdiction to enjoin proceedings pending in the higher Court of Parliament.[6] They assert this jurisdiction in the case of private bills on a supposed analogy to the issue of a common injunction (that is, to restrain common-law proceedings) and by way of exercising the traditional *in personam* power of the court of chancery.[7] In *Re London, Chatham and Dover Railway Arrangement Act*, where an injunction (granted by Stuart V.C. to restrain directors of a company from proceeding before the House of Lords with a bill already passed by the House of Commons) was dissolved on appeal, Giffard L.J. coupled his assertion of an injunctive power with the statement that "in no case which has ever come before this Court has such an injunction been granted nor has anyone ventured to say in what particular case such an injunction would be granted".[8] Nevertheless, *Halsbury's Laws of England*, on which Mr. Justice Challies relied, states the matter as if

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[3] See B.N.A. Act, s. 92(1); *Fielding* v. *Thomas*, [1898] A.C. 600, at pp. 610-11.

[4] See Hanbury, Modern Equity (6th. ed.) p. 651.

[5] See Jennings, Parliament (1939), Chap. XII.

[6] See Snell, Equity (24th ed.) p. 599; May, Parliamentary Practice (15th ed.), Chap. II.

[7] Holdsworth, *supra*, footnote 2.

[8] (1869), L.R. 5 Ch. App. 671, at p. 682.

the power asserted by the courts were a live one.[9] In fact, none of the authorities cited by Mr. Justice Challies stand up under examination.[10] In some of the English cases, an injunction was refused even where the promoters or opponents of the private bill had contracted not to promote or oppose one.[11] There seems little doubt that such contracts are unenforceable.[12]

The analogy urged by the English courts has been convincingly exploded by the late Sir William Holdsworth and his words speak for themselves:[13]

> A principle which the courts have consistently refused to apply is necessarily suspect. In fact, some of the reasons which the courts have found for refusing to issue an injunction of this kind show that the principle itself is radically unsound. It is radically unsound because there is no real analogy between the issue of a common injunction to prevent a person from suing in the common law courts, and the issue of an injunction to prevent a person from petitioning Parliament for a private Act. In the first case the injunction prevented a person from enforcing a right which was given to him by the rules of law. Because it was a right of this kind the common law courts were obliged to enforce it; and because they could not take account of equitable considerations, equity was obliged to interpose to prevent an inequitable use of a legal right. In the second case the application is made, not to a tribunal which is bound by the strict rules of law, but to a tribunal which can take into account, not only the rules of equity, but also considerations of public policy. The reasons, therefore, upon which the issue of a common injunction was justified fail to apply to an application to Parliament. . . . If, as I think, this analogy is destroyed, it would seem to follow that the dicta in favour of this jurisdiction, which are all based on the supposed existence of this analogy, are demonstrably unsound.

In none of the English cases in which the supposed injunctive power was invoked were the defendants parliamentary members or functionaries. In fact, while asserting the power, the English courts have expressly disclaimed any right to interfere with the proceedings of Parliament, presumably referring to actual deliber-

[9] (2nd ed.), vol. 18, "Injunction", p. 11. He also refers to May's Parliamentary Practice (14th ed., 1946) p. 825.

[10] Apart from the English cases cited, the learned justice refers to two Canadian cases. In each a passing reference was made to the alleged jurisdiction but nothing turned on it. One, *Helm* v. *Port Hope* (1875), 22 Gr. 273, was a ratepayer's action to restrain a municipality from submitting a proposed by-law to a vote of electors. The other, *Matthew* v. *Guardian Assur. Co.* (1918), 58 S.C.R. 47, was simply an action to restrain a foreign insurance company from applying for registration under a provincial statute.

[11] See *Lancaster & Carlisle Ry.* v. *North Western Ry.* (1856), 2 K. & J. 293; *Bilston Corp.* v. *Wolverhampton Corp.*, [1942] 1 Ch. 391.

[12] Note (1943), 59 L.Q. Rev. 2.

[13] *Supra*, footnote 2, at p. 361.

ations of any of the Houses of Parliament or of any committee, or to the duties of any official, such as the speaker. Mr. Justice Challies made a similar disclaimer in the case at bar. Two illustrations at least exist, however, of attempts at direct interference, one in Australia and one in South Africa; both involved public bills. In the now famous *Trethowan* case, an Australian court enjoined the submission of certain bills for His Majesty's assent where the constitutionality of the procedure governing their enactment was put in issue.[14] In the South African case, the request for assent to the impugned bill had already been made so that the claim for an injunction was moot, but the judicial opinion was expressed than an injunction would have been refused had the issue been open, because the courts could not control legislative processes, such as the right to seek assent to a bill.[15] In the United States, too, it is fairly clear that courts cannot enjoin enactment of legislation even if it will allegedly be unconstitutional, but must await enactment before attacking it on that ground.[16] Professor Sawer has given an interesting exposition of the *Trethowan* case,[17] but, even beclouded as it was by constitutional considerations, there is little to be said in favour of the case in so far as it interfered with internal parliamentary business. The Australian court's action was premature regardless of the fact that the constitutionality of the bill was doubtful.[18] It could well be that after purported enactment a measure might still be challenged in the courts because it is not an "act".[19] There has been a recent example in a Prince Edward Island decision which raised the question whether a measure from which assent had been withheld could, without again being passed by the Legislative Assembly, become effective by a subsequent assent.[20] This case, like *Trethowan*'s case, could be put

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[14] *Trethowan* v. *Peden* (1930), 31 S.R. (N.S.W.) 183, aff'd *sub. nom. A.-G. N.S.W.* v. *Trethowan* (1931), 44 C.L.R. 394; aff'd by the Privy Council, [1932] A.C. 526.

[15] *Masai* v. *Jansen N.O.*, [1936] C.P.D. 361. See, particularly, Cowen, Legislature and Judiciary: Reflections on the Constitutional Issues in South Africa (1952), 15 Mod. L. Rev. 282; (1953), 16 Mod. L. Rev. 273. See also note (1944), 60 L.Q. Rev. 226.

[16] See 16 Corpus Juris Secundum, s. 151a; 43 Corpus Juris Secundum, s. 118.

[17] Injunction, Parliamentary Process, and the Restriction of Parliamentary Competence (1944), 60 L.Q. Rev. 83.

[18] See, however, the discussion by Friedmann, Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change (1950), 24 Aust. L.J. 103.

[19] See *Cowen, supra*, footnote 15, 16 Mod. L. Rev. 273, at p. 274.

[20] *Gallant* v. *The King*, [1949] 2 D.L.R. 425. It was held that where the bill was not re-presented by the Legislative Assembly, the Lieutenant-Governor could not assent to it to make it law when his predecessor in

in a constitutional context by reference to sections 55 and 90 of the British North America Act; and, similarly, the decision of the South African Court of Appeal in *Harris* v. *Minister of the Interior*, dealing with the so-called entrenched clauses of the South Africa Act, that country's constitution.[21] There is, however, no parallel between a case where a challenge is made to the validity of a statute by reason of an alleged defect in the procedure for its enactment (as where such procedure is laid down in a "fundamental" document) and a case where an attempt is made to challenge regular legislative processes. The latter is a negation of parliamentary privilege, and indeed integrity, in a way in which the former is not.

Clashes between Courts and Parliament over the latter's privileges arouse echoes of by-gone days, but one is tempted to speculate whether judges might not be in contempt of Parliament as much, say, as the sheriff in the *Case of the Sheriff of Middlesex*,[22] who was arrested on the speaker's warrant when he was proceeding to levy execution to satisfy the judgment for plaintiff in *Stockdale* v. *Hansard*.[23] The speculation cannot be taken too seriously because habeas corpus would lie to challenge any arrest for contempt and the probable end of the matter would be an assertion of the respective independence of courts and legislatures (or legislative assemblies) when respectively called upon to exercise their functions.[24] Law at this point dissolves into politics.

Finally, it should be noted that the defendants in the *Ducharme and Berthiaume* case were sued for breach of trust and their petition for a private bill was for the purpose of securing a favourable termination of the litigation. But how does this fact alter the legislature's right to control and supervise its own proceedings? Surely nothing turns on the fact that an action is pending when the application is made to the legislative branch! If the application were made before action, the same issue would be presented if an ac-

office had previously withheld consent. See Comment (1946), 24 Can. Bar Rev. 625.

[21] 1952, 2 S.A. 428. See McWhinney, **The Union** Parliament, the Supreme Court and the "Entrenched Clauses" of the South Africa Act (1952), 30 Can. Bar Rev. 692.

[22] (1840), 11 A. & E. 273.

[23] (1839), 9 A. & E. 1. This is the well-known libel action in which defendant's publication was by order of the House of Commons. It led to the Parliamentary Papers Act, 1840.

[24] See Sir William Holdsworth's interesting article, Immunity for Judicial Acts (1924), 1 Jo. S. P. T. L. 17. He concludes that the practical reason for the immunity of Superior Court judges is that there is no judicial tribunal by which they can be held accountable. What remains, however, is the political control through removal for misbehaviour.

tion were subsequently begun and an injunction were sought in connection with it. The pendency of an action may well be relevant to the legislature's willingness to support the private bill but it does not lend any greater strength to the court's position. The legislature is entitled to override existing claims or alter existing legal relations to one party's disadvantage. There have been some cases in Canada in which the courts have refused to recognize the overruling effect of legislation superimposed on a trial judgment where the legislation was enacted between the conclusion of the trial and the hearing of an appeal. A prime example is *Beauharnois, Light, Heat & Power Co.* v. *Hydro-Electric Power Commission of Ontario*.[25] At the same time there have been other decisions, as, for example, *Gold Seal Ltd.* v. *Dominion Express Co. and A.-G. Alta.*, in which the court (here the Supreme Court of Canada) acted upon an interpreting enactment passed before judgment was rendered by the court and qualifying an enactment which was before the court during the hearing.[26] Recently in *Western Minerals Ltd.* v. *Gaumont*, the Supreme Court of Canada affirmed the doctrine of the *Gold Seal* case by holding itself bound to give effect to a statute passed to overrule a trial judgment or (as some of the members of the court put it) to declare what was the pre-existing law for the purpose of affecting the very proceedings before the court.[27] Mr. Justice Cartwright commented on the *Beauharnois* case as follows: "If and insofar as the judgment in the *Beauharnois* case negatives the power of the Legislature to declare the law, retrospectively or otherwise, in regard to matters entirely within the ambit of its constitutional powers it ought not to be followed".[28]

It does not matter at what stage in the unfolding of a legal situation the legislature intervenes. For the courts there are only the questions of the interpretation of the legislation and its constitutionality. They are no more entitled to resist its application than they are to interfere with its enactment.[29]

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[25] [1937] O.R. 796. See Comment (1941), 19 Can. Bar Rev. 45; Comment (1943), 21 Can. Bar Rev. 662.

[26] (1921), 62 S.C.R. 424. See also *Matthew* v. *Guardian Assur. Co.*, *supra*, footnote 10, where Cassels J., *ad hoc*, said at p. 72: "It seems to me that the [British Columbia] Court of Appeal should have been guided by the fact that when the appeal was heard the law was changed".

[27] [1953] 3 D.L.R. 245.

[28] *Ibid.*, p. 269.

[29] While this comment was in preparation, advice was received that plaintiffs had desisted from their petition for an injunction, apparently as part of an overall settlement, and therefore the point now being discussed has no chance of reaching a higher court.

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LIBEL AND SLANDER—PLAINTIFF NOT MENTIONED BY NAME—CLASS LIBELS.—It has long been a commonly held fallacy among writers that a man cannot be defamed unless he is named in the offending article. This fallacy probably arises from a misunderstanding of the well-known principle of libel law that, where the words complained of reflect on a body or class of persons generally, no particular member of the body or class can maintain an action. This was the principle which Willes J. laid down in *Eastwood* v. *Holmes:*[1] "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual". But if the class is reasonably small, and can be accurately determined, then every member or any member can maintain a separate action. So, to vary the example of Mr. Justice Willes, if the statement were made that all the lawyers concerned in a certain cause or proceeding were thieves, then any or all of the lawyers referred to would be entitled to claim damages for defamation. In an American case in 1875[2] the plaintiff was one member of a jury of twelve. The defendant wrote in a newspaper article that the verdict of the jury was "infamous", and added that: "we cannot express the contempt which should be felt for those twelve men who have thus not only offended public opinion, but have done injustice to their oaths". In such circumstances, the plaintiff was held entitled to maintain his action.

In each case, the test appears to be: Does a reasonable person believe that the words refer to the plaintiff? If so, then the question whether the libel is a class libel or not is immaterial. Perhaps the best statement of the rule was that laid down by Lord Campbell in *Le Fanu* v. *Malcolmson* in this language:

> Where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, *if those who look on, know well who is aimed at*, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated.[3]

In applying Lord Campbell's statement, however, I would sug-

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[1] (1858), 1 F. & F. 349.
[2] *Byers* v. *Martin* (1875), 25 Amer St. R. 755.
[3] (1848), 1 H.L.C. 637, at p. 668 (italics added).

gest, for greater accuracy, that the italicized words be altered to read: "If those who look on, know well who is hit". The use of the word "aim" suggests intention, and in libel law innocence of intention is no defence.

A recent trial in the Saskatchewan Court of Queen's Bench, the case of *Arnott* v. *College of Physicians and Surgeons of Saskatchewan*,[4] provides an interesting example of a class libel in which the plaintiff unsuccessfully contended that he had been "hit". Dr. Arnott was a physician in good standing in the province of Ontario, who had become well known as a practitioner who had faith in and regularly used in his practice what is known as the "Koch" treatment for cancer. He had studied with its discoverer, Dr. Koch, in the United States, and he introduced and promoted the treatment in Canada. As a result of his work, Dr. Arnott became well-known in medical circles as the most enthusiastic sponsor in Canada of the treatment.

The sting of the libel published by the College of Physicians and Surgeons in Saskatchewan in its medical quarterly was contained in these words: "We know the Koch treatment is quackery". Dr. Arnott was not named, described or referred to in the article, but evidence was admitted to show that persons who might read the article would think immediately of Dr. Arnott by reason of his close relationship to the Koch treatment. Thus, it was argued, the libel of a class, that is, the charge of quackery against the users of the Koch treatment, became the individual libel of the plaintiff himself. In the result, the jury awarded the doctor $7,000 damages.

On appeal to the Saskatchewan Court of Appeal, the judgment was reversed and the action dismissed. On further appeal to the Supreme Court of Canada, it was held that the action was properly dismissed. The grounds of dismissal advanced by the members of the Supreme Court varied, three of the judges holding that the occasion of publication was privileged, and only one specifically ruling that the plaintiff did not fall within the class of persons being practitioners using the "Koch" treatment. This case is an interesting example of the general principle enunciated earlier in this comment: namely, that to "defame", it is not always necessary to "name".

ALEXANDER STARK*

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[4] [1953] 4 D.L.R. 392, rev'd [1954] 10 W.W.R. (N.S.) 446, 1 D.L.R. 529; appeal dismissed [1954] S.C.R. 538, [1955] 1 D.L.R. 1.

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ADMINISTRATIVE LAW—DISCLOSURE OF INSPECTOR'S REPORTS—AMERICAN REJECTION OF ARLIDGE RULE.—A recent decision by the highest court of the State of New Jersey[1] deals with a question that has been of interest to Anglo-American administrative lawyers ever since the celebrated decision of the House of Lords in *Local Government Board* v. *Arlidge*.[2] The question at issue arises out of the process of administrative hearing and decision that is common in all countries. Powers of decision affecting private rights and obligations have been vested by the legislature in the heads of the different departments or agencies in the executive branch. The administrative decisions must, however, normally be preceded by notice and hearing, in order to give those affected an opportunity to present their side of the case. So much, at least, is demanded, both by the British concept of *natural justice* and its American counterpart of procedural *due process*.

For practical reasons, it has been impossible for agency or department heads themselves to preside at the hearings which must be held before decisions can be rendered by them. The great volume of administrative adjudication makes such a procedure all but impossible—"administration would come to a virtual standstill if the heads of governmental agencies were themselves required to preside at every hearing to receive testimony".[3] The conduct of the actual hearings held by Anglo-American administrative agencies has, therefore, customarily been vested in subordinate officials. The typical case is the hearing afforded in connection with a common type of ministerial decision in England, the public local inquiry held before an inspector of the ministry, to permit those affected to present their views to the minister.

Though the subordinate inspector or examiner (as he is commonly called in the United States) has thus been given the task of presiding at the hearing, it is not he who has had the power to decide the case. That task has been reserved for others higher in the administrative hierarchy. But it is precisely out of this dichotomization of the functions of hearing and decision that the question we are concerned with arises. Where the administrative hearing is normally conducted by one official and the ultimate decision made by another, the problem naturally arises of how to convey the information acquired by the hearing officer to the one who

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[1] *Mazza* v. *Cavicchia* (1954), 105 A. 2d 545 (N.J.).
[2] [1915] A.C. 120.
[3] Gellhorn, Administrative Law: Cases and Comments (2nd ed., 1947) p. 689.

decides. To resolve this problem, the practice has developed for the hearing officer to prepare a report, containing a summary of the evidence and issues and his recommendations, for the benefit of the deciding officer.

Under the established English administrative practice, the report of the hearing officer (or inspector, as he is usually termed) is a confidential document, made solely for the benefit of the minister and his advisers, and not disclosed to private individuals who may be affected. And it was this, among other aspects of the English administrative process, that was put to the test of "natural justice" by the famous challenge of Mr. Arlidge. His case arose under the Housing, Town Planning, etc., Act, 1909,[4] which provided for appeals to the Local Government Board from orders of local authorities closing a dwelling house as unfit for human habitation. The procedure on such appeals was to be such as the Local Government Board by rules determined, but the rules were to provide that the board should not dismiss an appeal without holding a public local inquiry. In the *Arlidge* case, the board, after having held the required inquiry, dismissed the appeal of the houseowner. The latter then applied to the courts to quash the decision of the board, claiming that it was contrary to "natural justice" on the ground, among others, that he was entitled to see the report of the inspector who had conducted the public local inquiry on behalf of the board.

The House of Lords rejected the claim and, "so far from disapproving the procedure adopted by the department, regarded it as complying with all the essentials of justice and as having done complete justice to Mr. Arlidge".[5] Referring to Mr. Arlidge's claim of a right to disclosure of the inspector's report, Lord Moulton said that "no such right is given by statute or by an established custom of the department. Like every administrative body, the Local Government Board must derive its knowledge from its agents, and I am unable to see any reason why the reports which they make to the department should be made public. It would, in my opinion, cripple the usefulness of these inquiries. . . . Such a practice would, in my opinion, be decidedly mischievous."[6]

The aspect of *Arlidge*'s case just discussed has turned out to be by far the most controversial part of the House of Lords' decision. The holding of their lordships that the non-disclosure of in-

[4] 9 Edw. VII, c. 44, ss. 17, 39.
[5] Carr, Concerning English Administrative Law (1941) p. 115.
[6] *Local Government Board* v. *Arlidge*, [1915] A.C. 120, at p. 151.

spectors' reports did not violate any of the principles of "natural justice" has been severely criticized.[7] The Committee on Ministers' Powers, which devoted much attention to the subject as part of its over-all survey of English administrative law, concluded unanimously that inspectors' reports should be published, even implying that non-disclosure in these circumstances was contrary to "natural justice".[8]

Criticisms of the *Arlidge* case, even from as weighty a source as the Donoughmore Committee, have, however, been mainly of academic interest, so far as the English law has been concerned, in view of the rigid adherence of the House of Lords to the doctrine of stare decisis.[9] Thus, in the one case since *Arlidge* where the claim of a right to disclosure of an inspector's report has been raised, Swift J. had no difficulty in holding that the matter was conclusively decided by the case of *Local Government Board* v. *Arlidge*.[10]

Those who, like the present writer, have always felt that *Arlidge*'s case was wrongly decided in upholding non-disclosure of inspectors' reports have now received strong support in the 1954 decision of the Supreme Court of New Jersey in *Mazza* v. *Cavicchia*.[11] It has already been indicated that in the United States, as in England, administrative hearings have normally been presided over by subordinate hearing officers (customarily called examiners) who, like their English counterparts, have submitted reports for the benefit of their agency heads. The American practice has, unlike the English one approved in *Arlidge*, been for such reports to be submitted to the private individuals concerned.

It has, indeed, generally been assumed by American administrative lawyers that those affected have a due process right to see the report and to take exceptions to it before the decision of the agency is rendered. For an agency decision to be based upon a secret report, by an examiner or some other officer, would be for it to violate the right of the private party to have his decision based only upon materials which he knows about and is given an opportunity to meet.

Though this view clearly seems consistent with basic American administrative-law principles—and it has, it should be noted,

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[7] See, *e.g.*, Schwartz, Law and the Executive in Britain (1949) pp. 248-249; Allen, Law and Orders (1945) p. 151.

[8] Report of the Committee on Ministers' Powers (Cmd. 4060, 1932) pp. 80, 105.

[9] *London Street Tramways* v. *London County Council*, [1898] A.C. 375.

[10] *Denby & Sons* v. *Minister of Health*, [1936] 1 K.B. 337, at p. 343.

[11] (1954), 105 A. 2d 545 (N.J.).

been given express statutory articulation in the Federal Administrative Procedure Act of 1946[12]—there was not, until recently, a decision by an ultimate appellate tribunal in the United States expressly on the point. During 1954, however, the question of the right of private individuals to disclosure of an administrative hearing officer's report which plays a part in the decision process was unequivocally answered in the affirmative in the decision by the New Jersey court already referred to.

In that case, the private individual had had his licence to sell alcoholic beverages suspended after a hearing, which had been held before a subordinate (in this case called a hearer) of the agency. The hearing officer had forwarded the record of the hearing to the agency head together with a report of his findings and conclusions, but a copy was not furnished to the private party. The court held that the failure to disclose the hearer's report violated the individual's statutory right to a hearing. Though, in a field such as liquor licensing, there is in the American system no constitutional right to be heard, where the enabling statute expressly requires a hearing it carries with it the elementary due process requirement that the hearing be fairly conducted. And this precludes the submission by a hearing officer to the deciding authority of secret reports containing findings of fact, conclusions of law and recommendations for the disposition of the case.

The American court's rejection of the *Arlidge* holding of non-disclosure was based primarily upon the fundamental principle against *ex parte* evidence which governs all judicial proceedings. It was this principle which was at issue in the well-known case of *Errington* v. *Minister of Health*[13] and the line of cases following it.[14] Where an administrative deciding officer takes into consideration materials which might have been, though they were not, presented at the public local inquiry or other agency hearing, but were given *ex parte* afterwards without the private parties having any opportunity whatever to deal with those materials, then the administrative decision in question is illegal.[15] Such was the basis for the decision of the Court of Appeal in *Errington*'s case.

The New Jersey court, in the decision under discussion, relied upon the *Errington* principle (which is as firmly established in American as it is in English law) as the foundation for its holding

[12] Section 7(d).

[13] [1935] 1 K.B. 249.

[14] *Horn* v. *Minister of Health*, [1937] 1 K.B. 164; *Offer* v. *Minister of Health*, [1936] 1 K.B. 40; *Frost* v. *Minister of Health*, [1935] 1 K.B. 286.

[15] Paraphrasing Greer L.J. in *Errington* v. *Minister of Health*, [1935] 1 K.B. at p. 268.

that the private individuals concerned had a right to disclosure of the hearing officer's report. Its opinion, delivered by one of the most distinguished of American jurists, Vanderbilt C.J., starts by reiterating that in any proceeding that is judicial in nature, whether in a court or in an administrative agency, the process of decision must be governed by the basic principle against *ex parte* evidence. "'Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing'. . . . Unless this principle is observed, the right to a hearing itself becomes meaningless. Of what real worth is the right to present evidence and to argue its significance at a formal hearing, if the one who decides the case may stray at will from the record in reaching his decision? Or consult another's findings of fact, or conclusions of law, or recommendations, or even hold conferences with him?" [16]

The principle against *ex parte* evidence, the opinion goes on, necessarily bars the use of the hearing officer's report as an aid in the decision process unless it is made part of the record. Whatever actually plays a part in the decision should be known to the parties and be subject to being controverted. The report obviously played a part in the administrative decision. For it to have played a part without having been shown to the private individual violates his right to have the decision based exclusively upon public matters, which are known to him and can consequently be controverted by him.[17] The individual litigant is entitled to be apprised of the materials upon which the administrative agency is acting. He has a right not only to refute but, what in a case like this is usually more important, to supplement, explain, and give different perspective to the hearing officer's view of the case.[18]

The administrative hearing, the chief justice rightly emphasizes, has been given a particular form and character by the legislature for the purpose of satisfying those whose interests may be involved that all relevant facts and considerations will be put fairly before the deciding official, so that he may arrive at a just decision. When the report giving the hearing officer's digest of the evidence and his findings and recommendations is turned over without coming to the attention of the private individual, doubt may well arise as to whether a true view of the facts has been conveyed. The very

[16] *Mazza* v. *Cavicchia*, *supra*, footnote 1, at p. 554.
[17] Compare Maugham L.J. in *Errington* v. *Minister of Health*, [1935] 1 K.B. at p. 280.
[18] *Supra*, footnote 1, at p. 555.

purpose of the statute is that the hearing should be public, but how can it be said that the hearing is public when the report which summarizes it as to both law and facts and makes recommendations as to sanctions is private?[19]

The hearing officer may have drawn some erroneous conclusion in his report, or he may even have made some factual blunders. Such mistakes are not uncommon in both judicial and administrative proceedings; indeed, the whole process of judicial review in both fields is designed to guard against them. But if a party has no knowledge of the secret report or access to it, how is he to protect himself? An unjust decision may very likely be the result where no opportunity is given to those affected to call attention to mistakes. That is why it is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert. In the instant case, Chief Justice Vanderbilt concludes, the hearing officer can be characterized as a "witness" giving his evidence to the judge behind the back of the private individual who has no way of knowing what has been reported to the judge.[20]

To one familiar with the almost bare assertion of the House of Lords in the *Arlidge* case, that there was no right to disclosure of an inspector's report, the well-reasoned opinion of Chief Justice Vanderbilt appears particularly satisfying. Other than the claim of administrative convenience, no valid reason was really given in *Arlidge* why inspector's reports should be treated as confidential documents. Their lordships appear to have felt that the inspector could declare himself freely only if his report were kept confidential. As it was expressed by Lord Shaw, "if it were laid down in Courts of law that such disclosure could be compelled, a serious impediment might be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks".[21] But as Dr. Allen has pointed out, these arguments might apply with equal force to any report whatever. "A judge could often give a very far from 'colourless' judgment if he allowed himself to comment at large on the elements which nearly always loom behind, though they do not actually appear in a lawsuit."[22]

The New Jersey decision under discussion contains by far the

[19] *Ibid.* [20] *Ibid.*
[21] *Local Government Board* v. *Arlidge*, [1915] A.C. at p. 137.
[22] Allen, Law and Orders (1945) p. 151.

most complete judicial analysis of the problem of the reports of administrative hearing officers in the English-speaking world. As such, it should be of interest to jurists beyond the borders of the jurisdiction in which it was rendered. This is particularly true in so far as the British administrative lawyer is concerned. It may well be that, in Britain itself, the *Arlidge* case has irrevocably settled the case-law on the subject. But it should certainly be noted there that an eminent judicial tribunal, fortified by some forty years of perspective with regard to administrative law unavailable to the House of Lords in 1915, has examined and expressly rejected the *Arlidge* holding. And Chief Justice Vanderbilt's reasoning should be used by those in Britain who may aim for either administrative or legislative changes in the situation. And, even more important perhaps, it should give pause to other countries in the British Commonwealth, like Canada, whose case-law may not be irretrievably fixed, before they follow the jurisprudence of the House of Lords on this point. The New Jersey decision should induce their judges, as well, to hold that the disclosure of hearing officers' reports must be a basic feature of the process of administrative decision. "Without that feature the use of a hearer's report is like a performance of *Hamlet* without the Prince of Denmark."[23]

BERNARD SCHWARTZ*

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CRIMINAL LAW—POSSESSION—OPIUM AND NARCOTIC DRUG ACT—NARCOTIC DRUGS—UNKNOWN PRESENCE OF MINUTE PARTICLES. —The newspaper accounts which heralded the decision of the Alberta Court of Appeal in *Quigley*[1] referred to it as the grant of a new charter to the Royal Canadian Mounted Police in their fight against the drug traffic in this country. That may be true, but it is a charter designed more for the police than for the public; more to secure convictions than to convict only the criminals. In 1928 Fullerton J.A. remarked in *Venegratsky*:[2] "The Government is evidently alarmed at the existing conditions and determined, if possible, to stamp out this illegal traffic. In an effort to effect such a laudable object it is entitled to every assistance this Court can

[23] *Mazza* v. *Cavicchia*, *supra*, footnote 1, at p. 560.

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[1] (1954) 14 W.W.R. (N.S.) 37.

[2] [1928] 3 D.L.R. 201, 49 C.C.C. 298 (Man.).

legitimately give it." Today the same conditions exist, though to a more serious degree, and the same assistance should be rendered by the courts. But the undeniable assistance given by the court in the present case seems to be not "legitimately given".

The point in issue has never been raised, except obiter, in any other reported Canadian decision and, as the possible effects of the decision on other crimes of possession are so great, and at the same time so undesirable, it demands close consideration. The accused was charged under the Opium and Narcotic Drug Act[3] with the unlawful possession of heroin. By a series of chemical tests it had been established that microscopic, but identifiable, amounts of the drug had been present in the dust in his pockets, in a handkerchief he carried, in the dust on the furniture in his room, and in the fibres of a paper tissue found on the floor of his car. Although the accused was entirely unaware of the existence of these infinitesimal quantities in his clothing and on his other possessions, Clinton J. Ford J.A., speaking for the court, and reversing the trial judge, McBride J., held that knowledge was an irrelevant consideration, and convicted the accused.

Knowledge may well be irrelevant if the case comes under section 17 of the act and the accused does not attempt to rebut the presumption raised by that section, but the importance of the present decision is that the court dealt with the charge expressly under section 4(1)(d), which reads:

> 4. (1) Every person who
>
> (d) has in his possession any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority;
>
> is guilty of an offence. . . .

The decision is therefore directly on the straight-forward question of the meaning of "possession" in this offence, and it necessarily bears upon the meaning of "possession" in all possessory offences.

McBride J., in the court below, adopted as his reasons for decision the reasons set out in his earlier judgment in *Ling*.[4] Among them was one which was sufficiently unusual, and perhaps wrong, as to attract the eye of the Court of Appeal and, while distracting it from the real question involved, to lead it to feel justified in reversing the trial judge's decision. McBride J. had, in the earlier judgment, and on practically identical facts, expressed the opinion that the maxim *de minimis non curat lex* applies equally in criminal

[3] R.S.C., 1952, c. 201 (am. 1953-54, c. 38).
[4] (1954) 12 W.W.R. (N.S.) 581, 19 C.R. 173.

as in civil cases, and that there should be no conviction under the statute unless the accused was found to have been in possession of a reasonable amount, for example, sufficient to contribute to addiction. That the maxim is applicable in criminal cases cannot be doubted, but it is of course not of automatic application and does not call for the result at which McBride J. arrived. Trifling amounts may have great significance. Theft of a farthing is a serious offence; the selling of meat infected with germs of but microscopic size may have grave social consequences. So, too, the possession of a very small amount of heroin is a serious matter when the country is struggling to stamp out the traffic in narcotic drugs. It was therefore quite reasonable that the Court of Appeal should express the opinion that, having regard to the intention of Parliament, the terms of the subsection were to be regarded as absolute, in the sense that possession of *any* amount was unlawful.[5]

The real question involved, however, is not how much must be possessed before the possession is unlawful, but whether there was in this case any possession at all. This particular question received very little consideration from the court. The court assumed that the accused had no knowledge of the presence of the traces of heroin, but it nevertheless held that there could be a possession sufficient for the purposes of section 4(1)(d) of the act despite the absence of knowledge and, in doing so, it purported to follow a number of authorities which had held that *mens rea* was not an essential ingredient of an offence under the section.

Seldom do our courts experience any difficulty in correctly appreciating and applying a rule or concept despite the ambiguity of its expression or the fact that many ideas are masquerading under its guise. Although judges may stubbornly refuse to state in plain words, possibly even to themselves, the exact nature of *mens rea* in common-law and in statutory offences, the decisions seem usually to come out all right in the end. The present case is one of the exceptions.

It is a trite observation that in our law possession is composed of at least two elements: the fact of possession, or rather detention, and the intention to possess. There must be both *factum et animus*.[6]

[5] McBride J. had followed the unsatisfactory decision of the Manitoba Court of Appeal in *Peleshaty*, [1950] 1 W.W.R. 108, 96 C.C.C. 147, 9 C.R. 97, a liquor possession case, but Ford J.A. followed other decisions on possession of narcotics, notably *Lee Wah Yuen* (1932), 57 C.C.C. 372, and *Au Chung Lam* (1943), 81 C.C.C. 27.

[6] This is true of "direct" or "physical" possession, though there may, despite the absence of one of those two elements, be a legal continuation of possession already acquired.

The exact nature of the *animus* necessary is a subject of much debate and it is possible to show that in civil cases the *animus* need not include knowledge of existence, that a mere general intention to exclude is sufficient. The device of possession plays a very different rôle in criminal law and it should not be suggested that the civil cases must there be followed when dealing with possession, or even that all the cases on larceny (taking out of the "possession" of someone) are authoritative when considering crimes of possession.

Perhaps as a result of the general doctrine of *mens rea*, possessory crimes have always been held to involve the mental element of knowledge of the existence of the thing. And, if the crime was a common-law offence, a further mental element that would be required, as a result of one of the ordinary rules of *mens rea*, would be knowledge of the nature of the thing possessed. This latter requirement is not essential to the notion of possession, but is essential to full common-law *mens rea*. In order, therefore, to convict a person of a common-law offence of possession it was necessary to show (i) the *factum* of physical detention, (ii) the *animus* of intention to possess, (iii) the knowledge of the existence of the thing, and (iv) the *mens rea* of knowledge of the nature of the thing. In some statutory offences, of course, the position has been affected by the fact that the *mens rea* doctrine has been held to have been cut down, but cut down in part only.

Consider a statute which prohibits the possession of an unobjectionable article of commerce, say, tobacco, only if it has a particular characteristic which is undesirable, for example, that it is adulterated. An "absolute prohibition" reading of the statute will reduce the requirements as to *mens rea* so as to make knowledge of the existence of the adulteration irrelevant. But in such a case it is usually considered necessary to show that the accused knew he was possessing tobacco. If it is decided that even that type of knowledge is not necessary, then the enactment is doubly one of "absolute prohibition".

Where the possession of a thing is altogether prohibited, irrespective of its quality or further characteristics, for example, the possession of tobacco *simpliciter*, then, if it is said that the prohibition is an absolute one, knowledge that the thing was of the type prohibited is irrelevant.[7]

These two types of case are mere examples of the ordinary way

[7] It is appreciated that the distinction between identity and attribute is an unreal one, but the adoption of the distinction is convenient for the purpose of illustration and discussion.

in which the requirement of *mens rea* may be said to have been cut down in a statute. But in the general type of offence with which we are here dealing, possessory offences, it has consistently been held that the very use of the word "possession" marks a limit to how much the mental element can be said to have been reduced. In these cases knowledge of the existence of the thing is necessary, for otherwise there would be no possession. In *Woodrow*,[8] the case on possession of adulterated tobacco, Alderson B. said: "A man has not in his possession that which he does not know to be about him. I am not in possession of any thing which a person has put into my stable without my knowledge. It is clear, therefore, that possession includes a knowledge of the facts, as far as the possession of the article is concerned." Similarly Pollock C.B. said: "It appears to me that, in this case, it being within the personal knowledge of the party that he was in possession of the tobacco (indeed, a man can hardly be said to be in possession of the tobacco without knowing it), it is not necessary that he should know that the tobacco was adulterated".

Courts do not often have the opportunity of adverting to this necessity, in cases of possessory offences, of knowledge of the existence of the subject matter, possibly because persons rarely have about them or under their control things which they do not know to exist, and possibly because in such cases prosecutions are not often brought, and for good reason. In the administration of the liquor laws of this country, however, it is to be expected that the question would have received frequent judicial attention. In 1920 the Manitoba Court of Appeal in *Cappan*[9] had to deal with the defence that the accused did not know that there was an illicit still in his house. As he was charged with possession of the still and not merely with the presence of it in his house, the court held that the defence must be successful, for there could be no possession of a thing without knowledge of its existence, and Fullerton J.A. specifically drew the important distinction between knowledge of the thing's existence, which was necessary, and knowledge that it was a still, which was not necessary. In subsequent cases of liquor possession the *Cappan* case has been followed, either explicitly or, at least, in effect.

How does the drug-possession offence under section 4(1)(d) of the Opium and Narcotic Drug Act stand with regard to *mens rea*? At one time it was sought to excuse an accused, who had full knowledge

[8] (1846), 15 M. & W. 404, 153 E.R. 907.
[9] 51 D.L.R. 672, 32 C.C.C. 267.

of all the facts, merely because his possession was "innocent" in some moral sense.[10] This defence was naturally rejected, the courts saying, perhaps unnecessarily, that the offence was one in which "*mens rea* is irrelevant". The Quebec Court of King's Bench (Appeal Side), in the leading case of *Morelli*,[11] held that knowledge of the fact that the thing possessed was a narcotic drug was not necessary to an offence under section 4(1)(d) and that the act was *to that extent* one of "absolute prohibition". That decision has been followed in at least a dozen cases, one of the more recent being *Lawrence*,[12] with the only dissentient voice being that of the British Columbia Court of Appeal in *Hess (No. 1)*,[13] in which the *Morelli* case was not even mentioned.

In all those cases the facts were, for our purposes, the same. The accused knew of the existence of a powder, or a packet, or a suitcase, and intended to exercise control over the object and its contents, whatever they might be. His defence in every case was that he did not know the *nature* of the article he possessed. This knowledge was not an essential part of common-law possession, but was an essential element of common-law *mens rea* in crimes of possession. The *mens rea* is held to have been cut down in this offence. Is possession also cut down? This precise point has never been in issue before, and that is why *Quigley* is an important case.

In *Martin*,[14] in 1948, the Ontario Court of Appeal held that the possession required in section 4 of the act was the common-law possession, consisting either of (i) direct physical possession, (ii) legal or artificial possession, or (iii) the right to be put into possession. This tripartite analysis has obvious origins in Pollock and Wright's treatise,[15] where it will be seen in their treatment of, for example, direct physical possession that knowledge of the existence of the subject matter is essential. This aspect of *Martin* has been followed in Alberta in *Rogers and Byrnes*.[16] In the *Morelli* case it-

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[10] *Ganda Singh*, [1939] 3 D.L.R. 706, 72 C.C.C. 240, *Ryan* (1947), 90 C.C.C. 98.

[11] [1932] 3 D.L.R. 611, 58 C.C.C. 120.

[12] [1952] O.R. 149, 102 C.C.C. 121, 13 C.R. 425.

[13] [1949] 1 W.W.R. 577, 94 C.C.C. 48, 8 C.R. 42. The decision could have been the same by relying on the fact that the accused had not gained possession because he was still in the act of opening the parcel he found, in order to decide whether he would detain it. In basing its decision on the broader question of absence of knowledge of the nature of the contents, the court went against its previous decision in *Codd and Bentley*, [1944] 3 D.L.R. 746, 82 C.C.C. 97, which followed *Morelli*, but which was not cited in the *Hess* case except by Sidney Smith J.A., dissenting.

[14] [1948] O.R. 962, 92 C.C.C. 257.

[15] Possession in the Common Law (1888). See pp. 26, 119.

[16] [1949] 2 W.W.R. 1062, 95 C.C.C. 306.

self Rivard J. expressly, though obiter, reserves to "possession" the connotation that there must be knowledge of existence of the thing, for he was concerned to show that absurd convictions would not result from making the offence one of "absolute prohibition".

Despite the absence of authority, in fact in face of a fair amount of contrary authority, the court has in *Quigley*'s case decided that knowledge of existence is not necessary. Counsel attempted to put to the court the classical analysis, but the retort was: "The argument cannot prevail against the express language of the subsection and the decisions on it dealing with the question of possession".

Certainly the language is express: it expressly mentions "possession" as a prerequisite. And there are no decisions dealing with this aspect of possession, except obiter; and they arrive at the opposite conclusion. The unfortunate practice of the courts, previously referred to, of saying that in all crimes of "absolute prohibition" the mental element is completely irrelevant has led the court in this case to assume that even the mental elements of "possession" have been cut down, so that it is sufficient to show "mere physical possession", by which was meant *de facto* detention, not the "direct physical possession" of Pollock and Wright or of *Martin*.

This false conclusion may not be objected to if its use resulted in convicting only well-known peddlers, but of course its use could not be so restricted. What is to be the liability of the person who takes the wrong coat when leaving a restaurant, or of the person into whose pocket a packet is slipped by a cornered peddler? Where they are found to be in physical detention of a narcotic drug they will be guilty under section 4(1)(d), if *Quigley* is followed. Yet this example is the very one used by Rivard J. in the *Morelli* case to demonstrate the limits to the effect of regarding section 4 (1)(d) as one of "absolute prohibition". Such a person, he said, would not be guilty, for the very word "possession" imports the necessity both of knowledge of existence and of intention to detain. If the convictions of the innocent persons in these cases are felt to be necessary for the effective administration of the act, no strong objection should be raised. But it is submitted that the reduction of the required mental element to the extent specified in *Morelli* is adequate to cover any legitimate case.

The decision in *Quigley* is to be deplored (i) because it departs from authority and principle, (ii) because of its effects, possibly unforeseen, in this and other possessory offences, and (iii) because, on the particular facts of the case, it was unnecessary. For, although

the reasons for judgment were wrong, it does not necessarily follow that there should have been an acquittal.

The presence of microscopic quantities of drugs may not amount to illegal possession; but neither do fingerprints amount to theft. Yet each may be very good circumstantial evidence of the fact that an accused had committed an offence, and in the present case the circumstantial evidence was abundant. It is no mere conjecture to say that the evidence would have satisfied the rule in *Hodge*'s case, for the court said: "The only reasonable conclusion under the circumstances in which they were found is that each of these quantities is the remnant or residue of a larger amount".[17]

On its own finding, therefore, the court's unfortunate excursion into the field of possession was unnecessary. It forms, nevertheless, what is bound to be called the *ratio* of the case, and as such it is likely to be looked to in the future, especially in offences under the same section. It is to be hoped that decisions in the appeal courts of other provinces, or, better, one of the Supreme Court of Canada, will soon serve to detract from whatever authority it may appear to have. The latter hope is perhaps a vain one, for there has been as yet no consideration of the subsection in the Supreme Court and apparently no case involving the substantive law of any of the offences created by the act has been appealed to that court.

A. B. WESTON*

Solace for the Maligned Judge

All these generalities are as easy as they are obvious, but, alas! the application is an ordeal to try the souls of men. Write an opinion, and read it a few years later when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the power of speech, or, if not those of speech in general, at all events your own. All sorts of gaps and obstacles and impediments will obtrude themselves before your gaze, as pitilessly manifest as the hazards on a golf course. Sometimes you will know that the fault is truly yours, in which event you can only smite your breast, and pray for deliverance thereafter. Sometimes you will feel that the fault is with counsel who have stupidly misread the obvious, in which event, though you rail against the bar and the imperfect medium of speech, you will be solaced, even in your chagrin, by a sense of injured innocence. Sometimes, though rarely, you will believe that the misreading is less stupid than malicious, in which event you will be wise to keep your feelings to yourself. (Benjamin N. Cardozo, Law and Literature, from *Law and Literature and Other Essays and Addresses.* 1931)

[17] See *Sherman* (1945), 1 C.R. 153, and especially *Yok Yuen*, [1930] 1 D.L.R. 716, 52 C.C.C. 300.

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