Case and Comment

CHARITABLE TRUSTS—"CHARITABLE OR PHILANTHROPIC PURPOSES"—POWERS OF APPOINTMENT—VOID FOR UNCERTAINTY.—When a would-be testator decides to draw his own will, unless it be of the very simplest character, his chances of using words which will, in law, achieve desired objectives are, to say the least, fairly remote. The layman is usually advised, and quite properly so, to "consult a lawyer". Yet the decisions of the courts must often lead the observer to conclude that the hazards of testamentary seas are so formidable that a testator's treasure ship may flounder on unforeseen rocks in spite of the assistance of the ablest legal pilots. Such was the case in *Brewer* v. *McCauley*,[1] a recent decision of the Supreme Court of Canada, on appeal from Harrison J. in the Supreme Court of New Brunswick.[2]

The testatrix, having made a number of specific bequests of approximately $228,000 to her next of kin and of $20,500 to specific charities, directed her executors to apply her residuary estate, valued at $600,000, "for charitable, religious, educational or philanthropic purposes". After this disastrous opening the clause continued to provide that the executors were to have special powers of appointment to distribute, at their discretion, the residuary estate for the aforesaid purposes provided they were within the province of New Brunswick. A second clause provided that, "without restricting the generality of the foregoing special Powers of Appointment I express the wish that a special Trust, Scholarship or Foundation or more than one, be established and named . . .", in the name of the testatrix or her late husband.

On the initial application for directions as to the validity of these provisions Harrison J. did what he could to preserve something of the testatrix's objectives, which had undoubtedly been expressed in unfortunate phraseology. He felt compelled by Eng-

[1] [1954] S.C.R. 645; [1955] 1 D.L.R. 415.
[2] (1954), 34 M.P.R. 66; *sub nom., Re Loggie, Brewer and Murray* v. *McCauley et al.*

lish decisions to hold the first clause void for uncertainty, but acceded to the argument that the second clause established a valid charitable trust in favour of education. Accordingly he directed half of the residue to be applied for this purpose, the remainder going to the next of kin. The Supreme Court of Canada varied this direction in holding that the whole trust of the residue was void for uncertainty because it was not confined to charitable purposes.

The argument in favour of charity rested on two bases. The first was that the word "or" in the phrase "for charitable, religious, educational or philanthropic purposes" should be construed as "and". In both courts this construction was rejected on the basis of the decision of the House of Lords in *Chichester Diocesan Fund & Bd. of Finance (Incorp.)* v. *Simpson*.[3]

This decision is representative of one of the most unsatisfactory portions of the law of trusts. Equity leans towards charity in that the settlor of a charitable trust may leave the objects of his bounty unspecified, provided that those objects are made clearly and exclusively charitable within the technical definition of *Pemsel*'s case.[4] On the other hand, the existence of even the most remote possibility that the trustees might, whilst acting within the terms of the trust, apply the trust funds to non-charitable purposes will vitiate the whole trust.

Sometimes the courts have held that words such as "charitable or benevolent" really mean "charitable and benevolent", that is to say, charitable objects which were also benevolent objects.[5] In these cases gifts are upheld as valid charitable trusts. In other cases, as in the present one, the opposite result is reached.[6] A similar situation arises where the testator uses the word "and" to link general charitable and non-charitable purposes; the cases fall on either side of the line in an apparently arbitrary fashion.[7] The lawyer can do no more than hazard a guess as to which con-

[3] [1944] A.C. 341 (The *Diplock* case).

[4] [1891] A.C. 531.

[5] For example, *Re Allen*, [1905] 2 Ch. 400 (Swinfen Eady J.); *Clark* v. *Attorney General and Pritchard* (1914), 33 N.Z.L.R. 963 (Denniston J.); *Re Ludlow* (1924), 93 L.J. Ch. 30 (C.A.); *Re McClellan* (1918), 46 N.B.R. 161 (White J.).

[6] For example, *Houston* v. *Burns*, [1918] A.C. 337; *Chichester Diocesan Fund* v. *Simpson*, [1944] A.C. 341; *Re Macduff*, [1896] 2 Ch. 451 (Stirling J.); *Re Poole* (1931), 40 O.W.N. 558 (Riddell J.A., following *Re Macduff*).

[7] *Re Best*, [1904] 2 Ch. 353 (Farwell J.); *Caldwell* v. *Caldwell* (1921), 91 L.J.P.C. 95 (on appeal from the Court of Session)—"and" construed as conjunctive so that the trust was valid. Cf. *Attorney General for New Zealand* v. *Brown*, [1917] A.C. 393 (P.C.); *Attorney General* v. *National Provincial Bank*, [1924] A.C. 262 (H.L.)—"and" construed as disjunctive so that trust was invalid.

struction the courts will place on the words "and" and "or". Will they be construed in a conjunctive or disjunctive manner? The nearest approximation to a general statement which can be made is that the word "or" is more usually construed as disjunctive (thereby invalidating the trust) while "and" may be more favourably construed as conjunctive, which will enable the court to uphold the validity of the trust. In *Re Diplock* Goddard L.J., as he then was, remarked, "Indeed, when I find a rule which says that if property is left to trustees to give to charitable and benevolent purposes, that is good, but if it is for charitable or benevolent purposes, it is not, I regard it with some distaste".[8]

The courts thus appear to have got themselves into the unhappy position of feeling compelled to invalidate what were obviously intended to be charitable bequests simply because technical words of art are not used by "philanthropic" testators. Obviously legislation is the only available method of cutting this Gordian knot, and legislation has in fact been adopted in the states of Victoria and New South Wales in Australia and in New Zealand.[9] Broadly speaking, this legislation empowers the court to use a blue-pencil technique to strike out any non-charitable objects, so that the general charitable objects take the whole fund. Some writers feel that the courts are taking an unjustifiably restricted view of their powers under these acts,[10] but the legislation has undoubtedly done much to relieve the unsatisfactory state of the law, which still exists unchanged in England and Canada.

In England the Nathan Committee on Charitable Trusts[11] was fully apprised of the New Zealand and Australian legislation just mentioned. The committee recognized that:

> The fine distinctions between what is and is not charitable create serious difficulties in the drafting of gifts or bequests to charity. Yet many testators will continue to make home-made wills, and others, even though they consult the most astute and learned lawyers, may have

[8] [1941] Ch. 253, at p. 266 (C.A.), subsequently affirmed by the House of Lords in the *Chichester* case (*supra*). Actually even Lord Goddard was over-simplifying the matter since the words "charitable and benevolent" have been construed disjunctively: see *supra* footnote 7.

[9] Victoria Property Law Act, 1928, section 131; New Zealand Trustee Amendment Act, 1935, s. 2; New South Wales Conveyancing, Trustee and Probate (Amendment) Act, 1938, No. 30, s. 3, which adds a new section 37D to the Conveyancing Act, 1919-1932.

[10] An account of the cases decided under these acts is to be found in Garrow and Henderson's Law of Trusts and Trustees (2nd ed., 1953) pp. 124-127. See also E. H. Coghill, Mixed Charitable and Non-Charitable Gifts (1940), 14 Aust. L.J. 58, and E. C. Adams, Trusts for Charitable and/or Non-Charitable Purposes (1941), 15 Aust. L.J. 134.

[11] Report of the Committee on the Law and Practice relating to Charitable Trusts (Cmd. 8710, 1952).

> their wishes frustrated by a technical rule of law. These three enactments and their apparently successful application in practice would seem to reinforce the argument that testators should be protected, by the legislature, from the consequences of their own folly or the mistakes of their draftsman.[12]

After this promising analysis of the present law comes the committee's most astonishing reasons, if they are even worthy of being called reasons, for rejecting the idea of amending legislation:

> We have said that the principle that every person must be presumed to know the law is of fundamental importance. Even the interests of charity would not justify the dangerous precedent which would be established by an exception to this principle. The correct drafting of a gift or bequest to charity is difficult; so too is the drafting of many other legal documents. . . . charitable trust instruments already enjoy important privileges. . . . To protect charitable instruments, alone among legal documents, from the consequences of mistakes in their drafting would, in our opinion, be an unwarranted extension of these privileges.[13]

The committee did however recommend legislation to validate a large number of existing trusts which, having been successfully administered for a number of years, were suddenly found to be invalid because some of their secondary objects were strictly non-charitable. The two cases which drew attention to this situation were *Ellis* v. *Commissioners of Inland Revenue*[14] and *Oxford Group* v. *Commissioners of Inland Revenue*.[15] As a result of the committee's recommendation the Charitable Uses (Validation) Act, 1954,[16] was enacted to validate those trusts which had already been created, but not any similar trusts which testators might attempt to establish in the future. The provisions of this English act seem wide enough to validate trusts of the *Diplock* and *Brewer* type, which are already in existence and have not been challenged, but, of course, the position of future trusts remains unchanged.[17]

[12] Para. 533, at p. 132.

[13] *Ibid.*, para. 534. In paragraph 535 the committee states, presumably in all seriousness, "A testator must say what he means in words apt in law to achieve the purpose he desires and, consequently, he must be taken to have meant what he said. From this it follows that every will must be construed as it stands. To require the Court to determine, not what the testator has said but what he intended to say, would be to throw an intolerable burden on it, *and to create a state of uncertainty in the minds of all testators and their legal advisers as to what necessarily might eventually be read into their words* [my italics]." The irony of this argument is, of course, that the portion in italics is aptly descriptive of the position under the existing law.

[14] (1949), 31 T.C. 178 (C.A.).

[15] [1949] 2 All E.R. 537 (C.A.).

[16] 2 & 3 Eliz. 2, c. 58.

[17] For an interesting account of the background to, and provisions of the act, see Spencer G. Maurice, Validation of Charitable Trusts (1954), 18 Conv. and Prop. Lawyer 532.

Since the Supreme Court of Canada in the *Brewer* case has now expressly incorporated the *Diplock* case and its idiotic linguistic gymnastics into Canadian law, it seems obvious that a good case can now be established for the enactment of ameliorating legislation by the provinces on the lines of the New Zealand and Australian acts. This, of course, will provide cold comfort for the charities which might have benefited in the instant case.

It will be recalled that the testatrix in *Brewer* v. *McCauley* had expressed the desire, in a supplementary clause, that the trustees should establish "a special Trust, Scholarship or Foundation" and the argument, which found favour with Harrison J. at first instance, was that this established a valid educational trust which could be severed from the obnoxious "charitable . . . or philanthropic" phraseology in the principal clause. The Supreme Court rightly rejected this argument on the ground that the context of the will clearly indicated that the trustees' discretion in the principal clause extended to the whole fund and there was no fiduciary obligation imposed on them to establish an educational trust even if the words "a special Trust . . ." could be so construed.

The second argument advanced in favour of the validity of the gift to charity was that the testatrix had given her trustees a power of appointment to allocate the funds among mixed general purposes and, being a power of appointment as distinct from a trust, the rules on certainty of objects were inapplicable. This particular argument does not seem to have been put before Harrison J. at first instance. It appeared in the factum presented to the Supreme Court on behalf of the Attorney General for New Brunswick in these words:

> If it is a good power of appointment the Court is not concerned whether the objects are charitable since the trustees have complete discretion. . . . the Court can ignore all the technical distinctions so artificially woven into English law respecting charities.

This argument really involved three related questions:

(a) Did the words of the will create a special or general power of appointment or neither?

(b) Is there any fundamental distinction between a testamentary trust and a testamentary power of appointment?

(c) In more general terms, to what extent, if at all, can a testator leave the choice of beneficiaries to others?

Professor A. W. Scott has pointed out[18] that any rule of public

[18] Trusts for Charitable and Benevolent Purposes (1945), 58 Harv. L. Rev. 548, at p. 566. For a discussion of the distinction between powers of appointment and trusts in *inter-vivos* documents, see Gilbert D. Kennedy,

policy which prohibits the delegation of testamentary power must be equally applicable to both trusts and powers of appointment and that, although there is a multitude of cases which hold that a trust for general non-charitable purposes fails for uncertainty, there is little authority on the validity of a power of appointment over property for the same purposes. It was perhaps this dearth of adverse authority which prompted this invitation to the Supreme Court to construe from the words of the testatrix a power of appointment and thereby reach a position where it could "ignore all the technical distinctions so artificially woven into English law respecting charities". It is the almost cavalier treatment of this argument which, in the writer's opinion, is the most disappointing aspect of the case. The Supreme Court failed to take a unique opportunity of giving guidance to the profession on a very practical problem on which existing authorities give little or no enlightenment. Rand J. did not mention the argument in his judgment and Kellock J., with whom Estey, Cartwright and Fauteux JJ. concurred, dismissed it in a mere sentence saying, "The argument may be disposed of by reference to the decision of Romer J., as he then was, in *Re Clarke*, [1923] 2 Ch. 407, at pages 419-20, with which I respectfully agree". This portion of the judgment of Romer J. reads: "For a power to appoint to charitable and non-charitable indefinite objects is just as invalid as a direct gift to such objects".

It is regrettable that the Supreme Court did not make reference to the excellent analysis of the overlapping of powers of appointment and trusts in *Tatham* v. *Huxtable*,[19] a decision of the High Court of Australia. In this case a testator gave a number of specific legacies, including two to his executor, and then provided that the executor should distribute the surplus "to the beneficiaries of this my Will and Testament, in addition to the amount already specified, or to others not otherwise provided for who, in my opinion have rendered service meriting consideration by the Testator". Fullagar and Kitto JJ. (Latham C.J. dissenting) held that the testator had not provided a definite criterion for the ascertainment of his beneficiaries and therefore the entire residuary gift was void for uncertainty. The analysis in the majority judgments of the nature of a power of appointment and the justification for upholding testamentary powers of appointment of certain defined categories is certainly more useful than the rather abrupt judgments in *Brewer*

Pure Power and Power in Trust (1954), 7 University of New Brunswick L.J. 7, based on *Re Gestetner*, [1953] 1 All E.R. 1150.

[19] (1950), 81 C.L.R. 639.

v. *McCauley*, although in both cases the attempted gifts were frustrated.

In conclusion two recommendations may be summarily restated. The first is that legislation now appears necessary to free Canadian courts from the burden of hair-splitting English precedents concerning the mixture of testamentary charitable and non-charitable objects of a general nature. The sensible statutes in New Zealand and two of the Australian states provide sound legislative precedents: cases such as *Brewer* v. *McCauley*, the justification. Secondly, with the greatest respect, the Supreme Court of Canada must face up to its responsibility, as our final appellate court, for moulding the jurisprudence of this country in accordance with its peculiar needs. This responsibility can only be discharged by the handing down of judgments which contain the fullest analytical examination of the legal issues involved, and their bases, and by making new contributions to the common law and equity which this country has inherited.

ERIC C. E. TODD*

* * *

SUPREME COURT OF CANADA — STARE DECISIS — RÔLE OF CANADA'S FINAL COURT — UNSATISFACTORY NATURE OF REASONS FOR JUDGMENT. — My colleague, Mr. Todd, has just commented upon one aspect of the unfortunate decision in *Brewer* v. *McCauley*[1] and has suggested another in his last sentence. I agree with his remarks, but should like to add something about the rôle of a final court of appeal, using the *Brewer* case as an example. In that case, five of the nine judges of the court sat. Reasons for judgment were given by Rand and Kellock JJ. The three other judges concurred with Kellock J. The matter involved the residue of an estate, a sum of approximately six hundred thousand dollars. The question of law was of sufficient importance that an appeal was taken *per saltum*.

The one-and-a-half page judgment of Rand J. can be summarized fairly as follows:

> Notwithstanding the exhaustive argument of Mr. Carter, I have no doubt about what our judgment should be. . . . [T]he residue is to be given and applied 'for charitable, religious, educational or philanthropic purposes'. . . . [T]he last word is indistinguishable from 'benevolent' and admittedly the authorities in England have pronounced on both of them. . . . *Chichester* v. *Simpson*[2]. . . . The appeal must, there-

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[1] [1954] S.C.R. 645; [1955] 1 D.L.R. 415.

[2] [1944] A.C. 341 (H.L.).

> fore, be dismissed, and the cross-appeal allowed; the judgment below should be varied so as to declare that the whole of the purported trust of the residue is void for uncertainty. . . .[3]

Kellock J. in three and one half pages stated the facts and the effect of the judgment below, recited in summary form *some* of the arguments of counsel, and proceeded:

> I do not think it necessary to discuss these arguments in detail. In my view, upon the language of this will it is impossible to read the word 'or' as conjunctive. Accordingly, while the word 'charitable' must receive its technical meaning, and there is no difficulty about the words 'religious' and 'educational', the presence of the word 'philanthropic' vitiates the gift. In my view, the case at bar is governed by the principle of the decision in *Chichester Diocesan Fund* v. *Simpson.* The earlier decision in *Attorney-General for New Zealand* v. *Brown,*[4] may also be usefully referred to. In this view the appeal fails. . . .[5]

A few remarks follow to the effect that a testator must not leave it to others, save in charity cases, to select his beneficiaries. On this point reference is made, not only to the *Chichester* case, but also to one or two other well-known cases. After disposing of the cross-appeal, his lordship continued:

> An argument was addressed to us on behalf of the Attorney General for New Brunswick to the effect that as the testatrix had used, in the first sub-paragraph, a form of words which gives to her trustees a power of appointment for the purpose of allocating among the named purposes instead of simply constituting a trust for the purpose, the will was not open to the objection given effect to in the decisions to which I have referred. The argument may be disposed of by reference to the decision of Romer J., as he then was, in *In re Clarke*, at pages 419-20, with which I respectfully agree.
>
> I would therefore dismiss the appeal and allow the cross-appeal, . . .[6]

Brevity is a welcome change when we consider some of the lengthy summaries of facts which the court has had to set out in some recent cases. But has brevity not been carried too far here? Has the court dealt adequately with the problems before it?

Neither report of the case tells us much of Mr. Carter's "exhaustive argument". The appeal was brought by the executors (Brewer et al.) and by the Attorney General. Counsel (including Mr. Carter) appeared for the executors. Separate counsel appeared for the Attorney General. Both supported the validity of the gift of the residue. The validity of this gift was an important point

[3] Rand J., at pp. 646-647 (S.C.R.), 415-417 (D.L.R.). His lordship also referred to the Court of Appeal judgment in the *Chichester* case and to two other lower-court decisions.

[4] [1917] A.C. 393 (J.C.P.C.).

[5] Kellock J., at p. 649 (S.C.R.), 418 (D.L.R.).

[6] At p. 651 (S.C.R.), 420 (D.L.R.).

of law, involving not only the question of a direct gift for "philanthropic" purposes (and such other purposes as may have been linked with it) but also the question of the validity of such a gift by way of a power of appointment. No suggestion appears in the judgments that there is support in the cases (not cited by the court) for the validity of the main gift, that the *Chichester* (*Diplock*) case has been severely criticized on both grounds by at least one very competent writer, or that there were strong arguments in favour of distinguishing the *Chichester* decision. There is nothing in the judgments to suggest that the judges considered the merits of the *Chichester* rules. The approach in both sets of reasons for judgment seems to be simply, so far as one can judge from the words used—"the authorities in England have pronounced".[7] Even if their lordships agreed with the merits of the result they were reaching (and there is no indication in the report), would it not have been better if they, a nation's highest judicial body, had given reasons why they preferred one view to the other on each point?

It is true that judges are human. They can only do so much in a day. They do not have the opportunity to write, rewrite and reconsider their judgments in the same way as do we who write in periodicals in criticism of them. They have not the assistance of an editor, such as the editor of this periodical, to make them clarify their thinking, in simple English. On this score I do not criticize. Our judges produce, and have produced over the years, some of the finest examples of logical analysis expressed in simple English to be found anywhere. But I do suggest that in this case our highest court has failed to discharge the heavy responsibility resting upon it. They have apparently renounced that responsibility in favour of, "the authorities in England have pronounced".[8]

Judges, as human beings, cannot know all the law or be expected to be aware of all the possible views upon any particular subject. They must to a large extent rely upon the bar for materials, ideas and a thorough presentation of the legal issues. But there is a point beyond which the bar cannot go. The actual decision, which often involves, especially in a highest court, serious questions of policy, is the sole responsibility of the court. It is very easy to say that it would be disquieting to legal advisers or to "established" practice to permit an inquiry into the merits of a case when that case, or a somewhat comparable model, was decided one way in England some years ago. The easy way out is

[7] Rand J., at p. 647 (S.C.R.), 416 (D.L.R.). [8] *Ibid.*

certainly to accept that verdict. For Canadian courts that may have been all very well when there was a Privy Council to "set the law right". If it ever was, it is no longer. The challenge to the bar and bench of Canada has been made; shall we accept it?

Admitting all these difficulties, let me deal more specifically with the *Brewer* case. I have suggested that here the court has not faced its responsibility. Were counsel deficient? Counsel for the Attorney General, in their factum, invited the court to find, inter alia, a valid charitable intent; that the use of "philanthropic" was not necessarily fatal (as a question of interpretation, it might be limited to charitable purposes); that "or" was not necessarily disjunctive; that, if there is a power of appointment, the court is not concerned with whether the gift is charitable or not; and that, in any event,

> Canadian Courts have not invariably considered themselves bound by decisions of English Courts of higher jurisdiction. *That is now especially true since the Supreme Court of Canada is the Court of last resort in Canada.*[9]

The court's attention was drawn, in support of these arguments, to the American Restatement of the Law of Trusts, to Canadian, English, New Zealand and American cases (and especially to the qualifying words in the judgments in the *Chichester* case itself), to Austin Wakeman Scott's learned criticism of the *Chichester* decision in the Harvard Law Review, to a number of leading English and American works on trusts, to cases and articles on *stare decisis* and the effect of English decisions in Canada, and to Laskin's valuable article in this review on "The Supreme Court of Canada",[10] where the responsibilities and opportunities facing the court as a truly highest court are thoroughly canvassed. The court may choose upon reflection in any particular case to adopt and follow the reasoning of Privy Council and House of Lords cases just as it may turn "to decisions of final courts in other common law and civil law countries", or it may choose a different solution for the case before it.

Counsel for the executors, also appellants, expressly stated as the third ground of appeal:[11]

> 3. The learned trial judge was not bound by the decision in *Chichester Diocesan Fund* v. *Simpson* (1944) A.C. 341 or by decisions in other English and Judicial Committee of the Privy Council cases because:

[9] Factum of Attorney-General for New Brunswick, at p. 17. The italics are added.

[10] (1951), 29 Can. Bar Rev. 1038, at pp. 1071-1072.

[11] Factum of appellants Brewer and Murray, executors and trustees of the last will of Alexandra Loggie, at p. 4.

(a) those decisions are distinguishable from the present case and (b) the Supreme Court of Canada is not bound by decisions of the House of Lords or lower English courts, or by decisions of the Judicial Committee of the Privy Council except in Canadian cases, and ought not, in the present case, to follow such decisions.

At page 11, they expressly submit, with reasons in support, that the *Chichester* decision is wrong. And, at page 21, they say:

> It is further submitted that, since the abolition of appeals from Canadian courts to the Judicial Committee (amendment to Supreme Court Act, C. 37, 1949 Statutes of Canada) the decisions of the House of Lords are no longer binding on this Honourable Court. They are of strong persuasive value but they are only persuasive, not binding. Therefore the decision in the *Chichester* case (1944) A.C. 341, even if not distinguishable from the present case, is not binding on this Court. It is true that in the *Robins* case (1927) A.C. 515 it was said that decisions of the House of Lords were binding on Colonial courts. That case, however, was decided before the decision in *A.-G. for Ontario* v. *A.-G. for Canada* (1947) A.C. 127 and before the abolition of appeals to the Judicial Committee. *It can no longer be said that this Honourable Court is in any sense a 'Colonial court'.* The House of Lords is not a part of Canada's judicial system. It was linked to our system through the Judicial Committee, and, now that the link is gone, its position is no longer one of authority but only of persuasion. Final appellate authority lies with the Supreme Court of Canada. [Italics added.]

These remarks are then enlarged upon in the factum and, repeating the submission that the *Chichester* case should not be followed, reference is not merely made to Scott's article but a short portion of it is quoted.

None of these matters is discussed or mentioned in the court's judgment.

I am not concerned, for the moment, with the merits of the decision in this case. I do draw attention, in this rather blunt way, to the failure by our Supreme Court to deal in a forthright manner with these arguments of very great importance to Canadians, the living and the yet unborn. Counsel were *not* at fault here; the court was fortunate in having such valuable briefs. The responsibility for failure, if I am correct that there was a failure, must rest in this instance on the court. Unfortunately this is not an isolated instance. But it is enough to make Canadians pause and ask why the Supreme Court is not meeting our expectations of it as a highest court. This appeal involved only a matter of six hundred thousand dollars in a private estate in one province. If the result is unsatisfactory, it can be overturned shortly by a simple act of the New Brunswick legislature altering the disposition of the estate

of Alexandra Loggie. But is the decision symbolic of the kind of decision we are likely to receive in fundamental constitutional cases, which cannot be so easily overturned? We are perhaps entitled to express the hope that it is not. And I am sure that the members of the court will, as time goes on, apply that same vision and statesmanship that have made Canada a nation. Baldwin and Lafontaine would hardly have been content with, "the authorities in England have pronounced". In this new era of judicial independence let us turn to others for guidance, and then make our own decisions as Canadians.

GILBERT D. KENNEDY*

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JOINT BANK ACCOUNTS — CREATION — TESTAMENTARY ACT OR PRESENT GIFT INTERVIVOS — AN UNSETTLED POINT. — A point of considerable practical importance was recently decided by Mr. Justice Danis of the High Court of Ontario in *Larondeau* v. *Laurendeau*.[1] It is that a gift made by means of opening a joint bank account with the usual right of survivorship (the presumption of a resulting trust in favour of the donor having been rebutted) is in its nature testamentary and will, upon the death of the donor, be ineffectual in the absence of a will executed in conformity with the Wills Act.[2] With the greatest respect to the learned judge, who cites only one case (an Ontario trial judgment, *Hill* v. *Hill*,[3] which was delivered in 1904), the point does not appear to be authoritatively decided in Canada or England and the weight of such authority as there is seems to be against the conclusion he reached. In Ontario, at least, the value of *Hill* v. *Hill* may be seriously questioned,[4] for in 1921 the Appellate Division of the Supreme Court in *Re Reid*[5] decided by a majority of four to one,[6] and in support of the trial judge, that, upon facts difficult to distinguish from those in the recent case before Danis J., there was a completed intervivos gift. Mr. Justice Hodgins, who dissented, held (as

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[1] [1954] O.W.N. 722, 4 D.L.R. 293.

[2] R.S.O., 1950, c. 426.

[3] (1904), 8 O.L.R. 710.

[4] Nevertheless it does appear to have been followed on a number of occasions. See, for example, *Van Wart* v. *Synod of Fredericton* (1912), 5 D.L.R. 776 (N.B.); *Re Daly; Daly* v. *Brown* (1907), 39 S.C.R. 122 (N.B.); *Shortill* v. *Grannan* (1920), 55 D.L.R. 416 (N.B.); *Stadder* v. *Canadian Bank of Commerce*, [1929] 3 D.L.R. 651 (Ont.); *Southby* v. *Southby* (1917), 38 D.L.R. 700 (Ont.).

[5] (1921), 20 O.W.N. 382, 50 O.L.R. 595.

[6] *Per* Meredith C.J.O., Maclaren, Magee and Ferguson JJ.A. concurring, Hodgins J.A. dissenting, thereby affirming the judgment of Latchford J. at trial, 18 O.W.N. 97.

did the judgment in *Larondeau* v. *Laurendeau*) that there was an attempted testamentary gift that failed for non-compliance with the Wills Act. Doubtless *Re Reid* was not brought to the attention of Mr. Justice Danis.[7] In the only other Canadian decision the writer has been able to discover touching the point and reported during the past twenty-five years, *French* v. *French*,[8] Mr. Justice LeBel, also of the High Court of Ontario, in the course of obiter dicta states: "In conclusion I should perhaps add that if the deceased intended that the defendant should have the money remaining in the joint account at the time of his decease, which is not at all clear, he could have made his intention effective in law only by means of a will". No authority is cited.

What, then, is the law today in Ontario and other common-law provinces having comparable Wills Acts? Perhaps the explanation for its seemingly unsettled state lies in the relative scarcity of reported cases in point both here and in England and, one might suspect, also in a lack of diligence in preparation on the part of counsel who argued the *Larondeau* case. For though there may be a dearth of case law, there is hardly a lack of legal writing on this matter. An article by Mr. John Willis appeared in this review in 1936[9] and Dr. C. A. Wright wrote a comment in 1937[10] upon a

[7] *Re Reid* has, however, been considered in at least the following decisions in Ontario: *Re Hodgson* (1921), 50 O.L.R. 531 (Middleton J.); *Parks* v. *Royal Bank of Canada* (1922), 23 O.W.N. 194 (Latchford J.); *Mathews* v. *National Trust Co. Ltd.* (1925), 29 O.W.N. 110 (Rose J.); *Woolcox* v. *French* (1927), 32 O.W.N. 32 (Lennox J.), and *Re Baechler* (1931), 66 O.L.R. 483 (Garrow J.).

[8] [1952] O.W.N. 806, O.R. 889.

[9] Willis, The Nature of a Joint Account (1936), 14 Can. Bar Rev. 457. His conclusion is worth quoting in full: "Doubt has recently been thrown upon the right of B to claim money deposited by A in the X Bank to the joint account of A and B by way of gift. Every one will agree with Lord Atkin that an argument which casts such a doubt is 'inconsistent with well-established banking practice and likely to impair the confidence in deposits made in joint names,' and 'not attractive hearing for customers or potential customers of the bank'. [*McEvoy* v. *The Belfast Banking Co.*, [1935] A.C. 24, 43] Unfortunately the judgments of the three concurring Law Lords and the separate judgment of Lord Atkin in the *McEvoy Case* have only increased that doubt. The writer has therefore examined four legal theories upon which B might acquire the right that common sense and convenience alike demand that he should have. Three of them have been dismissed as unsound: (i) the orthodox theory which extends to a joint account the principles applicable to a transfer of stock into the joint names of A and B: (ii) the theory of Lord Atkin that A, the depositor-donor, enters into a contract with the X Bank as agent for B the donee, which contract B may subsequently ratify: (iii) the theory that A in depositing the money declares himself trustee of his claim against the bank for himself and B as joint cestuis que trust. The fourth theory, that in depositing the money A simultaneously makes a contract with the bank and assigns his claim against the bank by writing under the Judicature Act to himself and B jointly, is no less fictional than the others, but it is preferable to them in that, so far as the writer can see, it does not run counter either

most valuable and instructive decision of the High Court of Australia,[11] which decision, incidentally, disapproved of the Canadian cases stemming from *Hill* v. *Hill*. In 1949 the present writer commented[12] upon the English case of *Young* v. *Sealey*,[13] which cited with approval and followed the Ontario decision in *Re Reid*. *Young* v. *Sealey* has also received attention in the Modern Law Review,[14] the Law Journal[15] and the Conveyancer and Property Lawyer.[16]

It is not intended in the present comment to discuss the subject anew or in any detail. The references here given should form an adequate starting point for research, there being little useful judicial discussion in recent years save in the Australian case in 1936,[17] which has been spoken of as "one of the very few cases which makes the proper analysis of conferring rights in a chose in action as distinguished from rights to 'money' ",[18] and in the English trial decision in 1948[19] already mentioned. The two recent Ontario judgments must, however, be deplored. It would not appear that counsel in either the *French* or *Larondeau* cases were aware of the considerable authority, in Ontario and elsewhere, for the proposition that the creation of a joint bank account could constitute a valid present gift intervivos. Instead of clarifying the law, these decisions tend to obscure it, since they fail to discuss cases that are, it is submitted, entitled to some respect, and attempt no resolution of the opposed approaches to the problem which have bedevilled its solution in the past.[20] They also provide

to the intention of A or to any positive rule of law. Its novelty and complexity, however, render it a little suspect, and the writer submits it, and then with some diffidence, only because of a conviction that no long time can elapse before a court will be faced with the problem of how to give, not good, but any legal grounds at all for upholding a transaction which is every day entered into without question. When are we going to have third party beneficiary contracts?"

[10] (1937), 15 Can. Bar Rev. 371.

[11] *Russell* v. *Scott* (1936), 55 C.L.R. 440.

[12] (1949), 27 Can. Bar Rev. 344.

[13] [1948] W.N. 498, [1949] 1 All E.R. 92, Ch. 278, L.J.R. 529, 93 S.J. 58.

[14] (1949), 12 Mod. L. Rev. 380.

[15] (1949), 99 L.J. 552.

[16] (1949), 13 Conv. (N.S.) 226.

[17] *Russell* v. *Scott*, *supra*.

[18] Dr. C. A. Wright in (1937), 15 Can. Bar Rev. 371, at p. 373.

[19] *Young* v. *Sealey*, *supra*.

[20] A brief quotation from Dr. C. A. Wright's comment upon *Russell* v. *Scott* in (1937), 15 Can. Bar Rev. 371, at p. 375, puts both the testamentary act and the intervivos gift arguments in a nutshell. It is also compelling in its advocacy of the latter. "It may sound plausible to say that as the donor retained the beneficial interest in the 'money' until her death, a disposal of this beneficial interest after her death must be made by a will. On the other hand if the subject of the gift is regarded as the chose in ac-

an illuminating commentary upon the use of legal periodicals by the profession in the preparation of argument.[21] Let it be hoped that a persevering litigant, aided by industrious counsel, may soon bring this matter before a provincial appellate court or, better still, the Supreme Court of Canada. Though the problem is a narrow one, there can be few in the field of commercial law that affect a larger body of the public. Gifts through the creation of joint bank accounts must surely be one of the commonest practices of the non-will-making section of the community. And it is a large section.

MAXWELL BRUCE*

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TAXATION—SUCCESSION DUTY—DUTY-FREE BEQUEST—LEGAL ARITHMETIC.—The recent decision of Potter J. of the Exchequer Court in *Hospital for Sick Children* v. *Minister of National Revenue*[1] gives rise to some interesting speculations on the need for a text on "Arithmetic for the Legal Profession". The facts, shorn to essentials, were as follows. A testator's whole estate was of net value $995,670.02. He had left to his wife various items, including a legacy of $100,000.00, insurance and an annuity, the total of the succession to her being $655,363.51, and the residue, after other gifts totalling $3,000.00, to the Hospital for Sick Children. There was a direction in the will that the trustees of the estate should pay from the capital of the estate ". . . all succession duties and inheritance and death taxes . . .".

The Minister of National Revenue contended that the succession duty should be determined by calculating the duty upon the gift, adding that to the gift and then recalculating the duty. This new duty should then be added to the gift and the duty again recalculated. This process is to be continued until there is no further

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tion against the bank, it will be seen that the beneficial contractual right of survivorship was created at the time the joint account was made. This should not be regarded as a testamentary act. . . . Promises to leave property on death have been uniformly enforced without any objection that they are testamentary. [*Fentos* v. *Emblers* (1762), 3 Burrow 1278] If the opening of the joint account creates a contractual duty on the part of the bank to pay money on the death of the donor to the donee, it would likewise seem that the corresponding contractual right should be respected as a present gift inter vivos."

[21] In this connection see the article by the editor of this review entitled "Legal Periodicals and the Supreme Court of Canada" (1950), 28 Can. Bar Rev. 422.

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[1] [1954] Ex. C.R. 420.

increase, and the duty payable is this figure which does not increase. Using symbols:

The original gift is ..... G
Duty upon G ..... $D(1)$
First recalculated gift ..... G plus $D(1)$
First recalculated duty ..... $D(2)$
Second recalculated gift ..... G plus $D(2)$
Second recalculated duty ..... $D(3)$
Third recalculated gift ..... G plus $D(3)$
Third recalculated duty ..... $D(4)$, and so on.

At some stage, say $D(n)$, it would be found that the duty did not increase any further, no matter how many more recalculations were made. The duty then would be this figure $D(n)$. The same result would be reached more quickly by calculating the amount subject to duty which, less the duty, would equal the duty-free gift. Thus, if the amount be A and the duty upon A be D, and A less D equals G, the duty-free gift, then the duty to be collected upon the duty-free gift G would be D.

Potter J., however, decided that the process should stop after one recalculation. The duty upon the legacy is to be calculated and added to the legacy. Upon that total a new duty is to be calculated, which is to be the duty payable in respect of the legacy. In the instant case the duty required under the minister's method, added to the legacy, exceeded the total estate. The minister therefore considered the whole estate as a succession to the wife, who would thus have received $616,076.72, some $40,000.00 less than the amount the testator had specifically left to her duty free. The method selected by Potter J. gave a duty of $327,815.93 on the legacy of $655,363.51 to the wife, which, added to the legacy to her and to the other gifts ($3,000.00), left a residue of $9,490.58.

Without going into the legal niceties of the problem, the arithmetical process has some interesting aspects, which are illustrated by the following examples:

Example 1:

Suppose an estate of aggregate net value $940,000 and that T, the testator, is interested in leaving his wife the maximum sum after duty that he can arrange.

(a) If T leaves everything to his wife the duty payable will be as follows:

Aggregate net value: $940,000.		Initial rate	12.7%
Wife: Exempt (Section 7(i)(a)	$ 20,000		
Dutiable	$920,000	Additional rate	25.4%
		Total rate	38.1%

Duty on $920,000—$350,520

(b) If, however, *T* leaves to his wife a duty free gift of $630,000, the duty payable will be calculated, on the method approved in *Hospital for Sick Children* v. *Minister of National Revenue*, as follows:

Aggregate net value: $940,000.		Initial rate	12.7%
Wife: Legacy $630,000			
Exempt	$ 20,000		
Dutiable	$610,000	Additional rate	23.0%
		Total rate	35.7%

Duty on $610,000 — $217,770.

Recalculation:

Wife: Legacy $630,000 + Duty $217,770 = $847,770		Initial rate	12.7%
Exempt	$ 20,000		
Dutiable	$827,770	Additional rate	24.6%
		Total rate	37.3%

Duty on $827,770—$308,758

and this is the duty payable, which, added to the legacy of $630,000, gives $938,758, which, for practical purposes, exhausts the estate.

Example 2:

Suppose two men, *X* and *Y*, die each leaving an estate of $940,000 and that *X* leaves to his wife a sum subject to duty which, on deduction of duty, will leave her $550,000 duty paid, whereas *Y* leaves his wife $550,000 free of duty. In each case suppose that the residue is left to a child over eighteen years of age.

(a) Calculation shows that if *X* leaves to his wife the sum of $868,000 liable to duty, then the duty will be as follows:

Aggregate net value: $940,000.		Initial rate	12.7%
Wife: Legacy $868,000			
Exempt	$ 20,000		
Dutiable	$848,000	Additional rate	24.8%
		Total rate	37.5%

Duty on $848,000 — $318,000. (Note: The legacy less the duty is exactly $550,000.)

			Initial rate	12.7%
Child: Residue	$72,000	Dutiable $ 72,000	Additional rate	9.6%
			Total rate	22.3%

Duty on $72,000 — $16,056.

Residue, less duty, $55,944, and the disposal of the estate is:

Wife:			$550,000
Child:			$ 55,944
Duty:	Wife	$318,000	
	Child	$ 16,056	$334,056
			$940,000

(b) *Y* has left his wife $550,000 free of duty. The calculation of tax payable will then be:

Aggregate net value: $940,000.			Initial rate	12.7%
Wife: Legacy	$550,000			
		Exempt $ 20,000		
		Dutiable $530,000	Additional rate	22.2%
			Total rate	34.9%

Duty on $530,000 — $184,970

Recalculation:

Wife: Legacy $550,000 + Duty $184,970 = $734,070			Initial rate	12.7%
		Exempt $ 20,000		
		Dutiable $714,970	Additional rate	23.8%
			Total rate	36.5%

Duty on $714,970 — $260,964

			Initial rate	12.7%
Child: Residue	$129,036	Dutiable 129,036	Additional rate	14.2%
			Total rate	26.9%

Duty on $129,036 — $34,710

Residue, less duty, $94,326, and the disposal of the estate is:

Wife:			$550,000
Child:			$ 94,326
Duty:	Wife	$260,964	
	Child	$ 34,710	$295,674
			$940,000

Here it may be noted that the gift to the child might also have been duty free in the sum of approximately $97,200, the duty on which would be $31,775, totalling $128,975, so that a further $3,000 of succession duty might be saved.

Recapitulating these examples, it appears that:

(1) On an estate of $940,000 a tax free gift to the wife of $630,000 will attract duty of 308,758, which for practical purposes exhausts the estate, while a disposition wholly to the wife attracts duty of $350,520 and she gets some $42,000 less.

(2) On an estate of $940,000 a legacy to the wife subject to duty of $868,000 will net the wife $550,000 and leave a residue of $72,000. A duty free legacy of $550,000 will attract duty of $260,964 and leave a residue of $129,036, which is some $57,000 more.

These results indicate a mathematical unsoundness in Potter J.'s decision. The minister's contention is equivalent to saying that the beneficiary of a duty free gift has actually received that gross amount which, less the duty, would equal the specified duty free gift: and this seems basically reasonable and mathematically sound. Correction to the decision may be forthcoming by statute. In the meantime, however, perhaps some revision of the Wills Book might be worth while.

J. B. WATSON*

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ADMINISTRATIVE LAW — DISCOVERY — WHETHER MINISTER OF NATIONAL REVENUE CAN REFUSE TO PRODUCE INCOME TAX RETURNS — CONCLUSIVENESS OF MINISTER'S STATEMENT THAT PRODUCTION WOULD BE PREJUDICIAL TO THE PUBLIC INTEREST. — The important decision of the Supreme Court of Canada in *Re Constitutional Questions Determination Act (B.C.)*: *Regina* v. *Snider*[1] is likely to confine within narrower limits than hitherto the power of government departments in Canada to refuse, on the ground of prejudice to the public interest, to allow documents filed with them to be put in evidence in legal proceedings. Although the point actually decided was relatively narrow — the Minister of National Revenue's claim of a common-law privilege to refuse, on this ground, to produce any income tax return or statement being held inapplicable

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[1] [1954] S.C.R. 479; [1954] 4 D.L.R. 483. The decision of the British Columbia Court of Appeal in this case, [1953] 2 D.L.R. 9, was commented on by F. E. LaBrie at (1953), 31 Can. Bar Rev. 927.

to criminal proceedings—the reasons given by most of the members of the court suggest that the principles laid down by the House of Lords in the well-known case of *Duncan* v. *Cammell, Laird & Co.*[2] can no longer be relied on in Canada. They also suggest that the line of recent cases,[3] which establishes the minister's right to refuse production of income tax returns in civil cases by merely stating that in his opinion their production would be prejudicial to the public interest, has been overruled. Indeed Kellock J., with whom Kerwin, Taschereau and Fauteux JJ. concurred, specifically disagreed with *Weber* v. *Pawlik*, the British Columbia representative in that line.

In the *Duncan* case a government department objected to the production (a) in civil proceedings between the builder of a submarine and his sub-contractor of (b) the plans of the submarine and (c) gave no ground for its statement that their disclosure would be prejudicial to the public interest—but it is quite obvious to anyone that such disclosure might give away important defence secrets. In the present case the federal Department of National Revenue objected to the production under subpoena issued by a provincial attorney-general (a) in a criminal prosecution for conspiracy to keep a common betting house, (b) of the accuseds' income tax returns and statements (c) on the ground that their production would violate a tacit understanding between all taxpayers and the department that they will be kept secret and would in this way prejudice the public interest. On their facts the cases are, of course, miles apart, but in the *Duncan* case Lord Simon, in delivering the unanimous judgment of the House of Lords upholding the department's objection, and after reviewing all the cases, laid down the following wide principles:

1. "The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document or (b) *by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.*"[4]

2. An objection taken to production on the ground that this

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[2] [1942] A.C. 624.

[3] *Re Geldart's Dairies, Limited* (1949), 30 C.B.R. 120 (New Brunswick); *M. N. R.* v. *Die-Plast Co. Ltd.*, [1952] 2 D.L.R. 808 (Quebec); *Weber* v. *Pawlik*, [1952] 2 D.L.R. 750 (British Columbia); and *Clemens* v. *Crown Trust Co.*, [1952] 3 D.L.R. 508 (Ontario).

[4] [1942] A.C. at p. 636.

would be injurious to the public interest is conclusive and the court cannot go behind it; for a department of government to which the exigencies of the public service are known, as they cannot be known to the court, must determine a question of this kind for itself.[5]

It is in reliance on these principles, and particularly on the second of them, that Canadian courts have hitherto uniformly upheld the refusal of the Minister of National Revenue to produce, in civil proceedings, a taxpayer's income tax returns. In view of the reasons given by the Supreme Court in the *Snider* case, they cannot continue to rely on them. Of the nine judges who sat on the case only two, Mr. Justice Locke and Mr. Justice Cartwright, gave reasons without repercussions outside the field of criminal proceedings—a field which Lord Simon in the *Duncan* case was careful to say might be outside the operation of the principles laid down by him.[6] The reasons given by the other judges for disallowing the minister's refusal to produce the returns are as applicable to civil as they are to criminal proceedings.

As to the classes of documents which qualify for the ministerial privilege of non-production, Kellock J. and the three judges who concurred with him said that "if, in any case, the nature of the information sought to be placed before the court is not of such a nature that by no person or by no means may evidence be given of it, there is no public interest attaching to its non-disclosure".[7] Mr. Justice Estey appears to exclude from the privilege all documents except those whose disclosure would prejudice the safety of the state and public security. A taxpayer can obviously give evidence with respect to his own income and disclosure of a taxpayer's income tax return can hardly, except in exceptional circumstances, prejudice public security. Income tax returns do not therefore seem to meet the tests laid down by five of the members of the Supreme Court. They do, however, appear to meet the test laid down by Lord Simon in the *Duncan* case: he supported the non-disclosure of government files "on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation".[8]

As to who is to decide whether the public interest will be prejudiced by production, Mr. Justice Rand (with whom Chief Justice Rinfret concurred) and Mr. Justice Cartwright held that if the minister states his ground for declaring that non-disclosure is re-

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[5] *Ibid.*, at pp. 638-642.
[6] *Ibid.*, at pp. 633-634.
[7] [1954] S.C.R. at p. 488; [1954] 4 D.L.R. at p. 491.
[8] [1942] A.C. at p. 635.

quired by the public interest and those grounds do not, in the opinion of the court, show the existence of such an interest the court will order production.[9] Lord Simon's judgment in the *Duncan* case gives no hint of the existence of any such rule; differing from the Privy Council case of *Robinson* v. *State of South Australia*,[10] he held that the minister's objection to production on the ground that it would be injurious to the public interest is conclusive. Nor do subsequent English cases suggest the existence of any such rule. Even when, as sometimes happens, an English court is clearly of the opinion that the public interest would not be prejudiced by the production of a document as to which the minister has given his opinion that it would—as in *Ellis* v. *Home Office*,[11] which involved police reports and medical reports on the behaviour of a fellow-prisoner who had beaten up the plaintiff and injured him while in prison—the court must, and does, being bound by the *Duncan* case, refuse to order production and can do no more than deliver general exhortations to the department as to how the department should in its view exercise the privilege of non-production.

The Income Tax Act should be amended to clarify the status of the minister's common-law privilege of non-disclosure; the present section 121 forbidding disclosure to anyone except a person "legally entitled thereto" does not, obviously and as the Supreme Court held, confer any such statutory privilege with respect to income tax returns and statements. To do so the government will have to decide (a) whether the cloak of inviolable secrecy is a fundamental prerequisite to honesty in the making of an income tax return, and (b) if so, whether the interest of the Canadian community in obtaining full disclosure of their income from taxpayers outweighs or is outweighed by that community's interest in the administration of justice, civil or criminal. The decision will not be an easy one, but it should not be left to be made by the courts. It should be made by the cabinet, who will make it in the light of known needs, as opposed to traditional ideology, and will have to defend it against attacks in Parliament, the newspapers and learned periodicals.

When, as happened in the *Snider* case, a court has to decide which of two conflicting public interests is to prevail, the inherited tradition of the legal past lies heavy upon it. Relying on the traditional right of the courts to keep "the executive" in its place, it is

[9] [1954] S.C.R. at pp. 485 and 497; [1954] 4 D.L.R. at pp. 489 and 500.
[10] [1931] A.C. 704.
[11] [1953] 2 Q.B. 135.

likely to deny to the government and claim for itself the right to decide what the public interest requires. Because of its intimate knowledge of, and deep appreciation of the importance of, the legal process, it is likely to rank the public interest in the administration of justice higher in the hierarchy of values than the public interest in the collection of the money to pay for it. It is likely to be unaware that there is nothing particularly novel in exempting whole classes of documents filed with government departments from production in any court of law, on the ground that the candour and completeness of the people filing them might be prejudiced if they were ever liable to be disclosed in subsequent litigation. Many statutes in Canada contain sections of this kind: *Wigmore on Evidence* lists a number of them in the supplement to volume 8.

Perhaps, these sections should be reconsidered. Wigmore thinks so and so does Street in a recent article.[12] In any event, neither the *Duncan* case—a wartime decision departing from traditional ideology—nor the *Snider* case—a return by the Supreme Court of Canada to the tradition—have anything but a very general bearing on the proper action to be taken by the government with respect to the secrecy of tax returns and other documents containing information which the persons filing them consider highly confidential.

JOHN WILLIS*

The Clarity of Omission

There is an accuracy that defeats itself by the overemphasis of details. I often say that one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement. Of course, one must take heed that the margin is not exceeded, just as the physician must be cautious in administering the poisonous ingredient which magnified will kill, but in tiny quantities will cure. On the other hand, the sentence may be so overloaded with all its possible qualifications that it will tumble down of its own weight. 'To philosophize', says Holmes in one of his opinions —I am quoting him from uncertain and perhaps inaccurate recollection —'to philosophize is to generalize, but to generalize is to omit.' The picture cannot be painted if the significant and the insignificant are given equal prominence. One must know how to select. (Benjamin N. Cardozo, Law and Literature, from *Law and Literature and Other Essays and Addresses.* 1931)

[12] State Secrets: A Comparative Study (1951), 14 Mod. L. Rev. 121.

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