Case and Comment

CRIMINAL LAW—HABITUAL CRIMINALS—PART X(A) OF THE OLD CRIMINAL CODE—APPEAL BY THE CROWN—SECTION 667(2) OF THE NEW CODE—SUFFICIENCY OF NOTICE—DISCRETION OF JUDGE. —The recent decision by the Saskatchewan Court of Appeal in *R.* v. *Ryan*[1] carries the leading Canadian case on habitual criminals[2] one step further. In the *Brusch* case the Supreme Court of Canada, leaning heavily on English jurisprudence, decided that a charge under part X(A) of the old Criminal Code[3] was an allegation of behaviour rather than an accusation of crime. In the *Ryan* case Martin C.J.S. ruled that if that be so—and it was not disputed—the Crown has no right of appeal.

Let it be said at once, however, that the new code attempts to remedy this situation in section 667(2), a section which has no counterpart in the old code and which provides that:

> The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part.

It may therefore be felt that any discussion based on the *Ryan* case will be a matter of academic interest only. It is submitted, however, that the drafting of section 667 is such that a number of legal difficulties are bound to arise and, if these are to be met, recourse may have to be had to the "old" law. A brief review of the *Ryan* case is therefore in order.

Ryan was charged with unlawful breaking and entering and a notice was served on him by the clerk of the court stating that, if found guilty, he would be tried on a further charge of being an habitual criminal. The trial judge found Ryan guilty of the primary charge, but held that the notice served on the accused was defective and that the further charge would therefore have to be dismissed.

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[1] (1954), 19 C.R. 361; 109 C.C.C. 343.

[2] *R.* v. *Brusch* (1952), 16 C.R. 162 and 316; 105 C.C.C. 110 and 340; [1953] 1 S.C.R. 373.

[3] The new code deals with the subject in ss. 660 ff.

The Attorney General appealed against the acquittal, alleging that the learned trial judge had been in error in holding that the notice was defective. The defence challenged his right to appeal. It therefore became necessary for the Court of Appeal to examine: (1) the character of a charge laid under part X(A) of the code, as it then was; (2) the right in general by the Crown to appeal in criminal matters; and (3) the wording of the relevant sections of this part, to see whether or not they varied the general law.

To determine the first issue, Chief Justice Martin considered the English case of *R.* v. *Hunter*,[4] which held that

> . . . there is nothing in the Act[5] which would justify us in saying that the charge of being an habitual criminal is a charge of a crime or offence.

This had been confirmed by the *Brusch* case, where three of the five judges who heard the case in the Supreme Court of Canada followed Lord Reading's judgment in *R.* v. *Hunter*.[6] The two remaining judges expressed no opinion on the point, although Cartwright J. was "much impressed" by the reasoning of O'Halloran J.A., which distinguished the English act from the Canadian statute.[7] However, with the preponderance of Canadian judicial opinion in favour of a construction similar to that of the English act, together with the majority opinion of the Supreme Court of Canada, Martin C.J.S. had little difficulty in finding that a charge laid under part X(A) did not envisage an indictable offence.

On the second point, the Saskatchewan court looked at section 1013(4) of the old code, which provided that:

> Notwithstanding anything in this Act contained, the Attorney General shall have the right to appeal to the court of appeal against any judgment or verdict of acquittal of a trial court *in respect of an indictable offence* on any ground of appeal which involves a question of law alone.[8]

Since it is an accepted principle of law that the right to appeal is an exceptional right, and since the attorney general is given no other right than that mentioned in section 1013(4), it follows that any appeal by the Crown is doomed to failure unless it fits square-

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[4] (1920), 15 Cr. App. Rep. 69.
[5] Prevention of Crime Act, 1908, s. 10(4).
[6] (1920), 15 Cr. App. Rep. 69.
[7] Mr. Justice O'Halloran examined the differences in language between the two acts and concluded that the Canadian statute used words such as "charge", "trial", "sentence", which "seem to me to contain all the indicia of an indictable offence". He also took into consideration that "Parliament has mandatorily stipulated it [the charge] shall be dealt with by the Courts in the same manner (with one or two exceptions) as if it were an indictable offence".
[8] Italics added.

ly within the quoted provision. Obviously, the court having come to the conclusion that the charge was not in the nature of an indictable offence, the Crown lost this round.

Finally, the learned Chief Justice looked at the appropriate section itself and found that it made no provision whatever for an appeal by the Crown:

> 575(E). A person convicted and sentenced to preventive detention may appeal against his conviction and sentence, and the provisions of this Act relating to an appeal from a conviction for an indictable offence shall be applicable thereto.

It is this section which has been changed for the future:

> 667. (1) A person who is sentenced to preventive detention under this Part may appeal to the court of appeal against that sentence.
>
> (2) The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part.

A comparison of the two sections will reveal at least two major changes: (1) in the subsection dealing with the accused's right of appeal, section 667 speaks of appeal against sentence only, whereas section 575 (E) mentioned appeal against both "conviction and sentence"; (2) subsection 2 attempts to remedy the very situation which arose in the *Ryan* case.

It may be argued that the change in wording—the removal of the word "conviction"—was in line with the approach that the finding that an accused is an habitual criminal does not amount to a conviction. That may be so and, if that was the intention of the drafters and of Parliament, it was a laudable effort to create harmony between the code and the decisions. But, whatever the intention, one cannot but conclude, from a strict reading of the section, that the new code restricts the rights of the accused: whereas he could previously appeal from the ruling—call it what you will, conviction or finding—he now may appeal against sentence only. At the same time, the Crown's right to appeal is vastly enlarged, a situation which goes against the whole economy of Canadian criminal law.

The situation is all the more incongruous when it is borne in mind that under section 662(2) of the new code

> An application under this Part shall be heard and determined before sentence is passed for the offence of which the accused is convicted and shall be heard by the court without a jury.

Under the old code, it was the jury who had to decide the issue, except of course in cases where a judge sat alone. Since it is the jury's duty to decide questions of fact, it must be presumed that the

transfer of this duty from the jury to the judge is tantamount to saying that the question has now become one of law rather than one of fact. It is for this reason that the change—and, so long as the wording remains the way it is, it must be considered a change—is all the more surprising, since, if any right to appeal can be called basic, it is the right to appeal on questions of law.

On the other hand, if the legislators intended section 667(1) to cover the same ground as was covered by the old section 575(E), then it must be presumed that they neglected to take into account the fact that a court could—and still may—declare an accused to be an habitual criminal *without* imposing a sentence, a theme which is further developed at a later stage.

In the absence of any further explanation in either the code or the commissioners' report, it must remain a matter of conjecture what was intended and, from the practitioner's point of view, he has no choice but draw those conclusions which a reasonable interpretation of the wording of the code permits.

Turning to the attorney-general's new right of appeal, the question arises what the new code means by "the dismissal of an application for an order". Nowhere in part XXI of the new code does the word "order" appear, save in that instance. What, then, is the "order" envisaged? Is it an "order" for an inquiry whether or not a person is an habitual criminal? Could it be an "order" declaring an accused to be an habitual criminal? Or, perhaps, might it be an "order" for a sentence of preventive detention?

It is the last suggestion which is the most attractive. The new code, in section 660(1), speaks of an "application for preventive detention" and the word "order", by some stretch of the imagination, might be construed as referring to the granting of this application. Secondly, this interpretation, whatever other defects it may have, is at least in line with the accused's limited right of appeal, inasmuch as the extent of appeal given to each of the parties would now be the same. If this hypothesis be correct, however, why did the legislators have to resort to different wording and sentence construction in two subsections of one and the same section? Could the language not have been made uniform and thereby clearer?

Returning to the *Brusch* case, it is, perhaps, somewhat ironical that it was the accused who argued that section 775(a) of the old code created an indictable offence and it was the Crown who opposed this view. The latter won, and thereby lost the benefit of section 1013(4).

But what about the decision from which the Crown tried to appeal in the *Ryan* case? Was the notice given to the accused in fact defective? Section 575(c)(4)(b) provided that:

> . . . not less than seven days' notice has been given by the proper officer of the court by which the offender is to be tried and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge.

In the case at bar, the notice was admittedly given to the proper officer of the court not less than seven days before the trial. As for previous convictions, a number were set out and all followed the same pattern as the first:

> (a) previous convictions for indictable offences since you attained the age of eighteen years for which you were liable for at least five (5) years imprisonment —
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> (1) on the 4th day of September, 1933 at Carlyle, Saskatchewan, on a charge of theft, for which you were imprisoned for six (6) months;

Unfortunately the report does not give us sufficient detail to draw definite conclusions about the learned trial judge's decision, and we must therefore assume that he felt it to be not only proper but mandatory for the accused to be told *with precision* about the previous offences on which the Crown relies. Such precision is needed because not every conviction can be used to lay the foundation for a successful prosecution under this part. A conviction by a military tribunal, for instance, would not suffice. Nor would a conviction outside Canada: *R.* v. *Murphy*.[9] Both sentence and locality were given in the notice, however, and, in the absence of a further explanation, it must be presumed that the learned trial judge followed the dictum in *R.* v. *Luft*,[10] where the Alberta Court of Appeal held that

> . . . there is no reason why there should not be accuracy in giving dates of convictions, describing the offences and *specifying the court of trial*.[11]

This was again emphasized in the most recent Canadian case, *R.* v. *Short*.[12] In that case, the notice served upon Short listed six previous convictions in the following manner:

> (1) November 16th, 1939 — Forgery and Drogues [*sic*].
> (2) May 23rd, 1940 — Forgery and Drugs.

[9] [1949] 2 All E.R. 867, which held that a conviction in Northern Ireland could not form the basis of a prosecution under the English act.

[10] (1948), 6 C.R. 180; 91 C.C.C. 294, [1948] 3 D.L.R. 680, [1948] 2 W.W.R. 225.

[11] *Per* Frank Ford J.A. at p. 191 (italics added).

[12] Unreported as yet. The case was heard on Feb. 28th, 1955, in the Court of Queen's Bench (Crown Side), Montreal.

(3) May 30th, 1944—Poss. of Drugs.
(4) November 25th, 1946—Poss. of Drugs.
(5) From Dec. 1st, 1945 to October 30th, 1946—Poss. of Drugs.
(6) February 10th and 11th, 1949—Poss. of Drugs.

Lazure J. held that this did not meet the requirements of the code and that date, place, court and sentence must be given. Since the notice was also defective in at least three other respects, he had little difficulty in holding that the charge could not be heard since proper notice had not been given.

It is suggested that in a case like *Short*'s it is of particular importance that full details be given, since previous convictions under the Opium and Narcotic Drug Act[13] could have been had either by way of indictment or of summary procedure. If obtained under the latter, they could not form the basis of a conviction and this defect would be fatal to any such finding.

It may be well at this point to examine briefly four other aspects of the notice which has to be served on the accused: (1) the attorney-general's consent; (2) the person who must give the notice; (3) the accused's age; and (4) details of other allegations, if any. In the first place, it is clear that "a person shall not be tried on a charge of being an habitual criminal unless the Attorney General of the province in which the accused is to be tried consents thereto . . .". The consent, it is suggested, should be shown either on the face of the notice or on a separate sheet attached to it. It is not sufficient to say that the attorney general consents to the prosecution, but he must actually sign the appropriate document.

In *R.* v. *Toner*,[14] the Alberta Court of Appeal ruled that an acting attorney general may sign the papers, but Frank Ford J.A. took pains to point to the "serious consequences" which may follow the giving of the consent—"a highly important duty and discretion". A careful reading of the judgment will suggest that it was only after some hesitation that the court decided to allow this departure from the text of the code and, it may be assumed, further inroads on strict interpretation would not likely meet with favour. Therefore, then, it would be reasonable to assume that a deputy attorney general could not sign. It follows that a crown prosecutor, even though he may in fact be a "substitute" attorney general, as he is in Quebec, does not possess the power.

The second point is one that involved more difficulty, but most of the hurdles have been overcome by a change in wording in the new code. Under the original amendment, notice had to be given

[13] R.S.C., 1952, c. 201, s. 4(d).
[14] (1950), 10 C.R. 52, 97 C.C.C. 171, [1950] 1 W.W.R. 1038.

by the "proper officer of the court by which the offender is to be tried". This was a change from the English act,[15] from which the former part X(A) was admittedly copied, inasmuch as the wording there had been to the effect that notice had to be given "to" the proper officer of the court, as well as to the accused, by the Director of Public Prosecutions. Ford J.A., in the *Luft* case,[16] was inclined to think that the difference was intentional. At the same time he questioned "whether or not it is an improvement".

Under the new code, the notice must be given to the accused "by the prosecutor", and not by an officer of the court, an innovation prompted, no doubt, by some of the cases mentioned later. The change, it is submitted, is a sensible one because, in the final analysis, it is the prosecutor (in consultation with the attorney general) who decides whether the additional charge will be laid. So far as the court is concerned, while its officers prepare the indictments, they do so in conjunction with the Crown.

In the meantime, however, it has been held that the proper officer for Alberta is the clerk of the court for the district in which the trial is to be held[17] and that in other provinces it may be the clerk of the peace or the prothonotary. In a subsequent judgment,[18] Manson J., while admitting that "it may not be necessary for me to say anything with regard to the signature by Crown counsel", felt that he could not

> . . . refrain from expressing an opinion that Crown counsel is not only an officer of this court, but in my judgment, I think he is a proper officer of this court for the purpose of signing this notice.

In Quebec, Lazure J. came to the conclusion[19] that no one individual could adequately sign the notice. Looking at the French version of the code, which speaks of a "fonctionnaire compétent", the learned judge found that the Clerk of the Crown[20] was a *fonctionnaire* all right, but that—in the legal sense—he was not competent, since he could not be expected to know whether the Crown intended to add the habitual criminal allegation to any given indictment. On the other hand, while the crown attorney would be

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[15] Prevention of Crime Act, *supra*, footnote 5.
[16] (1950), 10 C.R. 52.
[17] *Luft* case (1950), 10 C.R. 52.
[18] *R.* v. *Greer* (1950), 97 C.C.C. 66, at p. 72; 10 C.R. 42; [1950] 1 W.W.R. 1122.
[19] *R.* v. *Short*, unreported.
[20] In the only other Quebec case under part X(A) of the old code, it was the Clerk of the Crown who had given this notice and no objection was taken to his authority: *Young* v. *The King* (1950), 101 C.C.C. 73, at p. 74; 11 C.R. 308.

competent, he is no *fonctionnaire*. As a result, Mr. Justice Lazure suggested that both the clerk and a prosecutor sign the notice.[21]

As for the accused's age, Lazure J., in the same case, suggested that some proof should be made that convictions enumerated in the notice were, in fact, obtained after the accused's eighteenth birthday.

Lastly, again in the same case, Lazure J. held that it was insufficient to say to the accused in the notice that "you are leading persistently a criminal life", but that, if it is the intention of the Crown to make such proof—and no conviction could or can be had without it—details of the behaviour to be proved must be given.

A final point of interest, which has not yet been argued in Canadian courts—it was referred to earlier—is the judge's task after an accused has been declared to be an habitual criminal. Under the old code, in virtue of section 575(b), the judge "*may* pass a further sentence . . .".[22] The new code, in section 660 (1), adds that he may only do so "upon application", presumably by the Crown. Under neither code, however, does he have to do so, and there may be compelling reasons why he should not.

In *R.* v. *Apicella*,[23] for instance, the Court of Criminal Appeal had this to say:

> It is important that the minds of those who are concerned with the administration of the Act should be drawn to this matter to see that, when corrective training is imposed, that it is a case for corrective training.
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> . . . the mere fact that all the conditions are fulfilled . . . is of itself no reason why corrective training should be ordered. . . . the court itself must weigh up the facts and circumstances of the case and then decide the appropriate sentence.[24]

In Canada, of course, the only sentence that can be imposed is one of preventive detention, and the only consideration remaining for the judge, therefore, is whether or not, even if all the technical conditions are fulfilled, justice would best be served by imposing this sentence.

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[21] In a subsequent Quebec case, *R.* v. *Dushin*, heard in the Court of Queen's Bench (Crown Side) on March 28th, 1955, the judge's suggestion was followed and the notice served upon the accused was signed both by the Chief Crown Prosecutor for the district and by the Clerk of the Crown. However, before the allegation could be heard, the Crown reversed its decision and withdrew the application.

[22] Italics added.

[23] (1949), 34 Cr. App. Rep. 29.

[24] The Criminal Justice Act, 1948, introduced the principle of corrective training, less severe but similar in character to preventive detention under the old Prevention of Crime Act. The words "habitual criminal", by the way, have now fallen into disuse in England and the new act speaks of "persistent offenders" instead.

That was the sentiment of Lord Chief Justice Hewart in *R.* v. *Silverman*,[25] when he emphasized that "the matter is one left to the discretion of the Judge, having regard to all the circumstances of the case". Here the Lord Chief Justice found that,

> . . . having regard to all the facts of the case, and not least to the unfortunate start of the appellant's career and to the manner in which he was dealt with as a youth — a course which, it is to be hoped, would not be adopted today — we think that this sentence of preventive detention may properly be quashed.

The finding that the prisoner was an habitual criminal, however, was not disturbed.

It is submitted, having regard both to the wording of the code and to the jurisprudence, that Parliament envisaged cases where justice could best be served by omitting a further sentence and that, quite properly, the discretion should lie with the judge. It might be argued, of course, that in cases of this nature the naked finding, without the indeterminate sentence, is meaningless. If that were so, however, then any other conviction without subsequent sentence could equally be considered meaningless and a valuable tool of the courts — the suspended sentence — would be destroyed.

JOSEPH COHEN*

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TORT — OCCUPIER OF PREMISES — LIABILITY TO CHILDREN — LANDLORDS AS OCCUPIERS OF COMMON WASHROOM AND OF RECREATION GROUND. — The liability of an occupier of premises to a child who is injured on the premises is not always easy to determine despite the words of Lord Dunedin in *Addie* v. *Dumbreck*:[1]

> Now the line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories. When I say rigid, I mean rigid in law. When you come to the facts it may well be that there is great difficulty — such difficulty as may give rise to difference of judicial opinion — in deciding into which category a particular case falls, but a judge must decide and, having decided, then the law of that category will rule and there must be no looking to the law of the adjoining category. I cannot help thinking that the use of epithets, 'bare licensees', 'pure trespassers' and so on has much to answer for in obscuring what I think is a vital proposition; that, in deciding cases of the class we are considering, the first duty of the tribunal is to fix once and for all into which of the three classes the person in question falls.

[25] (1935), 25 Cr. App. Rep. 101.

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[1] [1929] A.C. 358, at p. 371.

The difficulty in determining this liability is illustrated by two recent cases, one Canadian and the other English, where the facts have some legal similarity but the decisions differ.

The Canadian case is *Ottawa* v. *Munroe* in the Supreme Court of Canada.[2] The child was four and one-half years old, and the occupier was the City of Ottawa. The premises consisted of an apartment-house washroom on the third floor, in common use by the occupants of the apartments on that floor, and admittedly in possession of the landlord. The child's grandmother was the tenant of one of the apartments and the child and its father lived with the grandmother in that apartment.

The washroom had a window, the sill of which was nineteen inches from the floor; under the window, just below the sill, was a radiator. Within two feet of the window and running at right angles to it was a structure variously described as a top, platform, counter, shelf or washstand (and here called a shelf) 2 ft. 11 ins. high, 1 ft. 6 ins. wide, and some 11 ft. long. In front of the shelf was a series of basins, but the basin nearest the window had been removed, leaving the equipment required to service it. Children had on a number of occasions used the equipment as a means of climbing from the radiator to the top of the shelf; and on the day the child was injured a tenant had told the child and his companion to get down from the shelf. Shortly afterwards there was a crash of breaking glass and the child was found seriously injured in the areaway immediately below the window.

The child's father, as well as others, had spoken to the janitor of the building about the danger of the low window, and had asked that boards be placed across the window to prevent an accident; but the janitor did nothing, nor did the father, and the accident that happened was just the sort of accident that might have been prevented by boards.

The trial at first instance was before a jury, which decided that the infant plaintiff was on the defendant's premises to the knowledge and with the permission of the defendants; that the combination of a heating radiator, pipes, basins, bracket and platform adjacent to the unprotected window was a hidden danger, an allurement or enticement to the infant; and that the defendant through its officials knew of the danger but failed to use reasonable care to prevent injury from it.

The English case is *Bates* v. *Stone Parish Council* in the English

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[2] [1954] S.C.R. 756; [1955] 1 D.L.R. 465.

Court of Appeal.[3] The child was three and one-half years old, the occupier a village council, and the premises a recreation ground, more particularly a chute or slide. This chute was of a common type, some twelve feet high with a ladder on one side leading to a small platform and then to the chute. On the sides of the platform were rails. Certain other rails had been erected by the council in 1934 after a small child had fallen from the platform, but these were no longer there when the plaintiff child climbed to the platform and fell through the gap left by the absence of the additional rails. His injuries were serious.

This trial at first instance was also before a jury, which found that the child was on the premises with the permission of the council, and that the council was aware of the dangerous condition of the slide.

The decision in the Canadian case was against liability (Kerwin C.J.C., Rand and Locke JJ., with Estey and Cartwright JJ. dissenting). The English case was decided in favour of liability by Somervell, Birkett and Romer L.JJ. Both courts found that the child was a licensee on the premises and that the occupier of the premises knew of the danger.

In view of the similarity of the fact-situations, an examination of the reasons given, particularly by the Supreme Court of Canada, is of interest. Of the majority of the Supreme Court who held against liability, Kerwin C.J.C. concurred with Rand J., who first pointed out that the tenant has no recourse against the landlord who leases him a house in a dangerous condition, quoted the well-known words of Erle C.J. in *Robbins* v. *Jones*, ". . . fraud apart, there is no law against letting a tumble down house",[4] and cited *Cavalier* v. *Pope*.[5] Admitting that these cases were not in point, since they dealt with leased premises, while here the injury occurred on premises retained in the possession of the landlord, he went on to examine the liability of the occupier of the premises.

The right of the child to be on the premises was derived from his grandmother, who was the tenant of the apartment though not of the washroom. Rand J. considered that the child was a guest or licensee of the grandmother and as such could have no right higher than hers: those of the grandmother's rights, if any, which arose from contract could not be availed of by the child. The authority for this he found in *Cavalier* v. *Pope* and *Fairman* v. *Perpetual Investment Building Society*.[6]

[3] [1954] 3 All E.R. 38.
[4] (1863), 15 C.B.N.S. 221, at p. 240.
[5] [1906] A.C. 428.
[6] [1923] A.C. 74.

He concluded that the child as guest of the grandmother was a licensee of the defendant, stated that the responsibility of the occupier to a licensee was only to protect him from hidden dangers and traps and went on:

> It is obvious that, here to the tenant as well as to her licensee there was no trap or hidden danger. What is complained of is simply certain parts of the structural design which the landlord saw fit to give to the washroom. On that state of things, the tenant could not found any claim against the landlord, nor could an adult licensee.
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> Is the child in any better position? The only ground upon which this can be suggested is that what is apparent to the tenant may be a trap or an allurement to the child. Apart from the fact that the child is brought on the premises by his father, it would be a strange proposition that a landlord should be bound to alter his premises in order to make them safe for the child when they are unobjectionable as to his tenant. The answer to be given the tenant is simply that if the premises are not fit for his children he should look for others. Now that may appear to be a cold answer when premises are at a premium; but if through stress of circumstances the tenant, and *a fortiori* a tenant's licensee, must live where he can, then any special accommodation necessary for the needs of his children must, in some manner, be provided by himself. Of course not all tenants have children and children may arrive in the family at any time and it would be a *reductio ad absurdum* that the duty of the landlord in relation to the structure of his accessory accommodation should depend upon such happenings. On long leases of, say, apartments, safe today they would become dangerous tomorrow as and where and when children happened to be added to a family.[7]

Here Rand J. appears to say that the tenant of the apartment would have been an invitee in the washroom and in this of course he follows *Fairman*'s case. There would have been no liability to an adult invitee, and therefore there could be no liability to a licensee even though a child.

Rand J. then inquires whether the landlord's knowledge that the child had used the shelf as a place to play made any difference. He concluded that strength for the child's case could be gained only on the principle of the cases that have held an owner liable to a trespassing child attracted by an object containing a hidden danger. "But the child here was not a trespasser nor was it attracted to the room by the so-called combination of features; it was in the room as of right through the tenant . . .".[8] This, taken literally, is a departure from the usual statement of law on the subject, for it suggests that had a trespassing child been attracted by the unusual facilities for climbing and injured, the occupier might have been

[7] [1954] S.C.R. at p. 761; [1955] 1 D.L.R. at p. 468.
[8] S.C.R. at p. 762; D.L.R. at p. 469.

liable, although to the plaintiff child, a licensee, the occupier was not liable.

Locke J. also held against liability, and gave two grounds for so holding: the first was that any licence given by the occupier to the child to be in the washroom was conditional upon his being accompanied by some person who could look after him. He went on, however, to say that, even if the licence were unrestricted, there was nothing in the nature of a trap in the present case. He defined a trap as a hidden peril and stated that there was here no concealed danger, even to a child, though the risk of falling from the shelf may not have been, and no doubt was not, present in his mind at the time of the accident.

Locke J. also referred to *Donovan* v. *Union Cartage Co.*, where Acton J. said:[9]

> To extend the principle of *Lynch* v. *Nurdin*[10] to things in no way dangerous in themselves . . . would be to impose burdens of responsibility so far reaching and incalculable as to be unreasonable and intolerable. It cannot be said that, even if such things are likely to attract children, there is in them anything in the nature of a trap or concealed peril.

He concluded that, if this were a trap, then any window-sill overlooking a scene attractive to a child would be a trap, as would any chair or table upon which a child might clamber and fall; and so to classify would "impose burdens of responsibility so far reaching and incalculable as to be unreasonable and intolerable".

In effect both Locke J. and Rand J. (with whom Kerwin C.J. concurred) have said that dangers face children in situations where there is no danger to adults: that liability cannot be imposed in every instance, and that this is an instance where liability should not be imposed. No fault can be found with such a result, but the classic approach of determining the status of the person injured has led Rand J. into holding in effect that a trespasser might be in a better position than an invitee. Locke J. has held that the accident was caused by the child's failure to have present in his mind the risk of falling through the window, and this although the child was four and one-half years old.

Of the two dissenting judges in the Supreme Court of Canada, Estey J. stressed the knowledge of the janitor that the place was dangerous, distinguished *Cavalier* v. *Pope*,[11] cited *Sutcliffe* v. *Client Investment Co.*,[12] where a "licensee with an interest" recovered when a balcony collapsed, and found the child to be a licensee. He

[9] [1933] 2 K.B. 71, at p. 74.
[10] (1841), 1 Q.B. 30.
[11] [1906] A.C. 428.
[12] [1924] 2 K.B. 746.

then found that the combination of alluring climb and nearby window formed a situation which might be a danger hidden to the child, but of which the occupier, by the janitor, was aware. Since the jury had found such a hidden danger, he was satisfied that the occupier was liable.

Cartwright J. dissented on much the same grounds. He had some difficulty in deciding whether the licence was a restricted one, but concluded that the circumstances did not justify attaching such a condition to the licence. He then followed Scrutton L.J., who adopted the words of *Pollock on Torts* in his decision in *Liddle* v. *Yorkshire* (*North Riding*) *County Council*:[13] ". . . an occupier who knowingly allows young children to come and play on his land must not expose them to dangers which, though manifest enough to an adult of ordinary sense, are not manifest to them". Since the jury had found the hidden danger, Cartwright J. considered that there should be liability.

In the English case the Court of Appeal dealt with only two points on the question of liability. The court found as a fact a point not specifically put to the jury — that, in the terms used earlier in this comment, the licence was an unrestricted one. The council had made it a policy to admit all children, whether attended by an older person or not, and had not changed that policy after the earlier accident. In the circumstances the Court of Appeal had no doubt whatever that the injured child was a licensee. On the second point, it was held that there was ample evidence to justify the jury's finding that the council knew the slide was dangerous. Once it was clear that the licence was not a conditional one and that the council knew of the danger, there were no doubts that the council was liable.

Comparing the two decisions, it will be seen that both courts found the child to be on the premises with the permission of the occupier. (Locke J. held this permission to be a conditional one, but considered this only an alternative ground in his reasons for judgment.) Both courts held also that the occupier knew of the dangerous state of the premises.

It may be that the similarity between the two fact situations is misleading: had the courts been exchanged — and the Supreme Court been called upon to decide on the English facts and the Court of Appeal on the Canadian facts — the decisions might well have been the same as they were. The courts pretend that the answer to the question of liability can be solved by the ancient shibbo-

[13] [1934] 2 K.B. 101, at p. 111.

leths of invitee, licensee and trespasser, but in fact all the circumstances must be taken into account. In the English case the council had provided recreational facilities for children; even though the plaintiff child could not reach the exalted height of invitee since it was too young, the council must ensure that the facilities were safe. In the Canadian case the occupier had provided a reasonable washroom; he could not be asked to do more.

If there is an answer to the problem of liability it probably lies in the answer to the question, Was the defendant's behaviour that of a reasonable man?

J. B. WATSON*

* * *

CONFLICT OF LAWS—RECOGNITION OF FLORIDA DIVORCE IN ENGLAND—RULE IN *Travers* v. *Holley*.—In his most instructive comment in this Review[1] on the English Court of Appeal decision in *Travers* v. *Holley*[2] Professor Kennedy raised a number of questions arising out of that case, and in a subsequent letter, which also appeared in this Review,[3] the writer ventured to draw attention to a number of additional problems. Some of these questions have now been answered, if not altogether satisfactorily, in an English judgment of first instance by Davies J. in *Dunne* v. *Saban*.[4]

The facts in the *Dunne* case were as follows. Husband and wife were married in England on February 4th, 1950, the husband's domicile of origin being English. In June 1951 the couple immigrated to the United States and took up residence in the state of Florida. The court was satisfied that the husband had assumed a domicile of choice in Florida in 1951. But in 1952 he decided that he was going to return to England, with a view to residing there permanently, and he did so towards the end of that year. It was held that by so doing he had abandoned his domicile of choice in Florida and had reverted to his English domicile of origin.

The wife continued to reside in Florida, however, even after her husband had left her, and some time around July 1953[5] she commenced proceedings before the courts in Florida for a dis-

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[1] (1953), 31 Can. Bar Rev. 800.

[2] [1953] P. 246; [1953] 2 All E.R. 799 (C.A.).

[3] (1953), 31 Can. Bar Rev. 1077.

[4] [1954] 3 W.L.R. 980; [1954] 3 All E.R. 586 (Davies J.).

[5] The exact date is not given in the report (although in the writer's submission it is a material factor: see *post*, footnote 14); all we are told is that the husband was served with a notice to appear on July 20th, 1953: [1954] 3 W.L.R. 980, at p. 981.

solution of her marriage, based on the husband's alleged cruelty towards her. The husband did not appear and in due course, on November 3rd, 1953, a decree of dissolution was granted. The husband now sought a declaration from the English court that his marriage in 1950 had been validly dissolved by the Florida decree. An American lawyer gave evidence to the effect that under Florida law a married woman had capacity to acquire a domicile of her own, which was separate from that of her husband, and that if, in addition to having acquired a domicile of choice in Florida, she resided within the state for a minimum of ninety days the Florida court would deem itself competent to hear her complaint.

It will be seen, therefore, that two distinct problems confronted the English court: (1) should the English courts recognize a foreign divorce decree which was based, not on the husband's domicile in the foreign forum, but on some other ground, such as the wife's residence; (2) assuming that the wife's residence is a sufficient basis, in the eyes of an English court, for the assumption of jurisdiction by the foreign court, how long must the wife have resided in the foreign country before an English court will recognize the foreign decree?

Counsel for the husband in the instant case did not seek to deny that under English law the wife had no capacity to acquire a domicile of her own,[6] but he argued that, consequent upon statutory invasion by Parliament of the domiciliary principle as the sole test of jurisdiction to dissolve a marriage, an English court was now competent, under section 18(1)(b) of the Matrimonial Causes Act, 1950, to assume jurisdiction "in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings . . ."; and he contended that, if the wife's residence is a sufficient basis to found jurisdiction in an English court, then a similar right should be conceded to a foreign court in whose territory the wife is residing at the time the proceedings are instituted. What is "sauce for the goose is sauce for the gander". Therefore, since the wife was a resident of Florida at the time the Florida decree was granted, the dissolution of the marriage by the Florida court should be recognized in England.

Counsel for the Queen's Proctor,[7] on the other hand, adopted the position that, if Parliament was minded to give foreign courts

[6] *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146; *A.G. for Alberta* v. *Cook*, [1926] A.C. 444.

[7] The wife was not represented.

the same jurisdiction based on the wife's residence as it was conferring on the English courts, nothing would have been easier than to have said so and that any departure from the domiciliary principle of jurisdiction in matters of status, such as was admitted in *Travers* v. *Holley*, should be strictly construed. Davies J. held that the answer to these conflicting views was to be found by determining the true scope of the decision in *Travers* v. *Holley*, and it is to a discussion of that case that we must now turn.

In *Travers* v. *Holley*, it will be recalled, the English Court of Appeal had to decide whether to recognize a divorce decree granted to a wife by the courts of New South Wales at a time when, as it was contended, the husband was no longer domiciled there, although his wife had continued to reside in the state. Section 16 of the New South Wales Matrimonial Causes Act, No. 14, 1899, conferred jurisdiction on the courts of New South Wales where the wife had been "domiciled" (that is, resident) in New South Wales for at least three years preceding the bringing of her petition and where also the husband had been domiciled in the state immediately before he deserted his wife. The Court of Appeal held by a majority that the husband had acquired a domicile of choice in New South Wales and all three judges were agreed[8] that, even if, while in desertion, the husband had reverted to his English domicile of origin, the courts of New South Wales under the Australian statute and the English court under section 13 (as it then was) of the Matrimonial Causes Act of 1937 claimed the same jurisdiction and that it would be "contrary to principle and inconsistent with comity" if the English courts refused to recognize a jurisdiction which *mutatis mutandis* they claimed for themselves.

Unfortunately, there is a certain amount of ambiguity in the judgment of Hodson L.J., who delivered the principal opinion in the *Travers* case, an ambiguity which would appear to have escaped the attention of the learned judge and counsel in the case at bar. The question that was left unresolved in *Travers* v. *Holley* may best be illustrated by the following example. Suppose a wife obtained a divorce from her husband in country *X*, of which the

[8] Davies J. construed it only as an obiter discussion: [1954] 3 W.L.R. 980, at p. 985; but, with respect, in so far at least as the majority of the court was concerned, it was the principal ground of decision, since both Somervell L.J. (at p. 250) and Hodson L.J. (at p. 255) had felt it unnecessary to decide when the husband had abandoned his domicile of choice in New South Wales. Davies J. is therefore, with respect, mistaken when he says (at p. 986) that the majority of the court had found that the husband was domiciled in New South Wales, "and therefore, statute or no statute, that the New South Wales court obviously had jurisdiction to dissolve the marriage".

wife was a national, at a time when her husband was domiciled in a different country, although she herself had been residing in country *X* for more than three years preceding the bringing of her suit. Will the English courts recognize the dissolution of her marriage? If the true interpretation of Hodson L.J.'s judgment is that the English courts will only recognize the jurisdiction of the foreign tribunal (where it cannot be based on the husband's domicile) in cases where the foreign legislation and the English legislation conferring jurisdiction on their courts are substantially the same, then it is obvious that in the hypothetical example the decree of country *X* would not be recognized if, let us assume, the courts of *X* would take jurisdiction by reason of the wife's nationality and not by reason of her residence in country *X*.

If, on the other hand, what matters is not the ground on which the foreign court purports to rest its jurisdiction, but whether an English court would itself have assumed jurisdiction in similar circumstances, then the foreign judgment is entitled to recognition. The distinction between these two possible interpretations, it need hardly be stressed, is one of critical importance.

It is time now to examine the actual language of Lord Justice Hodson. His lordship said:[9]

> It seems to me, therefore, that Parliament has cut the ground from the argument put forward on behalf of the husband. If English courts will only recognize foreign decrees of divorce where the parties are domiciled in the territory of the foreign court at the time of the institution of proceedings, because that is the jurisdiction which they themselves claim, what is the situation when the courts of this country arrogate to themselves jurisdiction in the case of persons not domiciled here at the material date? It must surely be that what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court.

Now, if he had stopped there, there would have been justifiable reason for supposing that he had the broader principle in mind, because there is no suggestion so far that the foreign jurisdictional rules and the English rules must be the same, or even similar, in nature. It is the next passage in the learned judge's opinion which unfortunately gives rise to doubts as to his true intent. He continues:[10]

> Lord Watson, in the *Le Mesurier* case, used the following language:[11] 'A decree of divorce a vinculo pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to

[9] [1953] P. 246, at p. 256.
[10] *Ibid.*, at pp. 256-7.
[11] [1895] A.C. 517, at p. 528.

> whose tribunals the spouses were amenable, claim extra-territorial authority.' Conversely, it seems to me that where it is found that the municipal law is not peculiar to the forum of one country but corresponds with a law of a second country, such municipal law cannot be said to trench upon the interests of that country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which mutatis mutandis they claim for themselves.

If this last passage is to be read literally, then it is difficult to escape the conclusion that the principle in *Travers* v. *Holley* will only be applied where there is substantial reciprocity in the municipal laws of the two countries.

It is submitted, however, that no such restrictive interpretation ought to be placed on Lord Justice Hodson's judgment, and this for the following reasons. First, it was unnecessary for the Court of Appeal in the *Travers* case to consider the wider question because there was in fact reciprocity between the Australian statute and the English statute. Secondly, it is as well-established as any principle can be in the English conflict of laws that whether a foreign court has jurisdiction (in the English sense) in a particular case depends, not on whether the foreign jurisdictional rules are the same as the English ones, but solely on whether an English court would itself have assumed jurisdiction if the facts had occurred in England. There is no express decision, so far as the writer is aware, which expressly establishes this principle, but it is implicit in all the cases concerned with the recognition of foreign judgments. It follows, therefore, that Lord Watson's dictum in the *Le Mesurier* case, quoted in the judgment of Hodson L.J., is not to be read literally, because, if it were, no foreign divorce decree which is based on the spouses' nationality rather than on their domicile would be entitled to recognition in England.

Thirdly, and this point appears to have escaped the notice of writers so far, no actual evidence appears to have been adduced in the *Travers* case to show on what grounds the courts of New South Wales actually exercised their jurisdiction—whether it was based on the assumption that the husband was still domiciled in New South Wales when the wife presented her petition, or whether it was based on the "deserted wife" provision in the New South Wales Matrimonial Causes Act, or on some other ground. If this is correct, then it seems but a short step from the argument that "true, you actually exercised jurisdiction on a ground we [the English court] do not recognize, but you *could* have rested it on a

provision of your statute law which is similar to our own" to the proposition that "whether your statute law is the same as ours does not matter, because it suffices if we would ourselves have exercised jurisdiction in similar circumstances". The critical reader might, however, object that, if this line of reasoning is sound, then it is difficult to see why the Court of Appeal in the *Travers* case bothered to refer to the Matrimonial Causes Act of New South Wales at all. The court could simply have said, "We would ourselves have exercised jurisdiction, and that is all that matters. We are not interested in any Australian legislation, since it cannot affect the position here one way or the other." The objection is a valid one and, as the writer does not claim to know the answer to it, it must be left to the English Court of Appeal to clarify its position on this point on a future occasion.

For my general submission, however, that the absence of reciprocal legislation ought not to be fatal to the recognition of a foreign divorce decree there is the weighty support of the distinguished Dean of the Harvard Law School. Dean Griswold has expressed the opinion that "it is the factual situation which is important. If the facts are such that the court of the forum would have jurisdiction, on proper cause, to grant a divorce, then it is my submission that it should recognize a divorce granted elsewhere on the basis of the same facts—regardless of any question of domicil."[12]

In *Dunne* v. *Saban*, however, Davies J. was apparently not aware, as has already been remarked, of the two possible interpretations that may be placed on the decision in *Travers* v. *Holley*, and his own judgment reflects what one might call the strict or narrow construction of Lord Justice Hodson's judgment. Thus the learned judge looks to see, not whether an English court would have assumed jurisdiction if an identical set of facts had arisen in England, but whether the Florida court was guided by residential requirements similar to those laid down in section 18 of the English Matrimonial Causes Act, 1950. His lordship said:[13]

> Mr. Hollins, for the husband petitioner, here argues therefore that as this court has the right by statute to dissolve marriages on the petition, for example, of a wife resident in this country where the husband is domiciled elsewhere, so we must recognize the right of foreign courts consequent upon the decision of the Court of Appeal in *Travers* v. *Holley* to do likewise. But, as I think, the real question is: does the

[12] (1951), 65 Harv. L. Rev. 193, at p. 228. See also the writer's letter in (1953), 31 Can. Bar Rev. 1077, at p. 1078.

[13] [1954] 3 W.L.R. 980, at p. 988; [1954] 3 All E.R. 586, at p. 591.

> foreign court do likewise? It seems to me that the observations of the Court of Appeal . . . were directed to a case where the extraordinary jurisdiction (I use that as meaning out of the ordinary jurisdiction) of the foreign court corresponds almost exactly with the extraordinary jurisdiction exercised by this court.

Following this line of reasoning to its logical end, the learned judge then arrives, not surprisingly, at the conclusion that, as the residential requirement under the law of Florida is only ninety days, whereas in England, in the case of a petitioning wife, it is three years, there was no reciprocity in the laws of the two countries, so that the Florida decree was not entitled to recognition.

It must not be hastily assumed however that, if the court had adopted the second and more liberal construction of the *Travers* case, its decision on the present facts would have been any different, for it would then have been seen that at the time the wife first instituted her proceedings in the Florida court[14] she had been continuously resident in Florida for about two years—that is to say, for a period that still fell short by a substantial margin of the three years required under the English statute. Suppose, however, that the period had been three years or more, would Davies J.'s decision still have been the same? The answer is surely yes, if he is to be at all consistent in the application of the test he set himself. But at the same time this method of approach demonstrates the unnatural and even unfair results to which a restrictive reading of *Travers* v. *Holley* can lead.

The second question Davies J. had to decide was a much simpler one than the first. It was as follows: if a wife petitioning in England under section 18 of the English act has to prove that she resided in England for at least three years, should the courts be willing to accept a lesser period of residence in a foreign country when the wife brings suit in a foreign forum? No help is to be derived on this point from *Travers* v. *Holley*, because it was not in issue in that case. Section 13 of the English Matrimonial Causes Act of 1937 did not stipulate for any particular period of residence before a deserted wife could present her petition under that section.[15] Professor Kennedy favours a liberal approach and would

[14] See *ante*, footnote 5. It is submitted that the terminal point for computing the period of residence is the date when proceedings were first commenced and not the date of trial or of the pronouncement of the decree. Cf. *Balfour* v. *Balfour*, [1922] W.L.D. 133 (S. Africa); Cheshire, Private International Law (4th ed.) p. 360; Wolff, Private International Law (1st ed.) p. 263.

[15] That was the original position. Section 13, however, was amended by the Law Reform (Miscellaneous Provisions) Act, 1950, section 1(3)(b) of which for the first time added the requirement of three-years residence by the wife. Section 1(3)(b) was later re-enacted as section 18(2) of the

be prepared to accept a lesser period than three years, provided that the wife's residence in the foreign forum is of a substantial duration.[16] In the instant case, however, there was no doubt in the court's mind what the answer should be. In the words of Davies J.:[17]

> *Travers* v. *Holley* deals with a case where the foreign court's jurisdiction depended on three years' residence, as does ours in similar circumstances.[18] What is the court to do when it is faced with a case of this kind? How is it to draw the line? Three years is all right because we exercise a similar jurisdiction. Is two years all right or is it too short? Is 12 months, 90 days, sixty days, one day all right? How is one to draw the line and where is one to fix the standard? It seems to me that that is a matter of impossibility unless there is some statutory yardstick by which one could measure what is reasonable residence from our point of view.

If one may respectfully say so, there is much to commend itself in this point of view. To have held that a lesser period than three years would have sufficed would have been to concede to the foreign court a greater jurisdiction than is allowed an English court under the 1950 act. It would have been more than is called for by the requirements of "reciprocity".

The Canadian reader may well wonder whether the Florida decree in *Dunne* v. *Saban* would be recognized in Canada if it were established that the husband deserted the wife and that the husband was domiciled in Florida immediately before his desertion. It is submitted that it should be recognized because in Canada, in those provinces which grant divorces, a deserted wife may petition for divorce in the province in which she was domiciled immediately before desertion if the desertion has continued for two years. In such circumstances the Canadian courts would themselves have exercised jurisdiction, and it is only just that a like jurisdiction be conceded to the courts of Florida.

JACOB S. ZIEGEL*

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Matrimonial Causes Act, 1950: see Halsbury's Statutes of England, Vol. 11, p. 843; Vol. 28, p. 739; Vol. 29, p. 406. In the *Travers* case the Court of Appeal was only concerned with the original section 13, because the wife had brought her petition in Australia in 1943.

[16] (1954), 32 Can. Bar Rev. 359, at p. 364.

[17] [1954] 3 W.L.R. 980, at p. 989; [1954] 3 All E.R. 586, at p. 592.

[18] His lordship must have been thinking of the 1950 act. See *ante*, footnote 15.

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EXPROPRIATION — DEFINITION OF "VALUE" — TEN PER CENT FOR FORCIBLE TAKING — FACTORS OF VALUE. — The President of the Exchequer Court has taken on some of the characteristics of Cato the Censor and parallels his "delenda est Carthego" with a constant attack on the ten per cent allowance for forcible taking in expropriations. *The Queen* v. *Supertest Petroleum Corporation Limited*[1] and *The Queen* v. *Hull School Commissioners*[2] are the latest in the series. It is unfortunate that the difference of judicial opinion on this matter and on the criteria which ought to govern the amount of expropriation awards should have resulted in some of the comments made by the president in his judgment in *The Queen* v. *Supertest Petroleum Corporation Limited*: firstly, his references to the remarks on stare decisis made by the Supreme Court of Canada in *Woods Manufacturing Co. Ltd.* v. *The King*[3] and, secondly, his statement that before his appointment he had been made aware of criticism of the Exchequer Court of Canada because many of its awards in expropriation cases were said by the critics to have been excessive, and that consequently he has set himself rigidly against excessive awards. No one who knows the president could for one moment doubt either his sincerity or his motives, but unhappily the judgment will be read by many who do not know him. They may infer from his remarks that he holds the Supreme Court of Canada in low esteem and that he comes to the judgment of expropriation cases with a bias against the subject whose property has been taken.

This judicial jousting has already attracted a good deal of criticism, but it is not worthy of as much consideration as other more important phases of the judgment in the *Supertest Petroleum* case. At page 111 of the report the learned president says:

> I doubt whether there is any concept in the whole field of law that is more elusive than that of value. There has been a long and ceaseless search by judges and others charged with the valuation of property to ascertain the proper tests by which the amount of such value can be ascertained in any given case. And the search must continue for the *factors* of value that should be taken into account are not static. On the contrary, there is a continuing shift in their respective weights as the circumstances under which they arise alter.

He then goes on from this unexceptionable premise to an exhaustive analysis of the evidence, of the qualifications of the expert witnesses, and of the various *factors* of value which were considered in this case, for example, the general nature of the property, its

[1] [1954] Ex. C.R. 105.
[2] [1954] Ex. C.R. 453.
[3] [1951] S.C.R. 504, at p. 515.

location, the kind and construction of the buildings, replacement cost, depreciation, life expectancy of buildings and equipment, sources of information on depreciation of special items, the proximity of rail and river transportation, of a main highway and extensive commercial development, the nearness of a large labour market, the appropriateness of the development of the property and other suggested possible uses for it and its future potentialities. The learned president's comments on the various factors and his weighing of them can be of great practical value to any solicitor or counsel in preparing a case for hearing in expropriation proceedings and are, accordingly, worth close study.

The extraordinary and ingenious manner in which the value of the expropriated land was built up by the defendant is made the occasion for a comprehensive review of the cases which enunciate the principles to be applied in determining the value of land in expropriation cases. As a result of this review, the learned president comes to the following conclusions:

(a) the principles of valuation laid down by the Supreme Court of Canada in *Diggon-Hibben Limited* v. *The King*,[4] and reaffirmed in *Woods Manufacturing Co. Ltd.* v. *The King*,[5] are different from those laid down by the Court of Appeal in England and the Privy Council in *In re Lucas and Chesterfield Gas and Water Board*,[6] *Cedar Rapids Manufacturing and Power Company* v. *Lacoste*,[7] *Pastoral Finance Association* v. *The Minister*[8] and *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatan;*[9]

(b) the conclusion of the Supreme Court has no precedent in England;

(c) it is the most expensive test that has been laid down;

(d) it will result in excessive awards;

(e) it will result in duplication in weighing the various factors of value that should be taken into account;

(f) it will be difficult to apply; and

(g) there should be a statutory definition of value.

All these conclusions are based on the premise that Mr. Justice Rand's words in *Diggon-Hibben Limited* v. *The King*, "the question is what would he [the owner], as a prudent man, at that moment [that is, the moment of expropriation] pay for the property rather than be ejected from it", change the law as it previously existed, and inject into it some new test of value. This is perhaps as

[4] [1949] S.C.R. 712.
[5] [1951] S.C.R. 504.
[6] [1909] 1 K.B. 16.
[7] [1914] A.C. 569.
[8] [1914] A.C. 1083.
[9] [1939] A.C. 302.

good an illustration as can be found of the extraordinary results which can be achieved by reading words out of their whole context and, having isolated them, proceeding to build up an argument upon them.

If we consider the context in which Mr. Justice Rand's remark is made, we find that it was a comment, or paraphrase, of Lord Moulton's illustrative remark in *Pastoral Finance* v. *The Minister* that "they [the owners] were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it". Neither Lord Moulton nor Mr. Justice Rand, it would seem, contemplated any delving into the mind of the owner to find out what he would take as a matter of evidence; what was obviously intended (and it represents no change or departure from usual practice) was for the court to place itself in the shoes of the owner, who for these purposes is presumed to be an honest, objectively-minded individual—in fact no one but the law's paragon, the reasonable man.[10]

If we then look at the context of Chief Justice Rinfret's approval[11] of Mr. Justice Rand's statement, we find that it is the concluding statement of several paragraphs emphatically affirming the Supreme Court's adoption of the principles laid down by the English Court of Appeal and the Privy Council in the very cases with which the president says it is at variance. If it is at variance, a view with which I do not agree, then the Supreme Court certainly did not intend it to be. In these circumstances, if this particular statement causes him difficulty, the president could safely ignore it and proceed on the principles enunciated in the English cases, which is in fact what he has done.[12] One feels that if, as seems to be the case, he thought the Supreme Court's attempt to elucidate these principles was somewhat inept, he might in charity have ignored it and passed on.

As is apparent from his remarks, the learned president thinks that compensation in expropriation cases, at least where the Crown is expropriating, should be based on market value alone, and cites many of the leading English cases, apparently in support of this thesis. But market value alone has never been the criterion in England any more than it has been in Canada. This is clear from the quotation from *In re Lucas and Chesterfield Gas and Water*

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[10] See *Fardell* v. *Potts*, in A. P. Herbert, Uncommon Law (1935) pp. 1 *et seq.*

[11] [1951] S.C.R. 504, at pp. 506-508.

[12] *The Queen* v. *Supertest Petroleum Corporation Limited*, [1954] Ex. C. R. 105, at p. 135.

Board at page 121 of the judgment, where Fletcher Moulton L.J. is quoted as follows: "The owner receives for the lands he gives up their equivalent, i.e. *that which they were worth to him* in money". The lands may be worth much more to the owner in money than market value. They may have for him, apart entirely from sentiment, a special value, such as existed for the owners in *The King* v. *Lynchs Limited*,[13] *Lake Erie Railway* v. *Brantford Golf Club*[14] and *St. Michael's College* v. *Toronto*.[15]

Of course what it all boils down to is that, if compensation were based on market value alone, apart from any special interest of the owner, the court would be relieved from the necessity of adjudicating upon some very highly controversial claims. It could rely upon the opinions of skilled real-estate valuators using only such factors of value as are usual in estimating value for purposes of sale or taxation. But this certainly leaves out of account any special loss that the owner may suffer because of an expropriation, which he would not have to suffer otherwise; for no matter what the opinion of the most skilled valuators, the owner does not have to sell at their price to anyone but an expropriating authority unless he wishes.

The learned president instances the allowance of $78,000 for disturbance given by the Supreme Court in the *Woods Manufacturing* case and says, "care should be taken to guard against such an award . . . allowed for a disturbance that has thus far not happened, the owner still being in undisturbed occupation of the property almost eight years after the date of its expropriation. There is something wrong with a principle that allows such a claim for a loss that has not happened and may possibly never happen." There is also something radically wrong with permitting an expropriation where the land is not needed at the time it is expropriated or for eight years after that or "possibly never"; but it is not a possibility which either the owner or the court could safely assume, because ordinarily the Crown expropriates for immediate use.[16]

The learned president also argues that if these special interests of the owner are given weight to increase the compensation over the market value, then the ten per cent granted for forcible taking represents a duplication and should not be allowed. He further argues, again, that there was and is no statute or rule of law in Canada compelling the allowance of a percentage for compulsory

[13] (1920), 20 Ex. C.R. 158. [14] (1917), 32 D.L.R. 219.
[15] [1926] S.C.R. 318.
[16] For a useful discussion of "special values", see Challies, The Law of Expropriation (1954) pp. 114-118.

taking (p. 146). Perhaps my understanding of what constitutes a rule of law is wrong, but before 1870 the case law of England certainly recognized the rule that in expropriation cases there would be an allowance for compulsory taking.[17] The learned president calls it a rule of practice rather than a rule of law, but, as it was recognized and consistently followed, it is submitted that the distinction is immaterial. Certainly the courts of Canada, including the Supreme Court, consistently followed the rule until it was "modified" by the judgment in *The King* v. *Lavoie*, which has certainly done nothing to add to the certainty of the law or its ease of administration, and does not appear to have any sound basis in the previous decisions of the Supreme Court. Taschereau J., in delivering the judgment of the court in *The King* v. *Lavoie*, says:

> Ce montant additionnel de 10 p. 100 n'est pas accordé dans tous cas d'expropriation, et *ce n'est que dans les causes où il est difficile, par suite de certaines incertitudes dans l'appréciation du montant de la compensation qu'il y a lieu de l'ajouter à l'indemnité.*

The italicized words would seem to be the converse of the rule previously followed by the Supreme Court (as the learned president points out) and, I respectfully suggest, is not a satisfactory statement of the law, which it seems to me is more correctly expressed in the recent Quebec judgment in *Proulx* v. *Paroisse de l'Annonciation*, where Casey J., referring to the ten per cent allowance, says:[18] "This indemnity has been recognized so often that it should be granted unless there is clear reason for not doing so"—a clear echo of the words of Fitzpatrick C.J. in *The King* v. *Hunting et al.*[19] It expresses a view of the law with which I agree, as does the learned author of *The Law of Expropriation*.[20]

The learned president then goes on at page 145 to reiterate his view that the ten per cent allowance for compulsory taking has no justification in principle. He rejects the analogy between trespass and expropriation enunciated by Erle C.J. in *Ricketts* v. *Metropolitan Railway Company*[21] as anachronistic and inapplicable to the conditions of the present times, "when it frequently happens that the property of individuals has to be expropriated for important public purposes". But, if it were not for "vis major", the "important public purposes" would have to do one of two things, either pay what the owner asked, no matter how much it is, as a

[17] See the judgment of Thorson P. in *The Queen* v. *Sisters of Charity*, [1952] Ex. C.R. 113, at pp. 131-135.
[18] [1954] B.R. 831, at p. 836.
[19] (1917), 32 D.L.R. 331.
[20] *Supra*, footnote 16, p. 213.
[21] (1865), 34 L.J.Q.B. 257, at p. 261.

private buyer would do, or go to unoccupied or less expensive sites, as would ordinary commercial enterprises. In looking at some of the cases, for example, the *Woods Manufacturing Company* case, one may justifiably inquire sometimes just how necessary the expropriation was or how important was the public purpose to be served.

Furthermore, I cannot agree with the view, apparently entertained by the learned president, that the Crown, merely because it is "the Crown", is entitled to specially favourable treatment in expropriations to the prejudice of the rights of the individual. Such a view is either anachronistic or, at the other extreme, is consistent only with the social theory of some contemporary states, where the state is supreme and the individual is without rights.

To remedy what he considers to be the faults in the principles of valuation laid down by the Supreme Court, the learned president suggests, at page 132 of his judgment in the *Supertest Petroleum* case, the enactment of a statutory definition of value similar to that in the Acquisition of Land (Assessment of Compensation) Act, 1919, of the United Kingdom. I have already ventured to point out one or two objections to this suggested panacea in my review of Mr. Justice Challies' book on expropriation.[22] In addition to those objections, it is now respectfully suggested that, firstly, the definition suggested is unduly restrictive and, secondly, far from reducing litigation, it would only result in added disputes. This, I think, is a fair conclusion to draw from the number of reported cases which have turned upon the various statutory definitions of "value" contained in the numerous assessment acts, city charters and other taxing statutes in Canada. The mere fact that a definition is contained in a statute hardly guarantees its clarity, much less the interpretation it will subsequently receive in the courts.

Except for the careful analysis of the factors which he applies to the valuation of the expropriated property, so characteristic of the learned president, the judgment under review adds little to the law, though as a piece of special pleading it may serve to advance in Parliament his views of what the law should be.

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[22] (1954), 32 Can. Bar Rev. 912, at p. 917.

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