Case and Comment

PUISSANCE PATERNELLE—DÉCHÉANCE—DROIT CIVIL ET JURISPRUDENCE DE QUÉBEC—COMPOSITION DE LA COUR SUPRÊME DU CANADA.—Dans la province de Québec, l'enfant reste sous l'autorité de ses père et mère jusqu'à sa majorité ou son émancipation.[1] Les codificateurs de 1866 ont adopté les règles de la puissance paternelle "telle qu'admise et pratiquée dans le ressort du parlement de Paris".[2] Or, dans les pays de coutume en France, l'autorité des parents sur leurs enfants mineurs, tout en n'ayant pas la rigueur de la *patria potestas* du droit romain, comportait une puissance sur la personne de l'enfant et un droit de garde. L'exercice de la puissance paternelle était tempéré et contrôlé par les errements des parlements—la jurisprudence du temps—et la justice venait en empêcher les abus dans l'intérêt de l'enfant.[3]

Dans *Marshall* v. *Fournelle*,[4] le juge Rivard avait fait sienne l'expression du tribunal civil du Puy dans un arrêt du 10 décembre 1869:[5]

> Les droits qui dérivent de la puissance paternelle sont antérieurs à toute législation et ont leur source dans la nature; et un intérêt d'ordre public, qui doit dominer tous les intérêts privés, s'oppose à ce qu'il soit porté atteinte à une institution que le législateur n'a pas établie, mais qu'il ne fait que consacrer.

Et le juge Rivard avait ajouté:

> Le principe reste toujours debout; c'est au père qu'il appartient d'élever son enfant. . . . Telle est la doctrine consacrée par notre Code civil. Seuls des motifs impérieux et exceptionnels peuvent incliner les juges à s'en écarter. . . .[6]

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[1] Article 243 du Code civil.

[2] Deuxième Rapport des Commissaires chargés de codifier les lois du Bas-Canada en matières civiles (1862) p. 202.

[3] Rapport de M. Henri Capitant, "Evolution du droit de la famille depuis le Code civil" (Livre-Souvenir des Journées de Droit Civil Français, Montréal, 31 août-2 septembre 1934) (Montréal, 1936) pp. 12 et s.

[4] (1926), 40 B.R. 391, à la p. 395; confirmé par [1927] S.C.R. 48.

[5] D.P. 1870.3.64.

[6] *Loc. cit.* à la note 4.

Cependant, nos tribunaux tiennent compte de la volonté de l'enfant, quand il est d'âge à l'exprimer. Par exemple, dans *Dugal* v. *Lefebvre*,[7] ils ont sanctionné le choix fait par un adolescent de quinze ans et demi, qui, pour des raisons jugées suffisantes, préférait habiter avec sa grand'mère et sa tante maternelle plutôt qu'avec son père; mais lorsqu'il s'agit d'enfants en bas âge, il faut "des circonstances extraordinaires", pour reprendre le texte du juge Rivard, "quand les parents sont incapables ou indignes d'exercer la puissance paternelle", pour "justifier le pouvoir judiciaire d'intervenir dans l'organisation de la famille".[8]

Ainsi dans *Blais* v. *Quartz*,[9] la Cour d'Appel, d'accord avec le juge de première instance, a donné effet au droit naturel du père à la garde d'une fillette de cinq ans, à l'encontre des grands-parents qui l'avaient recueillie et gardée dans des circonstances qui auraient pu faire conclure à l'indignité du père. Le juge de première instance avait répondu négativement à la question, "Has the petitioner forfeited his natural and legal right of authority?", et il avait conclu, "the natural and reciprocal feeling between father and child [should] be given every opportunity to develop naturally". L'autorité paternelle fut maintenue aussi dans *Larose* v. *Bergeron*.[10]

Cette jurisprudence québecoise était continuée dans un arrêt unanime de la Cour d'Appel dans *Donaldson* v. *Taillon*.[11] Les parents avaient confié la garde de leur deuxième enfant, dès sa naissance, aux parrain et marraine, qui étaient l'oncle et la tante paternelle de l'enfant et qui l'élevèrent comme s'il eût été leur. Les parents, voulant se faire remettre l'enfant qui avait atteint l'âge de sept ans, intentèrent la procédure d'usage par voie d'habeas corpus.

Le juge Gibsone, de la Cour Supérieure, refusa la requête des parents, tenant plus avantageux pour l'enfant de le laisser dans le milieu où il avait été élevé jusque là. Il estima que les parents n'avaient pas eu d'affection pour lui. La Cour d'Appel (les juges Galipeault, St-Jacques, Gagné, Casey et Bertrand), ayant conclu que le père n'était ni incapable ni indigne de reprendre son enfant pour l'élever avec ses deux frères, cassa le jugement de première instance et maintint le bref d'habeas corpus. C'est "avec beaucoup

[7] [1934] S.C.R. 501, infirmant [1932] B.R. 82. Voir aussi le juge Rivard, *loc. cit.*, à la note 4.

[8] *Loc. cit.* à la note 4.

[9] Jugement unanime de la Cour d'Appel nº 4390, district de Montréal, en date du 28 février 1952, confirmant le juge Mitchell.

[10] [1953] B.R. 798.

[11] [1953] B.R. 332.

d'hésitation et de répugnance" que le juge en chef Galipeault crut "devoir ne pas enregistrer une dissidence". Il convint, cependant, que la décision de ses collègues était en accord avec la jurisprudence dont le poids "semble s'affirmer à l'encontre de mon opinion".[12]

A la Cour Suprême du Canada,[13] une majorité de trois juges infirma l'arrêt de la Cour d'Appel dans cette affaire *Donaldson* et refusa au père la garde de son enfant. Elle décida que, l'intérêt de l'enfant devant prévaloir, la preuve faisait pencher la balance en faveur de l'oncle et de la tante, chez qui, comme l'avait pensé le premier juge, l'enfant trouverait plus d'affection que chez ses père et mère. Le jugement de première instance n'avait pas conclu formellement à l'incapacité ou à l'indignité des parents; et seul le juge Kellock, appuyé par le juge Cartwright, a décidé que l'indifférence et le manque d'affection des père et mère, tenus pour établis par le premier juge, constituaient une inaptitude ("unfitness") à exercer l'autorité paternelle.[14]

Les juges Taschereau et Fauteux motivèrent chacun fortement leur dissidence et citèrent tous deux l'opinion du juge Rivard dans *Marshall* v. *Fournelle*. Le juge Taschereau dit:[15]

> Le principe fondamental qui doit guider les tribunaux dans une cause comme celle qui nous est soumise, découle non seulement de la loi naturelle, mais se trouve consacré par l'article 243 du Code civil qui veut que l'enfant demeure sous l'autorité de ses parents jusqu'à sa majorité. . . . ce n'est que dans les cas *d'incapacité* ou *d'indignité* de leurs parents, que les enfants mineurs sont soustraits à l'autorité paternelle.

Le juge Fauteux, à la page 269:

> Dans toutes ces dispositions du Code civil sanctionnant la reconnaissance, le maintien et le développement de cette institution naturelle qu'est celle de la famille, l'intérêt de l'enfant a été l'objet d'une particulière considération du Législateur et, de cet intérêt, on ne saurait conséquemment se faire une conception nettement juridique sans tenir compte des droits et obligations qui y sont établis. Bref, on peut difficilement traduire et résumer le véritable esprit de la loi sur le point en termes meilleurs que ceux employés par M. le juge Rivard, de la Cour d'Appel, dans la cause de *Marshall* v. *Fournelle*, termes approuvés par cette Cour dans *Dugal* v. *Lefebvre*. . . .

Aux motifs des juges Kellock et Estey, le juge Cartwright, dont

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[12] Dossier, p. 167. M. Louis Baudouin a fait une analyse des notes des juges de la Cour d'Appel et du droit québecois sur la puissance paternelle dans (1954), 14 Revue du Barreau 478.

[13] [1953] 2 S.C.R. 257.

[14] *Ibid.*, à la p. 264.

[15] [1953] 2 S.C.R. aux pp. 257-258.

la décision fut, peut-on dire, le dernier mot de l'affaire, a ajouté des notes qui éclairent la décision des juges majoritaires. Les autorités qui y sont citées l'indiquent, c'est une conception juridique du droit des parents, étrangère au droit civil de la province de Québec, qui a prévalu dans l'affaire *Donaldson*. Le juge Cartwright invoque une affirmation du juriste éminent que fut le juge Middleton, de l'Ontario, dans *Steacy*,[16] et il conclut que le premier juge eut raison de refuser "to give effect to the *prima facie* right of the parents to have the custody of their child".[17] C'est là une définition du droit des parents toute autre que celle que lui donnent les juges Taschereau et Fauteux, à la suite de la jurisprudence traditionnelle formulée par le juge Rivard. Un droit naturel prenant sa source dans l'institution familiale est devenu, en Cour Suprême, un "*prima facie* right" qui se perd quand des parents font mauvaise impression sur un juge et lui donnent lieu de croire qu'ils n'ont pas d'affection pour leur enfant, ou qu'ils en ont moins que des tiers qui leur en contestent la garde.

L'assertion du juge Middleton était la suivante:

> In all the law relating to the custody of children the true welfare of the child is being even more clearly written as the fundamental axiom to which all other considerations must, in the end, yield.

Ce passage et la définition du juge Cartwright reflètent, je crois, un état de choses en droit anglais et le résultat d'une intervention législative dans l'exercice de l'autorité paternelle, qu'on ne trouve pas dans le droit civil québecois. Cette évolution est retracée par les trois juges de la Cour d'Appel d'Angleterre dans *The Queen* v. *Gyngall*[18] (Lord Esher M.R. et les Lord Justices Kay et A. L. Smith). En voici un résumé.

Les *Supreme Court of Judicature Acts, 1873-1875*, mirent fin en Angleterre à la séparation existant entre la juridiction des tribunaux dits de *common law* et ceux d'*equity*. Il n'y a depuis lors qu'un seul tribunal de première instance (*the High Court*) et le tribunal d'appel; tous les tribunaux appliquent à la fois les règles de la *common law* et celles de l'*equity*; en cas de conflit ce sont les règles de l'*equity* qui doivent prévaloir. Le législateur a spécifié particulièrement qu'il en serait ainsi en matière de garde d'enfant. Dans l'Ontario, l'intervention législative se trouve aujourd'hui à l'article 22 du *Judicature Act*:[19]

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[16] (1922), 52 O.L.R. 579, à la p. 594. Dans *Steacy*, un père s'est vu refuser la garde d'une enfant de neuf ans dans des circonstances analogues à celles de l'affaire *Donaldson*.

[17] [1953] 2 S.C.R. à la p. 267.

[18] [1893] 2 Q.B. 232.

[19] R.S.O., 1950, c. 190.

> In questions relating to the custody and education of children and generally in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

Or, *at common law*, le droit du père était plus absolu encore que dans la jurisprudence québecoise actuelle.[20] Mais il n'était pas ainsi devant les tribunaux dits d'*equity* où le juge, s'autorisant du fait qu'il y représentait le Souverain, dont l'une des prérogatives est d'être le *parens patriae*, exercait lui-même en fait l'autorité paternelle; ce qui lui permettait "[to] do what under the circumstances a wise parent acting for the true interests of the child would or ought to do", suivant l'expression du juge Kay dans *The Queen* v. *Gyngall*.[21]

C'est cette évolution à la fois historique et législative qui a donné au juge, en droit anglais, un pouvoir d'intervention dans l'exercice de la puissance paternelle, que ne connaît pas le droit civil de la province de Québec.[22] Dans l'état actuel de notre droit, quand il s'agit de jeunes enfants, l'intervention du juge se limite aux cas où les parents se sont montrés indignes, ou incapables, d'exercer leur autorité et d'en avoir la garde.

L'affaire *Donaldson* donc a été jugée en dernier ressort d'après une conception de la puissance paternelle inspirée du droit anglais. Quel poids doit-on accorder, dans notre jurisprudence, à cette décision de la Cour Suprême? Il faut le dire avec tout le respect qu'il faut: cette décision ne peut en avoir parce qu'elle est sans autorité en droit civil québecois pour les raisons ci-haut indiquées, et encore, parce que les deux juges de formation civile, qui y ont siégé, ont confirmé la Cour d'Appel et maintenu la jurisprudence québecoise.[23]

De toutes les provinces canadiennes, la province de Québec est la seule pour laquelle la loi organique de la Cour Suprême[24] a prévu que, sur les neuf juges qui la composent, au moins trois doivent être choisis parmi les juges ou les avocats de cette province. Quand le nombre des juges fut porté de sept à neuf, le ministre

[20] Voir Lord Esher, dans *Gyngall*, [1893] 2 Q.B. 232, à la p. 239; W. H. A. Stuart Garnett, *Children and the Law* (London,1911) pp. 2 et s.; Eversley on Domestic Relations (4e éd.) pp. 487 et s.

[21] [1893] 2 Q.B. 232, à la p. 248; et ". . . supersede [the] natural rights of the mother", suivant l'expression de Lord Esher, à la p. 246.

[22] Dans *Dugal* v. *Lefebvre*, [1934] S.C.R. 501, à la p. 510, le juge Cannon avait dit: "Il faut pouvoir dire que, eu égard à toutes les circonstances, l'autorité parentale doit céder à l'autorité du tribunal représentant le souverain *parens patriae*, quand l'intérêt de l'enfant l'exige". Nous croyons cette opinion tout à fait isolée dans notre jurisprudence.

[23] N'eut-il pas mieux valu que trois juges de Québec y eussent siégé?

[24] S.R. du C., 1952, c. 259, art. 6.

de la justice, M. Garson, exposa à la Chambre des Communes les motifs de cette disposition en ces termes:[25]

> We knew that when we created the Supreme Court as the court of last resort for Canada we would have to have appointed to the membership of that Court enough civilians or judges trained in the civil law so that, in the event of there coming from Quebec a case involving any matters other than criminal law, it would be decided without a stalemate,[26] having one civilian judge on one side and one civilian judge on the other. That necessitated the appointment of three judges trained in the civil law on that court of last resort. . . .
>
> So far as representation of Quebec is concerned, as I have already indicated, it is not in any sense a geographical representation, but rather one necessitated by the fact that, unlike other countries, we have in one of our larger and more thickly populated provinces a civil code, which is a system of law quite distinct from the common law. In making the Supreme Court of Canada the court of last resort we have to make adequate provision to hear appeals from all parts of Canada, including Quebec.

Ce n'est pas faire violence à la pensée du ministre de la justice de dire qu'un des soucis du législateur fédéral a été de maintenir le droit civil de la province de Québec dans son intégrité. On est fondé également à conclure qu'il n'était pas dans l'ordre des choses prévues par le législateur que, dans une question relevant du droit de la famille—l'une des raisons d'être du droit particulier à la province de Québec—la décision finale ne soit pas celle de juges "trained in the civil law", mais soit dérivée d'un droit étranger à cette province.

LÉON LALANDE*

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WILLS—DELEGATION OF WILL-MAKING POWER—POWERS OF APPOINTMENT.— In an article on "Delegation of Will-Making Power" in the Law Quarterly Review[1] I expressed the view that the long-established practice of inserting powers of appointment in wills was flatly opposed to a principle propounded by many strong *dicta* in the House of Lords and the Privy Council, which declared that a testator must make his own will and cannot delegate the task to another. I also contended that the creation of powers by

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[25] Debates, House of Commons, 1949 (2nd sess.), October 11th, 1949, pp. 662, 663.

[26] Dans l'affaire *Donaldson*, il n'y eut pas "stalemate"; les deux juges de formation civile furent unanimes à confirmer l'arrêt de la Cour d'Appel.

*Léon Lalande, c. r., du barreau de Montréal.

[1] (1953), 69 L.Q. Rev. 334.

will could reach the point where it defeated the whole purpose of the Wills Act.

The conflict between the common practice (with decisions of the lower courts approving this) and the *dicta* of the highest appellate tribunals has gone largely unacknowledged, but I foresaw that judges would soon have to grapple with the problem more openly and choose between two irreconcilable views. The conflict has since come up for a direct decision.

In *Re McEwen, McEwen* v. *Day*[2] Gresson J. had to pass on a will which appointed two executors and trustees and, after giving pecuniary legacies, gave the residue to his trustees

> Upon Trust for such person or persons (including the said [trustees], either jointly or severally for themselves personally and beneficially and absolutely free of any trust express or implied) as my Trustees may by any deed or deeds at any time or times within a period of ten years from the date of my death appoint and in default of any such appointment or appointments and in so far as the same shall not extend upon trust for my son. . . .

Gresson J., after a long review of the *dicta* mentioned, which he conceded were inconsistent with the validity of powers, or at all events of general powers of appointment, decided that, although the power given in the *McEwen* case was general, he should follow the express decisions of single judges in favour of the validity of powers rather than the mere *dicta* to the contrary, even though these latter came from the House of Lords and Privy Council. He accordingly upheld the will. Such a decision is not surprising; probably most judges of first instance would have done the same, when "put on the spot", as this judge was.

However he was not content to rest his decision on the balance of direct authority, but put forward considerations of his own to rationalize the result; and some of his reasoning seems open to criticism. First the judge said:

> . . . there must be an examination of the provision itself to determine whether it is a trust or a mere power.

At this point his language becomes rather confusing because the will contained both a trust and a power: the trustees were to hold in trust for the persons whom they appointed under the power, though, if they appointed themselves, the trust would of course be ended by a merger. But a power may itself be in the nature of a trust, and it was this point which the judge was really considering. He held that this power was not in the nature of a trust, and I see no reason to quarrel with his conclusion on that.

[2] [1955] N.Z.L.R. 575.

At page 581 Gresson J. held that:

> There is, therefore, judicial recognition that a general power of appointment is either not truly a delegation at all or is an exception to the anti-delegation principle.

On page 582 he added:

> It would seem, therefore, that the anti-delegation principle is not flouted when either there is a power of selection from a class designated with certainty (and the whole world less one *person* has been held in *In re Park* to satisfy that requirement), or where there is power to dispose in favour of any person including the donee. . . .

It would follow *a fortiori* that a power to appoint to a smaller class, that is the ordinary special power, would be valid, and then no power of appointment would "flout the anti-delegation principle", because there would be no anti-delegation principle left: there would be no room for it. Gresson J., like the single English judges whom he follows, evades grappling with the question whether there is truly any anti-delegation rule by treating both general and special powers of appointment as exceptions, and ignoring the difficulty that then the exceptions eat up the rule. It seems to me impossible to deny that granting powers amounts to delegation, whether it is valid or invalid.

If Gresson J.'s reasoning is sound, there seems to be nothing to prevent *A*'s making a will leaving all his property to his executor *B* to be divided among such persons as *B* thinks fit. No such will has ever come before the courts; but all the wills that most resemble *A*'s have been held to be invalid: see *Yeap Cheah Neo* v. *Ong Cheng Neo*,[3] *Fenton* v. *Nevin*,[4] *Re Carville, Shone* v. *Walthamstow*[5] and *Re Mack*.[6] The wills there held bad were however so held, not because of delegation as such, but because the distribution of the property was held to be too uncertain. Though the reasoning in the cases is vague, they seem to have been decided on the principle that a disposition under a will (except to charity) must be a disposition for the benefit of ascertainable *persons*, so that a will cannot validly authorize anyone to "dispose of", "apply" or "distribute" a fund or estate as that person thinks fit because the choice made might be more than a mere choice between persons.

In *Yeap Cheah Neo* v. *Ong Cheng* the will directed trustees to "pay and apply" residue "in such manner and to such parties as to them may appear just". In *Fenton* v. *Nevin* the will said: "My

[3] (1875), L.R. 6 P.C. 381.
[4] (1893), 31 L.R. Ir. 478.
[5] [1937] 4 All E.R. 465.
[6] [1939] O.R. 100.

executors shall apply the overplus, if any, as they think fit". In *Re Carville* the will directed: "The residue to be disposed of as my executors shall think fit". And in *Re Mack* the residue was given to executors "to distribute as they may in their discretion deem just and proper". In several of these cases, it is not easy to see the difference between the powers given and general powers of appointment.

If these cases are sound and also *Re McEwen*, are we to conclude that a will is bad where *A* leaves his estate to his executor *B* to distribute it as *B* shall think fit, but is valid where *B* is to distribute it among such *persons* as he shall think fit? Such a distinction will take a lot of swallowing.

The reasoning in some of the cases makes much of a will's creating a trust, as bearing on the validity of wide delegation. In fact, one could find support for the distinction that *A*'s will will be good if he leaves his property to his executor *B* to divide among such persons as *B* may select, but is bad if *A* leaves the property to *B* in trust for such persons as *B* may select. Personally, I find it impossible to see any valid distinction between the two wills.

If *A* can make a valid will in either of the forms suggested, this, it seems to me, would make a mockery of the Wills Act and defeat its main purposes.

It may be conceded that two sections of the Wills Acts that govern in most common-law jurisdictions refer to the use of powers of appointment; but the references are to the exercise of powers, not their creation; they do not necessarily even assume that powers may validly be created by will, for creation of powers is often by deed.

D. M. GORDON*

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CHAMPERTY—EFFECT OF NEW CRIMINAL CODE—ENFORCEABILITY OF CHAMPERTOUS CONTRACTS.—Under the new Criminal Code[1] there is no possibility that a person may be convicted of champerty, maintenance or barratry, notwithstanding that such offences may have existed at common law. The new code does not in so many words abolish the offences (section 8 simply provides that no person shall be convicted of an offence at common law), but, as none of the three has been perpetuated, and as the code purports to be exhaustive of all offences, in effect champerty, main-

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[1] Stats. Can., 1953-54, c. 51.

tenance and barratry can no longer be said to belong in the realm of Canadian criminal law, if they ever did. Thus, the considerable conflict of opinion[2] as to whether champerty and maintenance are offences at common law is no longer of any consequence. It is interesting to note that the royal commissioners who produced the new code considered champerty, maintenance and barratry obsolete and archaic, and apparently for that reason unworthy of inclusion.[3]

This development in the criminal law invites a re-examination of the civil (as opposed to criminal) and ethical consequences of the offence of champerty, the category of maintenance into which, at least in certain circumstances, falls the practice of undertaking cases on a straight percentage or contingency basis. "Champerty", according to *Halsbury's Laws of England*,[4]

> is a particular kind of maintenance, namely, maintenance of an action in consideration of the promise to give the maintainer a share in the subject matter of the proceeds thereof.

The civil consequences, for the time being at least, are unaffected by the new code. There is ample authority that a champertous contract is unfavourably regarded and will not be enforced by the courts.[5] For the future in British Columbia however, as in other provinces, it may be noted that the basis of the *Legal Professions Act* case,[6] in which the British Columbia Court of Appeal declared *ultra vires* legislation purporting to permit agreements giving a solicitor an interest in the result of litigation on the ground that it invaded the federal field of criminal law, has been implicitly destroyed by the new code. Since it can now be said with certainty that champerty is not a criminal offence in Canada, there can be no such invasion of federal jurisdiction. The legislature, once thwarted, may well decide to re-enact the legislation; but until it

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[2] For cases holding champerty and maintenance to be an offence at common law see footnote 5 *infra*. Holding the opposite are: *Thomson* v. *Wishart* (1910), 19 Man. L.R. 340; Halsbury's Laws of England (3rd ed.), Vol. 1, p. 39; and see the authorities cited by McPhillips J. A. in *Re Constitutional Questions Determination Act and Section 100 of the Legal Professions Act* (1927), 39 B.C.R. 83.

[3] (1955), 33 Can. Bar Rev. at p. 24, quoting the report of the Royal Commission on the Revision of the Criminal Code.

[4] (3rd ed.), Vol. I, p. 41.

[5] *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186; *O'Connor* v. *Gemmill* (1899), 29 O.R. 47; *Hopkins* v. *Smith* (1901), 1 O.L.R. 659; *Robertson* v. *Bossuyt* (1901), 8 B.C.R. 301; *Meloche* v. *Déguire* (1903), 34 S.C.R. 24; *Briggs* v. *Fleutot* (1904), 10 B.C.R. 309; *Taylor* v. *Mackintosh* (1924), 34 B.C.R. 56; *Re Constitutional Questions Determination Act and Section 100 of the Legal Professions Act* (1927), 39 B.C.R. 83. And see the cases listed in Halsbury, *supra* footnote 2, p. 42.

[6] *Supra*, footnote 2.

does, and despite the fact that its attitude has once been expressed, the law remains opposed to the enforcement of champertous contracts. It may be, and it seems reasonable to expect, that the courts will eventually give effect in certain circumstances to such contracts now that they are clearly without the pale of criminal law. But for the present the decisions certainly do not encourage that possibility, turning as they do rather on general considerations of public policy than on the supposed criminal nature *per se* of champerty.

The ethical aspect is an elusive one. It is not always easy to draw the line between right and wrong. Whether an agreement to accept a case on a straight contingency basis is ethically proper depends, not only on the terms of the agreement itself and the facts of the dispute, but equally upon the integrity of the particular lawyer, which will determine whether he will allow his sense of professional ethics to be clouded by the certainty that on the recovery of judgment hinges the recovery of his fee. On this point the authorities embody conflicting views. Chancellor Boyd, for example, in *Re Solicitor*, quotes the question:[7]

> How can the Courts put full faith in the sincerity of our labours as aids to them in the administration of justice if they have reason to suspect us of having bargained for a share of a result?

On the other hand, Lord Russell of Killowen, in his charge to the jury in *Ladd* v. *London Road Car Company*, said:[8]

> Justice would very often not be done if there were no professional men to take up [cases on behalf of the humbler classes] and take the chances of ultimate payment. . . .

A suggested test from the ethical standpoint is an examination of the proposed course of action in the light of the following statement by Sir Montague E. Smith, in his judgment for the Privy Council in the *Ram Coomar* case:[9]

> Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

[7] (1907), 14 O.L.R. 464, at p. 466.
[8] (1900), 110 L.T. Jo. 80; quoted as being approved by the Court of Appeal in a subsequent decision.
[9] (1876), 2 App. Cas. 186, at p. 210.

> But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them.

In other words, is the agreement conscionable? Is it made with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense for the assistance? And what may be an unreasonable recompense in one case may well be a reasonable one in another, so that a line drawn at a given proportion of the proceeds of an action would not necessarily be a true guide. It is submitted that the dicta[10] condemning, *ipso facto*, every agreement giving a solicitor an interest in the fruits of successful litigation ignore the real ethical problem, which turns upon the circumstances of the particular case.

Finally, it may be mentioned that the Canons of Legal Ethics adopted both by the Canadian Bar Association and by the Benchers of the Law Society of British Columbia have a word to say in point. In both cases canon 3(7) states, in part, that the lawyer

> should not, *except as by law expressly sanctioned*,[11] acquire by purchase or otherwise any interest in the subject matter of the litigation being conducted by him.

Thanks to the italicized phrase, the canon begs the question of how far in the realm of champerty a lawyer may properly venture, leaving unaffected, it is suggested, the test implicitly prescribed by the Judicial Committee.

JOHN N. STONE*

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CRIMINAL LAW—SECTION 624 OF THE CRIMINAL CODE—TIME SERVED PENDING APPEAL—CONTRASTING ENGLISH AND CANADIAN PROVISIONS.—Section 624 of the new Criminal Code retains

[10] See, for example, *Robertson* v. *Bossuyt* (1901), 8 B.C.R. 301; *Re Solicitor* (1907), 14 O.L.R. 464; *Williams* v. *McDougall* (1909), 12 W.L.R. 381. In the *Robertson* case, on appeal from the Yukon Territory to the British Columbia Supreme Court, Drake J., who gave the leading judgment, says at p. 304: "If any agreement had been come to as to a percentage fee on the collection of the judgment, this would be void as against the policy of the law relating to contracts between solicitors and their clients for solicitors to share in the results of the litigation. . . . The agreement would be in the nature of champerty, and void at common law."

[11] Italics mine.

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as part of Canadian criminal procedure a manifestly unfair provision that has formed part of the code since 1923. The relevant subsections of section 624 are as follows:

> 624. (2) The time during which a convicted person
> (*a*) is at large on bail, or
> (*b*) is confined in a prison or other place of confinement,
> pending the determination of an appeal by that person,
> does not count as part of any term of imprisonment imposed pursuant to his conviction, but paragraph (*b*) is subject to any directions that the court appealed to may give.
>
> (3) Notwithstanding subsection (1), a term of imprisonment, whether imposed by a trial court or by the court appealed to, commences or shall be deemed to be resumed, as the case requires,
> (*a*) on the day on which the appeal is determined, where the convicted person is then in custody, . . .
> but paragraph (*a*) is subject to any directions that the court appealed to may give.
>
> (5) An application for leave to appeal is an appeal for the purposes of this section.

These provisions of section 624 impose a hardship on a prisoner and a responsibility on his counsel that run contrary to established concepts of British criminal justice. This is particularly so because the courts in Canada have neglected to lay down principles that could guide prospective appellants and their counsel in deciding whether a conviction should be appealed, having regard to the possibility that time served by the appellant pending his appeal may not count against his sentence in the event of the dismissal of the appeal. In theory a prisoner convicted, for example, at the end of May in any year and sentenced to three months imprisonment, who is unable to set his appeal down for hearing before the summer vacation and who cannot raise bail, faces the possibility of imprisonment for nearly six months if his appeal is heard the following September and dismissed. The time served pending his appeal prima facie will not count against his sentence and he has no indication whether the Court of Appeal will make an order under section 624 permitting time served to count. In such a case, of course, it is likely that counsel would advise against an appeal on purely practical grounds and regardless of the justice or injustice of the conviction. It is submitted that neither counsel nor a prospective appellant should be put in the position of having to weigh the possible success of an appeal against the increased imprisonment that may result in the event of the appeal's failure.

Originally it was the practice in Ontario under section 624 (section 1054B of the old code) for the Court of Appeal, in dis-

missing an appeal, to order as a matter of course that the sentence commence from the date of its imposition, but in recent years the court has leaned toward a stricter interpretation of section 624 and has required evidence of special circumstances before an order is made. In some cases inordinate delay of the hearing of the appeal is considered by the court as sufficient grounds for making an order, if the delay has not been occasioned by the appellant or his counsel, but in one recent unreported case the court refused to make an order where the appellant had been sentenced to three months imprisonment and had spent over one month in custody pending his appeal because of uncontrollable and unforeseeable delay in the transcription of the evidence for the appeal.[1] In practice the Ontario Court of Appeal will almost always make an order where an appeal is delayed by the summer vacation, but there has been no formal judicial utterance to that effect.

It might be argued in favour of a strict interpretation of section 624 that it restricts frivolous appeals and makes a prisoner think twice before setting in motion the expensive appellate machinery. But who is to determine which appeals are frivolous and which have substance except the judges sitting on the Court of Appeal? Counsel's opinion is at best only an opinion, even though by reason of section 624 it must approach prescience if his client's liberties are to be protected. The provisions of section 592 (1)(b)(iii) (section 1014(2) of the old code) intensify the prospective appellant's dilemma by providing in effect that, even though the judgment of the trial court is erroneous on a question of law, the Court of Appeal may nevertheless dismiss the appeal if it finds that "no substantial wrong or miscarriage of justice has occurred". The impossibility of counsel deciding with any assurance whether the miscarriage of justice in any case is "substantial" is indicated by the conflicting majority and dissenting opinions on that point in recent cases.[2]

Before 1923 there was no provision in the code comparable to the present section 624. The original code, enacted in 1892, contained the following section:

> 749. The sentence of a court shall not be suspended by reason of any appeal, unless the court expressly so directs, except where the sentence is that the accused suffer death, or whipping. . . .

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[1] *Regina* v. *Harding*, decided on November 22nd, 1954, and recorded as No. 248/54.

[2] See *Rex* v. *Darlyn* (1947), 88 Can. C.C. 269; *Ruest* v. *The Queen* (1952), 104 Can. C.C. 1; *Boucher* v. *The Queen* (1954), 110 Can. C.C. 263; *Hebert* v. *The Queen*, [1955] S.C.R. 120.

This section when combined with section 3 of the Prisons and Reformatories Act, R.S.C., 1906, c. 148,[3] had the effect of commencing sentence from the date of its imposition regardless of whether an appeal was launched. Section 749 continued as the law of Canada (later as section 1023) until 1923 when it was repealed and replaced by the following:[4]

> 1019. (2) The time during which an appellant, pending the determination of his appeal, is admitted to bail, and, subject to any directions which the court of appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under the rules of any prison in which he is confined, shall not count as part of any term of imprisonment under his sentence; and, in the case of an appeal under this Part any imprisonment under the sentence of the appellant, whether it is the sentence passed by the trial court or the sentence passed by the court of appeal, shall, subject to any directions which may be given by the court of appeal as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

There were no provisions for special treatment of appellants pending appeal and as a result it would seem that time served pending appeal counted against sentence.[5] In 1932 a new subsection (2) was substituted in section 1019[6] so as to exclude the provision on special treatment of appellants and to set the law in much the same form as it is to be found today in section 624. In 1950 section 1054B replaced the old section 1019(2) with similar provisions,[7] but with the addition of the following subsection:

> (4) Where a person is sentenced to imprisonment in a penitentiary, no time spent in gaol or other place of confinement prior to the expiration of the time limited for appeal, shall count as part of any term of imprisonment under his sentence, but if he gives to the committing magistrate or other proper officer a written notice of his election not to appeal, any time spent in custody thereafter shall count as part of the term of imprisonment under his sentence.

The effect of section 1054B(4) was to add up to thirty days to the penitentiary sentence of a prisoner who took some time to contemplate the advisability of an appeal. Fortunately, this subsection was omitted from the new code.

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[3] "3. The term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence. . . ." See also section 43(2) of the Penitentiaries Act, R.S.C., 1906, c. 147, to the same effect.

[4] By Stats. Can. 1923, c. 41, s. 9.

[5] Halsbury (2nd ed.), Vol. 9, p. 281, note (v).

[6] Stats. Can. 1932-33, c. 53, s. 16.

[7] Stats. Can. 1950, c. 11, s. 20.

The English statutory provisions on time served pending appeal, although still unfair in this writer's opinion, are considerably more humane than the Canadian law. Section 38(2) of the Criminal Justice Act, 1948, as amended by section 54 of the Prisons Act, 1952, provides:

> 38. (2) Subject as hereinafter provided, six weeks of the time during which any appellant, when in custody, is specially treated as such in pursuance of rules made under section 47 of the Prisons Act, 1952, or the whole of that time if it is less than six weeks, shall be disregarded in computing the term of any such sentence as aforesaid:
>
> Provided that —
>
> (*a*) the foregoing provisions of this subsection shall not apply when leave to appeal is granted under the Criminal Appeal Act, 1907, or any such certificate as is mentioned in paragraph (b) of Section three of that Act has been given for the purposes of the appeal; and
>
> (*b*) in any other case, the Court of Criminal Appeal may direct that no part of the said time, or such part thereof as the court thinks fit (whether shorter or longer than six weeks) shall be disregarded as aforesaid.

This section is an improvement on the procedure provided by the Criminal Appeal Act, 1907,[8] which had no six weeks maximum. Section 38(2) was interpreted by Lord Goddard C. J. in *Rex* v. *Bedford* as follows:[9]

> This means that where a prisoner gives notice of appeal or makes application for leave to appeal the time spent in prison does not count as part of his sentence if the application or appeal is heard and dismissed within six weeks. If the hearing does not take place till after six weeks have expired from the date of the notice, and if the appeal or application is dismissed, any time that the prisoner has spent in prison over six weeks will be counted as part of his sentence.

In the *Bedford* case the appellant applied on July 17th, 1948, to a single judge for leave to appeal and the application was refused on August 17th, 1948. The appellant then applied for leave to the full Court of Criminal Appeal on October 13th, 1948, and again leave was refused. The court held that it should exercise its discretion under section 38(2)(b) of the Criminal Justice Act, 1948, to prevent any time spent in custody between August 17th and October 13th counting against sentence on the ground that the appellant should have been satisfied with the refusal of his application by the single judge. In other words, the prisoner was penalized with three months imprisonment for his persistence!

The English prison rules for special treatment of appellants

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[8] 7 Edw. VII, c. 23, s. 14(3).

[9] [1948] 2 All E.R. 266.

pending appeal,[10] passed under section 47 of the Prisons Act, 1952, mitigate very slightly the harshness of the six-week penalty for instituting an unsuccessful appeal. The rules provide for payment to the prisoner for work done by him in custody pending his appeal, in the event that he is released by order of the Court of Criminal Appeal, and for the furnishing to him of writing materials and the admission to him of visitors and medical practitioners for the purposes of his appeal.[11]

The English authorities, although more numerous than those to be found in Canada, are also sparse on the principles on which the court proceeds in ordering that time served will or will not count. It seems established that an order permitting sentence to run from the date of its imposition will be made if leave to appeal is granted to the appellant.[12] The case of *Rex* v. *Westlake*[13] seems to indicate that it was the usual practice in England to grant an order in every case permitting time served to run pending appeal (but *quaere*). In that case, however, an order was not made because adjournments of the hearing of the appeal were obtained upon the appellant's mis-statements.[14]

Although section 589(2) of the code provides that there shall be no costs on appeal, heavy costs are exacted in fact from unsuccessful appellants in Canada and section 624, particularly in the absence of limiting legislation similar to the English statute, could well be repealed in the interests of justice. In the alternative, section 624 should be amended so as to put the onus on the Crown of convincing the Court of Appeal in a particular case that time served should not count against sentence. If the section is to remain in the code, it is incumbent on Canadian courts to enunciate the principles on which they proceed in ordering or not ordering time served to count. Under the proviso to section 624(2)(b), it is submitted, the Court of Appeal has an absolute discretion to order that sentence commence from the date of its imposition in all cases. If the courts are unwilling to construe the section as liberally as that, it is submitted that section 624 gives them the power to set a maximum period pending appeal, beyond which time served will commence to run against sentence, as a guide to

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[10] S.I., 1949, No. 1073; now in force by virtue of the Prisons Act, 1952, c. 52, s. 54 (3).

[11] See Rules 123 to 126.

[12] *Rex* v. *Wheatley* (1919), 14 Cr. App. R. 124; *Rex* v. *Fenley* (1920), 15 Cr. App. R. 118; Criminal Justice Act, 1948, s. 38(2)(a).

[13] (1920), 15 Cr. App. R. 100.

[14] See also *Rex* v. *Fenley*, *supra* footnote 12.

appellants and their counsel in determining whether the stakes are too high to justify an appeal.

AUSTIN MORLEY COOPER*

Judges and Politics

The battle for the independence of the judiciary is almost a race memory in [the United Kingdom]. As veterans we watch others campaigning on similar battlefields. But while our backs are turned, a new danger threatens, one which springs from our very belief that this independence is unassailable. The impregnable position of the judge in the constitution has hitherto been due not only to the well-known safeguards of the Act of Settlement, but also to the unanimous desire not to drag the judiciary into politics. The danger of this occurring in cases such as conspiracy, libel or sedition has been considerably reduced by leaving the thornier issues of fact to juries.

Since the past war there have been a number of important problems which the legislature, accurately reflecting the hesitancies and dissensions of the electorate, has simply refused to solve, such as rent control, capital punishment and wage structures. Faced with a political nut too tough to crack, Parliament has recently shown an increasing readiness to send for the judiciary. It does so in random ways: it creates *ad hoc* tribunals, it confers wide and embarrassing powers on county court judges, or with its obvious approval the executive requests a lord justice to step down from the bench and resolve an industrial dispute. . . .

The latest political nut to be due for cracking is the question of the just wage. This is fundamentally a political question and the answer depends on your religious, moral and economic views. The sanctity of free bargaining appears to play no part in contemporary political realities, whatever the Common Law rule be. The lord justice of appeal who was called upon recently to adjudicate on this transparently political issue did so not *ex cathedra* as a judge, but personally as an arbitrator of acknowledged impartiality. But with him the whole judiciary was in a sense involved, and its political neutrality threatened, however remotely.

The dangers of passing the buck in this way are obvious. The reverence and esteem in which the judiciary is held are enormous assets; none the less they are assets that ought not to be touched by baffled politicians. You do not take the politics out of an issue by removing it from the floor of the House and sending it to the Law Courts, or by calling in the 'reasonable man'. The judiciary must be allowed to preserve its Olympian remoteness from the mortalities of politics. After all, everyone knows that Zeus's earthy visits scarcely improved his standing with mortals. Now that the Government has a clear majority, the need for judicial intervention in the perils of legislation has gone—if it ever existed. (Anthony Lincoln, Passing the Buck, The Spectator, July 15th, 1955)

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