Case and Comment

SUPREME COURT OF CANADA—THE COFFIN CASE—APPELLATE JURISDICTION—POWER OF EXECUTIVE TO EXERCISE CLEMENCY OR ORDER NEW TRIAL—THE COURTS AND THE EXECUTIVE.—A convicted murderer whose appeal from conviction is rejected without dissent in the provincial appellate court is, under the existing law in Canada, at the mercy of a single judge of the Supreme Court of Canada in respect of a possible further appeal to that court, or at the mercy of the Cabinet (and Minister of Justice) in respect of a plea for clemency or for a new trial.[1] This summary of his position is well known, but the events attending the recent *Coffin* case have given added interest to the rôles of the Supreme Court and the executive, and invite consideration of some jurisdictional and constitutional aspects of those rôles.

Wilbert Coffin was convicted of murder on August 5th, 1954, and his conviction was unanimously affirmed on July 19th, 1955, by the Quebec Court of Queen's Bench, Appeal Side. Leave to appeal was sought from the Supreme Court rota judge under section 597(1)(b) of the Criminal Code on various questions of law, but leave was refused without written reasons on September 2nd, 1955. An appeal from this refusal of leave was taken to the full court which, without pronouncing on the merits of the proposed appeal, declared in an oral judgment delivered by the Chief Justice on October 4th, 1955, that "in the circumstances of this case we are satisfied that we have no jurisdiction to entertain the application which is dismissed".[2] Counsel for Coffin thereupon submitted an application jointly to the Minister of Justice and to the Solicitor General for Canada, seeking from the former an order for a new trial under Criminal Code section 596 and from the latter (through the Cabinet) executive clemency. The result of this application was an unprecedented order in council issued on October 14th, 1955.[3]

[1] Cr. Code, ss. 596, 597.

[2] I am indebted to W. Kenneth Campbell, Esq., Secretary to the Chief Justice, for a copy of the oral judgment.

[3] P. C. 1955-1552.

The order is important for its recitals, as well as for the authority it invokes and the question it refers to the Supreme Court, and it is desirable to set it out in full:

WHEREAS there has been laid before His Excellency the Governor General in Council a report from the Minister of Justice, submitting:—

THAT Wilbert Coffin was, at Percé, in the Province of Quebec, on August 5th, 1954, convicted of the murder of Richard Eugene Lindsey and was sentenced to be hanged on November 26th, 1954;

THAT by reason of successive reprieves the date now set for the execution of Wilbert Coffin is October 21st, 1955;

THAT Wilbert Coffin appealed from his conviction to the Court of Queen's Bench for the Province of Quebec (Appeal Side) and that his appeal was dismissed without dissent;

THAT Wilbert Coffin applied to Mr. Justice Abbott who was the rota Judge sitting in Chambers when the application came on for hearing for leave to appeal to the Supreme Court of Canada on certain questions of law upon grounds alleged on the application, and his application was dismissed without the reasons for such dismissal being stated;

THAT Wilbert Coffin appealed to the Court against the dismissal by Mr. Justice Abbott of his application and the Court, without determining whether, if the application for leave had been considered by the Court, such leave would have been granted, dismissed the appeal on the ground that the Court did not have jurisdiction to entertain an appeal from the decision of Mr. Justice Abbott;

THAT in an application for the mercy of the Crown Wilbert Coffin has requested that the Minister of Justice, pursuant to section 596 of the Criminal Code, direct a new trial and in support thereof represents that there are, in this case, questions of law that relate to the issue whether he received a fair trial;

THAT in connection with such application the Chief Justice of Canada advised the Minister that he had been requested by some of his colleagues to state to the Minister that if the application by Wilbert Coffin for leave to appeal to the Supreme Court of Canada had been made to them, subject, of course, to hearing argument as well as on behalf of the Attorney General of Quebec as on behalf of the accused, they would have been inclined to grant leave on one or more of the points of law raised on behalf of Wilbert Coffin;

THAT, in the opinion of the Minister, it is in the public interest that the Minister should have the benefit of the views of the Supreme Court of Canada on the question of what disposition of the appeal would, after argument of the said appeal, have been made by the Court if the application made by Wilbert Coffin for leave to appeal to the Supreme Court of Canada had been granted on any or all of the grounds alleged on the said application;

THEREFORE, His Excellency the Governor General in Council, under and by virtue of the authority conferred by section 55 of the Supreme Court Act, is pleased to refer and doth hereby refer to the Supreme Court of Canada for hearing and consideration the following question, namely:

> If the application made by Wilbert Coffin for leave to appeal to the Supreme Court of Canada had been granted on any of the grounds alleged on the said application, what disposition of the appeal would now be made by the Court?

Apart altogether from the merits of Coffin's claim to a review of his conviction, which I do not propose to discuss here, there are four issues that deserve examination: (1) the function of the rota judge on an application under section 597 (1)(b) of the Criminal Code; (2) the appellate jurisdiction of the Supreme Court of Canada; (3) the power of the executive to exercise clemency or to order a new trial; and (4) the reference power under section 55 of the Supreme Court Act and its relation to the powers of the executive.

The practice seems to be that the rota Supreme Court judge does not give reasons for rejecting or allowing an application for leave to appeal. There have been departures from this practice, as, for example, in *Rex* v. *Suchan and Jackson* in 1952;[4] in *Bertrand* v. *The Queen* in 1953;[5] and in *Seguin* v. *The Queen* in 1954.[6] In each of these cases, the rota judges (Estey J. in the first case, Taschereau J. in the second, and Rinfret C.J.C. in the third) discussed the grounds of law advanced by applicant's counsel to support the application for leave and in each case the application was rejected. If the procedure for appeal in cases like Coffin's is to remain in force, there may be virtue in having reasons where the application for leave is rejected, because there is then a public record (especially important in capital cases) by reference to which the executive powers heretofore mentioned may be exercised or their exercise be withheld. I do not suggest that this would necessarily be the sole determinant of their exercise, but it surely is part of the accepted publicity of the administration of justice.

In the *Coffin* case, since the rota judge gave no reasons for refusing leave, the only conclusion that the bare refusal supports is that no question of law was involved, or perhaps that, even if there was a question of law, no substantial wrong or miscarriage of justice occurred. It may be still an open question whether the rota judge can apply what is now Criminal Code section 592(1)(b)(iii) (formerly section 1014(2)), even though a question of law is involved in the application for leave;[7] but if no reasons are

[4] (1952), 104 Can. C. C. 193. [5] (1953), 107 Can. C. C. 239.
[6] (1954), 107 Can. C. C. 359.
[7] The power given by section 592(1)(b)(iii) to dismiss an appeal where no substantial wrong or miscarriage of justice occurred, although there was an error on a question of law, is one given to the provincial appellate court, but, by section 600(1), the Supreme Court, on an appeal to it under

given for refusing leave, whether he acted on this principle will remain locked in the judge's breast unless he chooses to make a revelation outside the particular proceedings before him. The application of section 592(1)(b)(iii) would be another way of saying that the rota judge may refuse leave if the question of law proved before him is trivial or unimportant. This had been used as a test in civil cases under the old appellate jurisdiction of the Supreme Court.[8] Indeed, it has been recently used in criminal cases too, as for example in *Rex* v. *Suchan and Jackson*, where Estey J., in refusing leave, stated that "the points of law raised [were] not of such importance in this proceeding as to justify the granting of leave . . .".[9]

In *Latour* v. *The King*, written reasons granting leave to appeal were delivered by Fauteux J. and it appears from them that, being satisfied that questions of law were raised, he gave leave almost as of course.[10] The questions of law were, however, vital ones relating to the burden of proof in criminal cases, and it is not clear how far the judge considered that his function on an application for leave was in any sense discretionary. The fact that reasons are given, whether in refusing or granting leave, may be symptomatic merely of a personal predilection of the particular rota judge, but if any practice at all is to prevail it is better that it be a practice in which reasons are given (at least in capital cases) than one in which they are not.

The purpose of requiring leave from a single judge may understandably be to enable a preliminary sifting of the cases that warrant the attention of the full court. But when regard is had to the rather generous provisions for appeals as of right in civil cases,[11] one is struck by the disproportionate sense of materiality exhibited by Parliament (or by the government) in its attitude to criminal appeals. No single judge should be asked to carry the weight of a decision in a capital case that will foreclose consideration of the merits by the full court.

In this respect it is clear from the recitals in the order in council

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the Criminal Code, may make any order that the provincial appellate court might have made.

[8] See, for example, *Terry* v. *Vancouver Motors U Drive*, [1942] 2 D.L.R. 260; *Fortier* v. *Longchamp*, [1941] S.C.R. 193.

[9] (1952), 104 Can. C. C. 193, at p. 207.

[10] (1950), 97 Can. C. C. 385.

[11] The Supreme Court Act, R.S.C., 1952, c. 259, s. 36(a), provides for an appeal as of right where the amount or value of the matter in controversy in the appeal exceeds $2,000. In addition, s. 38 provides for an appeal with leave of the provincial appellate court where in the opinion of that court the question involved is one that ought to be submitted to the Supreme Court.

that colleagues of the rota judge disagreed with his conclusion refusing leave. This sentiment was apparently expressed at the hearing of the motion for appeal from the rota judge's decision, a hearing at which the rota judge quite properly was not present. This disagreement among judges of co-ordinate authority raises the question whether an applicant for leave might not go from judge to judge (assuming that he acts within the prescribed time) in order to reach a judicial ear favourable to his argument, a procedure open ordinarily in habeas corpus proceedings.[12] While there are differences between habeas corpus and appellate criminal proceedings, both touch the validity of the confinement of a person's liberty. True, in the one case a discharge frees him completely while in the other a favourable decision merely enables the merits of his claim to be tested, but this is all the more a reason for permitting the widest use of an appeal system, which is presently unsatisfactory and may even be, as the *Coffin* case shows, arbitrary. But if existing precedents in the provincial courts have any bearing, it is doubtful whether the Supreme Court will be disposed to permit a canvass of individual justices to secure leave to appeal, unless it does so because a criminal rather than a civil issue is involved. Provincial courts have held that, where provision is made for an appeal by leave of a judge, an applicant who has been refused leave would be abusing the process of the court if he made successive applications to other judges. A recent statement of this proposition was made in *Chesapeake & Ohio Ry.* v. *Ball*.[13]

As to the second issue, the Supreme Court's ruling that it lacked jurisdiction to entertain an appeal from refusal of leave appears to represent a strict appraisal of the statutory nature of any right of appeal and, moreover, it is backed by a previous ruling of the court in a similar situation in *Duval* v. *The King*.[14] True, the ground of application for leave is wider now than it was when the *Duval* case was decided, but this alone can hardly open the door to a jurisdiction which did not previously exist.[15] Neverthe-

[12] While the cases are clear that an applicant for habeas corpus may go from court to court to seek the writ (see *In re Seeley* (1908), 41 S.C.R. 5), there is also weight of authority to support the proposition that one may go from judge to judge of the same court: see *Eshugbayi Eleko* v. *Gov't. of Nigeria*, [1928] A.C. 459. This, of course, is subject to any competent statutory provision to the contrary; an illustration of such a provision is in the Liberty of the Subject Act, R.S.N.S., 1954, c. 147, s.13(1), which permits a further application, following refusal of discharge on the first one, only upon a ground not taken on the first application.

[13] [1953] O.R. 877.

[14] [1938] S.C.R. 390.

[15] At the time of the *Duval* case, the then section 1025(1) of the Criminal Code provided an appeal by leave of a Supreme Court judge "if

less, one may feel troubled by the Supreme Court's ruling when it is also the case, as has been held for example in *Marcotte* v. *The King*, that even the granting of leave cannot operate to confer jurisdiction on the Supreme Court where no jurisdiction exists.[16] Thus, since the existence of a question of law is jurisdictional, the Supreme Court may properly quash an appeal for which leave has been given if it concludes that no question of law is involved, or, in other words, that leave was improperly given.[17] Of course, the rota judge may be equally mistaken in refusing leave as he may be in granting it. Why then is it not open to the Supreme Court to correct the improper denial of jurisdiction as it is open to it to nullify its improper assertion? It appears entirely plausible to say that the two situations are merely opposite sides of the same coin. Yet there is a deep difference in view of the statutory prescription. In the case where leave has been granted, although mistakenly, it is properly before the court for argument, while in the case where it has been mistakenly denied, the applicant is not properly before the full court at all.[18]

There have been cases in which the Supreme Court has entertained a motion by way of appeal from the refusal of leave by a judge of the court, but only where the refusal of leave was grounded on some disregard or misapprehension of the statutory con-

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the judgment appealed from conflicts with the judgment of any other court of appeal in a like case". The ground for seeking leave was subsequently widened by substitution of a single requirement of a "question of law", and this is the ground now found in Criminal Code section 597 (1)(b). But the widening of the grounds for seeking leave cannot affect the procedural issue whether a refusal to give leave is appealable.

[16] [1950] S.C.R. 352.

[17] See also *The King* v. *Stewart*, [1932] S.C.R. 612; *Chalmers* v. *The King*, [1933] S.C.R. 196.

[18] A similar problem arises in provincial civil proceedings where on so-called interlocutory matters leave of a judge must be sought to appeal to the Court of Appeal. It has been held that no appeal lies to the Court of Appeal from the refusal of leave: see *Chesapeake & Ohio Ry.* v. *Ball*, [1953] O.R. 877. Moreover, if leave to appeal is by statute obtainable from a "judge", it cannot be sought from the appellate court before which the appeal on the merits is to be argued: see *Rickwood* v. *Aylmer*, [1955] 2 D.L.R. 726.

It may be noted, however, that where leave to appeal under Ontario Rule 493 in a provincial interlocutory matter was granted, the Ontario Court of Appeal refused to accede to the contention that the appeal might be quashed because leave was improperly granted; and it held that the Supreme Court of Canada practice (referred to in the text of this comment) was not applicable: see *Cameron* v. *Blair Holdings Corp.*, [1955] O.W.N. 61. Indeed, Laidlaw J. A., speaking for the Ontario Court of Appeal, said (at p. 63): "A judge of the Supreme Court of Canda in chambers has power to grant leave to appeal to the Supreme Court and no doubt there is inherent jurisdiction in the Court to review the decision made by one of its members exercising his jurisdiction in chambers". It is clear that this language is too wide: see footnote 19, *infra*.

ditions surrounding the right to seek leave and not where the refusal was on the merits or on the judge's view of the interpretation of the substantive grounds for obtaining leave. This was made clear by the court itself in *In re Smith & Hogan Ltd.*, where it set aside an order of Cannon J., who had refused leave in a bankruptcy case on his view of a statutory provision (held by the Supreme Court to be a mistaken view) that the bankruptcy judge had no power to extend the time for seeking leave. In holding that the application for leave should proceed, the court said:[19]

> We agree with the view expressed by Ritchie, C. J., and Strong, J., in *In re Sproule*, that where 'jurisdiction is conferred on a judge in chambers a right to revise his decision is impliedly conferred on the court unless there is something in the subject matter or context leading to a contrary conclusion'. In *Williams* v. *Grand Trunk Ry. Co.*, it was held that no appeal lies to the Full Court from a refusal on the merits of an application for leave to appeal from an order of the Board of Railway Commissioners under the provisions of the Railway Act. It has many times been held for obvious reasons that a decision by a judge in chambers dealing with an application for leave to appeal on the merits, whether granting or refusing the application, is not appealable. The chief purpose in requiring leave to appeal is to prevent frivolous and unnecessary appeals, a purpose which would, in great degree, be frustrated if an appeal were permitted from such a decision. Authorities giving effect to this view are cited in the judgment of Taschereau, C. J., in *Williams*' case and need not be reproduced here.
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> But *Williams*' case should not be regarded as governing cases in which the judge in chambers has granted an application for leave to appeal in disregard of some essential statutory condition of the right of the applicant to have his application for leave heard and passed upon. It was in pursuance of this principle that this court, recently, in *Montreal Tramways Company* v. *C.N.R.*, held that an appellant who had obtained an order for leave to appeal, without giving notice of an application for leave and without affording the respondent an opportunity to answer such an application, was not entitled to proceed with his appeal without obtaining leave upon a proper proceeding. For similar reasons that authority does not extend to a case where a judge in chambers, owing to a misunderstanding touching the effect of a statute, decides that an applicant for leave to appeal is not entitled to have his application heard, although in truth he has complied with all the statutory and other prerequisites of such an application.

Thus, the substantial question remains whether the right to a final hearing on the merits in a capital case, or at least the right to go before the court for that purpose, should hang by so slender

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[19] [1931] S.C.R. 652, at p. 654. *In re Sproule*, cited in the quoted passage, is reported in (1886), 12 S.C.R. 140; *Williams* v. *G.T.R.*, in (1905), 36 S.C.R. 321; *Montreal Tramways* v. *C.N.R.*, unreported, October 6th, 1931.

a thread as the disposition of a single judge to find that a question of law is involved. (This is, of course, apart from the executive powers discussed later.) True, there would be an escape from this situation if there had been a dissent on a question of law in the provincial appellate court because under Criminal Code section 597(1)(a) an appeal as of right would lie. Yet it remains astonishing that in the case of convictions of indictable offences which are unanimously affirmed access to the Supreme Court is only by leave of a single judge on a question of law; but in summary conviction cases (involving, in comparison, something as trivial as a challenge to a municipal by-law) leave to appeal on a question of law is, under section 41 of the Supreme Court Act, addressed to the Supreme Court as such and not to a single judge.[20]

The absurdity of the situation may be seen by comparing the *Coffin* case with the proceedings before the Supreme Court in the recent case of *Ross* v. *The Queen*.[21] The *Ross* case concerned a conviction under a township by-law prohibiting the owner or driver of a taxicab from permitting it to stand (when not in use for hire) on any highway or land within the township. Accused was licensed to operate in another municipality, and the neat question was whether the provincial Municipal Act authorized a by-law of this kind in respect of persons like accused whom the township had no power to licence, or whether the authority extended to persons like accused who were found in the township regardless of whether they were subject to its licensing power. The Ontario Court of Appeal affirmed the conviction, holding that persons who were not subject to the township licensing power were properly caught by the by-law, which was valid in its application to them. Leave to appeal was given by the Supreme Court, which quashed the conviction, holding that only persons subject to licensing by the township could be caught by a by-law of the kind in question. No one need quarrel with the Supreme Court's decision to give leave to appeal on an issue of the application and validity of a municipal by-law. But at least equal consideration before the court is due to a person who seeks to question his conviction of murder.

There is no question but that the jurisdiction of the Supreme

[20] Section 41 of the Supreme Court Act, R.S.C., 1952, c. 259, provides for an appeal on a question of law or of jurisdiction in respect of a judgment on a non-indictable offence, with the leave of the Supreme Court. The specific exclusion, by section 41(3), of appeals in respect of judgments on indictable offences is, of course, because particular provision is made for such appeals in the Criminal Code.

[21] (1955), 112 Can. C. C. 146, rev'g. 110 Can. C. C. 63.

Court needs re-examination. The 1949 amendments, made to the Supreme Court Act consequent upon abolition of appeals to the Privy Council, were eminently desirable in making the court itself the judge of the appealability of civil cases.[22] But this extension of jurisdiction should have been coupled with a review of the civil cases in which there are appeals as of right, with a view to cutting down such appeals as those on automobile negligence, which presently clutter up the court's calendar; and it should have been coupled with a re-appraisal of criminal appellate jurisdiction.[23] In addition, whether it be done by statute or by rules of court, it would be desirable to work out a system of sifting cases worth the court's time for hearings on the merits, which would ensure a fuller look than is provided by the scrutiny of a single judge. This could be done by merely requiring written submissions, which would be reviewed by the court as a whole without formal hearings, and a decision to permit argument on the merits could be made to depend on the approval of three or four of the nine justices.[24]

As to the third issue, executive clemency under the Criminal Code in respect of a sentence of death is by commutation of sentence; in respect of other cases it may take the form of a pardon or of a remission of a fine or of a forfeiture.[25] These provisions do not, however, exhaust the prerogative of mercy, as is expressly stipulated in section 658. There is no question but that this prerogative belongs to the Crown in right of Canada in respect of criminal offences covered by section 91(27) of the British North America Act.[26] Exercise of the prerogative has been for long delegated to the Governor General, at first in instructions accompanying the letters-patent creating the office, and now under the

[22] See Laskin, The Supreme Court of Canada: A Final Court Of and For Canadians (1951), 29 Can. Bar Rev. 1038, at pp. 1048 ff.

[23] A $2,000 qualification for an appeal as of right, now provided by section 36(a), of the Supreme Court Act, has no merit at all. Even if purely financial considerations are to govern it is not worth while wasting the Supreme Court's time on a sum in that neighbourhood. However, in my submission, financial considerations should play no part at all in determining whether an appeal should lie as of right. The Supreme Court should be regarded as primarily a court to determine disputed questions of law, and not the amount of recovery which may turn on a review of the evidence or a decision on apportionment of fault. If an appeal is to proceed because of the financial stake in the litigation, it should be only by leave of the Supreme Court itself.

[24] In this connection it may be worth while to look at the procedure of the Supreme Court of the United States in exercising its certiorari jurisdiction. See Laskin, *op. cit.*, footnote 22, *supra*, at p. 1056.

[25] Cr. Code, ss. 655, 656.

[26] See *Liquidators of the Maritime Bank* v. *Receiver-General of N.B.*, [1892] A.C. 437.

letters-patent themselves.[27] The relevant provisions of the letters-patent are in article XII, reading (so far as material here) as follows:

> And We do further authorize and empower Our Governor General, as he shall see occasion, in Our name and on Our behalf . . . to grant to any offender convicted of any . . . crime or offence in any court, or before any Judge, Justice, or Magistrate, administering the laws of Canada, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our Governor General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us. And We do hereby direct and enjoin that Our Governor General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of Our Privy Council for Canada and, in other cases, the advice of one, at least, of his Ministers.

Apparently (although this is not entirely clear) what Coffin sought in his application to the Solicitor General was commutation of sentence (rather than a pardon), if his contemporaneous application to the Minister of Justice for a new trial should fail. This minister's power to order a new trial is purely statutory under the Criminal Code, section 596, which however treats the power as an aspect of the exercise of clemency and also enables the minister to invoke the assistance of the appellate court of the province in which the convicted man was tried.[28] There have been instances of the exercise of this power after a conviction at a trial,[29] and also after the conviction has been affirmed by the provincial appellate court,[30] but none, apparently, where the case has gone through to the Supreme Court. While in express terms the power is one exercisable in respect of "a person who has been convicted in proceedings by indictment", and while it says nothing about exercise of the power after appeal proceedings have been taken without success, it is not to be doubted that, if a new trial may be ordered where a conviction has been affirmed by the provincial appellate court, it may equally be ordered after unsuccessful resort to the Supreme Court itself.

The tenor of the order in council in Coffin's favour indicates that the reference to the Supreme Court was in aid of the possible exercise of the minister's power to order a new trial. The order

[27] The most recent letters-patent are those of 1947. These, and the preceding ones of 1931 and the instructions accompanying them, are reproduced in (1948), 7 U. of Tor. L. J. 475.

[28] Cr. Code section 596(c) enables the Minister of Justice, who by subsection (a) may order a new trial, to refer to the court of appeal at any time for its opinion any question upon which he desires the assistance of that court.

[29] See *Rex* v. *Comba*, [1938] S.C.R. 396, aff'g. [1938] O.R. 200.

[30] See *Rex* v. *Peel* (1921), 36 Can. C. C. 221.

in council was necessary because section 596 makes no provision for seeking assistance from the Supreme Court. It does, however, speak of "inquiry" by the minister to satisfy himself that a new trial should be directed, and it is thus obvious that it was open to the minister to solicit the opinions of individual justices of the Supreme Court or to receive their opinions if they were prepared to give them, as was apparently the case here. No doubt, the minister could have acted without going any further, and one can only speculate that because there was no hearing on the merits before the Supreme Court as a whole it was felt advisable to get a more considered opinion from the court by way of a reference.

Finally, premising that courts may be utilized for advisory opinions to aid executive decision, there is nothing unusual in the resort to section 55 of the Supreme Court Act in support of the power of the Minister of Justice under section 596 of the Criminal Code.[31] The *Coffin* case happens to be merely the first occasion on which the Supreme Court is being used for that purpose. The premise might have been a doubtful one in respect of the Supreme Court, since section 101 of the B. N. A. Act refers to "a General Court of Appeal for Canada", and these words are capable of a construction limiting the court to appellate jurisdiction in the traditional sense. But, the Privy Council's opinion in *A.-G. Ont.* v. *A.-G. Can.* established the authority of Parliament to refer matters to the Supreme Court as well as the authority of provincial legislatures to use provincial courts for this purpose.[32] The opinion upheld the validity of what is now section 55 of the Supreme Court Act in the full range of its terms, which are wide enough to cover a reference on the most intimate or trivial matters of provincial policy or administration. It is unlikely that it will be used in this way, apart of course from references on constitutional questions, in respect of which it is clear that the Dominion may refer provincial legislation to the Supreme Court and a province may refer federal legislation to the provincial appellate court.[33] Certainly, so far as the *Coffin* case is concerned, the Dominion is fully competent to deal with a murder conviction. No trespass on provincial

[31] Section 55 of the Supreme Court Act has its origin in the original constituent statute of the Supreme Court. The history of the provision is reviewed in *A.-G. Ont.* v. *A.-G. Can.*, footnote 32, *infra*. Subsection 1 (e) authorizes a reference on "any other matter, whether or not in the opinion of the Court *ejusdem generis* with the [previous] enumerations, with reference to which the Governor in Council sees fit to submit any . . . question [of law or fact]."

[32] [1912] A.C. 571.

[33] See, for example, *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Re Canada Temperance Act*, [1939] O.R. 570.

authority is involved and no interference with provincial administration of justice. Further, federal executive power by way of an order for a new trial, or by way of clemency otherwise, can be made effective in criminal matters. It would be different in respect of matters falling within purely provincial authority, and this is the real reason why, for all practical purposes, section 55 of the Supreme Court Act is unlikely to be used (save on constitutional questions) as a means of appraising provincial issues.

It is worth recalling that the prerogative of pardon served a useful purpose in England in criminal cases, where there were limited rights of review of convictions until 1908 when the Court of Criminal Appeal began to function. But it operated only to free the convicted person or to commute or remit his sentence and it did not enable a re-examination of the regularity of the conviction.[34] In Canada, the executive power of clemency used in association with section 55 of the Supreme Court Act, or the power to order a new trial used by the Minister of Justice on the basis of his own inquiries or in association with a reference under section 55, provide alternative means of review with alternative consequential action. There is no reason to doubt that the executive will take whatever action in the *Coffin* case the Supreme Court opinion invites. The opinion will, however, be based on legal considerations, and this emphasizes the reasonableness of providing a regular appeal to the court on all legal matters so as to leave the executive powers, and especially those of pardon, available for use on considerations which would be outside the purview of the courts.

BORA LASKIN*

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INSURANCE—DESIGNATION OF "WIFE" AS BENEFICIARY WHEN MARRIAGE SUBSEQUENTLY DECLARED VOID AB INITIO—THE INSURANCE ACT OF ONTARIO—RIGHTS OF CREDITORS TO INSURANCE MONEYS. —Three matters of interest arise out of the judgments of Gale J. and the Ontario Court of Appeal in the case of *Re Isaacs*.[1] These matters are (1) the significance to be attached to a statement in a life insurance policy of the relationship of the assured to his beneficiary; (2) whether the word "divorce" in section 169(1) of the Insurance Act of Ontario[2] covers annulments; and (3) whether the creditors of the assured can successfully claim the insurance

[34] See Wade and Phillips, Constitutional Law (4th ed.) pp. 231 ff.

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[1] [1954] O.R. 647, 942. [2] R.S.O., 1950, c. 183.

moneys when a policy is payable to an ordinary beneficiary. The Court of Appeal, in reversing Gale J., held that life insurance moneys will go to a named beneficiary described as "Ruth Isaacs, wife of the insured", when the marriage had been annulled at the instance of the wife on the ground of the insanity of the husband at the time of the marriage.

On the first point, the Court of Appeal found that there was no mistake on the part of the insured as to the identity of the beneficiary, who was the insured's wife *de facto* though not *de jure*. "It was for her protection in the capacity of the woman who was living with him in the relationship of wife that he placed the insurance. To him she was his wife both *de facto* and *de jure* and it is not to be assumed that had he known she did not have the legal status of his wife he would not have effected the insurance, or, having effected it, would not have named her as the beneficiary."[3] The court, with respect quite rightly, held in effect that the word "wife" was descriptive only, intended for mere identification rather than as a condition of taking. English and United States courts have reached similar conclusions on the same facts, as for example, *Metropolitan Life Insurance Co.* v. *Olsen*.[4]

Having said in determining the first point that it was not to be assumed "that had [the insured] known [the person living with him] did not have the legal status of his wife he would not have effected the insurance, or, having effected it, would not have named her as the beneficiary", the court reached a rather anomalous conclusion, as suggested by counsel for the respondent, on the effect of section 169(1) of the Insurance Act. In interpreting the word "divorce" in that section, the court made a distinction between an annulment of a void and the annulment of a voidable marriage, which produced the result that a person who never had the legal status of a wife could retain the benefit of insurance moneys, while one who had the legal status of a wife and whose marriage was subsequently dissolved or annulled could not. Section 169(1) is as follows:

> Where the wife or husband of the person whose life is insured is designated as a beneficiary, and is subsequently divorced, all interest of the beneficiary under the policy shall pass to the insured or his estate, unless such beneficiary is a beneficiary for value, or an assignee for value.

The conclusion of the Court of Appeal on this point in *Re*

[3] [1954] O.R. 942, at p. 953.
[4] (1923), 32 A.L.R. 1472; 81 N.H. 143.

Isaacs was almost irresistible, anomalous as it may appear, since it had in an earlier case given the word "divorce" a very broad meaning, much beyond the usual and commonly understood meaning. In *Re Miles; Steffler* v. *Miles*[5] the court held that the word "divorced" in section 169(1) was not used "in a narrow sense or with a limited meaning . . . [but] was intended to apply in the larger sense to all actions for dissolution of marriage, whether based upon grounds existing at the time of the marriage, or because of events subsequent thereto. It was intended to mean the dissolution by law of the bond of matrimony." In its judgment in *Re Isaacs* the court distinguished its earlier decision by holding that *Re Miles* referred to only the annulment of a voidable marriage. The basis for this distinction was that in a marriage void ab initio, as in *Re Isaacs*, the parties to the "marriage" could not acquire the status of husband and wife, with the result that there was no bond of matrimony to sever. Roach J.A. in the *Isaacs* judgment stated that the words "wife" and "husband" in section 169(1) referred only to persons having that legal status. Having found that the parties to the marriage had never acquired the status of husband and wife, he concluded that on its plain wording section 169(1) had no application to the case. Of course, on its plain wording the section makes no mention of annulment. It took the earlier case of *Re Miles* to hold that the section meant more than the "plain wording" would ordinarily indicate. With these two cases extending the "plain wording" of the section and producing this anomalous result, surely not intended by the legislature, the time has come to amend the section so that it covers divorces and annulments of marriage whether the marriage is void or voidable.

In the conclusion of his judgment Roach J. A. held that creditors of the insured's estate were not entitled to be paid from the proceeds of a policy payable to an ordinary beneficiary. As a matter of law this is probably correct, but it is suggested that the court came to the conclusion relying on discredited authorities, namely, *In re Roddick*[6] and *Re Benjamin*.[7] Plaxton J., in the case of *Deckert* v. *Prudential Insurance Co.*,[8] considered the same matter at length, by inquiring into the whole scheme of life insurance legislation and the English decisions, and came to the opinion that *In re Roddick* and *Re Benjamin* were wrongly decided. The

[5] [1951] O.R. 647; [1951] 4 D.L.R. 359.
[6] (1896), 27 O.R. 537.
[7] (1926), 59 O.L.R. 392.
[8] [1943] O.R. 448.

Deckert case was subsequently affirmed by the Court of Appeal and led in 1946 to an amendment of the Insurance Act, giving an ordinary beneficiary a statutory right to sue for insurance moneys. The court in *Re Isaacs* makes no mention of the *Deckert* case and the case does not appear to have been cited to the court by counsel.

In his review of the authorities, Plaxton J. in the *Deckert* case stated that the mere fact that the policy moneys are expressed to be payable to somebody other than the assured does not make the assured a trustee of the policy for the person nominated. The English Court of Appeal in *In re Harrison & Ingram, ex p. Whinney*,[9] had previously held that where the owner of a policy on his life assigned it by a post-nuptual settlement to trustees for his wife and children, and himself continued to pay the premiums voluntarily, being under no covenant with the trustees to do so, no part of the premiums was a settlement within the meaning of the Bankruptcy Act so as to entitle the trustee in bankruptcy to any proportionate part of the policy moneys on the death of the insured.

In both *Re Roddick* and *In re Benjamin*, relied on by the court in *Re Isaacs*, it was held that insurance in favour of ordinary beneficiaries amounted to a voluntary settlement and therefore the beneficiaries were entitled to the proceeds in preference to the estate or the creditors represented thereby, unless it was shown that the insured was not in a position to make a voluntary settlement at the time he did.

Section 164 of the Insurance Act creates a trust in favour of preferred beneficiaries and removes the insurance from the control of the insured or his creditors. There are no such provisions affecting ordinary beneficiaries. It was argued in *Re Isaacs* that it should therefore follow as an inference that, as against an ordinary beneficiary, the creditors have a right of recourse to the insurance moneys, but this argument was rejected by the court.

A helpful and interesting discussion of the nature of the property right an insured has in a life insurance policy is found in the judgment of the New Hampshire Supreme Court in *Barbin* v. *Moore*, in which it is stated:[10]

> In a peculiar sense a life insurance policy may be said to be the property of the insured. But it is not subject to the claims of his creditors at his death unless he elects to make it so. Property over which he has a power of disposal is perhaps as correct a description of his right as can be stated. It therefore follows that in order for any creditor to maintain a claim thereto he must prove some act of the insured making it thus liable. No claim against it can be maintained upon

[9] [1900] 2 Q.B. 710.

[10] (1932), 83 A.L.R. 62, at pp. 69-70.

> the general ground that the property was the property of the insured, liable, in common with his other property, for his debts. The creditors have only such rights in the insurance as the insured gave them. Unless he manifested an intent to give them rights, or unless the legal effect of what he did was to confer rights upon them, they have no claim against the insurance.

By reason of the nature of the contract of insurance, the insurance moneys payable to a named beneficiary other than the estate of the assured never form part of the estate of the assured and therefore are not, in general, subject to the debts of the deceased. A statutory exception to this general proposition is contained in section 62 of the Bankruptcy Act. This section provides among other things that the payment of an insurance premium on a policy not payable to the insured's husband, wife, child or children is void unless it is shown that it was not within six months of the insured's bankruptcy, or that at the date of the payment the insured was solvent.

J. D. HONSBERGER*

* * *

MARIAGE — AUTORISATION MARITALE EN DROIT QUÉBECOIS — BIENS RÉSERVÉS — ACHAT D'IMMEUBLES — DROIT DE RÉMÉRÉ — ASSUMATION D'HYPOTHÈQUE. — Le récent arrêt de la Cour Suprême du Canada dans l'affaire de *Duchesneau* v. *Cook*[1] apporte une réponse précise à une question que tous les juristes souhaitaient voir soumise au plus haut tribunal du pays.

Les faits de la contestation se résument assez brièvement. Madame Corinne Duchesneau, épouse séparée de biens de Maurice Lasnier, ne vivait pas avec ce dernier. Elle prêta une somme de $3,000 à Willie Cook. Ce montant était constitué d'une somme de $2,500, biens réservés de la Dame Duchesneau, auxquels elle ajouta une somme de $500 empruntée de son père. Au lieu de constater le prêt de la façon ordinaire, l'on procéda par vente à réméré. Willie Cook vendit ses immeubles pour la somme de $3,000 et se réserva le droit de les rémérer à certaines conditions. L'acquéreure n'assuma pas personnellement l'hypothèque grevant ces immeubles.

La Dame Duchesneau ayant signé ce contrat sans autorisation, maritale ou judiciaire, la question s'est posée de savoir, et c'est le noeud du litige, si une femme séparée de biens peut être ex-

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[1] [1955] S.C.R. 207.

emptée d'autorisation pour poser un acte comportant les opérations suivantes: (1) achat d'un immeuble au comptant; (2) réserve d'un droit de réméré stipulé au profit du vendeur; et (3) assumation hypothécaire seulement de l'hypothèque grevant les immeubles vendus.

Parallèlement à cet aspect du débat, les juges de la Cour Supérieure et de la Cour d'Appel[2] ont envisagé le problème des biens réservés. Par une majorité, ils ont statué que l'on ne pouvait pas dans cette espèce considérer que les $500 empruntés par l'épouse faisaient partie de son patrimoine réservé. Nous approuvons cette interprétation. S'il est vrai que les articles 1425a et suivants doivent recevoir "une interprétation large et libérale, généreuse même . . . ",[3] conformément à l'article 41 de la Loi concernant les statuts,[4] cette interprétation ne doit pas aller jusqu'à affecter la consistance même des biens réservés.[5]

La Cour Suprême a eu raison de limiter la discussion au problème de la capacité de la femme mariée quant à ses biens personnels. C'est, à ma connaissance, la première fois que depuis les amendements apportés en 1931 aux articles 177 et 1422 C. c., nos tribunaux sont saisis de façon aussi précise de la question de la capacité de la femme mariée sur le plan contractuel. En effet l'avis du juge Surveyer dans *Dame Sadosky* v. *René T. Leclerc Incorporée*[6] n'est donné qu'en *obiter dictum* dans une question d'achat d'obligations industrielles et non de biens immobiliers: "Considérant que de l'ensemble des dispositions du code, semblables à celles du Code Napoléon, relatives à la femme séparée de biens, il résulte qu'elle peut disposer sans autorisation de son capital mobilier et même acquérir des immeubles, l'aliénation seule des immeubles étant interdite à la femme séparée de biens non autorisée".

Les amendments de 1931 ont considérablement compliqué la question, parce que ces modifications fragmentaires ne comportent pas de principe général et prévoient seulement certains actes que la femme séparée de biens peut maintenant poser sans autorisation. Devant cette difficulté, les savants juges ont cru devoir formuler une interprétation et décider si l'incapacité de la femme mariée est demeurée la règle ou est devenue l'exception. Le juge Gagné

[2] [1954] B.R. 333.
[3] Mignault, Biens réservés de la femme mariée (1941), 1 Revue du Barreau 30.
[4] S.R.Q., 1941, c. 1.
[5] On relira avec profit les commentaires de Me Wasserman (1954), 32 Can. Bar Rev. 666, et de Me Roger Bisson, *ibid.*, p. 1169.
[6] (1934), 72 C.S. 105, à la p. 108.

de la Cour de Banc de la Reine, exprimant une opinion analogue à celle de son collègue le juge Marchand, s'est prononcé catégoriquement pour conclure à la page 355, que ". . . si réellement l'art. 986 a posé une règle générale d'incapacité, il faut bien dire qu'à cette règle le Code édicte une exception pour la femme mariée sous le régime de la séparation de biens, et que c'est dans le seul texte de l'art. 1422 qu'il faut trouver les règles régissant sa capacité". Pour arriver à cette conclusion, le savant juge met en contraste les deux paragraphes de l'article 177; le premier ne devant s'appliquer qu'aux épouses mariées sous le régime de la communauté de biens ou de l'exclusion de communauté. Cependant il me semble que, précisément parce que le deuxième paragraphe est un amendement, l'on n'a pas pu vouloir décréter en l'article 1422 une règle absolument générale. Cette dernière disposition ne formule d'ailleurs aucun principe général, elle ne parle pas du droit pour la femme de "s'obliger et de contracter"—elle énumère seulement certaines opérations que la femme mariée peut faire sans autorisation et d'autres pour lesquelles elle doit être autorisée.

Cette opinion très avancée du juge Gagné a été rejetée par la Cour Suprême. Le juge Fauteux maintient que l'incapacité est restée la règle, parce que "le Législateur n'est pas présumé avoir eu l'intention de faire des changements substantiels et radicaux à la loi qu'il modifie. (Maxwell, On Interpretation of Statutes, 9e éd., p. 84, 'Presumption against implicit alteration of law'). Les dispositions des articles 210 et 1422, telles qu'amendées, ne sont, pas plus que la nouvelle disposition de l'article 177, dans leur forme ou substance, aptes à supporter la conclusion que la femme séparée de biens est désormais, *sauf évidemment dans la mesure où elle peut l'être par ces articles*, exclue de la règle d'incapacité retenue en l'article 177."[7]

J'ajouterai que l'opinion du juge Fauteux ne peut, à mon point de vue, être altérée par les amendments récemment apportés à l'article 986 du Code civil, par la loi 3-4 Eliz. II, c. 48, sanctionnée le 10 février 1955. C'est qu'en effet le nouvel article 986a ainsi conçu, "La capacité de contracter des femmes mariées, comme leur capacité d'ester en justice, est déterminée par la loi", ne fait que référer au droit existant, et laisse subsister les principes énoncés par les articles 177 et 1422.

Ce jugement de principe est à retenir. Le juge Fauteux n'a pas manqué de nuancer sa pensée lorsqu'il écrivait ces mots que j'ai soulignés dans le texte qui précède: *sauf évidemment dans la mesure*

[7] [1955] S.C.R. à la p. 215 (italiques ajoutés).

où elle peut l'être par ces articles (177 et 1422). Analysant le contrat soumis, la Cour Suprême a trouvé que l'acte posé par Madame Duchesneau était valide aux termes de l'article 1422. La femme mariée qui achète un immeuble au comptant dispose de ses deniers, biens meubles, qu'elle peut librement aliéner et fait du même coup un placement que l'article 981 permet aux administrateurs des biens d'autrui d'effectuer sans autorisation spéciale. Il s'agit donc d'un acte d'administration. Sur ce point particulier la jurisprudence nous semble clairement et catégoriquement établie: la Cour Suprême a été unanime et nous croyons que la Cour du Banc de la Reine se serait probablement prononcée dans le même sens si l'acte qui a fait l'objet du litige n'avait pas comporté autre chose qu'un achat d'immeuble au comptant.

Toutefois la convention n'énoncait pas une vente pure et simple. Le vendeur Cook s'y était réservé un droit de réméré et la propriété vendue était hypothéquée pour une somme de $1,100. La majorité des juges de la Cour d'Appel mettant déjà en doute la capacité de la femme d'agir seule pour toute matière immobilière ont trouvé que par ces éléments nouveaux la femme s'obligeait, car "les obligations qu'elle a assumées dans le contrat sous attaque dépassent les bornes normales d'un acte d'administration" (Juge Bissonnette à la page 342). La Cour Suprême a renversé cette proposition. Le juge Fauteux étudie longuement la nature du droit de réméré, et je crois qu'il a raison d'affirmer que la clause de réméré ne comporte pas une obligation d'aliéner de la part de Dame Duchesneau. Le vendeur qui exerce le réméré reprend son héritage qui est censé n'avoir jamais appartenu à l'acquéreure et celle-ci reprend ses deniers tout comme si elle les avait placés. Si d'autre part le vendeur ne rachète pas l'immeuble, l'acquéreure en demeure propriétaire incommutable.

L'autre objection consistait dans l'assumation de l'hypothèque par la femme mariée. L'acte énoncait que: "L'acquéreur à réméré sait qu'il existe une créance hypothécaire au montant de onze cents dollars ($1,100.) en faveur de la succession de René Fortier". Madame Lasnier n'a nulle part dans l'acte assumé personnellement l'hypothèque. La Cour d'Appel, sauf les deux dissidences (Juges Marchand et Gagné), a vu là un engagement sur le plan immobilier; cela apparaît plus particulièrement dans les notes du Juge Bissonnette, à la page 340. La Cour Suprême trouve à la page 221 au contraire que "par le délaissement, le détenteur ne fait aucun acte d'aliénation. . .". Tout en admettant cette solution, j'ai peine à considérer que la vente faite avec assumation

hypothécaire d'une créance est véritablement une vente au comptant. Par l'achat qu'elle fait, la femme consent qu'une partie de son patrimoine immobilier continue d'être grevée d'une hypothèque. Je me demande si au point de vue économique cette opération est un bon acte d'administration. Ainsi, dans l'espèce analysée, si elle délaisse l'immeuble elle perdra, vu l'indivisibilité de l'hypothèque, les $3,000 qu'elle a donnés lors de l'achat. La femme qui ne peut s'obliger en général ni hypothèquer ses immeubles pourrait ainsi faire entrer dans son patrimoine un immeuble qu'elle sait être déjà hypothéqué?

Je veux par ce commentaire souligner la portée du jugement de la Cour Suprême. Il me parait évident que le tribunal, malgré sa déclaration de principe à l'effet que l'incapacité de la femme mariée est la règle, entend interpréter très libéralement et largement les exceptions et exempter la femme séparée de biens de l'autorisation maritale chaque fois que son acte est permis par l'article 1422, soit expressément, soit par implication si cela "résulte irrésistiblement des dispositions nouvelles" suivant l'expression du juge Fauteux, à la page 215.

Je crois que la doctrine et la pratique vont s'orienter dans cette voie plus sûrement et se montrer plus audacieuses devant ce problème qui jusqu'ici inquiétaient l'une et l'autre, à cause de l'absence de précédents aussi décisifs que celui que nous venons d'analyser. Par contre, cette décision démontre encore l'impérieuse nécessité d'une refonte et d'une coordination des dispositions qui régissent la capacité de la femme mariée.

ROGER COMTOIS*

* * *

REAL PROPERTY—TORRENS SYSTEM OF LAND TITLES IN MANITOBA—RESERVATION OF MINERALS REQUIRED BY THE PROVINCIAL LANDS ACT—EFFECT OF REGISTRATION OF TITLE UNDER THE REAL PROPERTY ACT.—*The District Registrar of the Land Titles District of Portage La Prairie* v. *Canadian Superior Oil of California Ltd. and Hiebert*[1] is an illustration of the difficulty that occasionally arises of integrating a Torrens system statute with other statutes, particularly statutes requiring the reserving and excepting of mines and minerals from dispositions of land by the Crown.

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[1] [1954] S.C.R. 321.

Since 1885 there have been two land registration systems in force in Manitoba—one the old system under the Registry Act and the other, the new, or Torrens system, which first came into force on July 1st, 1885, by virtue of the Real Property Act of 1885.[2] The instant case is directly concerned only with the Torrens system but the existence of the other system played an indirect part by accentuating some of the difficulties of interpretation.

The province of Manitoba relied on section 25 of the Provincial Lands Act,[3] which reads as follows:

> It is hereby declared that no grant from the Crown of lands in freehold or for any less estate has operated or will operate as a conveyance of the gold or silver mines or any other mineral therein, unless the same are expressly conveyed in such grant.

The two statutes were founded on contrasting theories as to the ownership of mines and minerals. The Provincial Lands Act contemplated them not passing from the Crown to its grantee or to his successors in title unless they were expressly conveyed by the Crown. The Real Property Act, on the other hand, regarded them as being included in the title to a parcel of land unless they were expressly excepted.

The province's method of dealing with the land, though far from creating any estoppel against it, had done nothing to weaken the grounds on which its adversaries could base their claim.

The province emerged from the litigation with its title established to the petroleum, natural gas and related hydrocarbons in the land in question, but it had a narrow escape. Freedman J.,[4] the Manitoba Court of Appeal[5] and three dissenting judges in the Supreme Court of Canada delivered judgments against the province.

The title to the land had originally been in the Crown in the right of the Dominion but, on May 31st, 1901, was vested in His Majesty in the right of the province of Manitoba. On May 23rd, 1903, a certificate of title under the Real Property Act was issued to His Majesty in the right of the province and the land was thereby brought under the Torrens system of registration. The subsequent history of the title is long and involved, but can be simplified for the present purpose.

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[2] Statutes of Manitoba, 1885, c. 28. The Real Property Act referred to in this comment is R.S.M., 1913, c. 171. It is the revision that is most frequently referred to in the judgments. A later revision—R.S.M., 1940, c. 178—does not differ in any material respect.

[3] R.S.M., 1913, c. 155.

[4] (1952), 5 W.W.R. (N.S.) 686.

[5] (1953), 8 W.W.R. (N.S.) 49 and 417

An order in council of November 10th, 1914, authorized the transfer of the land to William P. G. Noble. On the same day a transfer executed on behalf of His Majesty the King in the right of the province of Manitoba transferred to Noble "all our estate and interest in the said land". The conveyance from the Crown to Noble was executed under the great seal of the province of Manitoba and was attested by the hands of the Lieutenant Governor and several provincial officials but, instead of taking the form of letters patent, was in the form prescribed for a transfer by the Real Property Act. Notwithstanding section 25, neither the order in council nor the transfer made any express mention of mines or minerals, either by way of exception or inclusion.

The transfer to Noble was registered on July 25th, 1919, and a certificate of title was issued in his name. At the same time the Crown's certificate of title was marked "cancelled in full".

After a number of intermediate transactions, the precise details of which are immaterial, the land was transferred to the plaintiff Hiebert and a certificate of title was issued in his name on November 30th, 1948. Hiebert acquired the land in good faith and for value. His position is the same as if the land had been transferred directly to him by Noble.

On August 2nd, 1950, Hiebert granted a petroleum and natural gas lease. The lessee's rights under the lease were subsequently assigned to the other plaintiff, Canadian Superior Oil of California Limited.

After an unsuccessful attempt by the company to file a caveat against the land the present proceedings were commenced by Hiebert and the company as plaintiffs to establish their title to the minerals (other than gold and silver) and to substantiate the company's right to file a caveat. The defendants were the District Registrar of the Land Titles District and the Attorney General of Manitoba.

Freedman J.[6] and the Manitoba Court of Appeal[7] decided in favour of the plaintiffs. Their judgment declared that the company was entitled to an interest in the petroleum, natural gas and related hydrocarbons within, upon or under the land and ordered the District Registrar to register the company's caveat.

The judgments of the Manitoba courts were reversed by the Supreme Court of Canada, which set aside the judgments below and restored the refusal of the District Registrar to register the

[6] (1952), 5 W.W.R. (N.S.) 686.
[7] (1953), 8 W.W.R. (N.S.) 49 and 417.

company's caveat. The decision of the Supreme Court is the equivalent of a declaration that Hiebert and the company had no right to or interest in the minerals. Rinfret C. J. and Estey and Locke JJ. dissented.

The plaintiffs relied on two main theses. The first was that the transfer of November 1954 had the effect of vesting the title to the minerals[8] in Noble. It was virtually conceded by the province that the transfer would entitle Noble to the minerals unless section 25 of the Provincial Lands Act had the effect of reserving them to the Crown. Section 25 has been set out verbatim in the third paragraph of this comment. In cases where it applies the section reserves all minerals to the Crown in the right of the province unless they are expressly included in the conveyance from the Crown. Under the construction placed on the section by the court the reservation extends to any and all minerals, whether found in a gold or silver mine or elsewhere and applies even though the land was thought to contain no minerals. The transfer from the Crown to Noble did not expressly convey any minerals.

There was some discussion of the Crown's right to have Noble's title rectified on equitable grounds, but the possible right to rectification was overshadowed by other issues. This branch of the case came to depend on the effect of section 25 and, more particularly, on the construction of the expression "grant from the Crown". The expression was not defined by the Provincial Lands Act and has no exact or well-defined meaning. Two contrasting interpretations were suggested. The plaintiffs contended that the phrase "grant from the Crown" must be given its usual meaning and that it refers only to a conveyance by means of letters patent. On this interpretation, section 25 would apply only to land which the Crown held by its prerogative title and which it disposed of by common-law methods. The transfer of November 1914 would not be affected by section 25 and the entire interest of the Crown in the land, including the minerals, would have passed to Noble. The province, on the other hand, contended that the expression is wide enough to include also a transfer by the Crown of land to which it held a certificate of title issued in its name under the Real Property Act and consequently that it applied to, and restricted the effect of, the transfer from the Crown to Noble.

The majority in the Supreme Court accepted the province's contention and held that in the case of land to which the Crown

[8] In the remainder of this comment, unless the context indicates otherwise, "minerals" denotes base minerals, and does not include gold or silver.

had a certificate of title issued under the Real Property Act the phrase "grant from the Crown" would include a transfer from the Crown in the form prescribed by that act.

On the basis of the language actually used in the statutes, the plaintiffs probably had the better of the argument. However, the majority felt that the legislative intention was to make section 25 applicable to any land that was at any time vested in the Crown for the use of the province, irrespective of the system under which it was registered. This conclusion was permitted by the language of section 25 and was dictated by the history and apparent purpose of a series of statutes, including Dominion legislation extending back to 1883. The necessity of giving effect to that intention persuaded them, even at the risk of extending the fundamental meaning of the phrase, to interpret "grant from the Crown" as including any form of conveyance appropriate for transferring the title to land owned by the Crown. The form of conveyance depends on the system under which the land is registered. Where, as in this instance, the Crown's title is registered under the new system, a transfer is the appropriate form of conveyance. Consequently, for the purposes of section 25, the transfer from the province to Noble is a grant from the Crown. It follows that, because the transfer was silent as to the minerals, the title to them did not pass to Noble.

The essence of the plaintiffs' second thesis was that, even if the Crown transfer of the land to Noble did not transfer the minerals to him, but left them vested in the Crown, yet, under the Real Property Act, he was able to transfer them to a transferee, who acquired the land bona fide and for value. I have already remarked that Hiebert's position is the same as if the land had been transferred directly to him by Noble.

Once again it is difficult to reconcile the language and apparent purpose of the two statutes. Under a group of sections in the Real Property Act, particularly section 79, the successive certificates of title issued to Noble and Hiebert were conclusive evidence as against Her Majesty, as well as against all other persons, that the persons named in them—Noble and Hiebert respectively—were entitled to the land described in them. Furthermore, under the definition contained in section 2(a) of the act

> the expression 'land' means and includes land . . . together with . . . all mines, minerals and quarries, unless any such are specially excepted.

Unless their effect is curtailed by other provisions these sections

are sufficient to entitle the registered owners, not only to the land, but also to the minerals contained therein.

The only curtailing provision in the Real Property Act that could conceivably be relevant is section 78(a):

> The land mentioned in any certificate of title granted under this Act shall, by implication and without any special mention in the certificate of title, unless the contrary is expressly declared, be deemed to be subject to —
>
> (a) any subsisting reservation contained in the original grant of the land from the Crown.

The certificates of title issued to Noble and Hiebert were each endorsed with a memorandum that was practically a verbatim copy of section 78(a), but neither title made any other mention of any reservation of minerals.

At this point the last main obstacle to a judgment in favour of the province becomes apparent. That the transfer of November 1914 must be regarded as "the original grant of the land from the Crown" follows inescapably from the court's acceptance of the province's argument on the first branch of the case. But even when that point has been decided in favour of the province it can still be argued that, in the ordinary sense of the English language, there were no reservations contained in, that is, included either explicitly or by necessary grammatical implication among the contents of, the transfer. Though section 25 of the Provincial Lands Act is designed to reserve the minerals to the Crown, it does not require the actual inclusion, or even the implication, of an appropriate reservation among the contents of the Crown grant. It accomplishes its object, not by a declaration as to what is to be contained, or regarded as contained, in the grant, but by enacting a principle which is to take effect regardless of the absence of any reservation from the grant. There may, under section 25, be a reservation, but it is not contained in the grant from the Crown.

This issue also was resolved in favour of the province. Notwithstanding the provisions of the Real Property Act, each successive owner of the land is subject to the restriction which section 25 imposes on the effect of the grant from the Crown. Two techniques of statutory interpretation collaborate to prevent the titles being subject only to the reservations that are made by way of express stipulation in the Crown grant. The first is to read the two statutes together and to treat the Provincial Lands Act as the paramount statute on the ground that it is a special statute enacted for the particular purpose of preventing the Crown's minerals passing to its grantee unless they are expressly conveyed *eo*

nomine. Accordingly, section 25 must prevail over any inconsistent provisions of the Real Property Act, which is merely a general enactment dealing generally with the effect of all transfers of registered land.

Reliance on the first technique alone might not completely reconcile the two groups of provisions, but it has the further utility of paving the way for the second, which disposes of any remaining difficulties. Once paramountcy is accorded to the Provincial Lands Act, the statutory reservation demanded by section 25 can be regarded as "contained" in the original grant from the Crown for the purposes of the Real Property Act. That construction may involve an extension and, possibly, a distortion of the ordinary meaning of "contained", but it has the benefit of preventing the primary legislative intention from being frustrated. There is no suggestion that the reservation had ceased to subsist.

The remainder of the reasoning follows readily. The Crown had never parted with its title to the minerals. Noble's title did not certify that he was their owner. On the contrary, his title was subject to the Crown reservation of the minerals and must be read as stating that it was so subject. In the language of the definition of "land" contained in section 2(a) of the Real Property Act, the minerals were "specially excepted" from the land covered by his title. The transfer by which Noble transferred to Hiebert all his estate and interest in the land neither transferred nor purported to transfer any estate or interest in the minerals. Consequently, Hiebert never acquired any right to or interest in the minerals. His title, like that of his predecessor, was subject to the Crown reservation of the minerals and must be read as stating that it was so subject. Once again, the minerals were "specially excepted" from the land covered by the title. The province always retained the minerals and neither certificate of title contained any statement to the contrary. For the purpose of ownership by the Crown the minerals were severed from the land as fully as the precious metals are at common law. They were withdrawn both from the operation of the Crown grant and from the subsequent operation of the Torrens system.

To agree with the result reached by the majority, it may be necessary to accept the premise that, of the various purposes manifested by the complicated body of legislation, the paramount purpose was to reserve all minerals for the province unless they were expressly conveyed. The acceptance of that premise guides and controls the remainder of the reasoning. The premise requires and

enables the court to hold that, in the event of inconsistency, the Provincial Lands Act prevails over the Real Property Act on the ground that the former is a special statute and the latter merely a general statute. It requires the court to ascribe, if possible, expanded meanings to "grant from the Crown", "contained" and other expressions, and enables it to hold that they are all sufficiently flexible to permit suitable meanings to be given to them.

The case is not an authority on any fundamentals of the Torrens system. The court held that the certificates of title issued to Noble and Hiebert must be read in the light of section 25 of the Provincial Lands Act and section 78(a) of the Real Property Act, and, consequently, as being subject to the Crown reservation of the minerals. When the titles are construed in that way the problems peculiar to the Torrens system do not arise. It follows, for instance, that the land titles office had not made any mistake, but had, instead, recorded both the Crown transfer and the subsequent transfer with complete accuracy. The doctrine of the indefeasible title could not apply because, even on its own interpretation, Noble's title did not purport to certify that his ownership included the minerals. Similarly his title contained nothing that could be regarded as expressly declaring that a reservation of the minerals was not contained in the original grant from the Crown. Section 78(a) suggests quite positively that the result might be altered by the inclusion of such an express declaration in Noble's title, but this issue did not arise because his title contained no semblance of any such declaration; it did not even contain the compendious phrase "minerals included".[9]

The decision furnishes direct guidance only where a Provincial Lands Act[10] requires the excepting or reserving of minerals from dispositions of land by the Crown. When applied to that situation it supports the belief that the court should rely on three prima facie principles: (1) the Provincial Lands Act should be

[9] *Re Prudential Trust Company Limited and Registrar of Humboldt Land Registration District* (1955), 16 W.W.R. (N.S.) 287, a Saskatchewan case, touches on questions that did not arise in *Hiebert*'s case. In the *Prudential Trust Company*'s case the original grant from the Crown contained a reservation of all mines and minerals. The applicant contended that the reservation was nullified by the fact that the words "minerals included" formed part of subsequent certificates of title to the land. Doiron J. held that, in spite of the presence of those words, the certificates of title were, because of their other contents and of a section corresponding closely with section 78(a) of the Real Property Act of Manitoba, subject to the reservation of mines and minerals contained in the original grant from the Crown. The judgment has been appealed.

[10] In this and the following paragraph "Provincial Lands Act" is used as a convenient title for any provincial statute which requires the excepting or reserving of minerals from dispositions of land by the Crown.

regarded as being of the widest possible applicability. Consequently expressions used in it, such as "grant from the Crown", should not, if it can be avoided, be construed in any narrow or technical sense. (2) The statute should, so far as possible, be regarded as paramount, so that its purpose is not frustrated by inconsistent language in other statutes. (3) A statute providing for a Torrens system of the registration of ownership can often be made to accommodate itself to the Provincial Lands Act, partly by treating the Torrens system statute as a general statute which must yield to the paramount special statute and partly, though possibly at the cost of departing from ordinary meanings, by treating the meaning of particular terms as dictated by the demands of the primary legislative purpose.

But, even in its rather limited field of applicability, the decision does not provide a universal solution. When the entire body of legislation is examined, it may be found that the Provincial Lands Act did not, as a matter of construction, reserve the minerals in the particular parcel of land.[11] Or the language of the Torrens system statute may be so inflexible that the normal operation of the system does not permit the reservation to continue in effect after the Crown grant is registered.[12] Or, though the reservation would still subsist if the Crown grant and all subsequent instruments had been properly recorded, it may have been nullified by a mistake on the part of the land titles office coupled with the operation of the indefeasible title provisions of the Torrens system.[13]

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[11] This possibility is illustrated by the dissenting judgment of Rinfret C. J. and Locke J. They held that the reservation provided for by section 25 of the Provincial Lands Act did not apply to the instant case because the expression "grant from the Crown" could not be construed as including the transfer from the Crown to Noble. Estey J., who also dissented, agreed, though not for quite the same reasons, that the petroleum, natural gas and related hydrocarbons were not reserved from the Crown transfer.

[12] That there is a possibility of the normal operation of the Torrens system depriving the reservation of any effect is also illustrated by the present decision. Each of the dissenting judges apparently agreed that the alleged reservation relied on by the province became ineffective when the land was brought under the Torrens system.

[13] In *Re Prudential Trust Company Limited and Registrar of Humboldt Land Registration District*, referred to in footnote 9, *supra*, the land titles office, by mistake, inserted the words "minerals included" in the certificates of title issued successively to the transferor and the transferee. The applicant argued that the mistake, combined with the theory of the indefeasible title, nullified the reservation of mines and minerals contained in the original grant from the Crown. The argument was rejected by the Queen's Bench judge in chambers. One difference between the two cases is that Hiebert and his co-plaintiff relied on the effect of the normal operation of the Torrens system, while the Prudential Trust Company relied mainly on a mistake on the part of the land titles office.

The widely divergent views expressed in the instant case are a clear indication that existing legislation does not always provide Crown reservations with the firmest of foundations.

E. F. WHITMORE*

Corporal Punishment

The verdict on corporal punishment rests upon our concept of its purpose. If the goal of corporal punishment, as a literal interpretation of the term suggests, goes no farther than punishment itself, scarcely any doubt can be entertained as to its validity. For corporal punishment causes pain, arouses a feeling of humiliation and mortifies the individual upon whom it is inflicted. At the same time, the force administering it, namely the State, is dramatically symbolized as the avenging power, striking down with the lash or strap on the bound, inert and helpless body of a rebel against society.

In the modern age, however, that narrow definition of punishment has been broadened. We hope to rehabilitate a criminal, to regenerate character, to redeem the conscience from hopeless enslavement to wrong. It is a fundamental ideal of our whole educational process that the stuff of human personality can be improved. Unless we are ready to lay a permanent road-block on the highway of human progress, we must believe that there are possibilities of betterment in every human creature—that no one is hopeless beyond repair. Without that faith, no matter how low the conduct of man may descend, we might as well write an end to the adventure of man on this planet in the atomic age. When unimaginable power over nature is being placed by science in the keeping of man, he must rise to a higher level or perish.

That basic foundation for the future of mankind is the ground of my plea against corporal punishment—for corporal punishment has no value for renewing the springs of decency in a human being upon whom it is inflicted. In fact, its mood is vindictive, its fruits negative, its ultimate result destructive. If anything, corporal punishment retards the process of rehabilitation.

What makes a man respect the being of another? Respect for himself, a sense of his own value, a realization that there are some acts too ugly, distasteful and indecent for him. A guilty man sentenced by the court, a prisoner in reformatory or penitentiary, has lost that sense; otherwise he would not have set his hand to the performance of evil. Will a strap or a lash help him to recover it? . . .

I cannot avoid regarding corporal punishment as a penalty which prevents the achievement of the very purpose to which it has been dedicated. Corporal punishment seems more likely to increase the sum total of brutality in our world and to subvert the spiritual foundations on which alone a better society may be fashioned. (Rabbi Abraham L. Feinberg, of Holy Blossom Temple, Toronto, at a panel discussion sponsored by the Criminal Law Section of the Canadian Bar Association at Toronto on September 30th, 1954)

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