CASE AND COMMENT

TRADE UNIONS—WRONGFUL EXPULSION FROM MEMBERSHIP—CAUSE OF ACTION IN CONTRACT OR TORT—REPRESENTATIVE FORM—LIABILITY OF UNION AND MEMBERS TO DECLARATION, INJUNCTION AND DAMAGES.—A man's noblest source of economic security is his ability to earn a living. That is dependent on the opportunity to get and keep work. Before the second world war the hazards of availability of employment were cushioned, and then tardily and by some standards inadequately, only by some form of unemployment insurance, by public works undertakings, by charity or by employer paternalism. Today in Britain through the principle of "full employment" to which governments appear to be committed, and on this continent through fringe benefits and the innovation of the "guaranteed annual wage", the hypothesis of "the right to work" is coming to be translated into a reality of an assured standard of life.

This reality is founded on the employer-employee relation. Through the same processes of collective bargaining through which the guaranteed annual wage is being sought, a condition of the employer-employee relation is with growing frequency coming to be union membership. An increasingly important feature of the social right to a fair standard of life through the propounded right to work is thus the right to union membership. To what extent is this latter right recognized and protected at law? This question has two immediate aspects:[1] (1) to what degree will the courts review the exercise by unions of disciplinary powers through which a person may be deprived of his union membership and hence of his job; and (2) where disciplinary powers are wrongfully exercised, what legal remedies are available to the injured party and against whom may they be claimed?

Both questions turn on a consideration of the nature of the relationship between the individual and the union. Until recently

[1] The right to union membership is not referred to here, although its importance should not be minimized: see, for example, *Guelph* v. *White & Carron*, [1946] 4 D.L.R. 114.

unions were in this respect regarded like other unincorporated associations: the relationship was that of contract between the individual and each of the other individuals in the society. The rights of the individual were rights of contract and his remedies were to be determined accordingly. This point of view had its fullest expression in the judgment of the Privy Council in *Kuzych* v. *White*.[2] There the plaintiff, expelled from his union, was denied a remedy at law because he had failed to exhaust, as he was held bound by his bargain of membership to do, the appeal machinery provided for in the union constitution. Since that decision the narrow contract approach has been tempered[3] and in one case has been qualified away[4] by considerations of public policy or the courts' felt sense of social justice.

To begin with, the *Kuzych* case has twice been distinguished[3,4] on the ground that there was no decision in the subsequent cases from which the plaintiff could appeal within the union. It has never been applied in Canada and in English cases it has not even been referred to.[5]

Secondly, the terms of the contract as evidenced by such sources as the union constitution and by-laws have been qualified by the view that, since there is no real freedom of contract in the member[6]—he must take the terms of union membership as they are or leave work—the contract must not only be interpreted *contra preferentem* but must be qualified by the standards of fairness and reasonableness.[7] Unincorporated associations have long been required, when exercising a judicial function, to adhere to the principles of natural justice,[8] or "an Englishman's deeply rooted principles of fair play".[9] But this new proposition goes further:

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[2] (1951), 2 W.W.R. (N.S.) 679; [1951] 2 All E.R. 435; [1951] 3 D.L.R. 641; comment, Lloyd (1954), 17 Mod. L. Rev. 360, Montrose, *ibid.*, 462, Cooke, *ibid.*, 574; Goodhart (1954), 70 L.Q. Rev. 322; Thomas (1954), 12 Camb. L.J. 162.

[3] *McRae* v. *Local 1220 C. & G.W.U.*, [1953] 1 D.L.R. 327; comment, Whitmore (1952), 30 Can. Bar Rev. 525.

[4] *Tunney* v. *Orchard et al.* (1951), 9 W.W.R. (N.S.) 625 (Man. Q.B.); (1955), 15 W.W.R. 49 (Man. C.A.).

[5] There is a brief and general allusion to the *Kuzych* type problem without reference to the *Kuzych* case in the judgment of Evershed M.R. in *Bonsor* v. *Musicians' Union*, [1952] 2 W.L.R. 687, at p. 691.

[6] *E.g.* Denning L.J. in the *Bonsor* case at page 691 (he is not here dissenting).

[7] Denning L.J. in the *Bonsor* case at page 692. Adamson C.J.M. in the *Tunney* case at page 57 expounds the standard of fairness and practicability for measuring "exhaustion" clauses and their application.

[8] *Dawkins* v. *Antrobus* (1881), 17 Ch. 615; *Andrews et al.* v. *Mitchell*, [1905] A.C. 78; *Wayman* v. *Perseverance Lodge*, [1917] 1 K.B. 677.

[9] *Maclean* v. *The Workers' Union*, [1929] 1 Ch. 602.

it qualifies the very terms of the membership "agreement" itself.[10] Furthermore, it has been held[11] that a domestic tribunal cannot be made the final arbiter of law—for instance to interpret or construe the "agreement"—and even on points of fact the courts will intervene if the finding is unreasonable.

Thirdly, the view has newly been expressed that, although the relationship between member and union is founded in contract, it ripens into status, the wrongful interference with which is a tort.[12] This is a view long ago expressed by Professor Chafee in a superb analysis of American law and legal theory,[13] but has not until now been recognized so openly in Anglo-Commonwealth jurisprudence.

The question of the incidence of judicial review has received excellent treatment in Professor Whitmore's article on "Judicial Control of Union Discipline"[14] and will not be considered further here. The burden of this comment is a question in remedies: Can a person wrongfully expelled from a union obtain damages and, if so, against whom may they be obtained? This question was before the House of Lords recently in *Bonsor* v. *Musicians' Union*[15] and is part of the problem of *Tunney* v. *Orchard*,[4] presently on appeal from the Manitoba Court of Appeal to the Supreme Court of Canada. The purpose of this comment is to examine the *Bonsor* decision to see to what extent it bears on the *Tunney* problem.

Harry Bonsor was a member in good standing of the Musicians' Union. He allowed his dues to fall into arrears and the secretary, without authority as the court found,[16] struck his name from the union's membership register. The union had a "closed shop" agreement with many employers; work at Bonsor's vocation was consequently restricted and eventually was unavailable to him. In an action by Bonsor against the union for a declaration of membership, an injunction and damages, the court awarded the first two remedies but, considering itself bound by the decision of the Court of Appeal in *Kelly*'s case,[17] refused damages. The

[10] *E.g.* Denning L.J. in *Lee* v. *Showmen's Guild*, [1952] 1 All E.R. 1175: "They cannot stipulate for a power to condemn a man unheard"; comment, Whitmore (1952), 30 Can. Bar Rev. 617.

[11] *Lee* v. *Showmen's Guild*, *ibid.*

[12] *Tunney* v. *Orchard et al.*, *supra* footnote 4.

[13] The Internal Affairs of Associations Not for Profit (1930), 43 Harv. L. Rev. 993.

[14] (1952), 30 Can. Bar Rev. 1.

[15] [1954] 2 W.L.R. 687 (C.A.); [1955] 3 W.L.R. 788 (H. of L.).

[16] Uthwatt J. in a judgment which does not seem to have been reported.

[17] *Kelly* v. *National Society of Operative Printers' Assistants* (1915), 84 L.J.K.B. 2236. The binding force of *Kelly*'s case seems to have been accepted by counsel at the trial of *Bonsor*'s case.

union appealed against the finding that the expulsion was wrongful and Bonsor cross-appealed for damages. Both appeals were dismissed, Denning L.J. dissenting on the question of damages. Bonsor had died meanwhile, and the Court of Appeal judgments consequently were pre-dated by consent. The House of Lords, overruling the *Kelly* case, allowed the appeal for damages taken by Bonsor's estate.

At the outset two points of distinction may be made between *Bonsor* and the Canadian case of *Tunney* v. *Orchard*: the English action was founded in contract; and it was against the union in its registered name. The reason for founding the action in contract is plain: section 4(1) of the Trades Disputes Act of 1906[18] declares that

> an action against a trade union . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court.

And the reason for bringing the action against the union in its registered name is equally plain: the Trade Union Act of 1871[19] has been held[20] to give a union capacity to sue and be sued in its registered name; furthermore, such a form of action avoids the hazards of a purely representative suit under the rules of court.

The main problem in *Bonsor*'s case was the queston of the validity of the reasoning of the Court of Appeal in *Kelly*'s case, undistinguishable from *Bonsor*'s case on its material facts. The Court of Appeal reasoned that, whatever a union may be in fact, it is not in law an entity distinct from its members. The material contract was therefore between Kelly and all the other members of the union except himself. The committee which acted wrongfully against Kelly was as much his agent as the agent of the other members.[21] In suing the union for damages Kelly was in effect suing in their collective name all the members including himself.[22] This cannot be. The declaration and injunction were granted because the committee acted *without authority* and in defiance of the rules. For that very reason Kelly could not claim *damages* from the other members collectively.[23]

The judgments in the Court of Appeal and in the House of Lords in the *Bonsor* case are summarized in some detail not only because of the importance of the question of union liability but

[18] 16 Edw. 7, c. 47. [19] 34 & 35 Vict., c. 31.
[20] *Taff Vale Ry. Co.* v. *A.S.R.S.*, [1901] A.C. 420.
[21] See particularly the judgments of Swinfen Eady and Bankes L.JJ.
[22] See particularly the judgment of Phillimore L.J.
[23] See particularly the judgment of Banker L.J.

because the judgments give a searching re-examination of statutes and cases the applicability of which in Canadian jurisdictions may tend to be overrated, particularly in light of the comparative paucity of Canadian material.

In the Court of Appeal Evershed M. R. held in effect that, as there is no evidence that the *Kelly* case was decided *per incuriam*, and although the decision was severely criticized by Scrutton L.J.—with characteristic acerbity—in *Rex* v. *Cheshire C.C.J.*,[24] the Court of Appeal is bound by it. He also held that the *Taff Vale* case[20] did *not* decide that the Trade Union Acts[25] created a new legal entity "at any rate save for very limited purposes".[26] In reviewing the decisions of the courts in *Gillian*'s case[27] (which held that a union could sue in its registered name for damages for libel) he found that the trial judge, Birkett J., did not hold "that in its relations with its own members the union should be treated as being a separate legal entity contracting as such";[28] and that, although in the Court of Appeal Scott L.J. and Uthwatt J.[29] went much further, the relationship of individuals to the union was not before the courts, and its decision is not inconsistent with *Kelly*'s case: it was merely the counterpart[30] of the *Taff Vale* case. He also expresses his own view that Parliament did not intend to confer a distinct entity upon a registered trade union.[31]

Jenkins L.J.'s judgment expresses much the same views. After reviewing the judgments in *Kelly*'s case at length, his lordship held that the case was indistinguishable from the case at bar and was binding on the court. He further held that, accepting the *Kelly* premise that suing a union in its registered name for wrongful expulsion was equivalent or analogous to suing the members in a representative action for breach of contract, there was no inconsistency in granting a declaration and injunction but refusing damages. He also agreed that *Gillian*'s case is the converse of the *Taff Vale* case and that Parliament did not intend to confer a distinct entity upon a registered trade union.[32]

Denning L.J., dissenting, quarrels at the outset with the proposition in *Kelly*'s case "that a trade union is only an unincorpor-

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[24] [1921] 2 K.B. 694, at p. 709.
[25] Footnote 19 *supra*, and (1876), 39 & 40 Vict., c. 23.
[26] *Supra*, footnote 15, at p. 701.
[27] *National Union of General & Municipal Workers* v. *Gillian*, [1946] K.B. 81.
[28] *Supra*, footnote 15, at p. 704.
[29] Mackinnon L.J. did not deliver a separate judgment.
[30] *Ibid.*, at p. 702.
[31] *Ibid.*, at p. 705.
[32] *Ibid.*, at p. 722.

ated association of individuals, without any legal personality of its own at all apart from its members";[33] rather it is a legal entity which can make and break contracts and be liable in damages as a result. His main authority is the *Taff Vale* case, although he referred also to the first *Osborne* case,[34] in which the doctrine of *ultra vires* was applied to a union, to *Braithwaite*'s case,[35] in which a declaration and injunction were granted to prevent an expulsion but the question of damages did not arise, and to *Gillian*'s case, referred to already. He concluded:

> . . . Parliament has legalized trade unions and has given them large immunities from the ordinary processes of the law. It has exempted them from any liability for tort, and also from liability for certain contracts; but it has never exempted them from liability for wrongful exclusion of a member. Nowadays exclusion from membership means exclusion from his livelihood. No one in this country should be liable to be fully excluded from his livelihood without having redress for the damage thereby done him. I would, therefore, allow the cross-appeal.[36]

The appeal of Bonsor's estate was allowed in the House of Lords without dissent. A majority upheld much of the rationale of the *Kelly* case, overruling it on a comparatively narrow but vital point.

However, Lord Morton of Henryton, on the question of the legal entity of trade unions, said:[37]

> . . . in my view the *Taff Vale* case goes far to decide the question. . . . It may be that Lords Macnaghten and Lindley thought that an action against the union was an action against all the individual members — indeed that view was expressed again by Lord Macnaghten in *Russell*'s case[38] and by Lord Lindley in *Yorkshire Miners' Association* v. *Howden*[39] — but I am satisfied that it has never been more than a minority view, inconsistent with the relevant authorities from the *Taff Vale* case onwards, with the solitary exception of *Kelly*'s case.

This led to the conclusion (expressed earlier in his judgment[40]) that

> . . . the action in *Kelly*'s case was an action by a member against his union as an entity recognized by the law and distinct from the individual members thereof, for breach of a contract between the plaintiff and his union. If this is so, the foundation for the refusal to award damage is gone.

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[33] *Ibid.*, at p. 707.
[34] *A.S.R.S.* v. *Osborne*, [1910] A.C. 87.
[35] *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite*, [1922] 2 A.C. 440.
[36] *Supra*, footnote 15, at p. 713. [37] *Ibid.*, at p. 794.
[38] *Russell* v. *A.S.C.J.*, [1912] A.C. 421, at p. 429.
[39] [1905] A.C. 256, at p. 280. [40] *Supra*, footnote 15, at p. 791.

Lord Porter, in a comparatively short judgment, also accepts Denning L.J.'s dissenting view of the effect of the *Taff Vale* case:

> If, then, they [Lord Macnaghten and Lord Lindley in the *Taff Vale* case] regarded an action against a trade union in its trade name as equivalent to a representative action against its individual members I cannot agree with their view. . . . If . . . there has been, as I think there has, a thing created by statute, call it what you will, an entity, a body, a near-corporation, which by statute has in certain respects an existence apart from its members, then I do not see why that body should not be sued by one of its members for breach of contract.[41]

But Lord MacDermott, after a meticulous analysis of the pertinent legislation and the judgments in the *Taff Vale* case, held that a registered trade union is not a juridical person.[42] He then adds "some observations respecting the procedural consequences of the *Taff Vale* decision". The importance of the passage warrants its quotation at length:[43]

> How a voluntary association of persons, such as a trade union, can be sued is hardly less important than its responsibility under the law. The numbers and the changing character of its membership may be such as to make it impracticable to sue the right persons individually and difficult to obtain an order appointing representative defendants. These difficulties are, perhaps, at their height in the case of trade unions of workmen where the membership often runs into many thousands and is subject to a constant fluctuation. Anyone—be he a member or an outsider—who seeks a remedy in the courts against an unregistered union of this nature may well be confronted at the outset with a formidable problem in determining how to constitute his suit. The *Taff Vale* decision removed this obstacle to the process of adjudication in the case of the registered union by holding that Parliament had allowed it to be sued in its registered name. Where this is done the party suing, if he is to succeed, has still of course, to show that the union concerned is, as an organized combination, responsible for the act of which he complains; but he does not need to marshall the membership on any basis of individual liability as, for example, by excluding those who are infants or who have joined since his cause of action arose or who, as a minority, have voted in his favour; nor (if a member) has he, in my opinion, even to make it clear on the face of the record that he excludes himself. The peculiarity of this procedure, like that under the rules of court in England and Northern Ireland whereby a partnership may be sued in its firm name, lies in the fact that it sanctions proceedings at law in a name which is not that of a juridical person, either natural or artificial. But that, as Farwell J. pointed out and as this House held in the *Taff Vale* case, is the result of what Parliament has enacted and, anomalous though it may be, there can be little doubt that as a procedure it is a convenient and valuable aid to the administration of justice. It has,

[41] *Ibid.*, at p. 799.
[42] *Ibid.*, at p. 811.
[43] *Ibid.*, at pp. 811-812.

> however, one consequence which ought not to be overlooked. If a union is sued to judgment in its registered name execution in respect of any sum it may be ordered to pay cannot, in my opinion, be levied on the assets of members and must be confined to the property of the union. . . . Parliament has not provided any machinery for extending what I may call a registered name judgment so as to make it enforceable against members as such. The situation where the members are sued by name or by duly appointed representatives raises different and, as it seems to me, more difficult considerations, but as that situation does not arise here I express no opinion upon it.

He then specifically overrules the views expressed in the *Kelly* case that a member who sues his union in its registered name cannot succeed because he is also suing himself (the view of Phillimore L.J.) and (here agreeing with Denning L.J.) that the executive committee in acting against the expelled member were acting as his agent (the view of Bankes L.J.).

In a more succinct but no less important judgment Lord Keith of Avonholm reiterates the views of Lord MacDermott:[44]

> My Lords, I think that the decisions of this House show that, in a sense, a registered trade union is a legal entity but not that it is a legal entity distinguishable at any moment of time from the members of which it is at that time composed. . . . It differs from an unincorporated association in that it is unnecessary to consider who were the members at any particular time. . . . The registered trade union may be said to assume a collective responsibility for all members past, present and future, in respect of any causes of action for which it may be made liable, irrespective of the date of the cause of action. On the other hand, the judgment creditor can look only to the funds of such a trade union to satisfy his debt, and to the extent to which these may be augmented from time to time by contributions of members, whether new or old, they will still be available for the unsatisfied judgment creditor.

He then stated that the views in *Gillian*'s case to the effect that registered trade unions have legal status went too far.[45] And he rejects the agency argument that the committee in expelling a member are acting as his agent[45] and states the opinion that *Kelly*'s case was wrongly decided.[46]

Lord Somervell of Harrow in a short but vital judgment[47] agrees with the views of Lord MacDermott and Lord Keith, giving them the importance of a majority, that a union is an unincorporated association, that the contract of membership evidenced by the rules of the union is an agreement of the members *inter se*, that the expelling agency cannot be considered the agent

[44] *Ibid.*, at p. 815.
[45] *Ibid.*, at p. 818.
[46] *Ibid.*, at p. 819.
[47] *Ibid.*, at pp. 820-822.

of the expelled member, that the union in its registered name is a proper defendant for a declaration, injunction and damages, and that damages,[48] if any, may be recoverable only from union funds.

What, then, are the limitations on the applicability of the *Bonsor* case to the Canadian scene as illustrated in *Tunney* v. *Orchard?* To begin with, there is no Canadian legislation equivalent to the English acts of 1871 and 1876.[25] The closest enactment, the federal Trade Unions Act of 1872,[49] does not go nearly so far as the English statutes, and in any event is probably unconstitutional.[50] The post-war provincial and federal labour codes have been held to confer legal status on unions for the purposes of those acts,[51] but whatever the extent of their purposes[52] they do not extend—at least not on present interpretations[53]—to internal affairs of trade unions.[54] If, then, trade unions are not to be treated as legal entities in this kind of problem in most or all Canadian jurisdictions, the action will presumably have to be brought in a representative form, or against individuals on their own behalf, whether the action be founded in contract or in tort.

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[48] Lord Somervell would add the union's trustees as parties: *ibid.*, at p. 822.

[49] R.S.C., 1952, c. 267.

[50] See Middleton J.A. in *Amalgamated Builders' Council* v. *Herman*, [1903] 2 D.L.R. 513, 65 O.L.R. 38; Duff J. in *Starr* v. *Chase*, [1924] S.C.R. 495, at pp. 507-508; McDonald C.J. B.C. in *Stephen et al.* v. *Stewart et al. (No. 1)*, [1944] 1 D.L.R. 305, 59 B.C.R. 410, at p. 416; and Barlow J. in *C.S.U.* v. *C.L.R.B. and Branch Lines Ltd.*, [1951] 2 D.L.R. 356.

[51] *Re Patterson* v. *Nanaimo Dry Cleaning & Laundry Workers' Union*, [1947] 4 D.L.R. 159; *Vancouver Machinery Depot Ltd.* v. *U.S.W.A.*, [1944] 4 D.L.R. 518 and 522; *In re International Nickel: Shedden* v. *Kopinak*, [1950] 1 D.L.R. 381.

[52] Compare the views of Farris C.J.S.C. in *Machinists, Fitters & Helpers Union* v. *Victoria Machinery Depot Ltd.*, [1953] 3 D.L.R. 414, and Freedman J. in *Peerless Laundry* v. *L. & D.C.W.U.*, [1952] 4 D.L.R. 475, with the view of McRuer C.J.H.C. in *Hallnor Mines Ltd.* v. *Behie et al.*, [1954] 1 D.L.R. 153; see also the limitations placed on the enforcement of the penal provisions in the Manitoba act in *Re Walterson & L. & D.C.W.U.*, [1955] 2 D.L.R. 776.

[53] But see the provisions in the labour codes, of which section 3(1) of the federal code is typical: "Every employee has the right to be a member of a trade union and to participate in the activities thereof". And see the award of Macfarlane J. in *Building & General Labourers' Union* v. *Ocean View Dev't. Ltd.*, [1955] 5 D.L.R. 12, sitting as a referee on a case stated under section 22 of the Arbitration Act, R.S.B.C., 1948, c. 16, by a board of arbitration appointed under the Labour Relations Act, Stats. B.C., 1954, c. 17—a very doubtful decision and not a legal authority.

[54] A possible exception is the B.C. Trade-unions Act of 1902, R.S.B.C., 1948, c. 342. There is no unqualified decision on the point, although there are *obiter dicta* that trade unions are legal entities for its purposes: see Wilson J. in carefully marked *dicta* in *Walker* v. *Billingsley*, [1952] 4 D.L.R. 590, concurring in *dicta* of O'Halloran J.A. in *Hollywood Theatres* v. *Tenny*, [1940] 1 D.L.R. 452, that a trade union may be sued as an entity for the torts covered by the Trade-unions Act; however, the purposes of the act appear to be confined to labour-management disputes.

Suing individuals on their own behalf will not reach union funds from which a damage judgment might otherwise be satisfied. Furthermore, in the absence of malice, damages in tort against individuals may not be recoverable.[55] The representative form of action in a suit for damages is chancey. Some of its dangers were referred to in the *Bonsor* case:[56] the membership of a trade union is constantly changing; persons members at the time the cause of action arose may no longer be members and others may have joined meanwhile; others may be infants; others may have voted in the plaintiff's favour. In each case the individual defendant may be entitled to claim a separate defence and ought not therefore merely to be represented as a defendant.[57] These dangers are particularly serious where the action is for damages founded in tort, in which separate defences may be even more readily available than in a contract action. But the court in the *Tunney* case seems, in an older tradition of the House of Lords, to have passed through these procedural dangers undeterred: on January 17th, 1949, the Manitoba Court of Appeal ordered[58]

> that the seven individual defendants (who were the executive board of the union) do represent and defend on behalf of all other members of Local No. 119, except plaintiff, as well as on their own behalf, and that all other members of Local No. 119 except plaintiff, as well as the individual defendants, be bound by the judgment and proceedings in this action.

But even more fundamental than the question of the representative form of action is the question of tort. A plaintiff may prefer to found his action in tort in the possibility that it may fetch higher damages than one founded in contract.[59] *But what is the tort?* This question did not arise in the *Bonsor* case because a statute precluded tort liability. But the recognition by the Manitoba Court of Appeal of the tort of interfering with union mem-

[55] See Morris L.J. in *Abbott* v. *Sullivan*, [1952] 1 All E.R. 226, [1952] 1 K.B. 189, [1951] 2 Lloyd's Rep. 573 (especially for the facts); and see comments (1952), 15 Mod. L. Rev. 413, and Hendry (1952), 30 Can. Bar Rev. 844.

[56] *Supra*, footnote 15: Lord Morton of Henryton at p. 793; Lord Porter at p. 799; Lord MacDermott at pp. 811 and 812; and Lord Keith at p. 815.

[57] On the representative action see generally: *U.M.W.A.* v. *Williams & Rees* (1919), 59 S.C.R. 240, at pp. 250-251 and 257-260; *Ellis* v. *Duke of Bedford*, [1901] A.C. 1, at pp. 7-8 and 18; *Walker* v. *Sur*, [1914] 2 K.B. 930, esp. at p. 937; and, particularly, *Barker* v. *Allanson*, [1937] 1 All E.R. 75. In *Aristocratic Restaurants (1947) Ltd.* v. *Williams et al.*, [1951] 3 D.L.R. 769, the representative form of action was not objected to.

[58] *Supra*, footnote 4, at p. 79.

[59] On quantum of damages see *Bonsor*'s case, *supra*, footnote 15, at p. 715; and *Tunney*'s case, *supra*, footnote 4, at pp. 60 (Adamson C.J.M.) and 77-79 (Tritschler J.).

bership is probably the point of greatest importance in the *Tunney* case. It is one of the clearest instances of judicial creativeness in current Canadian jurisprudence. No cases were referred to. The point is new, but the reasoning is clear:

> I cannot myself accept the theory that the relationship between a member of a union and his union is purely contractual. It starts in contract but once created the relationship ripens into status. The wrongful destruction of this status is a tort. The categories of tort are not closed. . . .
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> At one time the courts based their jurisdiction to relieve persons improperly expelled from associations upon the narrow ground of protection of the member's right to property, that is, his interest in the assets of the association of which he was deprived by the expulsion. With the growth of associations, particularly labour unions, in which the members had no property rights, the law did not hesitate to meet the changing conditions. It found a remedy in the theory of contract. The property theory was too narrow and rigid but the law proved flexible. It has now been demonstrated that the contract theory has become too rigid. . . .
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> If the law is too rigid, who makes it so? Who can keep it flexible? The judges found it possible to move from property to contract to meet the exigencies of the times. The step from contract to status is not more revolutionary. . . .
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> In my opinion the destruction of plaintiff's union status was a tort. What was done was tortious on the further ground that it was done maliciously. . . . Therefore, damages are recoverable.[60]

The authorities for these propositions, in logic if not in law, were Lloyd, "Judicial Review of Expulsion by a Domestic Tribunal",[61] Thomas, "Expulsion from Trade Unions"[62] and Fuller, *The Law in Quest of Itself*.[63] Reference might also have been made to such sources as Chafee's article, cited earlier, to later materials like Summers, "Disciplinary Powers of Unions",[64] "Disciplinary Procedure of Unions",[65] "Union Powers and Workers' Rights" and "Legal Limitations on Union Discipline",[67] to Lloyd, "The Disciplinary Powers of Professional Bodies",[68] to Allen, *Power in Trade Unions* (1954), to Ford, "The Use of the Injunction to Re-

[60] These passages are from the judgment of Tritschler J. in which Adamson C.J.M. and Coyne J.A. concurred; on this point Beaubien J.A. concurred in the judgment of Adamson C.J.M. and presumably therefore in the judgment of Tritschler J.

[61] (1952), 15 Mod. L. Rev. 413.

[62] From, The Law in Action; see also (1954), 12 Camb. L.J. 162.

[63] As to reference by courts to legal writings, see Nicholls, Legal Periodicals and the Supreme Court of Canada (1950), 28 Can. Bar Rev. 422.

[64] (1950), 3 Indust. & Lab. Rel. Rev. 483.

[65] (1951), 4 Indust. & Lab. Rel. Rev. 15.

[66] (1951), 49 Mich. L. Rev. 805. [67] (1951), 64 Harv. L.R. 1049.

[68] (1950), 13 Mod. L. Rev. 281.

strain Wrongful Expulsion from Voluntary Associations"[69] and even to Cardozo's classic, *The Nature of the Judicial Process*. All give from different aspects an insight into the conflict between group and individual freedom inherent in the problem of union security and the right to work, and into the jurisprudential problem of the approach of courts to new problems cast up by a changing society.

As to the form of the judgment in the *Tunney* case, it was ordered to run against the individual defendants personally and against all other members of the local except the plaintiff to the extent of their funds in the local, the property and funds of the local being subject to execution to satisfy the judgment. This form was borrowed from the *Taff Vale* case, already distinguished from Canadian law. But to objections thus made to following the English authority and deviating from the identification of the parties made in the representation order the court said:[70]

> The question is simple enough. Can a union, or other voluntary, unincorporated association which is an entity in fact, be made to answer in the courts for wrongs or for breach of contract or for debts contracted? If it cannot that ends the matter but if, as I think, it can, it must not escape the accounting because of a want of ability in the courts to devise a suitable form of judgment. The form of the judgment is but a means to achieve the end of imposing responsibility upon the union and of making it possible for the plaintiff to realize his judgment out of the assets of the union. The form of judgment to be adopted is not all-important so long as the intended result is reached.

It remains to be seen whether the same considerations of natural justice, public policy[71] and social need will commend themselves to the Supreme Court of Canada and whether, consequently, broad considerations of the relation of law to society and of legal theory to factual reality will become incorporated in positive form and for proper cases into the Canadian judicial process.

A. W. R. CARROTHERS*

* * *

CONSTITUTIONAL LAW—CLOSING OF STORES ON HOLY DAYS—CRIMINAL LAW—RELIGIOUS AND POLITICAL FREEDOM.—*In Birks v. City of Montreal and the Attorney-General of the Province of*

[69] (1954), 1 Sydney L. Rev. 186.
[70] *Supra*, footnote 4, at p. 87.
[71] See Lloyd, Public Policy (1953), esp. Ch. VII, The Role of the Judge.

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Quebec the Supreme Court of Canada have unanimously held to be ultra vires an amendment passed in 1949 by the Quebec legislature to the Early Closing Act[1] of that province and the by-law of the City of Montreal for the early closing of retail stores passed under its authority in 1951. The amendment authorized municipal councils to provide by by-law for the closing of stores for the whole day on New Year's Day, the festival of the Epiphany, on Ascension Day, All Saints Day, Conception Day and on Christmas Day. The decision reversed the majority view of the Quebec Court of Queen's Bench (Appeal Side) and restored the original judgment of Smith J.

The Supreme Court of Canada were unanimous in the opinion that the true purpose of the amendment was not to provide additional holidays for retail employees.[2] Such a purpose would have justified the intervention of the provincial legislature under the power to legislate in relation to property and civil rights in the province (section 92(13) of the British North America Act), or to matters of a merely local or private nature in the province (s. 92(16)), or to the imposition of penalties in aid of provincial legislative powers (s. 92(15)). In such a case the amendment would have been indistinguishable from the main statute, which the Supreme Court of Canada had already held to be within provincial competence in *Montreal* v. *Beauvais*.[3]

The real purpose of the legislation, the court held, was the enforcement of the observance of the days in question as "Holy Days" because of their religious significance. The legislation was analogous to Sunday observance legislation, for example the Lord's Day Act, and was therefore within the exclusive legislative authority of Parliament under section 91(27), "The Criminal Law".[4]

On the facts of the instant case it is hard to quarrel with the decision, notwithstanding the contrary view of the majority of the Quebec court of appeal and the doubts I expressed in a comment in the Canadian Bar Review after the decision by the judge of first instance.[5] Indeed I feel constrained to recant and admit that the reasons for assigning the present legislation, on the "aspect" doctrine, to the field of religious observance rather than the provision of additional holidays are overwhelming, as set out in the

[1] Stats. Que. (1949) c. 61. [2] The judgment is unreported as yet.
[3] (1909), 42 S.C.R. 211.
[4] *A.-G. for Ontario* v. *Hamilton Street Railway Co.*, [1903] A.C. 524; *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502.
[5] Brewin, Legislative History—Constitutional Law—City By-law Requiring the Closing of Shops on Certain Holidays—Dominion Juristion over Criminal Law (1952), 30 Can. Bar Rev. 840.

judgments of Fauteux J. (with whom Kerwin C.J., Taschereau, Estey, Cartwright and Abbott JJ. concurred), of Kellock J. (Locke J. concurring) and of Rand J.

The features of the legislation which persuaded the court that the real purpose of the legislation was religious observance of the days in question as "Holy Days", rather than the provision of "holidays", were that the closing required was for the whole day, twenty-four hours, and not for certain shorter hours to be specified by individual municipalities, that the days selected were all days of religious obligation, and indeed were all of the days of obligation under the canon law (except Sundays) that the Roman Catholic Church, to which the vast majority of the population of Quebec adheres, prescribes their observation in precisely the same manner as it prescribes the observation of Sunday as a Holy Day, and that no provision was made for an additional holiday if one of the days in question happened to fall on a Sunday.

The court would have been faced with a more difficult problem if some variation in the legislation had permitted the argument that at least mixed motives, secular as well as religious, had inspired the legislation. Suppose, for example, the hours of closing had been for part of the day and not all of it; suppose that, instead of the six days of religious obligation, four had been mentioned in the act and two other days of purely historic or national significance had been added. In such a case would the conclusion be justified that the enactment was "solely with a view to promote some object having no relation to the religious character of the day . . ."?[6]

The court found further support for its conclusion that the legislation was in fact "criminal law" in an examination of the legislative history in England. As long ago as 1354 a statute was passed in which the enforced observance of Holy Days other than Sundays was comprised within the same clause as the observance of Sundays. A statute of 1448 requiring the closing of fairs and markets on Sundays and High Feast days remained unrepealed at the time of the passing of the B. N. A. Act in 1867. The conclusion was irresistible that, if the legislation was criminal law as it affected the observance of Sundays, it must also be criminal law in its application to other Holy Days.

Some student of Canadian constitutional law should at some time examine the decisions of the courts on the interpretation of sections 91 and 92 of the B. N. A. Act to determine the extent to

[6] *Per* Duff J. in *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502, at p. 526.

which what might be called the "historical approach" has been adopted or rejected. An examination of English legislative history before Confederation to determine the meaning of phrases in the B. N. A. Act seems to have this danger that notoriously in England respect is often shown to tradition by leaving ancient and obsolete statutes and institutions unrepealed or intact, and then proceeding to disregard them entirely in practice.

But perhaps the most interesting aspect of the *Birks* decision is the reminder in the opinions of Rand and Kellock JJ. (the latter concurred in by Locke J.) that *Saumur* v. *Quebec*[7] has left wide open the question of whether freedom of religion (and other political freedoms, such as the freedom of the press) are protected from the interference of provincial legislatures under the scheme of the B. N. A. Act, as the dicta of Chief Justice Duff and Mr. Justice Cannon in the Alberta *Accurate News and Information* case suggested.[8]

The present case probably adds little more than a reminder of the unsolved constitutional problems raised in the *Saumur* case. Rand J., referring to his reasons in *Saumur*, expressed the opinion that the "Holy Day" closing legislation was legislation in relation to religion and was therefore beyond provincial authority to enact, and Kellock J. simply stated that, apart from "criminal law", the legislation would be within the exclusive jurisdiction of Parliament "as legislation with respect to freedom of religion dealt with by the statute of 1852 c. 175 C.A. [Freedom of Worship Act]".

That the subject matter of the legislation impugned in the *Saumur* case was legislation designed to prevent a manifestation of religious activity by a minority, deemed obnoxious, and that the legislation dealt with in the instant case was designed to promote an observance of religion deemed obligatory by a majority presumably makes no difference. Where the true purpose of legislation is either to prescribe or proscribe manifestations of religion, it is in the view of those members of the court withdrawn from provincial competence.

The paucity of comment in legal periodicals on the *Saumur* case is surprising because that case was undoubtedly one of the most interesting pronouncements on constitutional issues of great importance to Canadians that our Supreme Court has ever made. So far as the writer is aware, an article by Professor Bora Laskin in the Queen's Quarterly[9] and a discussion of the aspects of the

[7] [1953] 2 S.C.R. 299. [8] [1938] S.C.R. 100.
[9] (1954), 41 Queen's Quarterly 455.

case which affect civil liberties by Mr. Norman Chalmers in the University of Toronto School of Law Review[10] are the only comments that have been published. The widely differing views expressed and the implications of the decision for political as well as religious freedom in Canada enhance the importance of the case.

In that case the majority of the court quashed the conviction of the appellant, a Witness of Jehovah, for distributing through the streets of Quebec the pamphlets of that sect without permission of the chief of police. Four of the majority, Rand, Kellock, Estey and Locke JJ. were of the opinion that the legislation which authorized the by-law requiring permission was beyond the competence of the provincial legislature as an interference with religious freedom and not a matter of property and civil rights. Their views would presumably have been the same if the accused had been distributing political leaflets.[11] They expressly relied on the dicta of Duff C.J. and Cannon J. in the *Reference re the Alberta Accurate News and Information Act.* Kerwin J., as he then was, joined with the majority, but for an entirely contradictory reason—he explicitly disapproved Duff C.J.'s and Cannon J.'s dicta in the *Accurate News* case and held that freedom of religion (and presumably of the press) falls to be controlled and limited, if legislatures see fit, by provincial legislation, as a matter of property and civil rights. The by-law in question did not apply, in his view, to the action of the accused in distributing religious literature because of the Freedom of Worship Act. Rinfret C.J. and Taschereau J., holding the legislation authorizing the by-law, the by-law, and its application to the distribution of the pamphlets by the accused to be perfectly legal, explicitly held that freedom of worship was not a subject of legislation within the jurisdiction of Parliament but instead was a civil right in the province and subject to control by the province.

Cartwright J., with whom Fauteux J. concurred, agreed with the other members of the minority of the court that the legislation was within provincial competence because it dealt with the use of highways and the suppression of conditions likely to cause disorder. The reasons of these two members of the court might turn out to be crucial in the event of any new test of the question how far freedom of religion or political freedoms are beyond the reach of the provincial legislatures. It would appear that they do not close the door to the argument that provincial legislation designed

[10] (1954), 12 U. of Tor. School of Law Rev. 12.
[11] See F. R. Scott, Correspondence (1953), 31 Can. Bar Rev. 591.

to prevent the free observance of religion or to restrict political rights, for example freedom of speech or assembly, would be ultra vires. Cartwright J. does not refer to the dicta of Duff C.J. or Cannon J. in the Alberta reference. Surely, if he had agreed with Kerwin J. in disapproving them, he would have said so.

The key to the reasons of Cartwright J. seems to lie in his view that the legislation attacked in the *Saumur* case (apart altogether from its application in practice to the activities of the accused Witness of Jehovah) was in its true nature legislation with respect to the use of streets and the suppression of conditions likely to cause disorder. It was legislation which might *affect* freedom of religion but was not *in relation to* freedom of religion. This would be an application of the now familiar "aspect" theory and would not deprive Cartwright J., and Fauteux J. who subscribed to his reasons, of the chance of joining, without inconsistency, with their brethren who have held that legislation aimed at restricting religious or political freedom is beyond the competence of the provincial legislature.

Those who, like the writer, feel that the views expressed by Duff C.J. and Cannon J. in the Alberta case, Rand, Kellock, Estey and Locke JJ. in the *Saumur* case, and Rand, Kellock and Locke JJ. in the instant case, constitute an important bulwark of vital constitutional freedoms may be permitted to hope that an opportunity for the Supreme Court of Canada to clarify the present obscurity will arise before too long.

F. A. BREWIN*

* * *

PROCEDURE—DESCRIPTION OF PLAINTIFF IN WRIT OF SUMMONS—MOTION TO AMEND—INTERVENTION.—In *De Rosa* v. *Dupuis*[1] the Quebec Court of Queen's Bench (Appeal Side) confirmed a judgment of the Superior Court at Quebec which had maintained a motion to amend made by the plaintiff De Rosa. De Rosa had instituted an action in his own name claiming commission as a real estate agent and in the writ of summons he described himself as such. But he based his action upon a writing, in which his name did not appear as the contracting party, but the name of a company described as Raymond De Rosa Inc.

To this action the defendant at first did not file any defence,

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[1] [1955] B.R. 413.

but when his attorney was served with a notice that the plaintiff was proceeding ex parte, the defendant obtained permission to be relieved of the foreclosure to plead and he filed a defence, in which he alleged that there was no *lien de droit* between him and the plaintiff. The latter then presented a motion before the court of first instance, stating that it was by inadvertence that the plaintiff was not described in accordance with the document produced with the claim, and leave was asked to amend the description of the plaintiff by substituting "Raymond De Rosa Inc." for "Raymond De Rosa".

Mr. Justice Boulanger of the Superior Court granted the motion, and his judgment was confirmed by the court of appeal, composed of three judges (Martineau J. dissenting). The notes of only one of the two judges forming the majority, those of Mr. Justice Rinfret, are to be found in the report, besides the notes of the dissenting judge. Rinfret J. remarked that the inscription for judgment ex parte bore the name of the corporation, that the contract was with the corporation and not with the plaintiff personally, and that there was no doubt in the mind of the defendant as to who had a claim against him for the commission in question. The learned judge came to the conclusion that the error was the result of a *lapsus*. He cited a decision in which it was permitted to a plaintiff, who sued personally, to add on words to show that he was only suing in a representative capacity. He added, however, that the problem would be treated differently if it were one of acquired prescription.

The dissenting judge conceded that the greatest latitude should be given to the parties to amend their proceedings, so that they can exercise freely their rights, except where the amendment would revive a right which had expired as a result of lapse of time. He then referred to numerous decisions permitting an amendment to the designation of the defendant, where there was no error as to the person, but only an irregular description. The courts had been stricter, he pointed out, when it was a question of amending the description of a plaintiff and he therefore concluded that the motion to amend, which resulted in a substitution of plaintiffs, was not well founded.

It is not often that a question of procedure goes further than a provincial court of appeal. In *Kent* v. *La Communauté des Soeurs de Charité de la Providence*[2] the liquidator sued in his own name to recover a debt due to the company. The Privy Council

[2] [1903] A.C. 220.

reversed the judgment of the Quebec court of appeal and permitted an amendment of the description of the plaintiff by adding the name of the company. Lord Davey, who rendered the judgment for the Privy Council, remarked that their lordships always hesitated before interfering with the exercise of a discretion by the court below, but that the judges of the lower courts seemed to have proceeded on an erroneous construction of articles 516 and 518 of the Quebec Code of Civil Procedure. He took pains, however, to point out that this decision would not be a precedent for substituting one plaintiff for another in other circumstances and that all the board decided was that the proposed amendment could and, in the particular circumstances of this case, ought to have been allowed in the sound exercise of a judicial discretion.

The correction of a misnomer of the plaintiff is dealt with in a recent judgment rendered by Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District,[3] where the plaintiff was described as "Pacific Coast Line Company Limited", whereas its correct name was "Pacific Line Company Limited", there being no Pacific Coast Line Company Limited. The court permitted the plaintiff to amend the proceedings by striking out the word "Coast". In this case, the defendant opposed the change because the action was governed by the Water Carriage of Goods Act, under which an action must be brought within one year. Although the writ was issued within the year, when the application for the amendment was made the year had expired.

Mr. Justice Smith refers to *W. H. Hill & Son* v. *Tannerhill*,[4] a judgment of the English Court of Appeal, as ample authority for allowing the amendment. In this case, the amendment allowed added the name of an individual carrying on business under the name of W. Hill & Son, when the action was instituted under the firm name only. Scott J. A. of the Court of Appeal said, however, that if the writ had been issued in the name of W. Hill & Son Ltd. the case would have been very different, because W. Hill & Son Ltd. indicated a legal entity or a person.

Mr. Justice Batshaw of the Quebec Superior Court in *C. Barber Cartage Ltd.* v. *The Montreal Transportation Commission*[5] (where the plaintiff, who was described as C. Barber Cartage Ltd., made a motion to substitute for that name the name of Barber Transport Ltd.) held that both companies were separate and distinct

[3] [1955] Ex. C.R. 142.
[4] [1944] K.B. 472.
[5] [1955] Q.P.R. 294.

legal entities, and what was really asked for was the substitution of one party in the case for another by amendment, and he dismissed the motion.

In my opinion, in the instant case Raymond de Rosa Inc. should have made an intervention, as provided for by article 220 of the Quebec Code of Civil Procedure, which permits such a proceeding to every person interested in an action between other parties. It is doubtful if the judgment of the court of appeal will be followed, especially since it is really based on the opinion of only one judge, who was apparently influenced by the desire to save the parties the costs of another action.

S. W. WEBER*

* * *

TRUSTS—CHARITABLE TRUSTS—"POOR RELATIONS"—EMPLOYEES AND DEPENDENTS OF COMPANY—VALIDITY.—In an earlier comment[1] the decision of the Supreme Court of Canada in the case of *Re Cox, Baker* v. *National Trust Co.*[2] was criticized at some length and its earlier progress through the High Court of Ontario (Wells J.) and the Ontario Court of Appeal (Roach, Aylesworth and Bowlby JJ.A.) was noted. It was also pointed out that an appeal to the Privy Council was pending. The purpose of this present comment is to examine briefly the result of that appeal,[3] which affirmed the decision of the Supreme Court of Canada.

It will be recalled that the case involved the question, How far may a testator, whilst keeping within the rules relating to charitable trusts, benefit the employees and dependents of employees of a company with which the testator and his family have had a lifelong association? In the instant case the testator by his will had directed his trustees to hold the residue of his estate upon trust

> to pay the income thereof in perpetuity for charitable purposes only; the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependants of such employees . . . ; subject to the foregoing restrictions, the application of such income, including the amounts to be expended and the

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[1] (1953), 31 Can. Bar Rev. 1166; see also (1954), 32 Can. Bar Rev. 116-118.

[2] [1953] 1 S.C.R. 94, affirming [1951] O.R. 205 (C.A.).

[3] [1955] A.C. 627; [1955] 3 D.L.R. 497. (The report of the Incorporated Council contains a very full account of the arguments of counsel.)

> persons to benefit therefrom, shall be determined by the board of directors of the said . . . company, as they . . . in their absolute discretion shall from time to time decide. . . .

To establish a valid charitable trust, the appellants were obliged to show that the nature of the benefit to be received under the terms of the trust was not only "charitable" within the meaning of the classic Statute of Elizabeth and Lord Macnaghten's classification in *Pemsel's* case[4] but also that the trust was "for the benefit of the community or of an appreciably important class of the community",[5] sometimes referred to as the requirement of "public benefit".

In construing the clause the first argument, which had been accepted by a minority in the Supreme Court of Canada,[6] was that the words "in perpetuity for charitable purposes only" and "directly" should be read as setting up a trust for "indirect" benefits. Such a trust, it was argued, could be upheld as the primary charitable object, even though the court might find that the secondary purpose, namely "direct" benefits to employees, might be invalid because of the absence of the element of "public benefit". Lord Somervell of Harrow, delivering the judgment of the Privy Council, thought that this construction would exceed the natural meaning of the words and that "the only beneficiaries within the bequest are the employees and ex-employees of the company and their dependants".[7]

This conclusion having been arrived at, the second question was whether the testator could set up a trust "for charitable purposes only" in favour of employees of a company. Did this limitation in favour of employees remove the trust from the category of trusts for the public benefit?

One of two possible and, it is submitted, equally arguable constructions could have been placed on the words "for charitable purposes only".

(1) "You, my trustees, are to apply the trust funds for the benefit of my employees, former employees and/or their dependents in any of the ways recognized as "charitable" under the Statute of Elizabeth or the *Pemsel* classification. For example, you may, at your discretion, use the funds for providing scholarships for the children of employees or for the care of necessitous employees or their dependents."

[4] [1891] A.C. 531, at p. 583 (H.L.).
[5] *Per* Lord Wrenbury in *Verge* v. *Somerville*, [1924] A.C. 496, at p. 499 (H.L.).
[6] Rand and Cartwright JJ., [1953] 1 S.C.R. 94, at pp. 101, 102.
[7] [1955] A.C. 627, at p. 638.

(2) "You, my trustees, are to apply the trust funds to such of the objects of legal charity (as outlined by the Statute of Elizabeth and by Lord Macnaghten in *Pemsel*'s case) as will be valid in law having regard to the limitation of these potential beneficiaries by reference to employment by a particular company. Since the only class of charitable trust which appears not to require an area of public benefit is the "poor relation" category, you will be limited in your application of the trust moneys to relieving the poverty of necessitous employees, former employees and/or their dependents."

Two cases decided by the English Court of Appeal, *Gibson* v. *South American Stores*[8] and *Re Coulthurst's Will Trusts*[9] hold that the "poor relation" cases, though an anomaly, would cover trusts which contemplated the relief of poverty among employees of a company. In contrast, any other purpose, for example education, on the authority of *Oppenheim* v. *Tobacco Trust*[10] would not be charitable if limited in the same way.

With these cases before them the Privy Council in the *Cox* case suggested that, while the second construction was not an impossible one,

> . . . the circumstances of this case are such that their Lordships cannot adopt it. . . . the testator cannot have supposed that persons in the employment of the company would be in poverty save in the most exceptional circumstances, nor can he have supposed that former servants of the company would often require financial assistance for this reason. Yet the sum which he directed to be held for charitable purposes is large. . . .[11]

In the event, therefore, the Privy Council adopted the first construction which, of course, invalidated the trust as being non-charitable, because on that construction the testator purported to empower his trustees to apply the funds, for example, to the education of dependents of employees of a specific company, which had been declared to be non-charitable in the *Oppenheim* case.[12]

Suppose, however, that the second interpretation had been adopted so that the trustees were empowered to apply the funds only to the relief of poverty among employees, ex-employees and dependents. Would this be classified as a "poor relation" case and upheld?

It will be recalled that in the case under review the Ontario

[8] [1950] 1 Ch. 177 (C.A.).
[9] [1951] 1 All E. R. 774 (C.A.).
[10] [1951] A.C. 297 (H.L.).
[11] [1955] A.C. 627, at p. 639.
[12] [1951] A.C. 297.
[13] [1951] O.R. 205, at p. 224; see also (1953), 31 Can. Bar Rev. 1166, at p. 1170.

Court of Appeal[13] refused to follow the *Gibson*[14] and *Coulthurst*[15] cases, and there is nothing in the judgment of the Privy Council which might suggest that this refusal was wrong. The Board declined to deal with this matter, stating:[16]

> . . . a question of much difficulty arises, whether a gift in perpetuity for the relief of poverty confined to employees of a particular employer and their dependants is a good charitable trust. In the view which their Lordships take that question does not fall for decision.

The Board did however observe that the correctness of the *Gibson* case was expressly reserved in *Oppenheim* v. *Tobacco Trust.*[17]

Until this conflict between the two decisions of the English Court of Appeal and that of the Ontario Court of Appeal is firmly resolved, it would be hazardous for any testator to rely on the "poor relation" cases, if he wishes to benefit beneficiaries whose nexus to him is that of employment.

As a practical matter, is there any watertight method by which a testator may establish a charitable trust in favour of employees? The decision at first instance in *Re Koettgen's Will Trusts*[18] *may* provide an affirmative answer. Here a testatrix bequeathed her residuary estate on trust "for the promotion and furtherance of commercial education . . .". This provision was conceded to be a charitable object for the advancement of education. The will also provided that the beneficiaries were to be British born subjects of either sex "who are desirous of educating themselves . . . but whose means are insufficient . . .", a provision which was conceded to be sufficiently general to satisfy the necessary requirement of general public benefit. The case turned on a third direction to the trustees that, in selecting the beneficiaries,

> it is my wish that the . . . trustees shall give a preference to any employees of J. B. & Co. (London) or any members of the families of such employees: failing a sufficient number of beneficiaries under such description then the persons eligible shall be any persons of British birth as the . . . trustees may select. Provided that the total income to be available for benefiting the preferred beneficiaries shall not in any one year be more than 75 per cent of the total available income for that year.

It appeared that her father, and later the testatrix herself, had been chairman of the company for a period of thirty-two years, and that the total staff of thirty-two members were engaged in clerical work and would find a knowledge of a foreign language of advantage in view of the foreign connections of the company.

[14] [1950] 1 Ch. 177.
[15] [1951] 1 All E.R. 774.
[16] [1955] A.C. 627, at p. 637.
[17] *Ibid.*
[18] [1954] 1 Ch. 252 (Upjohn J.).

Objection was taken that this preference to employees brought the trust within the terms of *Oppenheim* v. *Tobacco Trust*,[19] in which the House of Lords held that an educational trust in favour of the employees lacked a sufficient element of public benefit to constitute a valid charitable trust; the wider class of "any person of British birth" could only come in if the preferred class, namely employees of J. B. & Co., should fail. Upjohn J. however accepted the contrary view, namely, that the testatrix had established a primary class of "any person of British birth", which, as it stood, constituted a valid charitable trust. The fact that the trustees were given a further positive direction to give preference to employees did not invalidate the primary trust nor prevent the employees from benefiting if the trustees exercised their discretion in that way.

> In my judgment it is at the stage when the primary class of eligible persons is ascertained that the question of the public nature of the trust arises and falls to be decided, and it seems to me that the will satisfies that requirement and that the trust is of a sufficiently public nature. If, when selecting from that primary class the trustees are directed to give a preference to the employees of the company, . . . that cannot affect the validity of the primary trust, it being quite uncertain whether such persons will exhaust in any year 75 per cent of the trust fund.[20]

Whether or not careful drafting on the lines of the will in *Re Koettgen's Will Trusts*[21] will prove to be a certain way out of the testator's dilemma in *Re Cox, Baker* v. *National Trust*[22] remains to be seen.

ERIC C. E. TODD*

* * *

INSURANCE LAW—FIRE INSURANCE—FRAUD AND MISREPRESENTATION—STATUTORY CONDITION 1—SUMMARY OF RECENT CASES. —There has been much discussion in legal and insurance circles on the subject of misrepresentation and fraud, and an actual proposal has been made to transfer Statutory Fire Insurance Condition 1 (fraud and misrepresentation) to the substantive law (that is, make it a section of the Insurance Act[1] rather than a prescribed policy condition). Apparently the suggested change is

[19] [1951] A.C. 297. [20] [1954] 1 Ch 252, at p. 258.
[21] *Ibid.*
[22] [1955] A.C. 627; [1955] 3 D.L.R. 497.
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[1] R.S.O., 1950, c. 183.

based on the assumption that the statutory condition sets out all the law on the question of fraud and misrepresentation. But if substantive law includes any principles of the common law embodied in the decisions (and it does if we consider the decided cases), the proposed amendment should embody a complete statement of the law as it is today or as it is proposed to make it. Before any decision is made on the proposal an essential step is to state the existing law.

Ontario Statutory Condition 1 is as follows:

> MISREPRESENTATION: 1. If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made.

As long ago as 1928 it was said of fraud and misrepresentation in applying for a policy:

> A Claim under a contract of insurance is especially subject to be met with a defence of fraud, because the principle *uberrimae fidei* applies; and even apart from any statutory conditions the policy will be voidable if obtained by fraudulent misrepresentation or suppression of material facts.[2]

Dworkin v. *Globe Indemnity Co. of Canada*[3] and *Holdaway* v. *British Crown Assurance Corporation Ltd.*[4] were cited in support of this assertion.

Perhaps at this point mention should be made of some very trite law on the principle *uberrimae fidei* as it has been applied in insurance cases. It is clear that a false statement on a material matter in an application for insurance, or an omission to disclose a material matter, is, apart from statute, ground for avoiding the policy at the instance of the insurer, and this irrespective of any fraudulent intent either in making the statement or omitting to disclose a relevant fact. A relevant fact has been held to be any fact that would influence an underwriter of an insurance company in deciding to accept or refuse a risk or even any fact which, if disclosed, would have caused the insurance company to impose an additional premium.

The principle *uberrimae fidei*, together with Statutory Condition 1, was part of the substantive law in force in Ontario in 1928,

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[2] Canadian Encyclopedic Digest (Ontario) (1st ed.), Vol. 6, s. 122, p. 240.

[3] (1921), 51 O.L.R. 159. [4] (1925), 57 O.L.R. 70.

when the quoted comment was made in the Canadian Encyclopedic Digest. What will be attempted now is to consider the decisions in Ontario on fraud and misrepresentation since 1928, having regard both to Statutory Condition 1 and the common law on contracts *uberrimae fidei.*

The *Dworkin* and *Holdaway* cases were approved in *Robins* v. *The Central Manufacturers Mutual Insurance Company,*[5] where the action was dismissed both on the general principle of law and on the ground that there had been a breach of Statutory Condition 1, and the following statement of Hodgins J.A. in the *Holdaway* case was quoted at page 231:

> that where untrue material statements are shewn to have been made in order to induce the issue of a policy of insurance, or fraudulent suppression of material matter is proved, resulting in the insurance contract being entered into and the policy delivered, then, quite apart from any defence based on its terms, the party responsible for such statements or omissions cannot recover upon the contract. It is vitiated by fraud.

Mr. Justice Hodgins also stated that this was the principle of the decision in the *Dworkin* case. So there is here a recognition of the principle of *uberrimae fidei,* although the judgment of the court was really founded on the conclusion that the assured was bound by the fact that the answers to certain questions were made the basis of the contract and were printed in the policy, and, one of the answers at least being false and material, the plaintiff could not recover. No mention was made of Statutory Condition 1, as this was a case of an automobile insurance policy, but it does seem to recognize the principle stated by Mr. Justice Hodgins. It was a tacit recognition of the principle.

The *Holdaway* case was again followed in *St. Regis Pastry Shop and Baumgartner* v. *Continental Casualty Co.*,[6] where the action was dismissed, there having been a false statement in the answers to some questions embodied in the policy and the contract having provided that all answers were to be regarded as material representations, citing and following *Thomson* v. *Maryland Casualty Co.*[7] The *Thomson* case was a decision of the Court of Appeal for Ontario, reversing the judgment in favour of the plaintiff by the late Mr. Justice Mabee on the answers of the jury at the trial. The Court of Appeal held that there had been a false statement of a material fact in the application. An appeal was taken to the Supreme Court of Canada on the ground set out in

[5] [1941] O.W.N. 228.
[6] (1928), 63 O.L.R. 337.
[7] (1906), 8 O.W.R. 598.

the appellant's factum that the answers in the application incorporated in the policy were not limited by the policy to statements in the application which were material to the contract as required by the Insurance Act at that time and on other grounds immaterial here. The case was settled before the appeal to the Supreme Court was heard, and I think I should add, at this date, on terms favourable to the plaintiff. In any event it is only a tacit application of the doctrine of *uberrimae fidei* when the contract contains the questions and the false answers.

Moreover, at the time of the *St. Regis* case, the Insurance Act required a written application by the assured, or his agent appointed in writing, for automobile policies, and no application had been obtained. Instead an insurance agent had apparently given the company some misinformation, because the policy contained a question whether previous insurances had been cancelled, to which the answer on the policy was "No Exceptions". In fact, there had been a cancellation. The court gave effect to the false statement by holding that, the policy having been accepted by both the assured and the company, although it was obtained without a written application, contrary to statute, both were bound by it. *Thomson* v. *Maryland* was cited in the judgment of Rose J. in the *St. Regis* case, which was accepted by the court of appeal, as establishing that in exactly similar circumstances the plaintiff was bound by the terms of his contract where there had been a false answer to a material statement and the question and answer were incorporated in the policy.

Thus both cases recognize the importance attached by the courts to anything that can be considered a misrepresentation of a material fact inducing a policy of insurance, at least when the misrepresentation is incorporated in the policy. They indicate, I think, that the common law as to misrepresentation and fraud should be kept in mind by the draftsman, and indeed the legislators, in considering the suggested statutory revisions.

The *Holdaway* and *St. Regis* cases were both distinguished in *Harten* v. *Grenville Patron Mutual Fire Insurance Company*[8] on the ground that section 98(1), now 108(1),[9] of the Insurance Act prohibited any conditions in a policy other than the statutory ones. In this case there was no appeal from the trial judge, who held that the insertion in the policy of a provision as to any misrepresentation contained in the application could not, under section 98(1), be relied on as a defence, as being inconsistent with

[8] [1938] O.R. 500.

[9] R.S.O., 1950, c. 183.

Statutory Condition 1, which alone could be considered. The *Harten* case further held that as the Insurance Act said the statutory conditions may not be varied, and the false statement affected only "the property in respect of which the misrepresentation or omission is made" according to Condition 1, the validity of the policy did not arise and the loss on all the other insured property could be recovered from the company. It was recognized that if a misrepresentation made in respect of a comparatively minor part of the property insured were made effective by the inclusion in the application of the clause, "It is also understood and agreed as a basis of the proposed insurance contract that the foregoing answers are regarded as material representations and facts, and that any untruthful answer or any suppression of material facts shall work a forfeiture of the insurance . . .", the misrepresentation would render the whole policy void. This case thus places a statutory restriction on the general principles of law on fraud and misrepresentation in applications for insurance by giving effect to the limitation contained in Statutory Condition 1, notwithstanding that the truth of the answers, if material, was the basis of the contract.

It is perhaps relevant to the subject of this comment to note that Laidlaw J.A. in a recent case, *Bonneville* v. *Progressive Insurance Company of Canada*,[10] considers provisions in an application quite similar to the one just quoted. His reference may be obiter, however, since the case concerned an automobile policy and turned on the question of the assured's knowledge when making the misrepresentations within the meaning of section 200 of the Ontario Insurance Act.

It is true that the general duty in law of an applicant for insurance to make full disclosure of all material facts was mentioned in the *Harten* case, but Greene J. considered it to have been "very much cut down by the inclusion a few years ago of the word 'fraudulently' in Statutory Condition No. 1 so that the governing words are now 'fraudulently omits' ". There had been no attempt to show any fraudulent omission to disclose any facts. *Kadishewitz* v. *Laurentian Insurance Co.*[11] and *Taylor* v. *The London Assurance Corporation et al.*[12] were cited on the question of "fraudulently" meaning only "real fraud in the sense of fraudulent intention as opposed to 'constructive' or 'legal' fraud", and will now be discussed.

[10] [1955] O.W.N. 97; [1955] O.R. 103.
[11] [1931] O.R. 529 (C.A.).
[12] [1935] S.C.R. 422.

Taylor v. *London Assurance* holds that, under Condition 1, no omission, unless fraudulent (that is, not innocent), is any defence. As there was no plea of misrepresentation in applying for the insurance, no reliance could be placed on it. The case of the defendants was rested solely on the ground of fraudulent non-disclosure of a material fact and the only finding was that the omission, being innocent, was not fraudulent within the meaning of the condition. It was suggested that, if misrepresentation had been pleaded and relied on, the omission might have amounted to a positive misrepresentation of a material fact and would have avoided the policies: indeed the court acknowledged that, but for the word "fraudulently" in Statutory Condition 1, it would have set aside the contract, there having been non-disclosure of a material fact even if innocent. Thus again Statutory Condition 1 alone governed on the issues in that case.

In *Kadishewitz* v. *Laurentian Insurance* the question of the applicability of the law other than Statutory Condition 1 was again considered. The defence in that case, however, was confined to what was an admittedly innocent omission and, as Statutory Condition 1 refers only to a fraudulent omission, it was held that no effect could now be given to the general principle of the common law, which would have avoided the policy on the ground of innocent omission of a material fact. In connection with misrepresentation, as distinguished from omission, it is emphasized again that the condition does not speak of fraudulent misrepresentation, but only of misrepresentation, of material facts. The court, in coming to the conclusion that the common law on the effect of omissions was not applicable, held that because fraudulent omission is specifically mentioned in the condition innocent omission is excluded.

Both the *Taylor* case and the *Kadishewitz* case were considered in *Ginsberg* v. *New York Fire Insurance Co.*[13] This was a case of inadvertently failing to disclose a material fact. The failure was held not to be fraudulent because, in the words of the headnote, "fraudulently" in Condition 1 "connotes actual fraud in the sense that the word is used and understood in a common law action of deceit". The judgment of McTague J., as he then was, frankly states that but for the *Taylor* case he would have applied the usual doctrine of law under which contracts of insurance are *uberrimae fidei*. This doctrine, he thought, still applies in Ontario and there-

[13] [1937] O.R. 715.

fore non-disclosure of a material fact should be sufficient to avoid the policy. At page 720 he says:

> . . . the introduction by the legislature of the word 'fraudulently', in my opinion, should not be construed so as to put upon a defendant the burden of proving what a plaintiff would have to prove in an action for deceit. To do that is to change the whole fundamental law applying to insurance, and to say that the doctrine of *uberrimae fidei* has no application in Ontario. I should rather reach the conclusion that the amendment of the condition was merely pleonastic than that the legislature intended anything else than that the fraud contemplated was of the type commonly applicable and well-known in contracts of insurance.

He felt himself bound by the *Taylor* case, however, and consequently gave judgment for the plaintiff. It is Statutory Condition 1 which alone is to be considered on the question of the omission to disclose a material fact.

The *Kadishewitz* and *Taylor* cases were again discussed in a more recent case, *Salata* v. *The Continental Insurance Company*,[14] where it was held that a misrepresentation in a written application for insurance need not be fraudulent if it is material, but that, if there is a mere omission, fraud must be shown. This again was merely applying the exact wording of Statutory Condition 1 as to fraudulent omission and the *Kadishewitz* case was referred to on that point. But the question of an omission did not arise in the *Salata* case, which was one of misrepresentation of a material fact in applying for the insurance. It is interesting to note that Robertson C.J.O., in writing the judgment of the court, cites the *Taylor* case as authority for the statement he makes at page 281:

> It is not necessary that, to give effect to statutory condition no. 1 of the policy, we should find fraud on the part of the appellant in making the misrepresentations contained in his written application.

On the same page he states that, according to the terms of the condition, the misrepresentation must be material, but need not be fraudulent. It was found as a fact that there had been misrepresentation of a material fact. Condition 1 was therefore effective and the action on the policy was dismissed.

Here again the case was dealt with under the provisions of Statutory Condition 1, but against these repeated decisions, relying on the condition alone, we have the statement of McTague J. on the fundamental principle of law governing contracts *uberrimae fidei* and recognition of that principle, especially when made a term of the contract, in some of the other cases mentioned.

[14] [1948] O.R. 270 (C.A.).

Furthermore, the misrepresentation in the *Salata* case affected the whole of the insured property (a tobacco crop). One may well ask what should be the result if there were a misrepresentation as to a material fact affecting only a very small part of the property insured, but which might have been of grave importance to an insurer in judging whether to accept or decline a proferred risk. It has been decided, as we have seen, that, to avoid a policy, an omission must be fraudulent and, even if it is fraudulent, the policy will be avoided only as to the property with respect to which the omission is made. Yet by Condition 1 this restriction as to the property affected applies in the case of a misrepresentation of a material fact and there may be misrepresentation as to material facts other than those affecting property, for instance, facts affecting the moral hazard.

To sum up, it can be said that the substantive law on misrepresentation is set out in the cases mentioned, whether they are based on Statutory Condition 1, or on the general law governing contracts *uberrimae fidei*, or both. Consequently, any statutory definition of the substantive law, if the proposed change is made, should, it seems, have regard to the principles of law applied and discussed in the cases, both statutory and common law, and clearly state, to the extent possible in a statutory enactment, what the law is, or is to be.

It must be remembered too that the cases treat omissions differently. An omission, in order to avoid the policy, must under Statutory Condition 1 be fraudulent and, so long as that condition remains, it seems impossible to contend successfully that an innocent omission of a material fact is to be governed by the common law on contracts *uberrimae fidei*, which would render the policy void. This raises the question whether the word "fraudulently" in Statutory Condition 1, as applying to omissions, should be eliminated. Possibly, also, some consideration might be given to broadening the wording of the condition by setting out that the effect of misrepresentation, and indeed of omission too, is not confined to the property in respect of which the misrepresentation or omission is made. The real question to be decided, however, is what the new law should declare to be the principles governing misrepresentation or omission of material facts in applications for insurance.

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