

CASE AND COMMENT

MARRIAGE AND DIVORCE—UNITED KINGDOM—ROYAL COMMISSION ON MARRIAGE AND DIVORCE—SOME POINTS OF INTEREST FOR CANADA. —“I cannot remember reading a report of a Royal Commission¹ which is so clearly expressed and which puts the case in such an interesting way. If any of your Lordships is ever in need of a little light reading I would recommend this particular Report as one which is worthy of consideration. . . . [It] will long be a reference book on the vital problems that [the Commission] studied.” With these statements made by Lord Silkin in the House of Lords² the present writer fully concurs. In its conciseness, lucidity and skilful arrangement in parts, divisions and subdivisions, and in its absolute freedom from stuffiness and technical jargon, it furnishes a model for all those who write on legal or sociological subjects. Lord Mancroft said that he found it on sale in Venice but was “slightly startled to see that it was listed, not as one would expect under ‘Law’ or ‘Sociology’, but under ‘Romance’”!

By thus introducing this brief commentary the present writer does not wish any of his readers to infer that the Report of the United Kingdom Royal Commission on Marriage and Divorce is not a very serious and very useful production. It will be extremely helpful, not only to sociologists and academic students of law, but also, especially its appendices, to legal practitioners. The appendices cover fifty pages, and Appendix III, which tabulates the grounds of divorce (1) in some other Commonwealth countries, (2) in some European countries, and (3) in the states of the United States of America and its possessions, furnishes a wealth of information useful both to the divorce-law reformer and to the practising lawyer. The use of the word “other” preceding “Commonwealth” is significant, as indicating clearly that the distinguished commission look upon England and Scotland as “Commonwealth countries”.

¹ Royal Commission on Marriage and Divorce: Report 1951-1955 (London: Her Majesty's Stationery Office, 1956. Cmd. 9678. 11s. 6d. net).

² Parliamentary Debates (Hansard), House of Lords Official Report, Vol. 199, No. 133, Oct. 24th, 1956.

Another fact very interesting to Canadians is that this is the third such report in England in a little over a century. The first, that of 1853, resulted in the act of 1857 (c. 85), which is law to-day in five of our provinces (those between Lake Ontario and the Pacific). The second report, that of 1912, resulted finally (World War I having intervened) in the revolutionary "Herbert Act" of 1937. This act greatly enlarged the grounds for divorce in England, by adding to the then existing grounds, namely, adultery and (for a wife) **sodomy and bestiality**, the new grounds of desertion, cruelty and **incurable insanity** (with qualifications as to time in respect of **desertion and insanity**), and it also made the wilful refusal to **consummate a marriage** a ground in itself for annulment. Before this, such a refusal was merely evidence (as it still is in the five Canadian provinces) from which the court might infer, in a proper case, impotency. These enlargements did not, however, go far enough to meet the views of the extreme "leftists" among the reformers; and in March 1951 Mrs. Eirene White, M.P., succeeded in obtaining, by a vote of 131 to 60, a second reading for her bill, which had for its object, broadly speaking, that either a husband or wife should be entitled to obtain a divorce if the parties had been separated for not less than seven years. The "inconvenient" question which the government was then confronted with was, in the words of Lord Silkin, "shelved for a number of years" by the government's promise to set up a royal commission covering the whole subject of marriage and divorce.

The scope of the inquiry the present Royal Commission was directed to make was "very wide, embracing not only the law relating to divorce and other matrimonial proceedings but also the administration of that law in all courts, and the law governing the property rights of husband and wife. Moreover, for the first time, the subject of the inquiry extended to Scotland, as well as to England and Wales." (para. 13 of the report) It is worthy of note that no similar commission has ever been set up in Canada, although one was suggested by Senator Aseltine a few years ago when reporting on the work of the Senate Divorce Committee, of which he was the conscientious chairman. The present writer ventures the prophecy that some day in the not distant future that suggestion will be adopted, if only, to quote Lord Silkin, as a "recognised and timely method of shelving inconvenient questions", and some, at least, of the recommendations of that commission will be made law. Action was eventually taken on the first and second of the English reports, and in each case the action was in

the direction of facilitating divorce in the case of unfortunate marriages.

An indication of the conscientious thoroughness of the commission's investigation is the fact that it held 102 meetings and heard evidence from 67 organizations and 48 individual witnesses; and it spent £35,463 4s. 6d.

The results were not, however, revolutionary. The commission was much concerned by the large number of cases in which marriage had broken down, but it did not believe that a restricting of the grounds for divorce would cure that situation. It did not, therefore, recommend that any of the grounds established by the "Herbert Act" should be dropped. On the other hand, it recommended that sodomy and bestiality should be grounds which a husband, as well as, at present, a wife, could invoke (para. 1204, sub-para. 11) (it distinguished, however, between sodomy by a wife and lesbianism); that wilful refusal to consummate should be a ground for divorce instead of, as at present, annulment (sub-para. (5)(a)); and that acceptance by a wife of artificial insemination by a donor without her husband's consent should be a ground (sub-para. (5)(b)).

On the fundamental question before it, namely, whether an irretrievable breakdown of a marriage should be a ground for divorce, in addition to the existing grounds, nine of the eighteen members, including Lord Morton of Henryton, the chairman, opposed the adoption of this additional ground, and nine of them supported it, and, in a separate statement (p. 340), one of these nine, Lord Walker (Senator of the College of Justice in Scotland), went so far as to advocate the abandonment of the doctrine of matrimonial offence and its replacement by a provision that marriage should be indissoluble unless, the parties having lived apart for three years, either party shows that the marriage has broken down, in the sense that it is one where the facts and circumstances of the lives of the parties adversely to one another are such as to make it improbable that an ordinary husband and wife would ever resume cohabitation. In his speech in the House of Lords³ Lord Merriman, President of the Probate, Divorce and Admiralty Division of the High Court (referred to by some wag as the "Wills, Wives and Wrecks Division") called these two sides of the commission the "Morton party" and the "Keith party". "But what nobody supported", said Lord Morton of Henryton, speaking in the same debate, "was that men who had gone off leaving a

³ *Ibid.*, cols. 1002 ff.

guiltless wife for seven years, should come back and divorce her against her will, notwithstanding that she might have conscientious scruples, and thereby deprive her, she having committed no matrimonial offence at all, of her status as wife", and of the rights pertaining to that status.⁴

Children and marriage guidance. The report indicates very forcefully the commission's concern with the well-recognized fact that the children are often the innocent victims of a broken home. It therefore recommended that the decree nisi be not made absolute until the court is satisfied that the arrangements proposed for the care and upbringing of the children are the best which can be devised in the circumstances. (In British Columbia, where there is no decree nisi, this practice would, of course, mean that no decree would be granted until the court was so satisfied.) It will be noted that the present writer used the word "often" in referring to the children of a broken home as "the victims", but "children of a broken home" has not, in my opinion, the same meaning as "children of a divorced couple". The latter children are very often the beneficiaries of a divorce; in other words, it is far better, in my opinion, for their health, physical and mental, and their happiness, that they be enabled by a new marriage of a divorced parent to be brought up in a home where there is mutual kindness, respect and understanding than to be compelled by the restrictions of the law to remain in one where they live in an atmosphere made tense by recriminations, and, in many cases, are witnesses of scenes of violence and have to listen to foul language.

As Lord Chorley said in the House of Lords debate:⁵

Where there is failure, where marriage has broken down, I think it is best to face up to the fact frankly and to grant divorce as they do in so many other countries. I think it is time that we followed their example. It is easy to make jokes about divorce in America, but when I was in America I came into personal contact with a number of cases of successful divorce, and I was very much impressed with what I regard as the sensible attitude of the Americans in this matter. . . .

I appreciate that to those who take a deeply religious view it may seem revolting. Nevertheless, I think it is common sense; and I think the trend of opinion in this country is going the same way. . . . It is significant that over the last years judgments of the courts have tended to mould themselves to the feelings of the people.

The commission also wisely emphasized the need of much more pre-nuptial and post-nuptial guidance on the difficulties and responsibilities of marriage. It, therefore, recommended (para. 1204,

⁴ *Ibid.*, col. 985.

⁵ *Ibid.*, cols. 1026-1027.

sub-para. 25) that a suitably qualified body be set up to review the marriage law and the existing arrangements for pre-marital education and training; and also (sub-para. 26) that the state "should give every encouragement to the existing agencies engaged in matrimonial conciliation, as well as to other agencies which may be approved in the future; [but] it should not define any formal pattern of conciliation agencies or set up an official conciliation service". It further recommended (sub-para. 27) that "Exchequer grants to voluntary agencies towards the cost of training and central administrative expenditure should continue to be made", and (sub-para. 30) that "the provisions of the Legal Aid and Advice Act, 1949, relating to legal advice should now be brought into operation".

The only real hope [said Lord Silkin] of making the marriage institution more successful is by action at the beginning. If it were possible, the right solution would be to make marriage more difficult and divorce more easy; but that is not a matter which is within the realms of possibility, except when the parties are too young. The fact remains that one of the great difficulties is that in many cases marriages are too hastily entered into by people without guidance and without experience. That, I would say, is probably the greatest cause of the breakdown of marriages. Frequently they are entered into without a realisation on the part of either party of what the obligations of marriage are.⁶

Evidence of facts learned by a guidance councillor in the course of conciliation work should, it was recommended (sub-para. 31), be inadmissible in any matrimonial proceedings between the spouses.

Collusion. The commission found that "it is still necessary to retain collusion as an absolute bar. . . there is no need for a change of principle", but they recommended that collusion should be defined by statute on the basis that "husband and wife should be restrained from conspiring together to put forward a false case or to withhold a just defence", and also that "a divorce should not be obtained if the petitioner has been bribed by the other spouse to take proceedings or has exacted a price from him for so doing. The present difficulties have arisen, in our opinion, because of the absence of a clear definition of the latter consideration." (para. 234) "We accept that it may be advantageous that the parties should be able to discuss through their solicitors arrangements which will adjust their position after the divorce, provided that any arrangement reached is not the result of a bargain

⁶ *Ibid.*, col. 977.

of the nature [of bribery]. We recommend, therefore, that it should be expressly provided by statute that it should not amount to collusion if reasonable arrangements are arrived at between husband and wife, before the hearing of the suit, about financial provision for one spouse and the children, the division of the matrimonial home and its contents, the custody of, and access to, the children, and costs." The parties should be able to apply to the court, before the presentation of the petition or while the suit is pending, for the court's opinion on the reasonableness of any such arrangements. (para. 235)

This recommendation should suggest to Canadians the important query whether, under the division of powers between the federal and provincial legislatures, it may not be possible for valid provincial legislation to deal with the making of such arrangements, in respect at least of some of the subjects which the commission recommends should be dealt with.

Speaking in the House of Lords, Lord Merriman said, "I feel it very important that the ignorance about what collusion is, or may be, should be dispelled. . . . To my mind, 'collusion' means a corrupt bargain; and the corruptness is the essence of it. It may be to bribe the other party to bring the petition—it need not necessarily be on false grounds, and the bribe need not necessarily be money, though those are merely palliations. The essence is that it is a corrupt bargain to bribe the party to bring the petition, or, it may be, to suppress a defence or falsify the facts. That is the essence of collusion."⁷

The fact is, as Mr. Justice Coyne of the Manitoba Court of Appeal has pointed out,⁸ that some judges have been led by their disagreement with the policy of the divorce act to give a much wider meaning to "collusion" than it originally had.

Lord Merriman, who was opposed to the "break-down" theory, said that he had tried between 1933 and 1947 between 12,000 and 15,000 undefended divorce cases and that it was "sheer nonsense to suppose that the bulk of undefended divorce cases are collusive". As to divorce by consent, he said that "the mere fact that the parties are both thankful to be rid of each other is not an answer to the suit and does not turn what is a remedy for a proved wrong into a divorce by consent", that is, one "where the agreement of the parties is the only basis on which divorce is sought".

The religious aspect. The report stated that "this Report will

⁷ *Ibid.*, cols. 1008, 1007.

⁸ *Riley v. Riley*, [1950] 1 W.W.R. 548, at p. 563, 57 Man. R. 527, [1950] 2 D.L.R. 694.

contain no discussion of what may be called the religious aspects of marriage and divorce" (para. 38). Speaking in the House of Lords,⁹ Lord Morton of Henryton, the chairman, said, after referring to the fact that there are many people who sincerely believe that a marriage can never be ended except by death, "It was not for us to go into matters of that kind at all. We were appointed in a country where legislation has been passed to enable people to get a divorce on certain grounds and it was for us to consider simply this: are these the best grounds that can be devised?" If this view of the duty of such a commission be correct in relation to England and Scotland, in each of which a state church exists (and the writer firmly believes that the view is the only correct one, so long as a divorce law exists), it is infinitely more appropriate in Canada; and legislators and writers on the subject should keep it in mind. No divorce-law reformer wishes to interfere with any person's religious beliefs, but, especially in a country where there is no state church, it is not consistent with democratic principles that any denomination or group of denominations should be allowed to impose by law their beliefs on very large numbers of their fellow citizens who do not adhere to those beliefs. The proper solution, in the writer's opinion, is to require a civil ceremony *as the legal basis* of marriage; and to permit all those who wish to do so to add a religious ceremony and to feel bound by it in their religious lives. The duty of legislators is to concern themselves solely with the law applicable to all citizens.¹⁰ This view will, I think, ultimately prevail.

Insanity as a ground. The report said:

We do not think that the arguments against having insanity as a ground are any more cogent than before. Where a spouse, at the end of sufficient period of care and treatment, is held to be incurably insane, the continuance of a normal married life has clearly become impossible; as the Gorell Commission said, 'the married relationship has ended as if the unfortunate insane person were dead, and the objects with which it was formed have become thenceforward wholly frustrated'. [para. 176]

[But] insanity has no precise definition and is a term used to describe varying degrees of mental disorder ranging from a mild delusional state to the extreme cases of paranoia or schizophrenia. In our view, divorce should be available only to a person whose spouse is suffering

⁹ *Ante*, footnote 2, col. 987.

¹⁰ In an interesting B.B.C. broadcast (printed in *The Listener* of Oct. 25th, 1956) under the title "Marriage, Real and Legal" the religious conception of marriage is referred to as a "metaphysical union" or real marriage, which, in that speaker's opinion, is indissoluble, as contrasted with a merely legal marriage, such as the marriage of a divorced person while the other party to the divorce is living.

from insanity to such an extent that it can be said that the objects of the marriage relationship have been wholly frustrated. It seems to us, therefore, that the adoption of incurability as the sole test would not be satisfactory and that some additional safeguard is required which will serve as a criterion of the mental disorder. [para. 187]

In our opinion the most satisfactory safeguard is to require a sufficient period of care and treatment in a hospital or similar institution to have elapsed before proceedings can be started. This is a test which has worked quite satisfactorily in both England and Scotland over a number of years. But we think that the present statutory definition of care and treatment is too narrow in the light of modern developments in the treatment of persons suffering from mental illness. . . . [para. 189]

Condonation. Fourteen of the commission believed that a successful reconciliation would likely be best promoted, once a matrimonial offence is discovered (in, may the writer add, both the old-fashioned and present sense of "discovered"), by permitting the husband and wife to live together in the matrimonial home. They therefore proposed that the husband and wife be allowed to have a trial period of cohabitation up to one month, which should be deemed not to amount to condonation. The other five members, including the chairman, were unable to support this proposal, but all nineteen agreed that husband and wife should be on the same footing with regard to the presumption of condonation raised by acts of sexual intercourse between them (paras. 240-243).

Cruelty. Of especial practical interest to Nova Scotia readers is the commission's view that the present law in the United Kingdom with regard to cruelty as a ground for divorce should remain unaltered as to the present legal requirements on injury to health and intention, except in one respect, namely, it should not be necessary for the plaintiff to prove that he or she needs protection, but proof of cruelty should in itself confer a right to divorce (paras. 129-132). The commission rejected the suggestion that cruelty should be defined by statute.

Single act of adultery as ground. The commission rejected the suggestion that a divorce should be denied, or the court should at least have a discretion to deny it, where the suit is based on the commission of a single act of adultery (para. 119).

Proposed new restrictions. Proposals for introducing new restrictions on the granting of divorces were rejected. One such was that the court should have a discretion to refuse a decree where it thinks the refusal would be in the interests of the children. After referring to the extremely difficult task such a rule would impose on the court, the commission said: "It may also be doubted whether the children's interests would be best served if they could be re-

garded by their parents as the reason for the failure of the divorce proceedings" (para. 219).

Property rights. The most valuable part of the report, so far as its immediate usefulness to Canadian practitioners is concerned, is Part IX dealing with property rights as between husband and wife. This part covers 30 pages (124 paragraphs) and constitutes a helpful monograph on this subject, especially on a deserted wife's right to remain in the matrimonial home, a phase of the law which is still not settled by the highest authority, although "In recent years the law has developed in such a way as to give the wife some sort of right to remain in the matrimonial home if the husband has deserted her and left her in occupation" (para. 603). In Canada, in those provinces in which "homestead" statutes (sometimes called Dower Acts) are in force, this problem is of course simplified, where the home is owned by the husband (and, also, in some provinces, by the wife) by the restriction which such statutes place on its sale or other disposal.

The domicile factor. To Canadians, especially, an extremely valuable section of the report is Part XII, The Basis of Matrimonial Jurisdiction and the Recognition of the Jurisdiction of Other Countries, and the accompanying Appendix IV, Draft Code (Jurisdiction and Recognition). Most Canadian practitioners will agree with the statement that "The most pressing problem revealed by the evidence is the hardship occasioned by a 'limping marriage', that is to say, a marriage which is regarded in one country as dissolved but in another country as still in being . . ." (para. 789). "We take the view that a greater measure of recognition should be given to the exercise of jurisdiction in other countries. Only in this way can a start be made towards lessening the number of 'limping marriages'. . . . Furthermore [critics of *Travers v. Holley*, [1953] P. 246, [1953] 3 W.L.R. 507, [1953] 2 All E.R. 794, will note this] we are proposing that recognition should be given to a divorce obtained in the exercise of a jurisdiction which is not based on the domicil or the nationality of the spouses, but which is substantially similar to that which is to be exercised by the English and Scottish courts, for instance a jurisdiction based on residence. We do not exclude the possibility of setting up an international Convention for the recognition of divorce decrees." (para. 812)

"The majority [of the Standing Committee on Private International Law set up by the Lord Chancellor in September 1952] favoured the retention of the present rule that domicil should consist of residence in a country accompanied by an intention to

live in that country permanently. However, to assist in the determination of a person's domicile, the majority recommended the adoption of certain presumptions designed to facilitate proof of the necessary intention. The most important of these presumptions is that where a person has his home in a country, he should be presumed to intend to live there permanently. The presumption is to be rebuttable, but it was said that the practical effect of the proposal will be that in cases which go to trial the burden of proof will be placed upon the person who seeks to show that the domicile of origin has not been abandoned for a domicile of choice. . . . We therefore accept the suggestions of the majority in the Standing Committee, which we think represent an improvement on the existing law, and we are content to endorse their recommendations as they stand." (paras 816 and 818) "We think, however, that the court should be able to exercise divorce jurisdiction in favour of a husband or wife who satisfies certain residential conditions provided that it does so in circumstances which are favourable to the recognition of its decrees in other countries." (para. 827)

The conclusion of the commission was (para. 810):

We consider that the time has come for a comprehensive set of rules to be framed in a Statute, which will set out clearly:

(i) the circumstances in which the English and Scottish courts will have jurisdiction in divorce proceedings;

(ii) the law which should be applied for a proper determination of the issues in such proceedings; and

(iii) the circumstances in which recognition will be granted in England and Scotland to pronouncements of divorce in other countries.

and (para. 811):

We consider that domicile should continue to be the main basis, but not the sole basis, upon which divorce jurisdiction is exercised by the English and Scottish courts. We think that there should be some relaxation in the strict requirements of the law as to domicile in order to bring it more into line with the concept which obtains in other countries. . . .

and (para. 825):

We recommend, therefore, that a wife who is living separate and apart from her husband should be entitled to claim a separate English or Scottish domicile for the purpose of establishing the jurisdiction of the English or Scottish court to entertain divorce proceedings by her, notwithstanding that her husband is not domiciled in England or Scotland, as the case may be. The burden of proof should be on the wife to establish that the circumstances are such that, had she been a single woman, she would be held to have acquired an English or Scottish domicile. . . .

To the present writer one of the most significant aspects of these recommendations on domicile is the great advance in realistic thinking disclosed by the report over the very unrealistic attitude of the Judicial Committee in *Cook v. Atty. Gen. for Alta. and Cook*,¹¹ which applied the separate country doctrine as between the different provinces of Canada. With all due respect for the members of that august tribunal, they indicated, or a majority of them did, an appalling lack of appreciation of the way life is carried on in this country of branch offices and frequent changes of residence from one province to another. To expect a man working in Toronto, who is told by his company to report in, say, Calgary tomorrow, to have any definite intention on arriving there about remaining there is the sort of decision which exasperates the intelligent layman. It is true that the decision can be defended as an application of established rules, but if that defence is resorted to then it is only fair to point out that the rules in question are judge-made law and did not come to fruition until almost forty years after the act of 1857 was passed.¹² Therefore it was not necessary for the same high tribunal which declared it to give it such an unrealistic extension. Is it not now open to the present highest court for this country to decline to follow the *Cook* case?

The report has been, of course, the subject of comment in the legal journals of the United Kingdom.¹³ A most interesting criticism was made by Lord Chorley, the distinguished practitioner, teacher of law and General Editor of the *Modern Law Review*, in his speech in the House of Lords already referred to. He attacked, among other things, the composition of the commission. In his view it was "top-heavy" with lawyers, eight, including only one solicitor. "After all", he said, "the barrister is not the person who sees this type of case in the raw; it is the solicitor who does that. If we had to have all these lawyers I think it would have been better to have a number of knowledgeable solicitors." Possibly this opinion may be cited in support of the Canadian system of not-separating the two branches of the profession. His other "serious criticism" of the composition of the commission was that there were "practically no people who could approach this matter in a scientific way. . . . this sort of problem has been intensely studied in the sociology departments of the universities and in other in-

¹¹ [1926] 1 W.W.R. 742, [1926] 2 D.L.R. 762, [1926] A.C. 444.

¹² *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, 64 L.J.P.C. 97.

¹³ For example, the Special Family Law Number of the *Modern Law Review* (November 1956).

stitutions over the last fifty years or more. Yet no social scientist was put on this Commission."

More important, felt Lord Chorley—and certainly important in the light of the growing interest in legal research in Canada—is his criticism "in regard to the method of taking evidence. The witnesses . . . largely gave evidence on the basis of conjectures and value judgments, and even prejudice. There was very little research into actual facts. . . . some of the witnesses . . . indicated how extremely difficult it was to form conclusions on a number of these problems because of the absence of real research. . . . Lord Morton of Henryton was evidently of the opinion that these questions are so intimate that it is not really possible to do research into them, but I do not think that is so; and I think that if he were aware of some of the work which has been done in this country, in America, and perhaps particularly in some of the Scandinavian countries into this sort of problem, he would be prepared to revise his judgment on this sort of point."¹⁴

W. KENT POWER*

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RESPONSIBILITY OF SURGEONS—MALPRACTICE—"FOREIGN MATTER" CASES—RES IPSA LOQUITUR.—There have been many malpractice cases in which surgeons have been held negligent for leaving swabs, pads or other foreign matter in their patients' bodies. In most of these cases the surgeon was unaware at the time that anything was amiss. A sponge, for example, may be left in the abdomen due to a miscount of the number used. The surgeon has no reason to suspect that all is not well until trouble develops later and the sponge is discovered and removed. He is then in the difficult position of being unable to explain why it was not taken out at the proper time. It is in this important respect that the circumstances in *Elder v. King*¹ were unusual, and for that reason have given rise to considerable discussion in medical circles. Briefly the facts were as follows:

The plaintiff, K, underwent an extensive abdominal operation

¹⁴ *Ante*, footnote 2, cols. 1017-1018.

*W. Kent Power, Q.C., LL.B., author of "Power on Divorce" and *The Western Practice Digest*; editor-in-chief, *Western Weekly Reports*; contributor to numerous encyclopaedias of law; a principal lecturer in law at the University of Alberta (1913-1921).

¹ S.C. No. 280,274, Montreal 1953 (Lalonde J.) (unreported); affirmed in 1956 by the Court of Queen's Bench (Appeal Side) No. 5257 (unreported at date of writing).

by a distinguished surgeon, Dr. *E*. After the surgery had been completed, it was discovered that one of the swabs was missing, and in an effort to locate it *E* started a careful exploration of the abdomen. When about three-quarters of an hour later no trace of the swab had been found, *E* decided to close the cavity rather than endanger *K*'s life by prolonging the search. These facts were made known to *K* in a written report which *E* gave him before his discharge from hospital.² Since the whereabouts of the swab were not definitely known at that time, the report stated that there was a "possibility" that it had been left in his body. The patient was told that in the event of his experiencing any trouble he should consult his doctor and show him the written report.

The swab was in fact in *K*'s body, and this subsequently caused an abscess necessitating further surgery. *K* thereupon sued *E* for damages, alleging negligence in the conduct of the first operation.

E admittedly was placed in the difficult position of having to decide whether to risk continuing the search for a swab that might have been left in the patient, or whether to close the incision. Although the evidence showed that he made the right decision, it was held that the position in which he was placed was brought about by his own negligence. According to medical witnesses, even the most skilful of surgeons, such as *E*, often experience difficulty in locating the swabs they have used. This fact, the trial judge considered, placed a serious duty upon a surgeon to exercise extreme care in using and placing swabs, knowing that at the end of the operation he will have to find and remove them. After citing the judgment of the Supreme Court of Canada in *Nesbitt v. Holt*,³ and after referring to the "rule" of *res ipsa loquitur*, the judgment concluded that the facts gave rise to a presumption of negligence against *E* which had not been rebutted. He was accordingly held liable.

The Superior Court judgment was affirmed by a two to one majority of the Court of Queen's Bench (Appeal Side), Gagné and Martineau JJ., McDougall J. dissenting. As pointed out in the court of appeal, the evidence showed that (a) Dr. *E* was a skilful surgeon; (b) both the surgery and the search that followed were performed with all due care and skill, and (c) in deciding to close

² The report was properly given by the surgeon in compliance with his duty of disclosure to his patient: see cases referred to in Meredith, *Malpractice Liability of Doctors and Hospitals* (Common Law and Quebec Law) (1956) pp. 8, 82 *et seq.*

³ [1953] 1 S.C.R. 143, affirming [1951] O.R. 60 (patient under general anaesthesia died due to asphyxia resulting from sponge becoming lodged in windpipe).

the incision rather than continue the search, Dr. *E* made the proper decision. In the circumstances McDougall J. was of the opinion that, while the trial judge was no doubt right in holding that a presumption equivalent to *res ipsa loquitur* was applicable, "it would appear that he disregarded the exculpatory evidence of the defence". In his lordship's view the question on which the trial judge should have pronounced himself was, "Did Dr. Elder commit any act of fault or negligence in the way he acted when the shortage of swabs was drawn to his attention?" Holding that it could not properly be said that the defendant acted negligently, McDougall J. observed:

In these circumstances to hold the surgeon responsible would put surgeons in many cases on the horns of a dilemma; whether to find the swab and let the patient die, or leave it and let him live. The choice, if the occasion arises again, might be, to say the least, very embarrassing.

Martineau J., while pointing out that the search for the swab was carried out carefully and with skill, and that the defendant was right in closing the abdomen when he did, questioned whether that proof was sufficient to absolve the surgeon of all liability. Since the onus was upon the appellant, should he not have gone further and proved that the methods he used to avoid misplacing a swab were among the best and most dependable known to the medical profession? Moreover, his lordship noted, it was for the surgeon to prove that the swabs which he used could be recovered as easily as those in any other hospital and that more efficient and less dangerous practical methods of employing such swabs did not exist. This proof, he added, had not been made. The third member of the court, Gagné J., was of the same opinion.

It should be recalled that as a general rule the defence to a malpractice suit will be successful if it is shown that the doctor's conduct was in accordance with the general and approved practice at the time, or (in cases susceptible of two or more methods of treatment) that his conduct conformed to a practice approved at the time by at least a respectable minority of competent practitioners in the same field. In adducing evidence to that effect, the defence usually relies principally upon independent medical witnesses. In the case under discussion the operation was performed eight years ago, and the court was therefore obliged to consider the accepted practice at that time. As Lord Justice Denning said in an English case: "We must not look at the 1947 accident through 1954 spectacles".⁴ Since it is obvious that a swab should not ordinarily be

⁴ *Roe v. Minister of Health*, [1954] 2 W.L.R. 915 (Eng. C.A.), [1954] 2 All E. R. 131.

left in a patient's body, it was for the appellant (in the words of Goddard L.C.J.) to show that "he exercised due care to prevent it being left there",⁵ and that the means he employed were in accordance with the accepted surgical practice of the day.⁶ McDougall J. stated that (in view of the status of the hospital in which the operation was performed) it was "to be presumed, failing proof to the contrary", that the appliances and supplies, including swabs, were "in accordance with the best practice". The majority of the court, however, held that the proof which a surgeon is called upon to make in such a case was insufficient. Leave to appeal to the Supreme Court of Canada was refused.⁷

A note on this case would be incomplete without some comment on the "maxim" *res ipsa loquitur*. Although Martineau J. disagreed with the appellant's contention that the maxim had no application, he observed that the trial judge had in reality based his judgment on proof made by the presumption resulting from the fact that the defendant had left a swab in the plaintiff's body. This indeed is evident from the judgment. Why, then, was it necessary to refer to *res ipsa loquitur*? With great respect, I submit that the less we see of this so-called "doctrine" in Quebec civil cases the better. If the question is whether negligence may be established by an inference drawn from the facts, that is, a presumption of fact, then resort should be had to the Civil Code⁸ and to the relevant Quebec jurisprudence on the matter. It is true that this would be equivalent in effect to *res ipsa loquitur* when reasonably interpreted; but the common-law rule has gone further and, as pointed out by the Supreme Court of Canada, has been "extended to apply to a great many sets of facts and circumstances to which the rule, when correctly stated and confined, has little or no application".⁹ Indeed, one authority has written that "its very nature seems to be shrouded in confusion"¹⁰—a confusion which prompted Lord Shaw to comment that "if the phrase had not been written in

⁵ *Mahon v. Osborne*, [1939] 2 K.B. 14 (Eng. C.A.). Goddard L.C.J. was then L.J.

⁶ Today it is common practice to employ opaque swabs which may be located by means of X-ray. It was alleged against the defendant in the present case that he was negligent for not having used swabs with strings or tapes attached. The evidence indicated, however, that it was not the practice to use that type of swab at the hospital in which the operation was performed.

⁷ The amount in issue did not permit an appeal as of right.

⁸ Articles 1238, 1242 C.C.

⁹ *The Sisters of St. Joseph of the Diocese of London v. Fleming*, [1938] S.C.R. 172.

¹⁰ G. W. Paton, *Res Ipsa Loquitur* (1936), 14 Can. Bar Rev. 480. For additional authorities pointing to the confusion in the common law on this matter, see cases cited in Meredith, *op. cit.*, footnote 2, at p. 113, n. 89.

Latin no one would have called it a principle"¹¹ To import this common-law principle—extended, as it has been, beyond all reasonable limits—seems to me to be inviting trouble. In the present instance no damage was done because the judgment was in fact founded on Quebec law. In other cases it is conceivable that *res ipsa loquitur* and its associated jurisprudence might be applied in this province with unfortunate consequences.

W. C. J. MEREDITH*

* * *

MARITIME LAW—BILLS OF LADING—VALUATION CLAUSES DECLARED INVALID—APPLICATION OF HAGUE RULES.—The holding in *Nabob Foods Limited v. The Cape Corso*,¹ a judgment rendered by Mr. Justice Smith in Admiralty in Vancouver, that a normal "valuation clause" of an ocean bill of lading was invalid, will probably have far-reaching consequences. Valuation clauses, which appear on the back of almost every bill of lading issued in Canada and throughout the world, limit the sum for which the carrier will be responsible in case of loss or damage to the cargo. Usually the clauses stipulate that the owner of the cargo can claim only the invoice value of the lost cargo plus insurance and freight charges. Sometimes the clauses limit the total responsibility to a maximum figure, such as \$100.00 per package or unit shipped.

The validity of valuation clauses was never questioned until the Hague Rules of 1924, the result of an international congress, were adopted by most of the maritime nations of the world. Britain accepted the rules in 1924, Canada and the United States in 1936, and ever since there has been running controversy between carriers and shippers when settling claims for damage to cargo, because the rules seem to invalidate valuation clauses. No judgment on the question was rendered until 1946 when the Australian High Court declared a valuation clause to be invalid. In 1952 an American court of first instance gave a similar judgment, but ocean carriers in their settlements of claims continued to ignore the rules and the resulting decisions. The British authors, Carver and Scruton, make no mention of the judgments, while the American authors, Knauth and Poor, do not refer to the Australian decision and

¹¹ *Ballard v. North British Ry. Co.*, [1923] S.C. 43 (H.L.).

*W. C. J. Meredith, Q.C., Dean, Faculty of Law, McGill University; author, among other works, of *Malpractice Liability of Doctors and Hospitals (Common Law and Quebec Law)* (1956).

¹[1954] Ex. C.R. 335; [1954] 2 Lloyd's Rep. 40.

dismiss the American one as inconsequential and not authoritative.

One may wonder why the seemingly clear wording of the rules, and even clearer decisions of the courts, have been ignored. The reason is that to settle claims on any basis other than the easily calculable terms of a valuation clause is very difficult. If valuation clauses are invalid, then the carrier is responsible for "arrived sound market value", which includes such virtual indeterminables as "a reasonable sum for profit to the importer".² The worth of valuation clauses lies in their convenience and practicability and for this reason carriers have been reluctant to dispense with them.

Nevertheless the settlement of claims on the basis of arrived sound market value is equitable because it forces the carrier to repair the full damage done, while it still leaves the burden of proof on the claimant, who must prove the value of that damage.

The action before Sidney Smith D.J.A. arose from damage to a shipment of black pepper carried from Liverpool to Vancouver. The parties to the action agreed at trial that the normal measure of damage was arrived sound market value if there was no valuation clause in the bill of lading or if the valuation clause was invalid. The carrier admitted responsibility for the damage but was willing to pay only "invoice value, insurance and freight", in accordance with the terms of a valuation clause in the bill of lading. The consignees pleaded that the clause was invalid. The British equivalent of the Hague Rules (The Carriage of Goods by Sea Act, 1924) applied, but the pertinent sections of that act are similar to the Canadian Water Carriage of Goods Act,³ the American act of 1936, known as Cogsca, and the acts of the more than a hundred nations, states, colonies and protectorates which have adopted the Hague Rules. The decision thus has wide relevance.

The questionable clause in the bill of lading was No. 9, which provided that the value of the cargo

... in the calculation and adjustment of claims for which the carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less, but so that the Carrier's liability shall in no case exceed £100 per package or other freight unit or pro rata in case of partial loss or damage.

The problem was to decide whether the clause contravened the

² Colinaux, *Carver's Carriage of Goods by Sea* (9th ed.) p. 1407.

³ R.S.C., 1952, c. 291 (first passed in 1936).

rules of the act of 1924, the pertinent sections of which are as follows:

ARTICLE III

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

ARTICLE IV

5. **Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding five hundred dollars per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.**

This declaration, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

Mr. Justice Smith's judgment can be divided into two parts: a consideration of the problem in the light of the jurisprudence, and then a study of the exact wording of the act. In considering the jurisprudence his lordship observes that there is no direct decision on the English act of 1924, which is before him, and thus he turns to decisions on the Harter Act, the precursor of the Hague Rules and the English act. The Harter Act, an American statute adopted in 1893, forbade the lessening of carrier's obligations but did not do so in as definite a manner as the Hague Rules. It is useful to note as well that the voluminous jurisprudence on valuation clauses under the Harter Act generally differentiates between "limitation clauses" and "true valuation clauses". The former merely limit the carrier's liability to a certain sum, while the latter set a value, such as C.I.F. value, and then usually add that this value is one of the considerations for the freight rate being set at the level it is. The courts have held true valuation clauses to be valid under the Harter Act, and in *Smith v. The Ferncliff*⁴ the United States Supreme Court held that a valuation clause was

⁴ (1939), 306 U.S. 444.

valid even if the value set had no connection with the freight rate. Despite this judgment, limitation clauses, whose characteristic is that they "relieve", have generally been declared invalid because they have the outright intention of limiting liability. One can easily appreciate that it is difficult to decide whether a clause is relieving or evaluating, and thus the distinction under the Harter Act has never been clear.

Despite these difficulties, Mr. Justice Smith concludes that certain clauses are valid as "valuation clauses" under the Harter Act, not because they are "valuation clauses" rather than "limitation clauses", which is a vague distinction, but because they do not "purport to 'relieve' the carrier from liability". The key therefore is not whether a clause falls into the category of a limitation or valuation clause, but whether it "relieves". Having established this bench mark, his lordship next observes that, if the wording of the Harter Act allows clauses which do not purport to relieve, the Hague Rules are much stricter, nullifying clauses which relieve and even "lessen". He supports his argument by citing *The Steel Inventor*,⁵ *The Campfire*⁶ and *The Ferncliff*.⁷

He does not discuss these three cases, probably because they are not exactly on the point, but it is strange that he does not consider or even cite the Australian and American decisions referred to at the beginning of this comment, which are directly on the Hague Rules. The American case, *The Harry Culbreath*,⁸ is a decision of a United States district court, which considered the Harter Act, the jurisprudence on the Hague Rules and then the rules themselves, in much the same manner as Mr. Justice Smith. The court concluded that valuation clauses are invalid, being contrary to article III, rule 8, and article IV, rule 5, of the Hague Rules. The *Holyman and Sons* case⁹ in Australia was the unanimous decision of six justices of the High Court of that country to the effect that a "limitation clause" was invalid as being contrary to article IV, rule 5, of the Australian act of 1924 (the Australian counterpart of the Hague Rules).

Having considered what foreign courts have said about related and similar acts, Mr. Justice Smith then turns to the actual act in question, the British act of 1924. He quickly finds that the valuation clause (clause 9) cannot be given effect because it substitutes "an

⁵ (1940), 35 F. Supp. 986 (D.Md.).

⁶ (1946), 156 F. 2d 603 (S.D.N.Y.).

⁷ *Ante*, footnote 4.

⁸ [1952] A.M.C. 1170.

⁹ *Foy & Gibson Proprietary Ltd. v. Holyman & Sons Proprietary Ltd.* (1946), 79 Lloyd's Rep. 339.

entirely new measure of damages" for "arrived sound market value" and is thus contrary to article III, rule 8. It is clear from his remarks that even a generous valuation clause (and clause 9 is a C.I.F. valuation clause) is invalid *if in any way it prevents the claimant from obtaining sound market value.*

It must be remembered that the parties to the action had agreed that a carrier is normally responsible for arrived sound market value. There can be no doubt that this measure of damage is the normal one, as a study of the law of Canada,¹⁰ Great Britain¹¹ and the United States¹² will confirm.

Thus Mr. Justice Smith in fact rules that arrived sound market value is the proper measure of damages and that the valuation clause is invalid by article III, rule 8, of the Hague Rules because it prevents the shipper from obtaining arrived sound market value.

The judgment is valuable as well in that it does not merely decide that the particular clause under consideration is invalid but declares in broad terms the conditions for the invalidity of any valuation clause. In short, valuation clauses are invalid if they prevent the carrier from obtaining arrived sound market value.

It is sanguine to hope that a single judgment of a Canadian court will affect the whole practice of evaluating maritime cargo claims throughout the world. Nevertheless the judgment is a studied one and cannot be disregarded, at least so far as Canadian shipping agents and attorneys are concerned.¹³

WILLIAM TETLEY*

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¹⁰ *David McNair & Co. Ltd. v. The Ship Trade Wind*, [1954] Ex. C.R. 450; *Dominion Textile Co. Ltd. v. Canada Steamship Lines Ltd.* (1919), 46 D.L.R. 255; *Rodocanachi, Sons & Co. v. Milburn Brothers* (1886), 18 Q.B.D. 67.

¹¹ *Hadley v. Baxendale* (1854), 23 L.J. Ex. 179; generally, Colinvaux, *Carver's Carriage of Goods by Sea* (9th ed.) chap. 22.

¹² *National Distillers Products Corp. v. Companhia Nacional*, [1952] A.M.C. 1613; *Ansaldo San Giorgio*, [1935] A.M.C. 419; *Kilthou v. International*, [1927] A.M.C. 1131.

¹³ Very recently the old wrangle on valuation and limitation clauses was revived in a brief judgment rendered in the Northern District of California, Southern Division: *Otis McAllister & Co. v. M. S. Marie Bakke*, [1956] A. M. C. 1307. In considering a pre-trial motion, the court declared that an invoice clause was valid under the Hague Rules "because it was a true valuation clause and not a limitation clause". The court cited only American judgments, did not discuss them, and ignored the difference between a carrier's responsibility under the Harter Act and under the Hague Rules. It is submitted that this decision does not detract from Mr. Justice Smith's judgment.

*B.A. (McGill), LL.L. (Laval); of Walker, Chauvin, Walker, Allison & Beaulieu, Montreal.

MARITIME LAW—LIMITATION OF LIABILITY BY AND AGAINST THE CROWN—CANADA SHIPPING ACT—RESOLUTION OF CANADIAN BAR ASSOCIATION.—*In Nisbet Shipping Company Limited v. The Queen*, the question for determination by the Judicial Committee of the Privy Council,¹ on appeal from the Supreme Court of Canada,² was whether the Crown could claim the limitation of liability provided by section 649(1) (now 657(1)) of the Canada Shipping Act³ for damages caused by a ship belonging to Her Majesty. The matter stood to be considered without reference to section 3 (4) of the Crown Liability Act of 1953,⁴ which now expressly makes the relevant provisions of the Canada Shipping Act apply for the purpose of limiting the liability of the Crown.

Thorson P., at first instance, and Mr. Justice Locke, dissenting in the Supreme Court, had held that the right to limitation was not available to the Crown because section 712 (now, with an unimportant verbal difference, 721) of the Canada Shipping Act provided as follows:

This Act shall not, except where specially provided, apply to ships belonging to His Majesty.

Kerwin J. (as he then was) and Estey J. thought that Her Majesty as an owner could escape from section 712 because the word "ships" is used in the section and a claim for limitation of liability is one made by an owner. They also, it would seem from a cryptic allusion, agreed with the reason advanced by Rand J. (Rinfret C.J. concurring), namely, that the general rule is that the Sovereign by prerogative can avail himself of the provisions of any act of Parliament, but that he is not bound by them unless the act expressly so provides. Kellock and Cartwright JJ. based their decision upon the view that section 712 was irrelevant because it was the Exchequer Court Act that created the right to sue the Crown for the negligence of its servants and, under the decisions of the court interpreting section 19(c) of that act, the Crown's liability was to be determined on the basis of the law applicable as between subject and subject, and therefore it was necessary, in order to determine the extent of that liability, to resort to the limitation provisions of the Canada Shipping Act.

The Privy Council took a direct approach to what Viscount Simonds termed a question "simple to state but difficult to answer". It agreed with Thorson P. and Locke J. The only holding not of

¹ [1955] 4 D.L.R. 1; [1955] 2 Lloyd's Rep. 173.

² [1953] 1 S.C.R. 480; [1953] 3 D.L.R. 321. See Lalande, Comment (1953), 31 Can. Bar Rev. 1148.

³ R.S.C., 1952, c. 29.

⁴ 1-2 Eliz. II, c. 30.

merely academic interest in the final judgment is that the words in section 712 (now 721) "ships belonging to His Majesty" are to be taken as "His Majesty" *simpliciter*. The Privy Council dealt with the reasoning of Kellock and Cartwright JJ. in the following terms:

It appears to their Lordships that there is no sufficient justification for saying that, because the Exchequer Court in the exercise of its jurisdiction applies to proceedings between subject and Crown the law which it applies between subject and subject, therefore it should apply even that law which by the terms of the statute enacting it is expressly excluded from application to the Crown.

So far as can be gathered from the three sets of reasons written by the six judges of the Supreme Court who held for the Crown, the only *ratio decidendi* that can be said to have been common to a majority of four was the application of the maxim taken from Joseph Chitty's *Treatise on the Prerogatives of the Crown*, that the Sovereign "may avail himself of the provisions of any Act of Parliament". The Privy Council did not think that it had to examine "that basic rule of the prerogative", as Mr. Justice Rand had termed it, and its applicability. Rather there was no reason "why full effect should not be given to section 712" of the Canada Shipping Act.

The "rule" has been examined elsewhere, however, and found to be resting on a very frail basis of common-law precedent. Indeed, as Lord Justice Scrutton remarked,⁵ the maxim gathered its authority more from repetition in text books than from decided cases. In fact, a few years before the Supreme Court's decision in *Nisbet Shipping*, Professor H. Street, in a Canadian legal periodical, had competently exposed the rule's scanty root.⁶

The subject matter of the *Nisbet Shipping* case is now largely of historical interest, because by section 3(4) of the Crown Liability Act there is a specific legislative enactment making the relevant provisions of the Canada Shipping Act applicable for the purpose of limiting the liability of the Crown in respect of Crown ships. My chief reason for drawing attention to the case again is as a reminder to the profession that the private shipowner still cannot limit his liability to the Crown. There was disappointment that the latest amendments to the Canada Shipping Act⁷ did not give effect to the reasonable expectations of the Canadian Mari-

⁵ In *Cayzer, Irvine and Company v. Board of Trade*, [1927] 1 K.B. 269, at p. 294, and referred to by Locke J. in his dissent, S.C.R. at p. 502, D.L.R. at p. 342.

⁶ See, *The Effect of Statutes upon the Rights and Liabilities of the Crown* (1948), 7 U. of Toronto L.J. 357, at pp. 373 ff.

⁷ Bill H7, assented to August 14th, 1956.

time Law Association and the Canadian Bar Association, which had jointly on February 8th, 1954, submitted to the Ministers of Justice and Transport a resolution asking that the private ship-owner be put on the same footing in this respect as the Crown. No reason has been stated why the Crown should be able to claim limitation of liability in maritime matters while the private ship-owner's liability to the Crown remains unlimited.⁸

LÉON LALANDE*

* * *

INNKEEPER—LIABILITY FOR LOSS OF GOODS LEFT IN CAR OF GUEST—WHETHER GOODS LEFT BY GUEST IN CAR PARKED IN HOTEL PARKING LOT ARE INFRA HOSPITIUM—INNKEEPERS LIABILITY ACTS.—In recent years legislation and standard-form contracts have greatly reduced the amount of litigation over the law of personal chattels. This is notably true of the law of bailment, where statutes and regulations governing common carriers and standard forms of contract for routine-business bailments are to be found in every common-law jurisdiction. The law governing innkeepers is, however, a striking exception to the pervasive trend. Certainly, the responsibility of innkeepers for the safety of the goods of their guests is a question frequently litigated. The applicable law is ancient—the custom of the realm—and by this law innkeepers are, and always have been, insurers of their guests' goods.¹

The recent case of *George v. Williams*² is a good illustration of the need for legislation in the field of innkeeper law. The Ontario Court of Appeal had in that case to deal with what it considered was a novel point and the resulting decision, as always happens in such cases, is based upon the court's conception of the considerations of policy involved. The court, in other words, made law.

The facts of the case are quite simple. A guest of the Chateau

⁸ For a fuller discussion see my previous comment on the *Nisbet Shipping* case (1953), 31 Can. Bar Rev. 1148.

*Léon Lalande, Q.C., of the Montreal Bar; Honorary Secretary of the Canadian Maritime Law Association.

¹ C. C. Ross, *Law Relating to Innkeepers* (1928) p. 70, citing many cases. Of course, the common law has been modified to a limited extent by provincial innkeepers acts. These statutes, modelled after the English Innkeepers' Liability Act, 1863, permit the innkeeper to limit his liability by following the procedure prescribed in the particular act. See footnote 3 *post*.

² (1956), 5 D.L.R. (2d) 21 (Roach, Aylesworth and Gibson J.J.A.).

Hotel, Coburg, Ontario, left his locked car overnight in an area close by the hotel which was provided for the cars of guests. On the area was a prominent sign reading "Parking for Chateau Hotel Guests Free". An attendant of the hotel assisted the guest in removing some of his personal belongings from the car and in locking the car doors. The following morning the guest found that his car had been broken into and a travelling-bag, containing personal belongings, and some clothing on hangers laid over the front seat were stolen. The guest brought an action against the innkeeper for the value of the stolen goods. The result in the trial court was a judgment in favour of the plaintiff for \$275 and costs. Incidentally, it is obvious that the judgment would have been for a much smaller amount if the innkeeper had adopted the usual practice of limiting his liability, which he could have done by simply complying with section 5 of the Innkeepers Act.³ The innkeeper appealed.

Roach J.A. delivered the judgment of the Court of Appeal. His judgment indicates that the main ground of appeal was that the property stolen from the guest's car was not within the hotel. In the result, the Court of Appeal found that the stolen property had not been brought within the hotel and, therefore, the innkeeper was not responsible for its loss.

This brief statement of an interesting case does not disclose the nice question facing the Ontario Court of Appeal. It was this: an innkeeper is by the common law responsible only for goods of the guest which are brought *infra hospitium*. And if the goods are *infra hospitium* they are "considered in law to be within the hotel".⁴ The short question to be answered, therefore, in *George v. Williams* was whether or not the handbag and clothing of the guest were, at the time they were stolen, *infra hospitium*.

Whatever the phrase *infra hospitium* means, Roach J.A. relied on the leading case of *Williams v. Linnitt*⁵ to find that the parking area of the Chateau Hotel, Coburg, was within the *hospitium* of the hotel in relation to the guest's car. It did not follow, the learned judge said, that the same parking area "was also within that *hospitium* in relation to the chattels that were stolen".⁶ Why

³ R.S.O., 1950, c. 182. This is the usual provision in innkeepers' acts, which provides that if the innkeeper desires to limit his liability to a guest he must post up in the office and public rooms and in every bedroom a copy of the section of the act in which the limit of liability is stated. In the Ontario Innkeepers Act the section to be posted up is section 3, which limits the liability of the innkeeper to \$40.

⁴ (1956), 5 D.L.R. (2d) 21, at p. 23.

⁵ [1951] 1 All E.R. 278.

⁶ (1956), 5 D.L.R. (2d) 21, at p. 24.

not? Because the chattels stolen, unlike "accoutrements such as knee-ropes or cushions", were not articles "associated with the car for its more comfortable use".⁷

Here is a remarkable judge-made distinction!⁸ Despite a number of important decisions⁹ in innkeeper law which make it clear that an innkeeper has no power to discriminate as to what goods of a guest he will or will not accept responsibility for, the Ontario Court of Appeal now appears to hold, in effect, that an innkeeper may discriminate. Roach J.A. correctly states the law when he says, "The goods of a guest are considered in law to be within the hotel if they are *infra hospitium*".¹⁰ Until *George v. Williams* the law has been that the goods of the guest include all the goods which a guest brings with him to the inn.¹¹

Having made this distinction, Roach J.A. devoted the remainder of his judgment to a justification of his novel departure from established law. The sign posted in the parking area should not be construed, he thought, as "a wide-open invitation" to guests to leave in their cars "such chattels as the whim or judgment of the owner might dictate".¹² The learned judge then drew a picture of "motor cars travelling along the highway loaded down with all sorts of stuff—on occasions a boat strapped on top and a rear seat packed to the ceiling with a varied assortment of household equipment".¹³ The court's object in drawing this picture was not (as one might be tempted to think) to frighten decent innkeepers, but, it seems, to inform them of their good fortune in being permitted by the law to discriminate between the few articles associated with the car (for which they would be responsible) and the many articles not so associated (for which they would escape liability).

Two final arguments favouring the law it had just made conclude the judgment of the court: first, that the common-law lia-

⁷ *Ibid.*

⁸ The only authority relied on by the court for this distinction is a recent decision of an English trial-court judge, McNair J., in *Gresham v. Lyon*, [1954] 2 All E. R. 786. McNair J. admitted, at page 788, that "this distinction has not been effectively drawn in any of the decided cases". If the word "effectively" is omitted, his statement of the law would appear to be absolutely correct.

⁹ The leading authority on this point is *Robins & Co. v. Gray*, [1895] 2 Q.B. 501, where Lord Esher M.R. said at pp. 506-507: "... an innkeeper is bound to take in goods with which a person who comes to the inn is travelling as his goods, unless they are of an exceptional character". And by "exceptional" Lord Esher means the article is something "such as a tiger or a package of dynamite" (at p. 504).

¹⁰ (1956), 5 D.L.R. (2d) 21, at p. 23.

¹¹ *Robins & Co. v. Gray*, *ante*, footnote 9.

¹² (1956), 5 D.L.R. (2d) 21, at p. 24.

¹³ *Ibid.*

bility of the innkeeper, having been extended from carriages to motor cars, should not be extended further "to every chattel which the motoring traveller might willy-nilly leave in the car . . .";¹⁴ secondly, that unless the guest brought chattels not associated with the car itself into the hotel proper the innkeeper would have no "opportunity of protecting himself against his common law liability in respect of them".¹⁵ To the first argument, the facts of *George v. Williams* itself suggest the answer. The respondent does not appear to have been "loaded down with all sorts of stuff", nor did he "willy-nilly" leave property in his car. He appears, rather, to have been a very normal traveller, having with him the usual property of travellers. In leaving some of his personal property in a locked car overnight he was doing what most travellers do. I do not think it is reasonable to require travellers to carry virtually all their personal articles into the hotel proper, without any recourse against the innkeeper if they do not do so and lose them.

But a more serious weakness in the court's argument is its own suggestion that it will be stretching the common law if it makes the innkeeper responsible for articles left in cars as they were left by the respondent in the case before it. Because the law has been stretched once, the argument goes, in moving from carriages to motor cars is no reason why we should stretch it further so as to include all the casual objects that travellers leave in cars. Surely, the answer to this familiar judicial approach is that the law was not stretched when motor cars of guests were brought within it: the law merely adapted itself to changed conditions. Interpretation of the law is all that is here involved. If this is granted, the fact that it is a commonplace today to leave articles in locked cars, whereas they were probably never left in unlocked carriages, will not alter the fundamental rule of innkeeper law that the innkeeper is an insurer of the safety of *everything* which is brought by guests *infra hospitium*.

The second and final argument of the court is addressed to the plight of the innkeeper, who has no opportunity to protect himself as to property of guests left in their parked cars. The court thought it was unreasonable to require him to have an attendant on duty in the parking area for that purpose every hour of the day and night. "To impose that obligation on the proprietors of hotels in every little hamlet throughout the Province . . . would be most unreasonable."¹⁶ One answer to this argument is that

¹⁴ *Ibid.*, at p. 25.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

hotels in every little hamlet of Ontario must vary greatly in their proneness to theft. I should think most of them would not need to take the extraordinary precautions suggested by the court. Some words of Montague Smith J., spoken in connection with the responsibility of a guest to his own property, are not, perhaps, out of place here. He said, "What would be prudent in a small hotel, in a small town, might be the extreme of imprudence at a large hotel in a city like Bristol, where probably 300 bedrooms are occupied by people of all sorts".¹⁷ Where the precaution of keeping an attendant on duty is necessary, it does not seem unreasonable to me to require hotels to take it. I should think most travellers would be willing to pay for this protection. But the concern of the court for the innkeeper's plight is really unwarranted. It was only because the innkeeper in *George v. Williams* failed to limit his liability by the usual procedure authorized by statute that the problem of that case ever arose. Surely the court is not suggesting that because the car in question was outside the walls of the hotel building, or, as Roach J.A. puts it, the hotel proper, the innkeeper was prevented from limiting his liability as to the goods left in it.

It is interesting, and may be profitable, to speculate how the Ontario Court of Appeal would have dealt with a similar case involving a modern motel rather than the usual common-law inn. The very attractiveness of motels (many of which are not "inns" because they do not offer meals) is based on the convenience to the guest in being able to leave most of his gear in the car outside. What are the considerations of policy involved here? Is the responsibility of a motelkeeper greater or less than that of an innkeeper? And when he is (as he often must be) an innkeeper, will the rule of *George v. Williams* be followed? Is it really a workable rule the court has laid down?

Questions such as these, and many others which did not arise when innkeeper law was being made by the courts, are peculiarly pertinent to modern travelling conditions. I doubt the wisdom of looking to our courts for the answers. It is distressing to find a court talking in terms of "knee-ropes or cushions", which are not likely to be found in most cars today. I believe that well-considered legislation is the answer to the newly created problems of innkeeper law. The province of Nova Scotia now has legislation

¹⁷ *Oppenheim v. White Lion Hotel Co.* (1871), L.R. 6 C.P. 515. Lord Macmillan quoted these words of Montague Smith J. in *Shacklock v. Ethorpe, Ltd.*, [1939] 3 All E.R. 372, at p. 375.

dealing specifically with the problem which arose in *George v. Williams*.¹⁸ All the provinces (including Nova Scotia) should have modern innkeeper acts taking into account the respective needs and desires of modern travellers and modern innkeepers. *George v. Williams* proves to me, if it proves nothing else, the need for legislation, not judge-made law, in this presently litigious area of the law of personal chattels.

R. GRAHAM MURRAY*

Intention versus Delegation

I have shown that the theory I offer you is based on a natural virtue in words themselves. Let me state this theory of interpretation dogmatically before I turn the coin over to show that it conforms with the actual practices of draftsmanship.

Words in legal documents—I am not now talking about anything else—are simply delegations to others of authority to apply them to particular things or occasions. The only meaning of the word meaning, as I am using it, is an application to the particular. And the more imprecise the words are, the greater is the delegation, simply because then they can be applied or not to more particulars. This is the only important feature of words in legal draftsmanship or interpretation.

They mean, therefore, not what their author intended them to mean, or even what meaning he intended, or expected, reasonably or not, others to give them. They mean, in the first instance, what the person to whom they are addressed makes them mean. Their meaning is whatever occasion or thing he may apply them to or what in some cases he may only propose to apply them to. The meaning of words in legal documents is to be sought, not in their author or authors, the parties to a contract, the testator, or the legislature, but in the acts or the behavior with which the person addressed undertakes to match them. This is the beginning of their meaning.

In the second instance, but only secondarily, a legal document is also addressed to the courts. This is a further delegation, and a delegation of a different authority, to decide, not what the word means, but whether the immediate addressee had authority to make them mean what he did make them mean, or what he proposes to make them mean. In other words, the question before the court is not whether he gave the words the right meaning, but whether or not the words authorized the meaning he gave them. (Charles P. Curtis, *It's Your Law* (1954) pp. 65-66)

¹⁸ Innkeepers Act, R.S.N.S., 1954, c. 129. Section 7(1) of this act reads as follows: "No innkeeper shall be liable for the loss of a vehicle of a guest or of its contents except where the loss occurs when the vehicle is stored or parked in a garage of the inn or in a car park within the precincts of the inn or maintained elsewhere by the innkeeper and where a fee is charged by the innkeeper for the storage or parking or where the innkeeper or his servant accepts the vehicle for handling or safekeeping". See a comment on this section, at the time numbered 8(1), by Duncan C. Fraser and James Gordon Fogo (1954), 32 Can. Bar Rev. 1149.

*R. Graham Murray, B.A., LL.B. (Dal.), LL.M. (Harv.), Professor of Law, Dalhousie University, Halifax, N.S.