CASE AND COMMENT

TRADE UNIONS—ACTION FOR WRONGFUL SUSPENSION—APPLICABILITY OF KUZYCH V. WHITE—REPRESENTATIVE DEFENDANTS.—In *Tunney* v. *Orchard et al.*[1] the Manitoba Court of Appeal has varied in some respects the judgment of Williams C.J.Q.B.,[2] but it agrees that none of the objections raised by the defendants prevent the plaintiff succeeding on his personal cause of action.

For a number of years the plaintiff had been a member in good standing of a trade union—Local No. 119 of the International Brotherhood of Teamsters, etc., of America. On August 4th, 1947, the local's executive board passed a resolution purporting to suspend the plaintiff from all his rights, benefits and privileges as a member of the local.

On October 6th, 1947, the plaintiff commenced an action against the seven individual members of the local's executive board. The plaintiff alleged that his suspension from the trade union was illegal and claimed a declaration, an injunction and damages. An interlocutory order directed that the named defendants represent and defend on behalf of all other members of Local No. 119, except the plaintiff, as well as on their own behalf. At the trial of the action, Williams C.J.Q.B. decided in favour of the plaintiff, holding that he was entitled to the declaration and injunction as claimed and to damages in the sum of $5,000.

The Manitoba Court of Appeal was unanimous in dismissing the defendants' appeal from that part of the judgment. The Appeal Court's decision on other relief claimed by the plaintiff and granted by the trial judge is not directly relevant for the purposes of the present comment.

The first branch of the defendants' argument that requires mention is the contention, based on *Kelly* v. *National Society of Operative Printers' Assistants*,[3] that a member of a trade union

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[1] (1955), 15 W.W.R. (N.S.) 49.
[2] (1953), 9 W.W.R. (N.S.) 625; commented on in (1954), 32 Can. Bar Rev. 201.
[3] (1915), 84 L.J.K.B. 2236.

who has been wrongfully expelled or suspended cannot recover damages from the other members of the union, and that the only remedies available to him are a declaration and an injunction. In *Bonsor* v. *Musicians' Union*,[4] where the essential facts were indistinguishable from those of *Kelly*'s case, the House of Lords overruled the earlier decision. The *Kelly* and *Bonsor* cases, and their possible application to *Tunney* v. *Orchard*, have been analyzed in a comment in the last issue of this Review by Professor Carrothers.[5] The present comment consequently refrains from examining that branch of the defendants' argument, beyond mentioning that it was apparently not made the subject of emphasis before the trial judge and was rejected by the Court of Appeal.

A second and distinct branch of the defendants' argument relied, in both courts, on the decision of the Privy Council in *Kuzych* v. *White et al.*[6] Stated in its briefest and most general form, the principle established by *Kuzych*'s case is that a member who has been expelled or suspended by a trade union is not entitled to resort to the courts unless and until he has exhausted the remedies available to him under the union's constitution. The Manitoba Court of Appeal offered a variety of reasons for holding that *Kuzych* v. *White* was not applicable.

To rely successfully on the principle of the *Kuzych* case the defendants must establish two propositions. The first proposition is that the union's constitution furnishes the aggrieved member with a right of appeal to other bodies within the general structure of the union. The existence of a right to appeal clearly depends on the contents of the union's constitution. The Court of Appeal agreed with the trial judge on this issue and decided it in favour of the defendants by holding that the constitution of the local contained the following section:

> 45. All decisions of the Executive Board shall be concurred in at a regular meeting of the union before becoming effective. The accused shall have the right to appeal to the General Executive Board.

The presence of this section in the constitution furnishes the aggrieved member with a right to appeal to other bodies within the

[4] [1955] 3 W.L.R. 788; [1955] 3 All E.R. 518. When the *Tunney* v. *Orchard* judgments were delivered on April 15th, 1955, *Bonsor* v. *Musicians' Union* had not been argued in the House of Lords. The House of Lords heard the argument in June and July 1955, and delivered judgment on November 7th, 1955. The English Court of Appeal (Denning L.J. dissenting) had applied *Kelly*'s case, [1954] Ch. 479; [1954] 2 W.L.R. 687; [1954] 1 All E.R. 822.

[5] (1956), 34 Can. Bar Rev. 70.

[6] (1951), 2 W.W.R. (N.S.) 679; commented on in (1952), 30 Can. Bar Rev. 1.

general framework of the union and satisfies the first requirement of the Privy Council decision.

The second proposition is that, before resorting to the courts, the plaintiff is obliged to exhaust the remedies which, as established by the first proposition, are available to him under the constitution. The trial judge had decided this issue in favour of the plaintiff.

In *Kuzych* v. *White* that obligation was imposed on the member as a contractual duty by the provisions of the constitution. In the instant case the right to appeal to the General Executive Board given by section 45 of the local's own constitution is optional. Section 45 does not purport to compel the exercise of the right to appeal before the member can resort to the courts.

The provision requiring the plaintiff to exhaust his internal remedies is the following section, contained not in the constitution of the local, but in article XVIII of the constitution of the international union:

> 13. Every member or officer of a Local Union . . . against whom charges have been preferred and disciplinary action taken as a result thereof, shall be obliged to exhaust all remedies provided for in this Constitution and by the International before resorting to any other court or tribunal.

The trial judge had disposed of section 13 of the International's constitution by finding, after an examination of conflicting evidence, that the constitution of the International was not part of the contract between the members of Local No. 119. There was, therefore, no contractual provision requiring the plaintiff to appeal to the General Executive Board and the decision of the Privy Council had no application to the facts.

The Court of Appeal, disagreeing with the trial judge on this question, inclined to the view that the local constitution and the International constitution must be read together and that where there is a conflict the constitution of the international body must prevail. This amounts to a finding that the constitution contains a provision—section 13—expressly requiring the plaintiff to exhaust the right of appeal conferred on him by another part of the constitution—section 45.

This finding establishes the defendants' second proposition and brings the case squarely within the prima facie scope of *Kuzych* v. *White*. It eliminates one of the grounds on which the trial judge had held that the earlier case was not applicable and that the plaintiff was not bound to exhaust his internal right of appeal before

commencing action. Moreover, this finding makes it unnecessary for the Court of Appeal to consider whether the duty to exhaust appeals is a duty which does not exist unless it is imposed as a contractual obligation by the union constitution or a duty which is imposed by law as a consequence of the existence of the right to appeal.[7]

The court was, however, able to find grounds for holding that, in the circumstances, the rule as to the exhaustion of internal remedies was no defence to the plaintiff's action. In doing so they indicate avenues by which an aggrieved member may escape from the effects of the *Kuzych* principle.

The first ground on which a plaintiff can be excused from exhausting the right of internal appeal is that there is nothing to appeal from or, more precisely, that the form of the proceedings departs so far from the course prescribed by the constitution that the resulting sentence of expulsion or suspension does not come within the ambit of whatever language is used in the constitution to define the right and duty to appeal.

This ground is made to cover a wide set of circumstances. In the view of Tritschler J. (*ad hoc*) the plaintiff came within this exception when he established that his suspension by the local's executive board had not been concurred in at a regular meeting of the local. The suspension was considered at a special meeting of the local held on August 29th, 1947, but the meeting adjourned without concurring in the decision of the executive board. Under the union's constitution the only decisions from which an appeal can be taken are those which have, at least in point of form, been made effective by the concurrence of a general meeting. On the interpretation of its own contents the constitution does not provide the plaintiff with a right to appeal from his suspension. Consequently it does not succeed in making an intra-union appeal a condition precedent to his right to sue. If there is no right of appeal there is no duty to appeal and no condition precedent. Williams C.J.Q.B. had reached the same conclusion.

Authority on the question is scarce but, on principle, the availability of further domestic remedies is a *sine qua non* to the applicability of the rule in *Kuzych* v. *White et al.*[8]

[7] None of the judgments delivered in either court in the instant case furnishes any support for the principle that the obligation to appeal exists as a matter of law even where it is not expressly provided for by the constitution. The possible effect of earlier cases and of the opinions of English and American writers is considered in (1954), 32 Can. Bar Rev. 201, at pp. 203-205.

[8] This conclusion may be supported by *Andrews et al.* v. *Mitchell*,

As is becoming customary in such cases, the conclusion that there was nothing from which to appeal is supported by criticisms of the nature and quality of the suspension proceedings. The procedural rules of the constitution had not been followed, for example. The conduct attributed to the plaintiff was not an offence under the discipline section of the constitution and by-laws. There was a complete absence of good faith, fairness and impartiality. The fundamental principles of justice had been disregarded. Because of these defects the local's executive board had no jurisdiction to try the plaintiff. The proceedings were null and void in their entirety and consequently there was nothing from which to appeal.

If the findings of fact on which these criticisms are based are correct, they present the strongest temptation to a court when it is asked to exempt the plaintiff from pursuing an appeal. Were the decision of a judicial tribunal tainted by similar defects it would be quashed as a matter of course. Should the courts condone such irregularities in the case of a mere domestic tribunal? Some parts of this reasoning, though not all of it, may have the support of *McRae* v. *Local No. 1720*,[9] but it is not an easy matter to reconcile the substance of it with the *Kuzych* decision.

The question whether there is anything from which to appeal may permit an examination of the proceedings but it is submitted that they can be examined only for the purpose of ascertaining whether they fall within the true construction of the sections of the constitution which confer the right to appeal or purport to impose conditions on access to the courts. Furthermore, the language of those sections is to be interpreted as it would be interpreted by laymen. When the court is engaged in the task of interpretation it must not import qualifications which might accomplish justice but, at the same time, depart from the natural meaning of the words, as understood by the ordinary members of the organization. Improprieties of a substantial nature, such as denial of natural justice, bias or departures from prescribed procedure, cannot of themselves directly excuse the plaintiff from exhausting his right of appeal. Equally so, the plaintiff cannot avail himself of the improprieties in an indirect way by using them to justify the

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[1905] A.C. 78, and *McRae* v. *Local No. 1720*, [1953] 1 D.L.R. 327, commented on in (1952), 30 Can. Bar Rev. 525. *Kuzych* v. *White et al.* (1951), 2 W.W.R. (N.S.) 679, especially at pages 687-689, may recognize the existence of the exception though it was not applicable to the facts as found by the Judicial Committee. See: (1952), 30 Can. Bar Rev. 1, at pp. 6-8, 16 and 26-27.

[9] [1953] 1 D.L.R. 327; commented on in (1952), 30 Can. Bar Rev. 525.

conclusion that there is nothing from which to appeal. When it is inquiring whether there is something from which the plaintiff could appeal the court must concentrate on the form rather than the substance. This view restricts the exception to a narrow compass but it may, on the facts, still be wide enough for the present plaintiff,[10] and the *Kuzych* case discountenances a more liberal view.

A second ground for excusing a plaintiff from pursuing an internal appeal is that the arrangements made by the union for the hearing and disposition of the appeal do not, in the circumstances, make adequate and proper provision for giving relief and administering justice. In particular the plaintiff is not bound to appeal unless the place where the appeal is to be heard is reasonably accessible to him. The theory behind this ground is that the court should not permit its jurisdiction to be ousted in favour of another tribunal unless it is clear that the plaintiff can obtain justice in the other tribunal.

In most cases a finding of inadequacy will have its roots in the contents of the constitution, but the issue will often depend more directly on whether the arrangements actually made by the union officials for the hearing and disposition of the particular appeal are reasonable and honest. The instant case is an example. On August 12th, 1947, the plaintiff appealed to the general executive board of the international union. His notice of appeal was not acknowledged until September 24th, 1947. On December 29th, 1947, the general secretary-treasurer notified the plaintiff that his appeal would be heard by the general executive board on February 3rd, 1948, in the Alcazar Hotel, Miami, Florida. The plaintiff did not go to Miami. On February 11th, 1948, after the meeting of the general executive board, the general secretary-treasurer informed the plaintiff that because he had resorted to court action the board had decided not to consider the appeal while his action was pending.

On these facts, coupled with evidence as to the plaintiff's financial position, Adamson C.J.M. denounced the provisions for appeal as unreasonable, impracticable and ineffective, and held that the general executive had not made reasonable provision for the hearing and disposition of the appeal. For this reason the failure of the plaintiff to exhaust his remedies in the union's forum is no defence. Montague and Beaubien JJ.A. and, in a large measure, Coyne J.A. concurred in the reasoning of the chief justice.

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[10] It may also have been wide enough for the purposes of the plaintiff in *McRae* v. *Local No. 1720*, footnote 9, *supra*.

The rule that the exhaustion of intra-union appeals will not be required where they would not furnish an adequate remedy for the aggrieved member has the support of some American authority,[11] but until this case its scope and even its existence *still* awaited consideration by English and Canadian courts. Does the rule depend on our ability to introduce implied terms into the constitution? As a simple instance, can article XVIII, section 13, of the International's constitution be made subject to the following implied proviso?

> If, however, the place fixed for the hearing of his appeal is not reasonably accessible to him, then the member shall not be obliged to exhaust the remedy of appeal provided for in this constitution before resorting to other courts or tribunals.

Can the express contents of the constitution be so inflexible and precise that they effectively prevent the insertion of implied provisions?[12] Or is the rule one of overriding public policy applied by the courts regardless of, and possibly in spite of the actual contents of the constitution?[13] The rule may prove more adaptable and effective if it is applied directly as a rule of public policy than indirectly through the fiction of implied terms.

How far does the rule extend? Does it cover the case where the plaintiff's only excuse is that the appeal would be useless because the appellate body would be sure to decide against him or would be incapable of giving its honest attention to his complaints and of endeavouring to arrive at the right decision?[14]

Tunney's attempt to escape from the apparent effect of the union's constitution raises once again the desirability of deciding internal disputes within a union solely on the basis of the law of contract. Recent cases[15] display an awareness of the rational difficulty and possible injustice of applying the law of contract in a situation where there is no genuine freedom of contract. Membership in a trade union may be an illustration of such a situation. In practice the member has no choice in the matter; of freedom of contract there is almost nothing; the union imposes the rules and,

[11] Zechariah Chafee, Jr., The Internal Affairs of Associations Not for Profit (1930), 43 Harv. L. Rev. 993, at pp. 1019-1020; Clyde W. Summers, Legal Limitations on Union Discipline (1951), 64 Harv. L. Rev. 1049, at pp. 1086-1902.

[12] *Maclean* v. *The Workers Union*, [1929] 1 Ch. 602, at pp. 623-625.

[13] *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175, especially the judgment of Denning L.J.; commented on in (1952), 30 Can. Bar Rev. 617.

[14] *Kuzych* v. *White et al.* (1951), 2 W.W.R. (N.S.) 679, at p. 689.

[15] The judgment of Denning L.J. in *Lee* v. *Showmen's Guild of Great Britain*, footnote 13 *supra*, and the judgment of Adamson C.J.M. in *Tunney* v. *Orchard et al.* are among the more notable illustrations.

at least where there is a closed shop agreement, if the member wishes to engage in the particular trade, he has no opportunity to reject them. The court can remedy the situation only by refusing to effectuate various parts of the so-called contract. Whether the court accomplishes its purpose by introducing implied terms into the contract[16] or by imposing restrictions on the ground of public policy[17] may be only an incidental question.

The status or special relationship theory suggested as an alternative by some American writers[18] may prove more adaptable. Under this theory a wrongful suspension is not a breach of contract but a tort,[19] consisting of a wrongful interference with the special relationship between the member and his union—with the plaintiff's status as the member of a union. The status or special relationship arises from membership in the union, and is consensual in its origin, but it is not contractual in all its elements. The constitution, representing the expressed intention of the members, determines many incidents of the relationship, but not all of them. Some of the incidents arise from the nature of the relationship and from its function—from the fact that the members have, by mutual assent, formed themselves into an association or organization of employees for the purpose of regulating the relations between employees and employers or of advancing the interests of employees in respect of the terms and conditions of their employment. The status theory may enable the court to escape from the fetters of a contractual constitution and to devise rights and duties which are not expressed in the constitution and which may even run counter to its provisions. The court can supplement, modify or even disregard the constitution without being forced to resort to the circuitous and vulnerable device of adding implied terms. The court would, for instance, find it easier to evolve rules permitting a suspended member to commence an action for reinstatement without first exhausting his right of internal appeal.

[16] As suggested by Adamson C.J.M. at page 67.

[17] As suggested by Denning L.J. in *Lee* v. *Showmen's Guild*, footnote 13, *supra*.

[18] Zechariah Chafee, Jr., The Internal Affairs of Associations Not For Profit (1930), 43 Harv. L. Rev. 993; Clyde W. Summers, Legal Limitations on Union Discipline (1951), 64 Harv. L. Rev. 1049. Compare, Dennis Lloyd, The Disciplinary Powers of Professional Bodies (1950), 13 Mod. L. Rev. 281. In the instant case the status theory was explained and accepted by Tritschler J. with the concurrence, direct or indirect, of the other members of the court. This appears to be the first instance of the status theory receiving express approval in an English or Canadian case.

[19] In England, the Trade Disputes Act, 1906, s. 4, probably prevents such an action being framed in tort. The existence of that type of legislation may, in some jurisdictions, militate against the development of the status theory. It appears that Manitoba has no such provision.

Whatever the possibilities of the status theory might have been, it is possible that Canadian courts have already rejected it, unequivocally if unconsciously, in favour of the contract theory.[20] If the weight of authority does compel us to subscribe to the contract theory, *Kuzych* v. *White* may prove to be the main barrier to the plaintiff's ultimate success. If that case merely established (1) that the relationship between the member and the union is purely contractual and (2) that the terms of the contract are contained in the union's constitution and by-laws, it would only affirm the effect of other decisions. But the case goes further, almost to the point of finally establishing (3) that the language of the constitution must be interpreted in accordance with the natural meaning of the words as understood by the ordinary member of the organization, and (4) that it is virtually impossible to qualify its literal effect either by the introduction of implied terms which enter into its interpretation or by the application of overriding principles of public policy which, while not directly affecting the interpretation of the constitution, enable the plaintiff to disregard some of its requirements.[21] Even though it concentrates on the inadequacy of the remedy by way of appeal instead of on the defects and irregularities in the trial, any attempt to circumvent the literal effect of the constitution will be difficult to reconcile with the Judicial Committee's unqualified version of the contract theory.

The one limitation on *Kuzych* v. *White* that has become reasonably apparent is that it is the type of case that is accepted with reluctance. It has been mentioned in two Canadian cases,[22] but was distinguished, without any hesitation or expression of regret, in each of them. In England the recent cases do not provide any direct authority on the requirement that internal remedies be exhausted, but the English Court of Appeal[23] has displayed a marked reluctance to treat as impregnable the privative clauses in a union's constitution.

The third main issue considered by the Court of Appeal in *Tunney* v. *Orchard* was the procedural problem of enforcing a claim for damages against a trade union. This feature of the case

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[20] *Maclean* v. *The Workers' Union* (footnote 12, *supra*), *Kuzych* v. *White et al.* (footnote 6, *supra*), *Lee* v. *Showmen's Guild of Great Britain* (footnote 13, *supra*) and *Bonsor* v. *Musicians' Union* (footnote 4, *supra*) are merely the more obvious authorities.

[21] *Lee* v. *Showmen's Guild of Great Britain*, footnote 13, *supra*, is the leading authority for the opposite view.

[22] *Tunney* v. *Orchard et al.* and *McRae* v. *Local No. 1720*, footnote 9, *supra*.

[23] *Lee* v. *Showmen's Guild of Great Britain*, footnote 13, *supra*.

has already been examined in my comment on the trial judgment[24] and the present comment will, so far as possible, avoid treading the same ground.

The balance of authority recognizes that the ordinary Canadian trade union is not a legal entity of any kind and that the union itself cannot be held liable or made a party defendant. Any liability that exists can attach only to the members. If they are to be held liable they must, in some way, be made parties to the action.[25]

How to constitute an action against a voluntary unincorporated association of persons is a formidable problem. The size and changing character of the membership may be such as to make it impracticable to sue the right persons individually. The difficulties are perhaps at their height in the case of trade unions where the membership often runs into many thousands and is subject to constant changes.

In England, in the case of registered unions, *The Taff Vale Railway Company* v. *The Amalgamated Society of Railway Servants*[26] and *Bonsor* v. *Musicians' Union*[27] hold that the Trade Union Acts, 1871 and 1876, have removed this obstacle to the process of adjudication by allowing a registered union to be sued in its registered name, whether the action is founded in tort or in breach of contract. The availability of this procedure is recognized even by those who decline to regard the registered union as some form of legal entity or as having an existence separate and distinct from that of its individual members. Their explanation is that though the nature of the union may be so unaffected by registration that it still remains an unincorporated and voluntary association yet, where the union is registered, the statutes sanction proceedings in a name which is not that of a juridical person, either natural or artificial.

The registered union procedure is productive of an indirect procedural consequence which may prove instructive in *Tunney*'s case, where the union was not registered. Execution for the enforcement of the judgment can be levied on the property of the union but must be confined to the property of the union and cannot be levied on the assets of the members. The exemption of the members' assets follows because there is no machinery for levying execution against the individual members.[28]

[24] (1954), 32 Can. Bar Rev. 201.
[25] Tritschler J. at pages 80-87 recognizes these principles.
[26] [1901] A.C. 426.
[27] Footnote 4, *supra*.
[28] *The Taff Vale Railway Company* v. *The Amalgamated Society of*

The registered union procedure may not conform completely with other theories, as to either legal personality or procedure, but, as a procedural device, it is a convenient and valuable aid to the administration of justice.

As Local No. 119 is neither incorporated nor registered its union name cannot be used either as the name of a legal entity or as a collective designation for its members. Is there any method of making all the members of the union defendants to the action without resorting to the impossible course of naming each one individually? Can any other simple procedure be used where the registered name procedure is not available?

The Court of Appeal, facing the question squarely, reached the conclusion that a judgment in damages for a tort committed by or on behalf of a trade union can be obtained in an action against representative defendants. The leading judgment on this point was delivered by Tritschler J. (*ad hoc*), whose reasoning had the express concurrence of Coyne J.A. and, apparently, the general approval of the other members of the court. After an exhaustive and valuable analysis of contrasting theories and conflicting authorities, the learned judge accepted the view advanced by Lords Macnaghten and Lindley in the *Taff Vale* case.

It is submitted that the court has underestimated the weight of the authority to the contrary, both in England and in Canada, and has failed to appreciate the logical force of the arguments advanced in criticism of the Macnaghten-Lindley dictum.

Part of the reasoning of the Manitoba court can be readily accepted. A trade union consists of a large number of persons who act together for a common purpose. It often carries on a vast and varied business, has a bank account and other assets, receives and pays out money and acts through agents and employees. It possesses a vast power for doing good and an equal power of causing injury. Though it is neither a corporation nor a quasi-corporation, it is an entity in fact. At least to the extent of its assets, it should be bound to pay its debts and to make compensation for damages. Its position in a damage action should differ but little from that of a body corporate.

The question still remains whether Queen's Bench Rule 58[29] enables the court to accomplish the desired result. The persons to be sued are numerous. Have they the "same interest" required by the rule? In *Tunney*'s case both the trial judge and the Court of

Railway Servants (footnote 26, *supra*) and *Bonsor* v. *Musicians' Union* (footnote 4, *supra*).

[29] Ontario R. 75 is identical; English O. 16, r. 9, is similar.

Appeal held that Rule 58 does provide a solution. It was clear to both courts that to rely on Rule 58 necessitates alterations in the form of judgment ordinarily used in damages actions. Williams C.J.Q.B. settled one modified form of judgment. Adamson C.J.M. suggested a second. Tritschler J. regarded the *Metallic Roofing* case[30] as indicating a third. That there is some disagreement over the precise form of the judgment for damages is not fatal, but it does reveal that there are difficulties to be solved. What is more instructive is that each of the three forms is based on the premise that the represented members are liable only to the extent of their interest in the union's property.[31] If they are responsible to the plaintiff in damages, what principle entitles them to the benefit of a doctrine of limited liability?

Because the union's membership is constantly changing and often divided in opinion, it includes three groups whose position calls for special consideration. The first group is the minority who always opposed the plaintiff's suspension; neither they nor their interest in any property should be under any liability to the plaintiff. A second group consists of those who die or withdraw from the union before the action is commenced; it cannot be argued with any semblance of logic that they are represented by the named defendants. The third group is comprised of those who join after the cause of action arose; the persons who actually committed the tort cannot possibly be regarded as their agents and neither they nor their interest in any property should be under any liability to the plaintiff.

With respect to the second and third groups, Tritschler J. resorts to the following explanation:

> The objections to the courses suggested in the *Taff Vale* and *Metallic Roofing* cases are all unrealistic. I refer particularly to the supposed difficulty about the property rights of persons joining or retiring from unions after the cause of action arose. The fact is that members leaving the union take nothing of its property when they leave. A member joining the union takes it as he finds it with all its debts and liabilities as well as its assets. No member of a union would think of saying, nor would he be heard to say, that he objected to the union paying a debt incurred or settling a liability for damages occasioned before he entered the union.[32]

It is submitted that the explanation offered in the passage quoted and the modifications suggested in the form of judgment are

[30] *Metallic Roofing Company of Canada* v. *Jose* (1905), 12 O.L.R. 200.

[31] Coyne J.A. at page 68 favoured altering the formal judgment to make it plain that the judgment against the represented members was confined to their interest in the assets of the union.

[32] Page 86.

valid only if the judgment is in effect a judgment against the property of the union rather than a judgment against the members of the union.

To distinguish some of the existing decisions requires the utmost in ingenuity. Tritschler J. concedes that corresponding results have not been obtained and probably should not be obtained in the case of an associated religious order[33] or an association to advance the interests of merchants in a section of Toronto.[34] There are, he explains, real distinctions between the various bodies. Whereas a trade union is carefully constituted and has property, the religious order was a loosely associated body with eighteen hundred members scattered throughout the world and the trade association was vaguely organized and had no property. The trade union is, while the other associations were not, entities in fact.

These factual differences may exist, but they are only differences of degree because none of the associations had become corporations, quasi-corporations or legal entities. Are the differences such that we can agree that the members of the religious order and the trade association did not have "the same interest" in the action and yet assert that the members of a trade union do have the necessary identity of interest? At what stage in its development does the constituting of a trade union become careful to such a degree that it ceases to be an analogue of the religious order and becomes something that is different in kind? Does it reach that stage automatically the moment it becomes a union? Or at the moment it acquires its first item of property?[35] Is it true in fact that the Brotherhood of St. John of God was less carefully constituted than Local No. 119?[36] Is there any half-way house between, at the one extreme, some form of body corporate and, at the other extreme, a mere association of individuals each of whom either is under no liability whatever or else is liable to the full extent of all his property?

After reading the judgments of the Manitoba courts one is strongly tempted to agree that their major premise is both sensible and just. There should be a form of procedure by which a trade union or its property can be held responsible to a plaintiff who has been injured by its wrongdoing.

[33] *Walker* v. *Sur et el.*, [1914] 2 K.B. 930.

[34] *Barrett* v. *Harris* (1921), 51 O.L.R. 484.

[35] Reference might be made to *Rex* v. *Labour Relations Board, Ex parte Gorton-Pew (New Brunswick) Limited* (1952), 30 M.P.R. 12, [1952] 2 D.L.R. 621; commented on in (1952), 30 Can. Bar Rev. 1058.

[36] The unincorporated religious society under consideration in *Walker* v. *Sur et al.*, footnote 33, *supra*.

But the decisive question for the case of *Tunney* v. *Orchard* still remains: Is the necessary procedure provided by Rule 58? How far does Rule 58 go? Does it enable the court to give a judgment for damages in an action against representative defendants? To curtail the effect of that judgment so that, in the case of the represented members, it can be enforced only against their interest in the union's property, or, more accurately, against the property they own in common as members of the union? To extend the effect of the judgment so that it can be enforced against the common property even after interests in it have been acquired by members who did not join until after the cause of action arose? To impress the common property with some kind of lien or trust, under which it continues to be liable for the obligations of its temporary owners even after its ownership has been changed by the withdrawal of some members and the admission of new members? To give a judgment in damages which is in substance a judgment against the property of the union rather than a judgment against the members of the union? To permit both the reasons for judgment and the minutes of judgment to disclose that the proceedings are really a device for imposing liability on the union as such, much as could be done if it were a legal entity? To endow indirectly the union with the status of a legal entity while always protesting that Canadian law has refused to take that step? To equiparate the liability of an unregistered Canadian union with that of a registered English union? To accomplish without the assistance of any statutory provision for registration or formal recognition by the state results which in England are accomplished by the Trade Union Acts, 1871 and 1876? To obtain such results in the case of trade unions while admitting that similar results cannot be obtained in the case of religious associations and trade organizations?[37]

If such results are obtained, then procedural obstacles are removed and justice is done. In Manitoba, as in several other Canadian jurisdictions, these results cannot be obtained through the instrumentality of any other statute or rule of court. Can they be obtained through the instrumentality of Rule 58, which originated in the practice of the Court of Chancery,[38] and which in many jur-

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[37] The only procedure that furnishes an approximate parallel is that applicable to partners who are sued in the firm name, but it depends on special rules of court—English Order 48a—and, even so, does not provide as many distinctive results.

[38] *Markt and Company, Ltd.* v. *Knight Steamship Company, Ltd.*, [1910] 2 K.B. 1021, at pp. 1027-1029, 1038 and 1043-1044.

isdictions is part of an Order of Court dealing primarily with parties? Anxious as most of us are to accomplish justice, it is not easy to regard Rule 58 as a firm foundation for a complex body of law dealing with the liability of a trade union in tort or contract.

Traditional lines of legal reasoning have proven extremely advantageous to trade unions in the course of litigation with their members. An unqualified form of the contract theory enables the union, as a powerful economic entity, to assume a dominant position when the terms of the membership contract are being arranged and to avail itself of the literal effect of those terms when litigation ensues. The union derives additional advantages from the circumstance that it is not a legal entity. The absence of corporate form places the union's opponent at a procedural disadvantage. The plaintiff's only hope of coping with the large and constantly changing membership is to resort to a representative action, a procedure which, even if applicable, is neither simple nor completely efficacious. The union's lack of corporate status and the peculiar form of the membership contract may also, though not probably, open the door to a revival of the argument in *Kelly* v. *National Society of Operative Printers' Assistants*.[39] *Tunney*'s case demonstrates that the union may be able to place, not one obstacle, but a series of obstacles in the path of the aggrieved member. The decision points to possible routes for avoiding those obstacles, but the entire subject of the relationship between the member and his union is so complex that it still requires further examination, possibly in a series of cases.

E. F. WHITMORE*

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MARRIAGE COVENANTS — GIVING IN PAYMENT — QUEBEC. — In *Meunier et autres* v. *Les Héritiers de Dame Dubois et Société Saint-Jean-Baptiste de Montréal*,[1] the Quebec Court of Queen's Bench (Appeal Side), with five judges sitting, rendered a judgment on the validity of a transfer by a husband to a wife — a subject of interest to Quebec lawyers in view of the prohibitions the law imposes upon certain contracts between consorts.

In 1889 Amedée Meunier married Dame Dorilla Dubois after

[39] Footnote 3, *supra*.

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[1] [1954] K.B. 767.

executing a marriage contract with her in which separation of property was stipulated and the future husband undertook to pay Dorilla the sum of $30 each month from the date of their marriage until the death of one of them, it being further provided that, if any arrears were owing at that time, they would be deemed paid.

During the years following the marriage Meunier failed to make a single payment, even though he was put in default in 1899. His wife must have become more and more concerned as the years went by because finally, during the depression, she threatened her husband with legal proceedings if he did not implement his undertaking. The result was that on July 13th, 1933, by notarial deed, Meunier transferred and ceded to his wife by *dation en paiement*, or "giving in payment", an immoveable property he had purchased many years earlier, as partial payment of the arrears which had accrued to that time, Meunier acknowledging that he was financially incapable of discharging his indebtedness in cash. Dorilla accepted this property as the equivalent of a payment of approximately $15,000 and reserved her rights for the balance of the arrears and for future sums.

Two years later Dorilla borrowed $6,000 from the Société Saint-Jean-Baptiste and, as a guarantee, sold the property to the *société*, which subsequently conveyed it back to her when the loan was repaid.

Meunier died in 1948 and his wife in 1949, and not long afterwards proceedings were taken by Meunier's heirs against the heirs of Dorilla with a view to having set aside the *dation en paiement* and the dealings with the society on the grounds that they were simulated and further, with respect to the transfer from husband to wife, that it brought about changes in the matrimonial regime of the parties and created a benefit for the wife prohibited by Quebec law. The question of simulation, including the allegation that the value of the property was considerably in excess of the $15,000 and therefore amounted to a gift, was disposed of on the facts. The primary interest of the case lies in the examination of the validity of a *dation en paiement* between husband and wife. On this point the notes of Mr. Justice Gagné[2] are the most extensive.

At this juncture it would be well to set forth a definition of *dation en paiement*. According to Pothier,[3] it is "un acte par lequel un débiteur donne une chose à son créancier, qui veut bien la recevoir, à la place et en paiement d'une somme d'argent ou de quelque autre chose qui lui est due". Principally, therefore, it is a

[2] At pp. 778 *et seq.*

[3] Edition Bugnet, vol. 3, No. 600.

method of paying a debt by the transfer of property in lieu of cash. To anyone who is not acquainted with Quebec law, it may seem surprising that, in the absence of any assertion of creditors' rights, such a contract between a husband and wife could be called into question, let alone give rise to a learned discussion by members of an appellate court. For if a man undertakes, by valid contract, to pay his wife a certain sum of money each month for the remainder of her days, why can he not, lacking liquid funds, transfer real estate to her in part payment, provided of course she consents? To this there is surely no answer in strict logic. To deny the parties this alternative would lead to the inequitable, if not absurd, result that the indebtedness might never be discharged.

To understand the background of the problem, one must bear in mind a fundamental principle of Quebec law regulating the relations between husband and wife, namely, that they shall not benefit each other *inter vivos*. That principle has its origins in the old French law as set forth in some of the *coutumes*. For example, in the *Coutume de Normandie* it is stated that "gens mariés ne peuvent céder, donner ou transporter l'un à l'autre quelque chose que ce soit, ni faire contrats ou confessions par lesquels les biens de l'un viennent à l'autre, en tout et partie". The essential purpose was (and is) of course to protect the wife and her property from the demands of her husband; its secondary purpose was to put beyond the reach of temptation a vehicle for frustrating the rights of creditors.

The Civil Code of Lower Canada has carried forward this principle in various of its provisions. By article 1483 C.C., husband and wife are prohibited from selling to each other; by article 1265 C.C. they may not make gifts to, or otherwise confer benefits on, each other unless in implementation of the provisions of their marriage contract. Now the article of the code which deals with *dation en paiement* (1592 C.C.) is to be found in a chapter entitled "Of Forced Sales and Transfers resembling Sale" and it provides in its first paragraph that "The giving of a thing in payment is *equivalent to a sale* of it, and makes the party giving liable to the same warranty".[4] It will be readily appreciated therefore why plaintiff's counsel endeavoured to assimilate the *dation en paiement* in the *Meunier* case with a sale, for if he succeeded the inevitable consequence would be its absolute nullity.

In an eminently fair decision the court of appeal unanimously

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[4] The italics are mine.

upheld the decision of Mr. Justice Surveyer[5] rejecting the action to set aside the *dation en paiement* (and subsidiary contracts dependent on it). What conclusions may the lawyer draw from the court of appeal's judgment? In examining the nature of the contract of *dation en paiement*, the court found that it is a special contract, equivalent to sale only as regards its effects, for example, that the transferor is bound by the same warranty as the seller. It referred particularly to the second and final paragraph of article 1592 C.C., which reads as follows:

> The giving in payment, nevertheless, is perfected only by the actual delivery of the thing. It is subject to the provisions relating to the avoidance of contracts and payments contained in the title *Of Obligations*.

As the Civil Code does not expressly prohibit a *dation en paiement* between husband and wife, the court was not disposed to infer such a prohibition.

Leaving aside the question of creditors' rights, which after all include the right to impugn any action of their debtor made to defraud them, all the judges appear to have concluded that a *dation en paiement* between spouses is valid. In doing so they have rendered a useful service if their decision effectively settles the lines of conflicting jurisprudence[6] on the subject and the difference of opinion among the authors.[7] But such a finding in general terms goes beyond what the court was called upon to decide specifically: the validity of a *dation en paiement* by a husband to a wife in implementation of the provisions of a marriage contract, which the law looks upon with particular favour, not, for example, a *dation en paiement* by a wife to a husband. And it should be remembered that an adverse decision in this particular case would have had patently inequitable consequences. In view of this it may be that another judgment of our appellate court is required on a different set of facts before the matter may be considered as definitively settled.

ROSS T. CLARKSON*

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[5] Unreported (Superior Court, District of Montreal, June 26th, 1951, No. 272,159).

[6] See, for example, *Prévost* v. *Aubin et Juteau* (1931), 69 S.C. 354, and *Legault* v. *Laliberté*, [1951] S.C. 232.

[7] See Langelier, Cours de Droit Civil de la Province de Québec, vol. 5 (1909), p. 21; Mignault, Le Droit Civil Canadien, vol. 7 (1906), p. 38; Perrault, Traité de Droit Commercial, vol. 2 (1936), pp. 194-195; Turgeon (1931-32), 34 Revue du Notariat 186 and 281, and (1938), 40 *ibid.* 481; Gagnon (1938), 40 Revue du Notariat 385; and Marler, Law of Real Property (1932), No. 447.

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CRIMINAL LAW—CONTEMPT OF COURT—FACTUAL NEWSPAPER REPORTS OF JUDICIAL PROCEEDINGS—TREATMENT OF ALLEGED CONFESSIONS AT PRELIMINARY INQUIRIES—PROPOSED AMENDMENT TO SECTION 455 OF THE CRIMINAL CODE.—Many of the basic freedoms and rights of twentieth century democracy are so well established that the courts are seldom called upon to reaffirm them, while others require frequent protection by the courts. A conflict between freedom of the press, a freedom of the former class, and the right of an accused person to a fair trial, a right of the latter class, arose in recent contempt proceedings in the Supreme Court of New Brunswick.[1] The matter was heard before Chief Justice Michaud of the Queen's Bench Division, who in his judgment has resolved the conflict in a manner that deserves the approbation of everyone in any way concerned with the preservation of liberty.

The principal issue before the court was the right of the press to publish fair and accurate reports of proceedings at coroners' inquests and at preliminary hearings before magistrates. The circumstances which gave rise to the proceedings led to consideration of a corollary issue of the protection of the prisoner's rights.

Before the accused woman was charged with the murder of her husband a coroner's inquest had been held into his death, at which the jury delivered its verdict in open court. The verdict contained a finding "that his wife, *L*, fired the said shot-gun and thereby the said *L* did murder the said *C*". The text of the verdict was published in the press.

The deceased's wife was in due course charged with murder and a preliminary hearing was held before the county magistrate. During the preliminary hearing the Crown offered in evidence a confession allegedly made by the accused to a police officer. After hearing evidence on the circumstances surrounding the making of the statement and argument by counsel for both the Crown and the accused on the issue of admissibility, the magistrate allowed the confession to be read into the record in open court. The lengthy statement was subsequently reported in several newspapers having a circulation in the county where the accused was to stand trial and, in at least one instance, was reproduced verbatim.

At the opening of the trial counsel for the accused moved to cite five newspapers and a reporter for contempt of court on the ground that the published reports had been of a nature calculated

[1] *In the matter of The Queen* v. *Lina Thibodeau*, Supreme Court of New Brunswick, Queen's Bench Division, May 16th, 1955 (not yet reported).

to interfere with the fair trial of the accused and had possibly created prejudice in the minds of the potential jurors. A citation was issued and made returnable in chambers after the trial was concluded.

In recent years both in Canada and in England there has been a rash of contempt cases arising out of violations of the accused's right to trial by an unprejudiced jury, a right the courts have stringently enforced by the imposition of heavy fines and, on occasion, imprisonment.[2] Chief Justice Michaud in his judgment was quick to point out the distinction which must be made between, on the one hand, *articles* or *comments* likely to prejudice a fair trial and, on the other, *factual reports* of judicial proceedings.

Early in the last century English courts did not hesitate to punish those who published even factual reports of court proceedings if prejudice to the accused was a probable result.[3] It was during that same century, however, that the modern concept of freedom of the press in this respect appears to have developed. In 1865 we find the case of *R.* v. *Gray*,[4] where a motion for a criminal information for contempt was made on behalf of a prisoner with respect to, *inter alia*, a newspaper report of a statement by Crown counsel before a police magistrate. In that case Lefroy C. J. said (at p. 189):

> In my mind, the editor of a public journal has an indemnity for the publication of a *bonâ fide* and correct report of proceedings of this description. Although, no doubt, it is very important that the prisoner should have the proceedings conducted in a manner not calculated to prejudice him, it is for the interest of the public that proceedings of this description should be published fully and at the same time fairly and correctly, for otherwise it would virtually amount to an investigation with closed doors, in which injury might result to the prisoner either from undue influence or some other cause. Now, it is of the utmost importance for the public to know that the magistrates do their duty impartially and without influence of any sort, and that they exercise their duty fairly and correctly according to the evidence brought before them. . . . And the only way in which the public can judge of that is by their having a correct and full detail of the evidence by the editor of a public newspaper.

[2] See *R.* v. *Bryan et al.*, [1954] O.R. 255, 18 C.R. 143. See also *R.* v. *Thomas*, [1952] 3 D.L.R. 622; *R.* v. *Evening Standard*, [1954] 2 W.L.R. 861.

[3] See, for example, *R.* v. *Fisher* (1811), 2 Camp. 563; *R.* v. *Lee* (1804), 5 Esp. 123, and cases cited by Wills J. in *R.* v. *Parke*, [1903] 2 Q.B. 432.

[4] 10 Cox C.C. 184. The decision in *R.* v. *Gray* was approved by Lord Hewart in *R.* v. *The Evening News, ex parte Hobbs*, [1925] 2 K.B. 158, at p. 168. See also *R.* v. *Parke* (*supra*, footnote 3) for a thorough review of the English cases to that date. Two Canadian cases were referred to by Chief Justice Michaud — *Hatfield* v. *Healy* (1911), 18 W.L.R. 512, and *R.* v. *Buller and Glazer* (1954), 108 Can. C.C. 352.

In the *Thibodeau* case it was not suggested that anything had been published other than accurate reports of what had actually happened in the coroner's and magistrate's courts, and consequently, in view of the now settled state of the law, the Chief Justice could not have come to any other decision than that no contempt had been committed. It is interesting to note that counsel for the Attorney-General appeared at the hearing and advised the court that the Attorney-General was not disposed to support the motion for contempt as the published material had been reported at hearings open to the public.

After disposing of the alleged contempt the court turned to the question of how a prisoner's rights may be protected in such circumstances as prevailed in the case before it. It cannot be disputed that reports of evidence of doubtful admissibility may lead some of those who read them, including potential jurors, to form definite opinions as to the guilt or innocence of the accused. The question was the subject of an article in this Review some years ago.[5]

Dealing with the facts in the *Thibodeau* case, Chief Justice Michaud pointed out that "it is not the function of Magistrates carrying on preliminary inquiries or investigations to rule upon the admissibility of confessions".[6] It is a well established rule that it is for the trial judge to determine the admissibility of alleged confessions by accused persons.[7] While that principle is generally adhered to, it is provided by section 455 of the Criminal Code of Canada as follows:

> Nothing in this Act prevents a prosecutor giving in evidence at a preliminary inquiry any admission, confession or statement made at any time by the accused that by law is admissible against him.

Unfortunately this section of the code was not referred to by Chief Justice Michaud and does not appear to have been drawn to his attention.

Dealing with what he considers to be the proper procedure at preliminary hearings, he has laid down these rules: (1) when a written statement is offered by the Crown the magistrate should note in the record that the statement is tendered and then add the statement to the record in order to bring it to the attention of the

[5] C. A. Wright, Newspapers and Criminal Trials (1939), 17 Can. Bar Rev. 191.

[6] With respect to the verdict of the coroner's jury Chief Justice Michaud pointed out, following *R.* v. *Hawken*, [1944] 2 D.L.R. 116, that the coroner's jury is not to determine the criminal liability of a person who has done a killing, but merely to determine how the deceased came to his death.

[7] See Halsbury's Laws of England (3rd. ed.) vol. 10, p. 469; *R.* v. *Sankey*, [1927] S.C.R. 436; *R.* v. *Thompson*, [1893] 2 Q.B. 12.

prosecuting officer and counsel for the accused; (2) if the statement offered is verbal, the magistrate should request that it not be published. If these rules are adhered to, the effect is, in the words of the learned judge, to "prevent the prejudicial effect that such confession or admission might have on persons who might be called to serve on a jury trying the person accused". In order to ensure protection to every accused person it would seem advisable for Parliament to consider amending section 455 of the code to embody the rules suggested by the court in the *Thibodeau* case. This case serves to illustrate that there is a gap in the procedural part of the code which threatens the right to a fair trial. No doubt there are many unreported instances where prejudicial publicity has surrounded preliminary hearings. Legislative action would prevent it in most cases. In any event section 455 is ambiguous in that it purports to allow the Crown to give *in evidence* at a preliminary inquiry a statement "that by law is admissible", but the admissibility of which can only be determined when the case reaches a higher court.

This comment would be incomplete if it failed to mention that the practice indicated in the New Brunswick judgment has been suggested, and is being followed, elsewhere. On the same day that Chief Justice Michaud delivered his judgment in the *Thibodeau* case the Deputy Attorney General for British Columbia, H. Alan Maclean, Q.C., made a similar suggestion. Addressing the annual conference of British Columbia magistrates, Mr. Maclean suggested that when the prosecution introduces a written statement or confession of the accused the statement should be introduced into evidence by filing it as an exhibit rather than by reading it into the record.

At about the same time widespread publicity was given to an incident which occurred at a preliminary hearing in Manitoba of three young men charged with murder.[8] The prosecution produced a written statement made in French by one of the accused and it was admitted as an exhibit, subject to objection. Counsel for the Crown then asked the witness to read a written English translation of the statement. Defence counsel submitted "that these statements, especially in a capital case, should not be read in court on a preliminary hearing so as to prevent them becoming public

[8] *R.* v. *deTonnancourt, Paquin and Ferragne*, before Magistrate William Stordy at Brandon, May 9th, 10th and 11th, 1955. The writer is indebted to Mr. Harry Walsh, Q.C., of Winnipeg, defence counsel in that case, for providing a copy of the transcript of the discussions before the magistrate, and to the Deputy Attorney-General of British Columbia for providing details of his suggestion to the conference of magistrates.

knowledge until their admissibility has been determined at the trial itself". Counsel relied on an unreported Manitoba case (in which he had also appeared for the accused) for the principle and stated that it had been consistently followed in the Eastern Judicial District, at least in capital cases. The contention of the defence was accepted by the magistrate and the written translation was filed, subject to objection, as a further exhibit. The magistrate pointed out during the course of the argument that the case for the prosecution did not stand to benefit by having the statement read and that it could possibly prejudice the defence.

These cases point up that what would appear to be the proper practice is not yet firmly established and illustrate the necessity of amending the Criminal Code to include the suggested rules in statutory form.

RONALD C. STEVENSON*

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DOMICILE — CHANGE FROM ONE PROVINCE TO ANOTHER — EVIDENCE REQUIRED. — In the recent case of *Gunn* v. *Gunn and Savage*[1] in the Saskatchewan Court of Queen's Bench, a wife brought an action for dissolution of her marriage. To succeed in establishing jurisdiction in the Saskatchewan court it was, of course, necessary for her to show that her husband was domiciled in Saskatchewan. He was born in Manitoba and, although he had lived in Ontario for a short while, it was admitted that he never established a domicile there. In 1949 he came to Regina because of a better position which had been offered him there by his employer, the Famous Players Canadian Corporation. He stated, however, that if he were offered a better position elsewhere with the corporation he would take it. He married in Regina in 1950, he had no assets in Saskatchewan and no ties there other than his position. Davis J. concluded that the evidence not only failed to satisfy him "with perfect clearness" that the defendant husband was domiciled in Saskatchewan at the time of the commencement of the action, but showed that he had never changed from his domicile of origin, which was Manitoba.

Counsel for the plaintiff argued that less evidence should be sufficient to show a change of domicile from one province of Canada to another than would be necessary to establish a change from

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[1] (1955), 16 W.W.R. 44 (Sask., Davis J.).

one country to another. Davis J., however, rejected counsel's argument and stated:[2]

> With deference I would be inclined to the view that stronger evidence would be required to establish a change of domicile from one province to another than in the case of moving to a foreign state. One does not lightly sever relationship with one's homeland, and the reasons are usually apparent, whereas it is not unusual to move about one's homeland in the pursuits of business or in search of employment.

This expression of opinion was not essential to the decision in the case, nor in fact was the conclusion with respect to the defendant's domicile, since the learned judge decided that, even if he had had jurisdiction, he would not have granted the petition because the plaintiff's own conduct in deserting her husband without cause had contributed to the adultery of which she complained.

The question I wish to consider is whether this suggestion of Davis J., that stronger evidence would be required to establish a change of domicile from one province to another than a change from one country to another, conforms to the law with respect to domicile in Canada. I submit that it does not. The better view, which is supported by judicial opinion in England, Australia and Canada, is that somewhat less evidence is required when the change is from one province or jurisdiction to another within the same country.

There are several English authorities supporting this view that less evidence is required. Although the following passages from the cases were obiter dicta, they and the quotation from *Halsbury* are important indications of the trend in English law:

> You may much more easily suppose, that a person having originally been living in Scotland, a Scotchman, means permanently to quit it and come to England, or *vice versa*, than that he is quitting the United Kingdom, in order to make his permanent home, where he must forever be a foreigner. . . .[3]
>
> [It] requires stronger and more conclusive evidence to justify the Court in deciding that a man has acquired a new domicile in a foreign country, than would suffice to warrant the conclusion that he has acquired a new domicile in a country where he is not a foreigner. For instance, the Court would more readily decide that a Scotchman had acquired a domicile in England, than that he had acquired a domicile in France.[4]

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[2] *Ibid.*, at p. 46.

[3] Lord Cranworth in *Whicker* v. *Hume* (1858), 7 H.L.C. 124, at p. 159; 11 E.R. 50.

[4] Sir R. T. Kindersley V. C. in *Lord* v. *Colvin* (1857-9), 4 Drewry 366, at pp. 422-423; 62 E.R. 141, at p. 163 (Chancery). Affirmed *sub nom.* *Moorhouse* v. *Lord* (1863), 10 H.L.C. 272.

> A change of domicil is a serious matter — serious enough when the competition is between two domicils both within the ambit of one and the same kingdom or country — more serious still when one of the two is altogether foreign.[5]
>
> A higher degree of proof is necessary to establish a change from a domicil in the United Kingdom to one in an alien country than to establish a change from one part of the United Kingdom to another part.[6]

J. G. Fleming points out in an article[7] on the law of domicile in Australia that the courts there find it much easier to draw inferences of fact to establish change of domicile in cases where the change is from one state of Australia to another than in cases involving a foreign country. In *Walton* v. *Walton*[8] a man had his domicile of origin in Victoria, he moved to New South Wales, obtained employment, married and settled down there to remain. While in the army he was posted some time later to Victoria and, while living there, he brought a suit for a decree of restitution of conjugal rights in accordance with the law of New South Wales, there being no such action in Victoria. The Supreme Court of Victoria held that he was domiciled in New South Wales and only resident in Victoria. Barry J. said:[9]

> But in the Australian community, where social ideas and customs are substantially the same throughout the continent, and where there is a common nationality and a common language, the same significance or importance cannot be ascribed to a person's conduct in moving from one State to another as when the question arises in connection with the action of a person moving to a community where, by reason of a difference of language and national traditions, institutions and usages, he takes on the character of a foreigner.

There is also authority in Canada, both by way of ratio decidendi and of obiter dicta, to support the view that less evidence is required when the change is within Canada. There are two very similar cases where the result turned on this question of how much evidence should be required to prove a change of domicile from one province to another. In both *Walsh* v. *Herman*[10] in British Columbia and *Fairchild* v. *McGillivray*[11] in Saskatchewan the action was to recover on a judgment given in default of appearance in a court of another province. In each case the defendant had his domicile of origin in the province where the judgment sued upon was given,

[5] Lord Macnaghten in *Winans* v. *Attorney-General*, [1904] A.C. 287, at p. 291 (H.L.).

[6] Halsbury's Laws of England (3rd ed., 1954), Vol. 7, pp. 19-20.

[7] J. G. Fleming, Recent Australian Decisions on Private International Law (1950), 3 Int'l L.Q. 86.

[8] [1948] V.L.R. 487 (Barry J.). [9] *Ibid.*, at p. 489.

[10] (1908), 7 W.L.R. 388; 13 B.C.R. 314 (Full Court).

[11] (1910), 16 W.L.R. 562; 4 Sask. L. R. 237 (Lamont J.).

but before the proceedings were commenced in the first action he had moved to another province. Thus the issue was whether the defendant had changed his domicile before the first action was begun. There was no evidence of an intention to acquire a new domicile other than a change of residence and the statement of the defendant himself, nor was there evidence of a contrary intention. Nevertheless, the court in each case held that, although the evidence was meagre, it could properly infer that the defendant had acquired a new domicile before the issue of the writ in the first action. Hunter C. J. in the British Columbia case said:[12]

> The case is not one where the party is alleged to have acquired a foreign domicile, but where he has merely shifted from one British jurisdiction to another under the same general government; and the circumstances which would warrant the inference of a change of domicile within British Dominions only, would not necessarily warrant the inference of a change to a foreign domicile.

Lamont J. in the Saskatchewan case approved this statement, but restricted it to a change from one province to another:[13]

> In my opinion, the circumstances which would warrant the inference of a change of residence from one province in Canada to another would not necessarily warrant the inference of a change to a foreign domicile.

More recently Graham J. in the Supreme Court of Nova Scotia, in *Morrisy* v. *Morrisy*,[14] expressed much the same view:

> I think that the length of residence which is required to establish domicil in a foreign country is not necessary to establish a new domicil when the change of residence is from one province of Canada to the adjoining province. It is, of course, still the same question of fact, but the probability of intention is more easily raised and does not require so long residence to prove intention.

Other judges have held that less evidence should be required, not because the two jurisdictions are under the same "general government" but because the laws applied in each are substantially the same. This argument, of course, would apply primarily among the common-law provinces. Clement J. in *Adams* v. *Adams* said:[15]

> I do not lose sight of the argument which may very properly be advanced that as between the various provinces of Canada with (if we except Quebec) the marked likeness in our laws the Court may well be more ready to draw the inference of intent to settle in one province upon

[12] (1908), 7 W.L.R. 388, at p. 389; 13 B.C.R. 314, at p. 315.
[13] (1910), 16 W.L.R. 562, at p. 564.
[14] 1948, unreported, N.S., Graham J. See comment in (1949), 27 Can. Bar Rev. 849, at p. 851. This case and the comment on it was referred to by Davis J. in the *Gunn* case immediately before the remarks quoted at the beginning of this comment.
[15] (1909), 11 W.L.R. 358, at p. 363; 14 B.C.R. 301 (Clement J.). Clement J. had concurred in the judgment of Hunter C. J. in *Walsh* v. *Herman, supra.*

removal from another than in the case, e.g., of a removal from Scotland to England, with its different laws and legal system.

I submit that a similarity of laws should not be the basis for such a rule. There is a great deal of law which is the same throughout Canada. But there is also a great deal which is different, especially between Quebec and the other provinces. A more important reason is that the law on change of domicile as formulated in England in the nineteenth century does not suit the temper and conditions of twentieth century Canada. The United States has recognized that the English law does not entirely suit conditions on this continent and has discarded the English doctrine of revival of the domicile of origin. P. B. Carter, writing on the law of domicile in Australia, suggests that that country should do likewise.[16]

In addition to being federal states, Canada, the United States and Australia are immigrant countries with many people whose domicile of origin is foreign to them now. There is a great deal of moving about from one province to another, which is made easier because of the absence of immigration formalities. Many people live in one province merely because they happen to have a good job there, and they are quite ready to move, as was the defendant in the case under discussion, if a better one is offered elsewhere. Does this mean that they cannot establish a domicile where they are at present living? Davis J.'s reasoning in the case would seem to imply this. Although he admits that "it is not unusual to move about one's homeland in the pursuits of business or in search of employment", he makes this statement to support his view that stronger evidence is necessary to establish a change of domicile within Canada than a change to a foreign country. I submit that on the contrary it is precisely this ease and frequency of movement from province to province, even though different laws may be involved, that makes it necessary for Canadian courts to relax the rule of "strict proof" and "heavy burden" derived from the *Winans* case.[17] There is authority for doing so in both English and Canadian decisions. Nowhere is there support for the view of Davis J. in *Gunn* v. *Gunn* that "stronger evidence would be required to establish a change of domicile from one province to another than in the case of moving to a foreign state".[18]

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[16] P. B. Carter, Some Impressions of Private International Law in Australia (1954), 3 University of Western Australia Annual Law Review 67, at pp. 69-70.

[17] [1904] A.C. 287 (H.L.). [18] *Supra*, footnote 2.

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CONSTITUTIONAL LAW—PROVINCIAL LEGISLATION IMPLEMENTING RECIPROCAL ENFORCEMENT ARRANGEMENT WITH FOREIGN STATE—THE TREATY POWER AND DELEGATION—FEDERAL INTERVENTION IN LITIGATION.—*Attorney-General for Ontario* v. *Scott*,[1] decided recently by the Supreme Court of Canada, is similar to the *Olympia Bowling Alleys* case,[2] not in its subject matter but in the fact that the attack on the validity of provincial legislation did not involve any correlative assertion that legislative power in the matter belonged to the federal Parliament. The certainty that this is so may be qualified only to the extent to which there can be any foreshadowing of a change in the conception of the federal treaty power.

The *Scott* case involved a challenge to the validity of the Ontario Reciprocal Enforcement of Maintenance Orders Act, under which Ontario, having undoubted authority to legislate in relation to marital obligations of support, carried out an arrangement, to which England and certain provinces became parties, for enforcement in Ontario against resident husbands of maintenance orders for which proceedings were initiated in a reciprocating jurisdiction by wives resident there.[3] The reciprocating jurisdiction, in this case England, provided by its legislation for enforcement there, against resident husbands, of maintenance orders for which the proceedings were initiated by Ontario wives. In this setting three arguments of substance were urged against the Ontario legislation and two of them were accepted by the Ontario Court of Appeal. The Supreme Court was unanimous in reversing the lower court and in sustaining the legislation.

The argument that was rejected by both courts was one basically related to the territorial limitation on provincial legislative power. Thus, it was urged that in providing, under section 4 of the act, for the making of a "provisional" maintenance order in Ontario against an English resident the province was legislating in relation to civil rights outside the province. The basic fallacy of this contention lay in its assumption that because the Ontario order might produce extra-provincial effects it was therefore invalid,[4] although these effects depended entirely on action by a foreign court willing to act upon them. The making of such an

[1] [1956] 1 D.L.R. (2d) 433, reversing [1954] 4 D.L.R. 546, and restoring [1954] 2 D.L.R. 465.

[2] [1955] S.C.R. 454, [1955] 3 D.L.R. 641. The case is discussed in an article in (1955), 33 Can. Bar Rev. 993.

[3] R.S.O., 1950, c. 334.

[4] Cf. *Lawson* v. *Interior Tree Fruit and Vegetable Committee*, [1931] S.C.R. 357, at p. 361; *Re Ogal Estate*, [1940] 2 D.L.R. 345.

order in Ontario against a person not resident there might well raise an issue of effective jurisdiction but not a question of legislative power when the matter in question is competent to the province. Indeed, even if a province should purport to provide for a binding order by its courts against a non-resident, enforceable, of course, against him or his assets within the province, it is difficult to see any constitutional infirmity, unless the courts propose to raise the ordinary requirement of personal jurisdiction to the level of a constitutional principle.[5]

Allied to the argument on extraterritoriality was a contention that the reciprocal arrangement with England partook of the nature of a treaty. Apart from any question of competence in respect of the subject matter, it is the traditional view that a constituent unit of a federal state has no international legal status.[6] There have been some inroads on this rigid conception of international personality, and one might well question whether, apart from internal constitutional limitations, there should be any objection to a province entering into binding commitments with foreign states on matters within provincial legislative power.[7] There could be no question of international law involved if two provinces of Canada entered into a binding engagement, and there does not appear to be any constitutional objection either to such a transaction.[8] What is missing in the British North Ameri-

[5] I am assuming, of course, that the cause or subject matter of action is within the province. A province does not have any extraterritorial jurisdiction, and hence, constitutionally, its exercise of authority must be founded on the presence of either persons or things (including choses in action) within the province. See Ontario Rule 25 as to service of process out of Ontario. *Quaere*, whether there could be a question of constitutional validity under subsection 1(c), which provides for service out of Ontario where any relief is sought against any person domiciled or ordinarily resident within Ontario, and under subsection 1(i), which provides for such service where a person out of Ontario is a necessary or proper party to an action properly brought against another person served in Ontario? See *McGuire* v. *McGuire and Desordi*, [1953] O.R. 328, denying provincial competence to direct habeas corpus in respect of a person detained outside Ontario to have him brought before an Ontario court in a divorce action (a federal matter).

[6] See Bowie and Friedrich, Studies in Federalism, Study 5, pp. 236 ff.

[7] *Ibid.*, at p. 246.

[8] The B. N. A. Act does not specifically provide for inter-provincial compacts but is completely silent on the matter. In the United States, the Constitution provides in section 10(3) of article I that "no state shall without the consent of Congress . . . enter into any agreement or compact with another state or with a foreign power . . .". (Section 10(1) provides also that "no state shall enter into any treaty, alliance or confederation . . .".) For a study of recent problems under the compact clause (section 10(3) of article I) see Abel, Ohio Valley Panorama (1952), 54 West Va. L. Rev. 186. In Australia, the Constitution under s. 75 (iv) gives original jurisdiction to the High Court "in all matters between states"; for an illustrative suit, see *Tasmania* v. *Victoria* (1935), 52 C.L.R. 157. *Quaere*,

ca Act is any provision for compulsory judicial jurisdiction over disputes between provinces, and it must rest (as it does, for example, under the Exchequer Court Act) on consent.[9] In the field of foreign relations, however, there is sound constitutional argument for denying to a province independent right of action. In the first place, such a possibility is neither expressed nor implicit in anything in section 92 of the B. N. A. Act; and it would be a rather startling proposition that the Privy Council's denial of a treaty-implementing power to the federal Parliament under section 132, otherwise than as a projection of its substantive legislative power (which makes section 132 superfluous), has the effect by indirection of conferring treaty-making authority on the provinces.[10] Moreover, although one cannot be too confident that the *Johannesson* case reinvigorated the treaty-implementing power as an aspect of the federal general power as much as it did the general power itself,[11] it has never been denied that the conduct of foreign relations and the acceptance of binding foreign commitments is the exclusive function of the federal authority, attributable to its paramount constitutional position, which has received international legal recognition.[12]

The effective answer in the *Scott* case to the treaty argument was given by Rand J., who pointed out that there was nothing binding in the scheme between Ontario and England but only voluntary and complementary enactments. Each was enacting legislation whose operation was conditional on similar legislation by the other. Arrangements of this kind, whether between provinces or between a province and a state of the United States or between a province and a foreign country, escape the stricture against treaty making yet produce the same result in the end in terms of conditional domestic legislation.

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whether this grant of judicial power is sufficient support for binding interstate engagements.

[9] The declaratory action against a provincial attorney-general and the constitutional reference which is in substance a contest between federal and provincial governments do not meet the point at issue, which is concerned not with the effect of federal or provincial legislation, as the case may be, but with the effect of inter-provincial or federal-provincial engagements. For an instance of a "litigated" issue between Canada and a province taken by consent before an *ad hoc* tribunal, see *Re Taxation Agreement between Government of Saskatchewan and Government of Canada*, [1946] 1 W.W.R. 257. And see the Exchequer Court Act, R.S.C., 1952, c. 98, s. 30.

[10] See *Labour Conventions* case, *A.-G. Can.* v. *A.-G. Ont.*, [1937] A.C. 326.

[11] *Johannesson* v. *West St. Paul*, [1952] 1 S.C.R. 292.

[12] See *Labour Conventions* case, *supra*, footnote 10. Cf. Duff C.J.C. in *Reference re Alberta Statutes*, [1938] S.C.R. 100, at pp. 133-134.

The two arguments that were accepted by the Ontario Court of Appeal but rejected by the Supreme Court were arguments of delegation and of a violation of section 96 of the B. N. A. Act. The delegation argument was related to that part of section 5 of the Ontario act which limits the defences in "confirmatory" proceedings taken in Ontario to those available in the proceedings in England.[13] The difference of opinion between the two courts was a difference as to the construction of the relevant Ontario provision. Whereas the Ontario Court of Appeal read it as amounting to a delegation of legislative power, the Supreme Court considered it as adoptive or referential legislation. This it undoubtedly was in so far as the situation is regarded as of the time a particular proceeding is taken in Ontario to give effect to a proceeding initiated in England. Such a situation is no different from a provision which, while envisaging future changes in the legislation of the "delegate", stipulates that they shall come into force only on proclamation or order in council by the "delegating" authority, and thus at a time when they are existing precepts.[14]

The more interesting feature of this problem arises, however, on the supposition that what we have here is in truth delegation by Ontario to England.[15] Mr. Justice Rand asserted that "there is no attempt [here] to permit another legislature to enact general, or generally, laws for a province: that would obviously be an abdication". And Mr. Justice Locke indicated that if the Ontario provision amounted to a delegation of the authority of its legislature to deal with the civil rights of residents of Ontario it would be invalid under the Supreme Court's judgment in *A.-G. N.S.* v. *A.-G. Can.*[16] What is the basis for the assertion that there is a delegation or abdication limitation on provincial legislative power in relation to matters within its authority, where the delegation is not to the Parliament of Canada or to a subordinate agency created by the delegating province but to an external agency such as a foreign legislature?[17]

[13] This provision, so far as material, reads as follows: "At the hearing [in Ontario] it shall be open to the person on whom the summons was served to raise any defence that he might have raised in the orginal proceedings had he been a party thereto but no other defence".

[14] See, for illustrations, Labour Relations Act, 1944 (Sask. 1st sess.), c. 95; Labour Relations Board Act, 1944 (Ont.), c. 29.

[15] That this is delegation is supported by the view of Read, Is Referential Legislation Worth While? (1940), 18 Can. Bar Rev. 415, at pp. 437-440.

[16] [1951] S.C.R. 31.

[17] There is of course, not the slightest constitutional objection to delegation to a subordinate agency created by the delegating legislature and the purpose of referring to it in the text is to pinpoint what is clearly good as well as what is now clearly bad.

The Ontario Court of Appeal answered this question on the basis of the "abdication" proposition enunciated by Lord Haldane in *Re the Initiative and Referendum Act*,[18] but subjoined to it the flat assertion that the civil rights of an Ontario resident cannot be determined by a foreign legislative body over which the Ontario legislature has no jurisdiction.[19] The proper retort to this is that the Ontario resident's rights in Ontario are not being determined by the independent whim of the foreign legislature but by the dictate of the Ontario legislature itself, which has chosen to legislate in this form. Since it can withdraw the delegation and remains at all times in control of the delegated legislation in its operation in Ontario, it is difficult to see where abdication comes in save as a matter of peremptory policy-making by the courts.

What is involved here is not the wisdom of delegation to a foreign body but the power to make it. Some of the case law, before and after the *Nova Scotia Delegation* case, *A.-G. N.S.* v. *A.-G. Can.*, and indeed the judgment of Mr. Justice Locke in the *Scott* case, exhibit a view of the delegation problem with which the present writer is in disagreement. The basis of the *Nova Scotia Delegation* case lay essentially in the unwillingness of the courts to allow the admixture of powers in a legislature beyond what was distributed by the B. N. A. Act.[20] This meant that neither the Parliament of Canada nor a provincial legislature could use the other as a subordinate agency for delegation purposes. The reason for this is understandable even though, as Professor Scott rightly pointed out, it depends on a view of the B. N. A. Act beyond the mere consideration of delegation as such.[21] In *P.E.I. Potato Marketing Board* v. *Willis*, the Supreme Court appeared to emphasize this restricted view of the *Nova Scotia Delegation* case by uphold-

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[18] [1919] A.C. 935. This oft-quoted passage remains more a counsel of caution than a constitutional limitation. It reads as follows (p. 945): "No doubt a body with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a provincial legislature in Canada could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done . . . in *Hodge* v. *The Queen* . . .; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence". This proposition has in no way affected the widest kind of delegation by Parliament and by a provincial legislature to agencies of their own creation or under their control: see *Reference re Regulations (Chemicals)*, [1943] 1 D.L.R. 248; *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] A.C. 708.

[19] [1954] 4 D.L.R. 546, at p. 551.

[20] The matter was put tersely by Chisholm C.J. in the Nova Scotia Supreme Court, [1948] 4 D.L.R. 1, at p. 6: "It was never intended that the [B.N.A.] Act should be a counter for the exchange of constitutional wares".

[21] Comment (1948), 26 Can. Bar Rev. 984.

ing a delegation of federal legislative power to a provincial marketing board.[22]

Two issues present themselves as by-products of the two cases just mentioned. First, is there any limitation on the delegation of legislative power by the federal Parliament or by a provincial legislature to an agency outside Canada? Secondly, is there any limitation on delegation even between federal Parliament and provincial legislature where each has independent competence in respect of the subject matter involved? On the first point, there is clearly no question of extraterritoriality involved (which would be a limiting factor for the provinces only[23]) because the delegated legislation would take effect in and by virtue of the law of the province. Again, there would be no violation of any explicit constitutional directions or basic assumptions such as underlay the *Nova Scotia Delegation* case, because the proposed delegation is not between federal Parliament and provincial legislature or between provincial legislatures.[24] The only possible objection then to external delegation would be that the delegating legislature is shelving its political responsibility for policy-making or for law-making and leaving it to an independent body.[25] Such an objection involves a considerable qualification of the doctrine of *Hodge* v. *The Queen*, which recognized the plenary authority of a provincial legislature within the scope of its legislative power.[26]

The policy-making or law-making objection just mentioned does not, however, stand with existing case law. If, as the *Willis* case indicated, it is open to the Parliament of Canada or to a provincial legislature to repose some of its legislative power in an agency of the other, is there not a shelving of responsibility proportionate to the extent of the delegation? Why then is it not equally open to either of them to delegate to an agency outside Canada, including a non-Canadian legislative body? It is really on this point that the Ontario Court of Appeal in the *Scott* case used the abdication argument. But if a provincial legislature is to be forbidden to delegate the making of some of its laws to a

[22] [1952] 4 D.L.R. 146; and see Ballem, comment (1952), 30 Can. Bar Rev. 1050.

[23] Any doubt of the extraterritorial power of the Parliament of Canada was removed by s. 3 of the Statute of Westminster, 1931.

[24] *Quaere*, however, whether the *Nova Scotia Delegation* case goes so far as to cover delegation between provincial legislatures. Read, *supra*, footnote 15, argues on p. 442 for a ban on such delegation.

[25] This was the view of the Ontario Court of Appeal in the *Scott* case, [1954] 4 D.L.R. 546. While Locke J. in the Supreme Court also pointed out that delegation to England would be illegal, he gave no reason other than referring to the *Nova Scotia Delegation* case.

[26] (1883), 9 App. Cas. 117.

foreign body because that body has no responsibility to the provincial legislature, then the same reason should operate to forbid the type of delegation permitted in the *Willis* case. The Supreme Court in the latter case surely saw that the real control lay not only in the delegating legislature's power to withdraw the delegation but also in previously worked out arrangements with the delegate. So it would be in the case of such reciprocal arrangements as were involved in the *Scott* case.

This brings me to the second point, which, stated positively, is that there is no objection to delegation even between provincial legislature and federal Parliament in relation to matters on which the delegated body is independently competent. The main point to be extracted from the *Nova Scotia Delegation* case is that the B. N. A. Act, in conferring powers exclusively and separately on Parliament and on provincial legislatures, must be read as forbidding the exercise by one of them of any powers of the other even by revocable delegation. This policy is not offended, however, where each exercises its own powers but yet provides for delegation because of a shared interest in the legislative field. A good example of such unobjectionable delegation may be found in the Ontario Summary Convictions Act, which in section 3(1) makes applicable to provincial penal proceedings stated sections of the federal Criminal Code "as amended or re-enacted from time to time".[27] In *Re Brinklow*, Judson J. upheld the validity of this provision on, apparently, the ground just taken, although it would have been better if he had avoided the remark that it was an incorporation by reference, and had been satisfied to state that it was not a delegation to Parliament of power not otherwise possessed by Parliament.[28] Certainly, the validity of the selected sections of the Criminal Code was beyond question for the federal Parliament's purposes. And, since it is open to a province to enact summary conviction legislation for provincial offences, there should be no constitutional objection to a delegation which involves a contemporary adoption from time to time for a valid provincial purpose of valid federal enactments. However, the Ontario Court of Appeal in the fairly recent case of *Regina* v. *Fialka* did not see the problem this way and it confined the terms of section 3(1) of the Summary Convictions Act to a rigid conception of incorporation by reference by denying effect for Ontario

[27] R.S.O., 1950, c. 379.
[28] [1953] O.W.N. 325, reversed on other grounds.

of any federal provisions enacted after the last passing of section 3(1).[29]

The situation becomes a little more obscure in view of the position taken by Locke J. in the *Scott* case, where he analogized the problem before him to the "summary conviction" matter under discussion, and concluded that it was legislation by adoption when the defences permitted in Ontario under its reciprocal legislation were those "from time to time" permissible under the laws of England. Surely, there is delegation where future precepts of another legislative body are encompassed,[30] but it may not be a delegation of legislative power not otherwise possessed by that other body. So it is in the *Scott* case, and hence this writer feels, first, that Locke J. was right for the wrong reasons and, secondly, that the Ontario Court of Appeal in *Regina* v. *Fialka* unnecessarily extended the conception of unconstitutional delegation. This extension is not required under the *Nova Scotia Delegation* case and, in my submission, there is nothing in the Supreme Court's judgment in *P.E.I. Potato Marketing Board* v. *Willis* which would warrant a restriction on delegation to any agency when no admixture of powers under the B. N. A. Act is involved. On the contrary, the *Willis* case, in permitting delegation of federal power to a provincial board which could not be given such power by its creator (the provincial legislature), suggests that *a fortiori* delegation may be made to an external agency where it does not depend on the delegating agency for its power. Conceivably there may be a semantic question here in respect of the sense in which the term "delegation" is used in the situations just considered. If it be that the term is improper when applied to a case where the delegated agency does not derive its power from the delegating one (which is the situation in the *Scott* case), this may help to explain what was actually decided on the point in the *Scott* case, but it would still leave *Regina* v. *Fialka* as an unsatisfactory decision.

It is well to notice that Mr. Justice Abbott had an entirely different answer (from those given by Rand and Locke JJ.) to the delegation argument. In his view, there was no delegation, but merely an application of conflict of laws principles in Ontario's legislative direction that only those defences available in the English proceedings would be permitted in the Ontario proceedings.

[29] [1953] 4 D.L.R. 440. If the Ontario Court of Appeal is right, then the new federal Criminal Code, which came into force on April 1st, 1955, is not part of Ontario law for summary conviction purposes.

[30] See Read, *supra*, footnote 15, at p. 440.

Surely this is not so when the obligation involved in the Ontario proceedings was one arising under the Ontario law and when the defendant was a person over whom Ontario courts had personal jurisdiction.[31] Any defences in such a case could only be defences arising under Ontario law, which was not only the law of the forum but the law governing the "cause of action" itself.

The "section 96" argument was grounded on the fact that under the Ontario act jurisdiction to effectuate maintenance orders was reposed in a magistrate or in a juvenile or a family court judge, who was a provincial appointee, and it was alleged that he was being asked to enforce a foreign court's provisional order.[32] On the assumption that if this were so he would be acting as a superior court or as a tribunal analogous thereto (within the ban of section 96 of the B. N. A. Act), the simple answer given by the Supreme Court was that the unfortunate use in the Ontario statute of the terms "provisional" and "confirmed" did not obscure the fact that the local tribunal was making an original order. Once this was clear, it followed from the judgment in *Reference re Adoption Act*[33] that provincial appointees were entitled to adjudicate in family welfare matters such as those involved in the *Scott* case.

One further point, unrelated to the merits of the case. The Attorney-General of Canada intervened in this case as he had intervened in the *Olympia Bowling Alleys* case, although neither there nor here was any issue of federal legislative power involved.[34] Perhaps the intervention was as general guardian of the constitution but, if so, it is not easy to appreciate why the federal government opposed the provincial legislation in the *Olympia Bowling Alleys* case but supported the provincial legislation in this case. The briefs filed by the federal Attorney-General in the two cases

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[31] If it were the case that under an Ontario conflicts rule the English law was applicable in the circumstances, the situation would conform to Mr. Justice Abbott's assertion. But here the English law is applicable not as such in virtue of an Ontario choice of law rule but simply because it is read into the Ontario statute as Ontario domestic law.

[32] Objection was also taken to the fact that the inferior judicial tribunal was acting upon a "provisional" order setting out the maintenance in sterling and it was urged that it was beyond the power of such a tribunal to "confirm" the order in Canadian currency. The argument was rejected. This was not a case where an attempt was made to deal with currency otherwise than as prescribed by federal authority under s. 91(14) of the B. N. A. Act, but rather a case of conformity to federal direction in relation to currency.

[33] [1938] S.C.R. 348.

[34] Rand J., in the *Scott* case, referred to the question of legislative power in respect of the duty of maintenance and its reciprocal enforcement as follows: "The alternative entrance upon such a field by Parliament needs only to be mentioned to be rejected".

disclose nothing of the reasons or policy which dictated the contradictory positions.

The recent appeal to the Privy Council in *Minister of National Revenue* v. *Anaconda American Brass Ltd.*[35] also calls for some eye-brow raising on the federal government's litigation policies. Two courts in Canada upheld a taxpayer's use of a certain accounting formula against the contrary view of the revenue department. Why was the government not content to accept the decision of the Supreme Court as final, despite the fact that this particular case was one in which an appeal to the Privy Council was still open? There is something strange in a government, which has promoted the establishment of the Supreme Court of Canada as the final appellate court for Canadian causes, taking an appeal from a decision of that court to an external tribunal no longer having judicial responsibilities for Canada. The government got its way when the Privy Council reversed the Supreme Court. The merits of the respective decisions are equally debatable[36] and, since no constitutional question was involved, it would have been better for the government to promote an amendment of tax legislation to secure future conformity with its views on proper accounting practices. For the government itself to question the final judicial authority of the Supreme Court by an appeal to the Privy Council was a disparagement of the court and not atonable by arguing that the government was in the position of an ordinary litigant.[37]

BORA LASKIN*

La justification de la désobéissance aux loi

Le législateur qui abandonne volontairement le secours que l'observation de la règle morale apporte à l'observation de la règle juridique doit s'attendre à voir se généraliser la désobéissance aux lois. . . . On ne considère plus dans l'opinion publique comme un acte immoral en soi le fait de se soustraire à l'application des lois civiles et même de certaines lois pénales. Les écoliers continuent à traduire le passage de l'Apologie de Socrate sur le respect des lois, mais ils entendent leurs parents railler les lois de la cité et se vanter d'y échapper. (Georges Ripert, Les forces créatrices du droit (1955) p. 186)

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[35] [1956] 1 All E.R. 20, reversing [1955] 1 D.L.R. 529.

[36] See LaBrie, Introduction to Income Tax Law (1955) pp. 107 ff.

[37] It may be noted that the Australian government, when the Australian Labour Party was in office, appealed to the Privy Council in the *Bank Nationalization* case (*Australia* v. *Bank of New South Wales*, [1950] A.C. 235), although the Labour Party has long favoured abolition of all appeals. However, steps to end them had not been taken so that the situation was somewhat different.

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