CORRESPONDENCE

Contempt of Court

TO THE EDITOR:

While we are all aware that technically speaking legal decisions are of value as precedents only in so far as they purport to decide matters of principle, nevertheless in practice the members of the bar, and the bench, derive considerable assistance in many problems from examining previous occasions on which the courts have considered the application of some broadly worded general principle to comparable factual situations. It seldom requires great genius to establish a general principle: the problem arises in applying that principle to the facts of a particular case.

In this respect the decision of Michaud C.J. in *In re Regina* v. *Thibodeau*, referred to by Mr. Ronald C. Stevenson in his comment appearing at (1956), 34 Can. Bar Rev. 206, will bring some measure of relief to those members of the profession who indulge in the disquieting occupation of giving "off-the-cuff" opinions on libel and contempt to newspaper clients with deadlines looming in the background.

While the decision in *R.* v. *Gray* (1865), 10 Cox C. C. 184, appears amply to support the conclusion arrived at by Michaud C.J., some care should be taken in applying in a country organized under a federal system of government statements made in courts operating under a unitary system, which can be suspected of being derived from a fusion of the principles applicable to libel and contempt. One can see in some of the English contempt cases the free use of terminology normally associated with the law of libel in its application to the reporting of judicial proceedings. Perhaps this is because the principles involved are considered to be substantially identical.

It is unfortunate that reference was not made to *Rex* v. *Willis and Pople* (1913), 4 W.W.R. 761, in which an application for the adjournment of a murder trial was allowed on the ground of possible prejudice arising from newspaper publicity given to alleged confessions admitted at the inquest. The facts are a little obscure from the report, but it would be unrealistic to dismiss the case as

being decided solely on the basis that undue emphasis was given to the alleged confessions in headlines. It is interesting to note that *Rex* v. *Willis* was cited by Edward S. MacLatchy in his article on "Contempt of Court by Newspapers in England and Canada" in (1938), 16 Can. Bar Rev. 273, as authority for a proposition directly contrary to the decision in *In re Regina* v. *Thibodeau*, and the case seems to have been similarly dealt with in 10A Hals. (3rd) 356, annotating 8 Hals. (3rd) 9, para. 12. In *In re Regina* v. *Tremblay* (unreported), decided by Manson J. on October 20th, 1955, the court said: "Perhaps the most glaring illustration of mischievous reports in the press is the reporting of alleged confessions of accused at preliminary hearings. These confessions may never be received in evidence in a higher court." But this was obiter, and the learned judge may have been, like Michaud C.J., merely deploring what is permissible under the existing state of the law.

One particular point of interest is the statement by Michaud C.J., not directly referred to by Mr. Stevenson, that "If, after a request or warning by a Magistrate that a certain part of the evidence should not be published, any newspaper disregards such warning or order and publishes it, then it might become liable to be penalized for contempt of court". It is a nice point whether a magistrate would have authority to make any such order. The authority of a superior court judge in similar circumstances appears to have been established in *Re Clement* (1822), 11 Price 68, 147 E.R. 404, and the question is also dealt with in *Rex* v. *McKinnon* (1909), 30 N.Z.L.R. 884.

Let us hope that a few more of these everyday problems can be clarified. What about the reporting of trials within trials, either where the jury are free to come and go, or where the jury are locked up?

C. PAUL DANIELS*

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Delegation between Federal Parliament and Provincial Legislature

TO THE EDITOR:

In Professor Laskin's comment on the *Scott* case at page 215 of the February issue of this review, he expressed the opinion that the *Nova Scotia Delegation* case does not preclude delegation between federal parliament and provincial legislature "where each has independent competence in respect of the subject matter in-

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volved" and that such delegation is, therefore, legally possible. This proposition seems to me to need important qualification.

Professor Laskin's argument begins by recalling that the main point of 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" (p. 221). That case therefore has no relevance, he argues, to a delegation in which the delegate is called upon to exercise a power it already has under the B. N. A. Act. And he concludes that this sort of delegation between federal parliament and provincial legislature is still possible.

This conclusion is significant only if the legislatures do in fact have "independent competence" in respect of the same subject matter. But to what extent do they have such competence? The answer to this question depends upon what is meant by "independent competence".

Firstly, it may mean that federal parliament and provincial legislature have a legislative jurisdiction in common—for example, a jurisdiction in relation to agriculture or immigration. If Professor Laskin means this, then his proposition is at best of limited value, for the great majority of legislative powers are not shared by federal parliament and provincial legislature, the powers under sections 91 and 92 of the B. N. A. Act being mutually exclusive. Since these powers are exclusive, a provincial legislature, for example, could never delegate to the federal parliament a section 92(13) legislative power, because the federal parliament does not have a section 92(13) legislative power. My point here is that most delegations, and almost all the ones that would be desirable, will necessarily involve an "admixture of powers" under the B.N.A. Act: that is to say, they will involve delegations of powers that are not common to both legislatures.

Secondly, "independent competence" may mean that federal parliament and provincial legislature are competent to legislate about something from different aspects. In other words, the same subject matter may be affected by both federal and provincial legislation, but from different aspects. Professor Laskin's reference to the Ontario Summary Convictions Act, which makes certain sections of the Criminal Code applicable to provincial penal proceedings, as a good example of the sort of delegation he had in mind, indicates that this is the meaning he attributed to these words. The provisions of these particular sections of the Criminal Code are valid federal legislation under section 91 and, when incorporated into the provincial law under the Ontario Summary Convictions Act, are valid provincial legislation under section 92.

Each legislature is "independently competent" to enact such legislation. But is there in such legislation anything in the nature of a delegation of power or the exercise of a delegated power? Does delegation not involve authorizing some body to exercise a power that the delegating body has? How can one say that the federal parliament is exercising a delegated power from a provincial legislature when parliament is legislating under the authority of a heading of section 91 that is exclusively its power (for example, under section 91(27)) and when the provincial legislature itself does not have that power? The provincial legislature cannot give what it has not got! I submit, therefore, that if "independent competence" is used in this second meaning, we cannot speak of the legislation about matters in which the legislatures are independently competent as being "delegated legislation", unless "delegation" is being used in a novel sense.

By the same reasoning, one may argue that delegation is not possible even in those cases where there is a legislative jurisdiction common to both federal and provincial legislatures. For example, let us suppose that a provincial legislature delegated power in relation to agriculture to the federal parliament. Would the federal parliament, in enacting a law that falls within the ambit of the delegated power, be acting under the delegated power or under its independent power? How could we know? The legislation would be valid federal legislation and in force in the province even though the provincial act delegating the power had never been passed. Is it then proper, or profitable, to speak of delegation here? To look at the problem from another viewpoint, let us suppose that the federal parliament delegated power in relation to agriculture to a provincial legislature. Would the provincial legislature, in enacting a law that falls within the ambit of the delegated power, be acting under the delegated power or its independent power? Because the provincial legislature has only the power given it by the B. N. A. Act (the *Nova Scotia Delegation* case prevents it from acquiring any more power by delegation), the power delegated to it would have to fall within the limits of the power of the provincial legislature in relation to agriculture under the B. N. A. Act. Again, how could one know whether it would be exercising a delegated power or its own power? To call it "delegated legislation" would have no practical significance.

And so I reconcile myself, admittedly with reluctance, to the fact that since the *Nova Scotia Delegation* case delegation, certainly any delegation of important consequence, between federal parliament and provincial legislature is not possible.

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Further Comments on Reese v. The Queen, [1955] Ex. C. R. 187

TO THE EDITOR:

Two matters arising out of *Reese* v. *The Queen*, which was the subject of comment by Mr. John Willis in your issue of December last (p. 1186), seem to call for further notice. Neither Cameron J. nor Mr. Willis in their discussion of the admissibility of inter-departmental communications refers to *Dufresne Construction Co. Ltd.* v. *The King*, an earlier decision of the Exchequer Court reported in [1935] Ex. C. R. 77. This case concerned a petition of right by the suppliant, claiming the value and cost of work done under a contract entered into with the respondent. Objection was made to the production of various memoranda prepared by respondent's chief engineer or local engineer, on two grounds, only one of which concerns us here: that it was against public interest that they should be filed (p. 87). Angers J., applying *Robinson* v. *State of South Australia*, [1931] A.C. 704, dealt with the objection in these words (p. 88):

> I do not think that public policy or public security are in the least concerned in the present case; on [this] ground I would have no hesitation to dismiss the objection to the filing of the memoranda in question. The production of these documents could not be prejudicial to public interest; they only deal with the relations of the Crown and the suppliant. The privilege of exclusion of documents as evidence at the request of the Crown must not be extended beyond the requirements of public safety or convenience.

Admittedly, *Duncan* v. *Cammell, Laird & Co.*, [1942] A.C. 624, had not yet appeared as a counter to the liberal tendencies displayed by the Privy Council in *Robinson*'s case. However, it would appear that the test applied by Angers J. in the *Dufresne* case was very much that set out by Rand J. in *R.* v. *Snider*, [1954] S.C.R. 479, at p. 485, when he holds that the question for the court is whether the documents might, on any rational view, be such that the public interest requires that they should not be revealed. Angers J. answered this question when he held that "the production of these documents *could* not be prejudicial to the public interest".

The other matter to be considered is the reference in *Reese* v. *The Queen* to section 27 of the Ontario Evidence Act, [1955] Ex. C.R. at p. 197. Cameron J. held that there was nothing novel in upholding an objection to production of correspondence and memoranda passing between members of one or more departments of government.

> Indeed, the Evidence Acts of several of the provinces have placed Crown privilege in relation to documents in statutory form. . . . For

example, section 27, Revised Statutes of Ontario 1950, chapter 119, provides as follows:

> '27. Where a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a department of the public service of Ontario, if the deputy head or other officer of the department has the document in his personal possession, and is called as a witness, he shall be entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the department, to object to produce the document on the ground that it is privileged, and such objection may be taken by him in the same manner, and shall have the same effect, as if such member of the Executive Council or head of the department were personally present and made the objection.'

This suggestion that section 27 *creates* some statutory privilege would appear to originate with 4 Canadian Encyclopedic Digest (Ontario) (1st ed., 1928) §83, p. 668, where Dr. MacRae writes:

> Moreover the Ontario Evidence Act enacts in broad form a privilege for 'documents in the official possession, custody or power of a member of the Executive Council or of the head of a department of the public service of [Ontario]'.

The same statement appears in 7 C.E.D. (Ont.) (2nd ed., 1952) §86, p. 333, and a similar one is to be found in Wigmore, §2378(6).

The suggestion might appear to have received judicial support in *Siebel* v. *Foster*, [1944] O.W.N. 647 (H.C. Ont.). There, counsel relied upon section 26 of the Evidence Act, R.S.O., 1937, c. 119 (the equivalent section at the time), *establishing* the privilege for documents "in the official possession, custody or power of a member of the Executive Council, or of the head of a department of the public service of Ontario" (p. 648). Roach J. held, at p. 649, that "*under the provision of the relevant section of The Evidence Act*, those documents are privileged".

A reading of section 27 would appear to disclose neither the creation of a new privilege for official documents nor even the statutory enactment of a common-law privilege. At common law, such privilege as exists in relation to official documents depends firstly on the fact that they are official, and secondly on the fact that the *head of the appropriate department of government* objects to production on the ground that disclosure would be contrary to the public interest. In determining whether a common-law privilege applies to a particular Ontario document, we must first inquire as to its official nature. It is submitted that for an Ontario document to be official it must be one "in the official possession, custody or power of a member of the Executive Council or of the head of a department of the public service of Ontario". The question then arises whether *the objection* to production must be made personally by the member of the Executive Council or the head of department concerned. Section 27 appears to provide an answer

to this question. The senior official is not bound to lose a day in court but may make his objection through the "other officer who has the document in his personal possession". Nothing more is to be found in section 27 than this provision which, if anything, creates a statutory exception to the hearsay rule and permits a junior officer to swear that his superior *claims* privilege on the ground that production would be contrary to the public interest. Nothing is said as to the nature of the privilege or the form of objection save that the objection may be taken by the junior officer "in the same manner, *and shall have the same effect*, as if such member of the Executive Council or head of the department were *personally* present and made the objection".

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Books Received

The mention of a book in the following list does not preclude a detailed review in a later issue.

Brothers in Law. By HENRY CECIL. Fifth edition. London and Toronto: Michael Joseph Ltd. 1955. Pp. 222. ($2.75)

Crime, Courts and Probation. By CHARLES LIONEL CHUTE and MARJORIE BELL. With an introduction by ROSCOE POUND. New York: The Macmillan Company. Toronto: The Macmillan Company of Canada, Limited. 1956. Pp. xviii, 268. ($4.75)

Derecho Internacional Privado. By JULIAN G. VERPLAETSE. Madrid: Ediciones Atlas. 1954. Pp. ix, 743. (No price given)

Disallowance and Reservation of Provincial Legislation. By G. V. LA FOREST. Department of Justice. Ottawa: Queen's Printer. 1955. Pp. 115. (No price given)

Essays on the Law of Evidence. By ZELMAN COWEN and P. B. CARTER. Oxford: The Clarendon Press. Toronto: Oxford University Press. 1956. Pp. xx, 278. ($5.25)

The Export Trade: A Manual of Law and Practice. By CLIVE M. SCHMITTHOFF, LL.D. (Lond.), LL.D. (Berl.), M.I.Ex. Third edition. London: Stevens and Sons Limited. Toronto: The Carswell Company Limited. 1955. Pp. xxx, 430. ($6.25)

Friends at Court. By HENRY CECIL. London and Toronto: Michael Joseph Ltd. 1956. Pp. 208. ($2.75)

Fundamental Rights in India. By ALAN GLEDHILL, M.A., I.C.S. (Ret.). London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1955. Pp. xvi, 134. ($4.75)

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A History of the School of Law: Columbia University. By the Staff of the Foundation for Research in Legal History under the Direction of JULIUS GOEBEL, JR. The Bicentennial History of Columbia University. Under the general editorship of Dwight C. Miner. New York: Columbia University Press. Toronto: Oxford University Press. 1955. Pp. xii, 524. ($6.50)

An Introduction to Evidence. By G. D. NOKES, LL.D. Second edition. London: Sweet and Maxwell Limited. Toronto: The Carswell Company Limited. 1956. Pp. xxxvi, 480. ($7.25)

The Last Hurrah. By EDWIN O'CONNOR. An Atlantic Monthly Press Book. Boston and Toronto: Little, Brown and Company. 1956. Pp. 427. ($4.50)

The Law of Torts. By HARRY STREET, LL.M., PH.D. London: Butterworth & Co. (Publishers) Ltd. Toronto: Butterworth & Co. (Canada) Ltd. 1955. Pp. lxxxiii, 555. ($11.25)

Lawyer's Guide to Accounting. By HARRY A. FINNEY, PH.B., LL.D., C.P.A., and RICHARD S. OLDBERG, B.S., J.D. New York: Prentice-Hall Inc. 1955. Pp. xxi, 291. ($7.65 U.S.)

Leçons de droit civil. Par HENRI, LÉON and JEAN MAZEAUD. Tome premier. Nouvelle licence, première année. Introduction à l'étude du droit privé (droits, preuves, personnes); Famille (incapacités). Paris: Editions Montchrestien. 1955. Pp. 1530. (No price given)

Malpractice Liability of Doctors and Hospitals (Common Law and Quebec Law). By WILLIAM C. J. MEREDITH, Q.C. Toronto: The Carswell Company Limited. 1956. Pp. xv, 300. ($7.75)

The Marshall Reader: The Life and Contributions of Chief Justice John Marshall. Selected and edited by ERWIN C. SURRENCY. Bicentenary edition. Docket Series, Vol. 3. New York City: Oceana Publications. 1955. Pp. 256. (Clothbound: $3.50 U.S.; paperbound: $1.00 U.S.)

Memorandum on the Office of Lieutenant-Governor of a Province: Its Constitutional Character and Functions (With Appendices). By PROF. JAMES MCL. HENDRY. Department of Justice. Ottawa: Queen's Printer. 1955. Pp. 43. (No price given)

Miscellany-at-Law: A Diversion for Lawyers and Others. By R. E. MEGARRY. London: Stevens & Sons Limited. Toronto: The Carswell Company Limited. 1955. Pp. xvi, 415. ($4.75)

Nationality and Statelessness in International Law. By P. WEIS, PH.D., DR. JUR. With a foreword by HERSCH LAUTERPACHT. Published under the auspices of The London Institute of World Affairs. London: Stevens & Sons Limited. Toronto: The Carswell Company Ltd. 1956. Pp. xxviii, 338, iv. ($11.25)

Obscenity and the Law. By NORMAN ST. JOHN-STEVAS. With an introduction by SIR ALAN P. HERBERT. London: Martin Secker & Warburg Ltd. Toronto: British Book Service (Canada) Limited. 1956. Pp. xxii, 289. ($5.00)

The Officer in the Courtroom. By FLOYD N. HEFFRON. The Police Science Series. Edited by V. A. LEONARD. Springfield, Ill.: Charles C. Thomas. Toronto: The Ryerson Press. 1955. Pp. xii, 162. ($5.00)