CORRESPONDENCE

Francis v. The Queen

TO THE EDITOR:

My comment at page 602 of the May issue on *Francis*, [1954] Ex. C.R. 590, was in type before the Supreme Court of Canada announced its judgment in appeal, and I would be grateful for an opportunity to make some additional remarks at this time.

The chief issue was whether article 3 of the Jay Treaty, 1794, entitled the suppliant, a Canadian Indian, to import consumer goods duty-free. In the Exchequer Court, Cameron J. denied the petition on two grounds: that article 3 did not enjoy statutory implementation, and that the article had been abrogated by the War of 1812. In the Supreme Court, where the appeal was dismissed with costs (the reasons for judgment are still unreported), all save two judges confined themselves to the first of Mr. Justice Cameron's reasons; consequently, they decided the matter on the basis of existing statutes. Since treaties cannot alter the domestic law unless they are implemented by domestic legislation, *Re Arrow River*, [1932] S.C.R. 495, the petitioner's claim was completely and logically answered by pointing to the absence of such legislation, and it was not necessary to go farther. Nevertheless, Mr. Justice Rand, with whom Cartwright J. concurred, addressed himself to the additional question of when and why war abrogates treaties. He recognized, in passing, the well-known situation in which war does not terminate international conventions, namely, when the terms of the agreement itself contemplate continuance or suspension. But in the absence of such an express term he held that the determination is made "according to the rules that govern that of instruments generally; from the entire circumstantial background, the nature of the matters dealt with and the objects in view, we gather the intention of the parties as expressed in the language used". Clearly, this is a confirmation of the so-called intention test, whereby the court ascertains an intention on the part of the contracting states, at the time of their agreement, that future hostilities between them will terminate their convention. Hence it is the intention of the parties, and not the fact of war itself, which gives rise to the right to terminate. The

application of this doctrine to international conventions is, of course, a partial carry-over to international law from the English law of contract. Moreover, its validity in the international sphere has the support of many reputable international lawyers, notably Hyde.

The burden of my comment, however, was that in practice the intention test has been superseded, at least in some Western European countries and in the United States, by the intrinsic-character test. When the latter test is used the court primarily concerns itself with the nature of the treaty provisions before it and their compatibility with the prosecution of the war effort, rather than with the extremely difficult task of imputing—sometimes decades later—a specific intention to the contracting states. (Incidentally, the intention test becomes virtually unworkable in the case of multilateral conventions.) It was, moreover, my view that Cameron J.'s reliance on the American precedents indicated that the time was coming when the judiciary in both countries would have reached an identical approach to the problem. That the intrinsic-character test constitutes the American rule is, I think, fairly clear: *Brownell* v. *City and County of San Francisco* (1954), 271 P. (2d) 974. That it constitutes the Canadian rule is now doubtful in view of Mr. Justice Rand's judgment. Still, the position *is* doubtful because the learned judge recognized the difficulties attendant upon a complete acceptance of the intention test. After adopting that test (in the words quoted earlier), he went on to say: "When such matters [that is, the particular treaty provisions] touch individuals, the judicial organ must act but a result that brought about non-concurrence between the judicial and the executive branches, say as to abrogation, and apart from any question of an international adjudication, would, to say the least, be undesirable". These words may be taken fairly to mean that in some situations the court will strive to act in harmony with the executive. When the court does so, in the sense that it accepts directives from the political departments of government, as it does in matters of diplomatic immunity, it in fact is veering toward the intrinsic-character, and not the intention, test. The result would appear to be that while the Supreme Court uses the intention test in normal situations the door is left open for an application of the intrinsic-character test in abnormal situations. Consequently, I was, perhaps, too hasty in implying that in Canada the intention test would be passed over entirely. It still plays a rôle; but not an exclusive rôle. The problem now becomes one of predicting which test the court will use. In making such a prediction it must, I think, be remembered that, ironically, *Francis* arose not as a result of the Second World War (as one might have expected) but from the effect of an old war on an old convention. The argument, more-

over, was heard in peace-time. In other words, the prevailing conditions were more or less normal and the intention test was capable of producing a reasonable result. One wonders, however, if the same approach would have commended itself to the court had the argument been heard in war-time over a similar but more recent convention with Germany. In such a situation, a "non-concurrence between the judicial and the executive branches" would be, "to say the least, undesirable". Here the suitability of the intrinsic-character test becomes obvious; and, it is for that among other reasons that American and European courts have adopted it wholeheartedly. Consequently, I still incline to the view that our courts increasingly will swing towards that test, unless, of course, there is an appreciable improvement in the general international situation.

Finally, there are two points in Mr. Justice Rand's judgment which, although they do not bear directly on the topic of abrogation by war, will be of considerable interest to international lawyers. First, he considered the very real possibility that article 3 has become inoperative by virtue of the *clausula rebus sic stantibus*. To my knowledge, this is the first time the doctrine has been discussed in a Canadian judgment, and its significance in *Francis* is obvious. Further, it is highly interesting to note that Mr. Justice Rand implies that the doctrine's basis is the intention of the parties, not the necessities of the situation (see 1 Schwarzenberger, p. 200; 2 Hyde, p. 1524). Secondly, the learned judge provides an admirably concise comparison between treaties and peace treaties, especially as to the implementation requirement. It is to be hoped that his remarks here will settle the conflict between *Ritcher* v. *The King*, [1943] Ex. C. R. 60, 3 D.L.R. 540, and *Bitter* v. *Secretary of State of Canada*, [1944] Ex. C. R. 61, 3 D.L.R. 482. Although one questions any definition of a treaty which excludes from its ambit those international organizations endowed with international personality (see the *Reparations Case*, I. C. J. Reports, 1949, 174), there is so much sound and stimulating international law in this judgment that it must be regarded as one of the most important cases of its kind in Canadian jurisprudence. The problems raised here whet the appetite, and one hopes it will not be long before the Supreme Court is invited to considered not only the wider problem of the entire status of the Jay Treaty but, indeed, the question of desuetude as it pertains to the Ashburton Treaty, 1842.

R. ST. J. MACDONALD*

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* Lecturer in Law, Osgoode Hall Law School.

Crown Security for Arrears of Income Tax

TO THE EDITOR:

It is almost universally assumed by solicitors that any title to or interest in real property acquired for value cannot be adversely affected by subsequent dealings to which the person acquiring the title or interest is not a party.

It was therefore somewhat disturbing to the writer to discover that, where the Minister of National Revenue had availed himself of the provisions of section 116(4) of the Income Tax Act, R.S.C., 1952, c. 148, and accepted as security for arrears of income tax a mortgage on the taxpayer's real estate, this mortgage, although subsequent in point of time, would prevent the prior mortgagee from perfecting his title by way of foreclosure.

In an instance which recently came to light, the executors of an estate acquired as an investment of the estate a mortgage which at the time was a first mortgage. Subsequently the Minister of National Revenue accepted and registered a mortgage on the taxpayer's property, the minister's mortgage being, both as to execution and registration, subsequent to the estate's security. The mortgagor having fallen into arrears in his payments due to the estate, the executors sought to institute an action for foreclosure but found they could not effectively pursue the remedy.

It is well established that the interest of the Crown in any land cannot be foreclosed, nor can the legal estate in the land when held by the Crown be extinguished by a sale. At one time the practice permitted a sale to proceed where the Crown only held an equitable estate in the land, but it is unlikely at the present time that any court would add the Crown as a party to a mortgage action so as to extinguish the Crown's interest in the land. Where the Crown is an execution creditor the courts have extinguished its interest, basing their jurisdiction on the submission by the Crown through its action in filing an execution; the registration of a mortgage, however, does not constitute a submission to the jurisdiction of the courts.

It is true that the mortgagee may still convey good title to a purchaser by exercising the power of sale; but this appears to be small comfort to the mortgagee. It is submitted that a prior mortgagee should have the right as against all subsequent encumbrancers to select, within the limits of the practices prevailing in his jurisdiction, the form of remedy which he wishes to use to enforce his security, and that he should not be forced to elect between proceeding by way of power of sale or assuming the charge of the subsequent encumbrance to the Crown if he proceeds by way of foreclosure.

This matter was referred to in the House of Commons recent-

ly during the debate on Bill 418, to amend the Income Tax Act (House of Commons Debates (unrevised), July 3rd, 1956, p. 5627). As a practical solution to a very inequitable situation, I suggest that the Minister of National Revenue should indicate that, wherever there appears on the abstract or register of title a mortgage in his favour given pursuant to section 116 of the Income Tax Act, he will on request submit to the jurisdiction of the local court in any proceedings by way of foreclosure under a prior encumbrance on the same land.

ARTHUR KELLY*

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Murphy v. Canadian Pacific Railway

TO THE EDITOR:

Mr. Ballem's interesting comment in the April 1956 issue of the Review on *Murphy* v. *C.P.R.*, [1956] 1 D.L.R. (2d) 197, 17 W.W.R. 593 (Maybank J.) inspired me to read the reasons for judgment. I was struck by what, with respect, appears to me to have been a failure to consider a point of importance. The point is not considered, either, in the judgment of the Manitoba Court of Appeal, rendered since Mr. Ballem wrote and just reported (1956), 19 W. W.R. (N.S.) 57.

Maybank J. holds (D.L.R. at p. 224) that the power of the Dominion to legislate with respect to grain elevators is derived from a declaration under section 92(10)(c) of the British North America Act. The declaration, in the Canada Grain Act, reads:

> 174. All elevators in Canada heretofore or hereafter constructed are hereby declared to be works for the general advantage of Canada.

I question the validity of this declaration, basing my doubt upon the decision of the majority of the Supreme Court of Canada in *Luscar Collieries* v. *McDonald*, [1925] S.C.R. 460, where one of the questions was "whether subsection (c) of section 6 of the Railway Act of Canada is within the legislative powers of the Dominion of Canada". The relevant part of section 6 (Stats. Can. 1919, c. 68) reads as follows:

> 6. The provisions of this Act shall, without limiting the effect of the last preceding section, extend and apply to,—
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> (c) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased, or operated by a company

*Arthur Kelly, Q.C., of Day, Wilson, Kelly, Martin & Morden, Toronto. Mr. Kelly is Honorary Treasurer of the Canadian Bar Association and a member of the Ontario Canadian Bar Review Committee.

> wholly or partly within the legislative authority of the Parliament of Canada, or by a company operating a railway wholly or partly within the legislative authority of the Parliament of Canada, whether such ownership, control, or first mentioned operation is acquired or exercised by purchase, lease, agreement or other means whatsoever, and whether acquired or exercised under authority of the Parliament of Canada, or of the legislature of any province, or otherwise howsoever; and every railway or portion thereof, now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada.

Idington J.'s view on the question is expressed at pages 471-472. In effect he holds it to be invalid to legislate ". . . by using a classification system to be determined by future results, and acts of others instead of specifically designating either before or after the execution of the work, what it was that Parliament intended to be declared to be for the general advantage of Canada".

Duff J. (with whom Anglin C.J.C. and Rinfret J. concurred) expressed his view at page 474 and pages 476-477, where he said:

> The grounds on which it can be argued that s. 6(c) of the Railway Act does not constitute a valid declaration within s. 92(10c) of the British North America Act, can be very concisely stated. The object of this provision, it is said, was not to enable the Dominion to take away jurisdiction from the provinces in respect of a given class of potential works; works, that is to say, which are not in existence, which may never come into existence, and the execution of which is not in contemplation; the purpose of the provision is rather to enable the Dominion to assume control over specific existing works, or works the execution of which is in contemplation. The control intended to be vested in the Dominion is the control over the execution of the work, and over the executed work. If a declaration in respect of all works comprised within a generic description be competent, the necessary consequence would appear to be that, with regard to the class of works designated by the description, provincial jurisdiction would be excluded, although Dominion jurisdiction might never be exercised, and although no work answering the description should ever come into existence.
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> In support of this view it may be said that the purport of the declaration authorized appears to be that the work which is the subject of it either is an existing work, beneficial to the country as a whole, or is such a work as ought to be executed, or, at all events, is to be executed, in the interests of the country as a whole. An affirmation in general terms, for example, an affirmation that all railways owned or operated hereafter by a Dominion company are works which ought to be or will be executed, as beneficial to the country as a whole, would be almost, if not quite, meaningless, and could hardly have been contemplated as the basis of jurisdiction.
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> . . . . .

> There seems to be a preponderance of argument in support of the view that s. 6(c) is not an effective declaration under s. 92(10c) of the British North America Act.

It appears to me that the reasoning here with respect to railways applies equally to "all elevators in Canada ... hereafter constructed". Those elevators are nothing more than "a given class of potential works". They are not "specific existing works, or works the execution of which is in contemplation".

The Supreme Court's decision in the *Luscar Collieries* case was affirmed by the Privy Council, [1927] A.C. 925, but it is to be noted that at page 933 their lordships said that they wished "it distinctly to be understood that so far as they are concerned the question as to the validity of section 6(c) of the Act of 1919 is to be treated as absolutely open". The question was similarly left open in *C.P.R.* v. *A.-G. for B.C. et al.* (the Empress Hotel case), [1950] A.C. 122, at p. 148.

Now Maybank J. did not overlook the *Luscar Collieries* case, but, while he noted (at pp. 223-224) that in it questions respecting declarations had arisen, he said ". . . I am not giving consideration to the subject of such declarations at the moment . . .".

I have not overlooked that Maybank J. cited (at p. 207) section 45 of the Canadian Wheat Board Act, which adds a declaration to that in section 174 of the Canada Grain Act and which may remove any doubt with respect to elevators already in existence at the time section 45 was passed, but he does not found his decision on the declaration in section 45 any more than on that in section 174.

It is to be hoped that, if the case goes further, the point I have mentioned will be dealt with.

There is another point in Maybank J.'s judgment that I hope will receive further attention. At page 202 the learned judge said:

> The Act contains sections numbered 1 to 46 inclusive, of which the last simply states that ss. 12, 13 and 14 are to come into force upon proclamation. There has been no such proclamation and hence it may be said that the Act consists of 42 sections. I may say now that counsel for the plaintiff based some of his argument upon these sections 12, 13 and 14, claiming that, although they had not been proclaimed their wording was useful in an evaluation of the Act because they tended to show what was in the minds of the legislators in the enactment of the whole statute; and I should state at once that I cannot agree with plaintiff's counsel in his contention. No argument about the meaning of a statute can be validly based upon sections of it which might some time in the future become law, but are not law now, and may never become law.

If I may say so, this conclusion surprises me. Apart from other considerations, it must follow from it that the meaning of certain

sections in an act may be different before and after certain other sections in the same act are proclaimed.

A. BRUCE ROBERTSON*

Books Received

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

Annuaire de jurisprudence du Québec 1955. By PAUL LEFEBVRE. Montreal: Wilson et Lafleur (limitée). 1956. Pp. 411. (No price given)

Anti-Trust Laws: A Comparative Symposium. University of Toronto Faculty of Law Comparative Law Series, Volume 3. Editor: W. Friedmann. Editorial Board: Dean Cecil A. Wright, Professor B. Laskin, Professor J. B. Milner. Toronto: The Carswell Company Limited. 1956. Pp. vi, 635. (No price given)

Banking and Bills of Exchange: Including The Bank Act and The Relation of Banks and Customer, Negotiable Instruments and The Bills of Exchange Act, Bills of Lading, Factors Act, Agency, Legislative Power and Conflict of Laws. By JOHN DELATRE FALCONBRIDGE, Q.C., M.A., LL.D., Docteur en Droit. Sixth edition. Toronto: Canada Law Book Company Limited. 1956. Pp. lxxii, 987. ($27.50)

Battles at the Bar. By L. K. GAUBA. Bombay: N. M. Tripathi Ltd. 1956. Pp. xv, 288. ($4.00)

British Tax Review. Editor: G. S. A. WHEATCROFT. The first issue of this new periodical, June 1956, has just been received. It contains Articles; The Budget and Finance Bill, 1956; Notes of Cases; Book Reviews and Current Tax Intelligence. London: Sweet & Maxwell Limited. Pp. xii, 112. (Annual subscription, 30s. post free; single part, 10s.)

Calendar of the Caernarvonshire Quarter Sessions Records. Vol. 1, 1541-1588. Edited by W. OGWEN WILLIAMS. With a foreword by THE RT. HON. LORD JUSTICE MORRIS, P.C., C.B.E., M.C., LL.D., D.L. Published by the Caernarvonshire Historical Society. London and Bradford: Percy Lund, Humphries & Co. Ltd. 1956. Pp. cix, 385. (20s.)

Chitty's Queen's Bench Forms. 18th edition by R. F. BURNAND, C.B.E., O.B.E. (Mil.), M.A., and D. BOLAND, M.B.E. With a foreword by THE RIGHT HONOURABLE LORD GODDARD. The Common Law Library, No. 4. General editors: John Burke and Peter Allsop. London: Sweet & Maxwell Limited. Toronto: The Carswell Company Limited. 1956. Pp lx, 1263. (£7.7s. net)

The Coffin Murder Case. By JOHN EDWARD BELLIVEAU. Toronto: British Book Service (Canada) Limited. 1956. Pp. vi, 154. ($2.00)

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*A. Bruce Robertson, Q.C., Vice-President and General Solicitor, British Columbia Electric Company Limited, Vancouver, B.C.

Congressional Government: A Study in American Politics. By WOODROW WILSON. With an introduction by WALTER LIPPMANN. Meridian Books. New York: The Noonday Press. 1956. Pp 222. ($1.25 U.S.)

Current Law Year Book, 1955: Being a Complete Statement of All the Law of 1955 from Every Source. With Cumulative Index to All the Law for 1947-1955. General Editor, JOHN BURKE; Year Book Editor, CLIFFORD WALSH, LL.M.; Assistant General Editor, PETER ALLSOP, M.A.; Editors: CLAUD G. ALLEN, B.A. (Oxon), BRYAN CLAUSON, M.A., A. LEOLIN PRICE, M.A. London: Sweet & Maxwell Ltd. Toronto: The Carswell Company Limited. 1956. Pp. 144 (followed by 2918 sections) 162. (£3.3s. net)

Defence Investigation. By EDWARD N. BLISS, JR. Springfield, Illinois: Charles C. Thomas Publisher. Toronto: The Ryerson Press. 1956. Pp. xi, 304. ($7.25)

Fundamental Law in English Constitutional History. By J. W. GOUGH. Oxford: At the Clarendon Press. Toronto: Oxford University Press. 1955. Pp. x, 229. ($3.75)

The Law of Banking and the Canadian Bank Act. By IAN F. G. BAXTER, M.A., LL.B. Toronto: The Carswell Company Limited. 1956. Pp. xxvii, 395. (No price given)

Parking: Legal, Financial, Administrative. By the Joint Committee on Urban Traffic Congestion and Parking. JEFFERSON B. FORDHAM, Chairman. Saugatuck, Connecticut: The Eno Foundation for Highway Traffic Control. 1956. Pp. xii, 196. (No price given)

Public Law: The Constitutional and Administrative Law of the Commonwealth. Editor: J. A. G. Griffith. Publishing Manager: P. H. B. Allsop. The first issue of this new periodical, Spring-Summer 1956, has just been received. It contains Comment; Administrative Jurisdiction, by SIR CARLETON KEMP ALLEN; Councils, Ministers and Cabinets in Australia, by GEOFFREY SAWER, and Book Reviews. London: Sweet & Maxwell Limited. Pp. viii, 192. (Annual subscription, £2.2s. post free; single parts 12s. 6d.)

Report Concerning the Manufacture, Distribution and Sale of Quilted Goods, Quilting Materials and Related Products. By the Restrictive Trade Practices Commission. Department of Justice. Ottawa: Queen's Printer. 1956. Pp. ix, 78. (No price given)

Report of the International Congress of Jurists. Athens, Greece, June 13-20, 1955. Published in English, French and German and distributed by the International Commission of Jurists, The Hague. 1956. Pp. 168. (No price given)

Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York. New York: Dodd, Mead & Company. 1956. Pp. xxvi, 301. ($5.00 U.S.)

Stroud's Judicial Dictionary of Words and Phrases. Third edition. First supplement (to January 1, 1956) by PETER ALLSOP, M.A. London: Sweet & Maxwell Limited. Toronto: The Carswell Company Limited. 1956. Pp. 117. ($3.25 net)