CASE AND COMMENT

COMPANY LAW—CAPITALIZATION OF INCOME—DISTRIBUTION OF PROFITS IN FORM OF REDEEMABLE PREFERRED SHARES TO TRUSTEE—REDEMPTION OF SHARES.—Although it is not apparent from the reasons for judgment in the recent cases of *Re Waters; Waters* v. *Toronto General Trusts Corporation et al.*[1] and *Re Hardy; Official Guardian* v. *Toronto General Trusts Corporation et al.*,[2] the Supreme Court of Canada there was not dealing for the first time with the problem of what constitutes capitalization of undistributed corporate profits. The first occasion was in 1949 in the appeal of *Bagg* v. *The Minister of National Revenue*.[3] Mr. Bagg was a shareholder of a company called Domestic Gas Appliances Limited and objected to an assessment to income tax on a deemed dividend under section 15 of the Income War Tax Act[4] resulting from an alleged capitalization of the undistributed income of that company. Because there was no definition or indication in the act of what is meant by the capitalization of undistributed income, the question was dealt with by the court in accordance with its own understanding of the principles of capitalization.

The consequence of the recent Supreme Court judgments was that beneficiaries of income were denied the enjoyment of stock dividends paid by companies of which an estate (in the *Waters* case) and a trust (in the *Hardy* case) were shareholders, for the reason that the dividend was regarded by the court in each case as a dis-

[1] [1956] S.C.R. 889; 4 D.L.R. (2d) 673; [1956] C.T.C. 217; [1956] D.T.C. 1113; on appeal from the Court of Appeal for Ontario, [1955] O.R. 268, [1955] 2 D.L.R. 176.

[2] [1956] S.C.R. 906; 4 D.L.R. (2d) 721; [1956] C.T.C. 233; [1956] D.T.C. 1121; on appeal from the Court of Appeal for Ontario, [1955] O.W.N. 835, [1955] 5 D.L.R. 10.

[3] [1949] S.C.R. 574; [1950] 1 D.L.R. 8; [1949] C.T.C. 316; 4 D.T.C. 629.

[4] Section 15 of the Income War Tax Act, R.S.C., 1927, c. 97, read: "When, as a result of the reorganization of a corporation or the readjustment of its capital stock, the whole or any part of its undistributed income is capitalized, the amount capitalized shall be deemed to be distributed as a dividend during the year in which the reorganization or readjustment takes place and the shareholders of the said corporation shall be deemed to receive such dividend in proportion to their interest in the capital stock of the corporation or in the class of capital stock affected".

tribution of capital. The Supreme Court rejected the submission that the stock dividend was merely a device whereby undistributed income of the company was made available to the shareholders and held that there had been an actual capitalization of the income at the time of the declaration and payment of the dividend and that the character of the amount received by the estate or trust was determined by that development. In these cases, as in the *Bagg* case, the question of whether income had been capitalized was answered by reference to general principles.

Although in the *Waters* and *Hardy* cases there is no reference to *Bagg*'s case, the issue of whether or not there had been a capitalization of income was the central point in all three cases. The question arose on all three occasions in connection with an effort to distribute corporate profits through the medium of redeemable preferred shares. In the *Bagg* case, the reasons for the corporate acts that were under review were never explained, and indeed were almost ostentatiously ignored. In the circumstances of the *Waters* and the *Hardy* cases, the purpose behind the companies' actions could not be ignored, but the court again made it clear that the reasons motivating the directors had no significance in the legal sense. It is not without interest to observe that, so far as can be determined from the judgments, the directors in no instance intended that capitalization of income should follow from their actions. Nevertheless the court in *Bagg*'s case (Kerwin, Rand and Estey JJ., Rinfret C.J. and Kellock J. dissenting) arrived at the conclusion that capitalization had taken place for reasons that have a striking similarity to those given by the court in the *Waters* case (Kerwin C.J., Rand, Kellock, Locke and Cartwright JJ.) and the *Hardy* case (Kerwin C.J., Rand, Locke, Cartwright and Nolan JJ.). In *Bagg* the decision was reached by following a practical line of reasoning with only passing references to United Kingdom decisions. In the recent cases the extensive attention given to the British decisions serves to obscure the fact that the judgments are essentially in keeping with the earlier Canadian case.

In order to arrive at an understanding of the approach taken by the Supreme Court it is necessary to review the facts in each instance. In *Bagg*'s case the company over a period of years had brought about a loss on capital account by writing off goodwill that had been credited to paid-up capital at the time of incorporation. Capital to the extent of $140,000 out of an original paid-up capital of $180,000 had thus been written off during the life of the company as not represented by available assets. The business

operations of the company, however, had been successful because at the relevant time, that is to say in 1938, the company had undistributed income on hand of some $38,000.

The accounting treatment of the capital write-off was to charge the loss first against undistributed income and then, as to the balance, against capital. In 1938 it was decided to give effect to the write-off and an application was made for supplementary letters patent reducing the authorized capital of the company from $200,000 to $79,200. This was done by cancelling $20,000 of unissued shares and reducing the par value of the 1,800 issued shares from $100 to $44, thus bringing paid-up capital down to $79,200. The reduced par value shares were at the same time converted into 1,800 preferred shares of a par value of $40 each and 1,800 common shares of a par value of $4 each. A few days after these matters were completed, the company redeemed the new preference shares, which would appear to have been the ultimate purpose of the transaction.

When the facts came to the attention of the Department of National Revenue the purported write-off of capital loss against earnings was disallowed. The taxpayer did not dispute this disallowance and it was admitted, for the purposes of his appeal, that the company had undistributed income on hand when it readjusted its capital in 1938. Bagg's argument was that this income had not been capitalized and that, if it had been capitalized, it was not "as a result of the readjustment of [the] capital stock" of the company so as to bring the case within section 15 of the Income War Tax Act with a resulting deemed dividend to the shareholders.

The attention of all the judges was focussed on the company's petition for supplementary letters patent, and the letters patent themselves. Opinions differed on whether either or both effected a capitalization of income. In his reasons for judgment Kerwin J. said:[5]

> Under section 15, the two questions to be determined are whether that income was capitalized and, if so, was it as a result of the readjustment of the Company's capital stock. The answers to both depend upon what the Company did and the evidence of William Edward Johnson [an accountant with the Company] makes that matter clear. . . . the first two questions and the answers thereto on his cross-examination are as follows:—
>
> 'Q. Can you tell us what happened to the undistributed income of

[5] [1949] S.C.R. at p. 588.

> $38,091.61 which existed at the date when the change in the capital set-up of the Company took place?
>
> 'A. Could I have that question again? (Question read by reporter). Well, the effect of the letters patent which were issued was to reduce or write off the capital of the Company by $100,800, thereby reducing the capital to $79,000 or $77,000. I just do not recall the amount. Now, you asked me what happened to the $38,000. Well it is assumed then that $38,000 still remained in the Company and formed part of the $79,000.
>
> 'Q. That is right? the $38,000 formed part of the $79,000?
>
> 'A. That is right.'
>
> If the problem be treated as one of fact, the testimony of this witness is conclusive and, in so far as they are matters of law, upon the fact deposed to by him, that the Company changed the undistributed income into capital, the answer in law is that that change or capitalization was as a result of the readjustment of June 3, 1938.

Rand J. dwelt on the point that, although capital to the extent of $140,000 had been written off, the petition for the reduction of capital represented that the lost capital was only about $101,000 and that the reduced paid-up capital was to be $79,200. To him this appeared as a de facto capitalization of undistributed income indicated by the form of the balance sheet and, when the supplementary letters patent were issued, the appropriation of income to capital became irrevocable.

Without reviewing the *Bagg* case at greater length, it is fair to say that the issue of capitalization turned on the effect attributed to certain formal acts of the corporation as they were reflected in the company's accounts. Where there had formerly been capital and undistributed income there appeared only capital, and the majority held that the income had been capitalized.

In the recent cases, the issue was raised in a different context. Both companies (Dodds Medicine Company Limited in the *Waters* case and G. T. Fulford Co. (Limited) in the *Hardy* case) had taken appropriate steps to permit their shareholders to enjoy the tax relief afforded by the 1950 amendments to the Income Tax Act. Each company had paid the 15% tax on undistributed income, thereby creating tax-paid undistributed income. It had then declared and paid a stock dividend by issuing paid-up preferred redeemable shares to the shareholders. By so doing the machinery of section 73 (now section 81) was set in motion: the payment of the stock dividend brought about a deemed or notional capitalization of income and the deemed capitalization in turn brought about a deemed dividend equal in amount to the amount of notionally capitalized income. The deemed dividend, however, was

neutralized by the tax-paid undistributed income in the company's hands and the shareholders suffered no tax. The proponents in these cases were not, however, shareholders in their own right but were the income beneficiaries of an estate or trust, the trustees of which were the shareholders.

In order that Colonel Waters, in the one case, and the beneficiaries of Hardy's trust, in the other, might enjoy the stock dividend, or, more accurately, the cash proceeds, because redemption followed soon after receipt of the shares, it was necessary to establish that the estate or the trust had received income from the company and not capital. If the undistributed income in the companies' hands had in fact been capitalized, the stock dividend was capital in the hands of the trustees. The question of capitalization thus raised appears to be no different from the question that came up in *Bagg*'s case.

In the recent cases the reasons advanced by the Chief Justice, Rand and Kellock JJ., who each wrote judgments, are alike in their general handling of the problem and have a strong affinity to the reasoning of the earlier case. All agreed on the point that the profits had been capitalized by the declaration and payment of a stock dividend, although the arguments do not follow the same paths.

The Chief Justice in the *Hardy* case, after quoting the resolutions of the directors successively declaring a stock dividend and providing for redemption of part of the shares in which it was paid, had this to say:[6] ". . . both resolutions were undoubtedly passed under the authority of s. 83(3) of the [Dominion] *Companies Act*, now R.S.C. 1952, c. 53, the intention obviously being to convert the tax-paid undistributed income to the extent of $260,000 into capital and to issue the preference shares fully paid to the shareholders". It would seem that the intention to convert income into capital was attributed to, or, it is more correct to say, imposed upon, the directors on the authority of a quotation from one of the English decisions on the subject. The Chief Justice said:[7]

> In *Commissioners of Inland Revenue* v. *Fisher's Executors*, [1926] A.C. 395 at 411, Lord Sumner, referring to statements which appear in some of the reported cases that it is the intention of the company that is said to be dominant, said that desires and intentions are things of which a company is incapable, these being the mental operations of its shareholders and officers, and that:—
>
> 'The only intention that the company has, is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox

[6] [1956] S.C.R. at p. 911. [7] *Ibid.*, p. 912.

> to say that the form of a company's resolutions and instruments is their substance.'

In short, what the company did is what governs, and what it did was to replace profits or surplus or whatever it was called by paid-up capital in its balance sheet and issue paid-up shares thereon. By so doing it capitalized its profits.

Mr. Justice Rand dealt with the issue in much the same way. Writing in the *Waters* case, he remarked:[8]

> A joint stock company . . . is in absolute control of the profits which its business produces. They may be distributed as dividends, kept in reserves, applied to restore lost capital assets or be capitalized by appropriating them as assets representing or fulfilling the payment of unpaid existing or newly issued share capital.

He then addressed himself to the theory according to which the transformation from income to capital takes place. After remarking that a declaration of a dividend which the shareholder has the option of receiving in cash or in paid-up shares will expose him to tax, he turned to the case of a declaration of a stock dividend with no option to receive cash. He said:[9]

> The company by declaration appropriates an asset available for dividends to the capital asset structure and creates for the shareholder a new capital stock-holding, with the same fractional interest in a new total capital asset as before.

His language here is strongly reminiscent of his remarks in the *Bagg* case, where he said that the action of the company "involved the irrevocable appropriation of the undistributed profits to capital and was, therefore, a capitalization . . .".[10] In that case supplementary letters patent in his opinion had confirmed a *de facto* capitalization indicated by the form of the balance sheet. In the *Waters* case, the issue of paid-up shares of capital stock served the same purpose—the appropriation was irrevocable.

In *Waters*' case, counsel pressed the argument that the company's intention was to release earnings to the shareholders. His lordship's comment in this regard was as follows:[11]

> The company undoubtedly intends by its total act to pass money to the shareholder: but if what the company does converts the earnings into capital, the 'intention' of the company must take account of that fact: it 'intends' that fact; and to carry the intention to a conclusion it intends to distribute capital assets by means of an authorized reduction in capital stock. Here form is substance; and the moment form has changed the character of the earnings as assets, the intention follows that change.

[8] *Ibid.*, p. 901.
[9] *Ibid.*, p. 903.
[10] [1949] S.C.R. at p. 591.
[11] [1956] S.C.R. at p. 905.

Mr. Justice Kellock in the *Waters* case took a somewhat different approach, concerning himself with the provisions of the Ontario Companies Act under which the stock dividend had been declared. After noting that section 96[12] provides that the directors of a company may declare a stock dividend and may issue therefor shares of the company "as fully paid or partly paid", he said:[13]

> It would therefore appear clear upon the face of this statute that an issue of paid-up shares by way of stock dividend requires the contemporaneous appropriation of sufficient of the company's undistributed profits to provide for the payment up of the shares; in other words, for the capitalization of the requisite amount.

He then proceeded to discuss the contention of counsel for the income beneficiary that there was no "permanent" addition to the company's capital, but in so doing his lordship argued from the premise that capitalization had already taken place when the stock dividend was declared. One suspects that the arguments of counsel on the permanence or otherwise of the addition to capital were concerned with the question of whether or not capitalization had taken place. His lordship dealt with them as though the question was whether the capitalized fund retained that character when it was paid out immediately after being created.

Mr. Justice Kellock's adherence to the form determines substance principle enunciated by the Chief Justice and Rand J. was clearly expressed in the statement that "Once shares are issued as paid-up shares, that portion of the undistributed profits in the hands of the company appropriated for the purpose of paying up the shares, immediately becomes capitalized".[14] This remark is followed by the statement that "The provisions of the Ontario Act to which I have referred so provide . . .". With respect, there are no provisions in the Ontario act which say that upon the declaration of a stock dividend undistributed income shall be capitalized and, reading further in his lordship's remarks, it appears that he was still addressing himself to the question whether the shareholders would receive income when the shares were redeemed. This is evident from the following comment:[15]

> Even where redemption takes place out of profits, therefore, the

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[12] The Companies Act, R.S.O., 1950, c. 59, s. 96, read as follows: "For the amount of any dividend which the directors may lawfully declare payable in money, they may declare a stock dividend and issue therefor shares of the company as fully paid or partly paid, or may credit the amount of such dividend on the shares of the company already issued but not fully paid, and the liability of the holders of such shares shall be reduced by the amount of such dividend".

[13] [1956] S.C.R. at p. 893. [14] *Ibid.*, p. 899. [15] *Ibid.*, p. 900.

> capital paid up on the shares originally appropriated out of profits remains as capital. This emphasizes, if emphasis be needed, that, in the purview of the statute, profits which have been used to pay up an issue of shares become capital and remain so from the moment the shares are so paid up.

Two comments appear to be justified. The first is put forward with due regard for the complete absence of any mention of the *Bagg* case in the *Waters* and *Hardy* cases. It appears, nevertheless, that the concept of capitalization applied by the Supreme Court of Canada in 1956 is intrinsically the same as the one which had been developed by the court in 1949.[16] The second comment is that capitalization, as understood by our Supreme Court, is quite different from capitalization as conceived in the British cases and accepted by provincial courts in Canada. The gist of the United Kingdom decisions seems to be the conception that assets that could have been distributed or made available for distribution as profits to the shareholders have been permanently applied by the company to its capital purposes. It is not enough that the balance sheet shows paid-up capital in lieu of earned surplus; there must be a clear indication that the company not only has changed the accounting presentation but the substance as well, so that the assets are permanently retained and used in the business and can be paid out to shareholders only on a reduction of capital. If that is the purport of the British cases, then the actions of a Canadian company that transformed profits into share capital on its balance sheet, with the announced intention of redeeming the new shares immediately thereafter, could not be regarded as capitalization in the British sense. This is precisely what was done by the Booth Lumber Company Limited, whose actions were reviewed by the Ontario courts in *Re Fleck*.[17] In that case it was held by Hogg

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[16] It may be of some interest that the *Bagg* case is referred to only in the factum of the appellant (Colonel Waters) in the *Waters* case and then in a manner that is anything but indicative of its significance to the issue there under discussion. It was said in this factum that "Income tax cases, of which a few are here cited, have adopted similar principles in determining the nature of capital and income for income tax purposes" and the *Bagg* case was then cited. Although the issue of capitalization arose in the *Bagg* case in connection with a section of the Income War Tax Act, there is nothing in the reasons of the judges to indicate that their conclusions were influenced by any provisions of that act or were applicable only to that act.

[17] [1952] O.R. 113; [1952] 2 D.L.R. 657, [1952] C.T.C. 196, [1952] D.T.C. 1050; affirmed [1952] O.W.N. 260, [1952] 2 D.L.R. 657, at p. 664, [1952] C.T.C. 205, [1952] D.T.C. 1077. For a comment on *Re Fleck* see Thom (1953), 31 Can. Bar Rev. 78, a comment that was followed by correspondence from Mr. H. Heward Stikeman, Q.C., Mr. M. Gerald Teed, Q.C., Professor F. E. LaBrie and Mr. Frank M. Covert, Q.C., in the same volume at pages 225, 343, 346 and 348.

J.A. and, on appeal, by the full Court of Appeal, that the actions of the company did not result in the capitalization of its undistributed income. The Supreme Court now says categorically that the *Fleck* case was wrongly decided and the implication is overwhelming that the British concept of capitalization was rejected.

The application of the principles to be found in the British cases entails an extensive review of the actions of whatever company is involved in order to determine whether in the final result it could or could not be said that there had been a permanent addition to the company's capital assets. As is apparent from any effort to rationalize the cases, this judicial process is conducive to differences of opinion, even among judges dealing with the same facts, and to much distinguishing of cases on their facts with consequent confusion and uncertainty in the law. It affords a certain feeling of relief, therefore, to observe that the Supreme Court has chosen to follow the relatively clear-cut and practical test of asking whether profits, in the accounting sense, have been formally and irrevocably applied to paid-up capital.

An extensive discussion of the numerous cases in the provincial courts on the question of the capitalization of income is hardly necessary in the light of the Supreme Court decisions. A comment on the attitude of the Supreme Court to the decision of the Ontario courts in the *Fleck* case is however relevant. Both the Chief Justice and Kellock J. stated flatly that the case had been wrongly decided. Kellock J. referred to other Ontario cases in which the decision was that income had been capitalized and, without approving them, nevertheless did not criticize them. It may be fair to remark that the differing decisions in the Ontario courts may not have arisen from any disagreement on principle but on the application of principle, about which there was general agreement, to the differing facts of each case. Pickup C.J.O., in his reasons for judgment in *Waters'* case, had this to say:[18]

> I do not propose to discuss the numerous cases dealing with the question whether a company has, in the facts of the particular case, capitalized surplus income, as the cases are fully and ably discussed in the judgment of the learned Chief Justice of the High Court in *Re McIntyre*, [1953] O.R. 910; [1954] 1 D.L.R. 192; [1953] C.T.C. 372. To review them in the instant case would be to repeat much of what the learned Chief Justice said in the *McIntyre* case. The result of the cases, in my opinion, is that it must be decided in each case whether the company by its corporate acts so dealt with its accumulated surplus income as to appropriate it irrevocably to capital purposes of

[18] [1955] O.R. at p. 279.

the Company. I adopt the language of Hogg J.A. in the *Fleck* case where he said, at p. 118: 'The conclusive test is whether or not the company has increased its capital in the distribution of the surplus profits'.

A company having surplus income may withhold it from distribution and use it for capital purposes without taking it into its capital structure, or may withhold it from shareholders and take it into its capital structure by issuing paid-up stock in lieu of a cash dividend. In the *Fleck* case the corporate acts of the company show that the company did not withhold its accumulated surplus income from shareholders nor did it appropriate such income to any capital purpose. In doing what it did the company did not in fact increase its capital. It did in form momentarily convert the surplus income into capital by issuing paid-up shares by way of stock dividend, but at the same time as it declared the stock dividend it committed itself to immediate redemption of the shares. If one disregards the tax situation, which no doubt prompted the company's acts to take the form they did, it will be seen that what the company in reality did was to distribute its accumulated surplus income among its shareholders by channelling it through its capital account. I think all that the *Fleck* case holds is that, in the circumstances I have mentioned, the moneys received by the shareholders were income and not capital, within the meaning of the cases dealing with capitalization of income. The *Fleck* case does not, in my opinion, hold that in a case, such as the instant case, where the company in issuing shares as a stock dividend does not at the same time commit itself to immediate redemption, its acts can be considered as being anything else than capitalization of income, binding as such upon the shareholders.

The Ontario judges were following the reasoning of the British cases and hence the conception that profits became capitalized only when they had been permanently transformed and used for capital purposes. The unavoidable result of this approach had been to produce a conflicting body of jurisprudence that incited rather than quieted litigation. It was the Supreme Court that, by reaching back to its earlier decision, for the first time applied to the stock dividend cases a rule that is simple and practical. The court did not overlook factors that would have been taken into consideration if the issue had come before a court in Great Britain, but rather regarded them as being irrelevant to its understanding of capitalization. One can be grateful to the Supreme Court for asserting its independence of precedents developed in other jurisdictions in the context of different statutory provisions and, at the same time, avoid criticism of provincial courts that did not have the same freedom of decision.

It now appears to be settled law in Canada that the appropriation of earned surplus to paid-up capital in the books of the

company in some formal way effectively capitalizes the surplus. Beyond that the *Bagg, Waters* and *Hardy* cases do not go, and further questions may arise as to whether surplus has been capitalized in circumstances where it is not specifically applied to paid-up capital. What, for example, would be the situation where a company that had transformed all its surplus into tax-paid undistributed income then proceeded to wind up? Under section 81 of the Income Tax Act the shareholders as such would not be subject to tax, but this would not answer the question whether the proceeds of realization in excess of paid-up capital were received as income or capital. There are precedents in British cases that would be useful, but it may be asked what weight should be given to them in the light of the *Waters* and *Hardy* judgments.

STUART THOM*

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AGENCY —THE FOREIGN PRINCIPAL PRESUMPTION—RECENT DEVELOPMENTS IN ENGLISH LAW.—It was once a generally accepted proposition that when an agent contracts on behalf of a foreign principal he is presumed to undertake also a personal liability. A clear statement of this point of view may, for instance, be found in Bowstead's Digest of the Law of Agency.[1] Halsbury's Laws of England is to the like effect.[2] Dr. Schmitthoff in his Export Trade[3] takes the same position, citing as his authority the judgment of Pearce J. in *Rusholme & Bolton & Roberts Hadfield Ld.* v. *S. G. Read & Co. (London) Ld.*[4] The facts of this case were that an Australian company ordered goods from the plaintiffs through their Australian agents, subject to confirmation and payment by the defendants, a confirming house in London. This confirmation was later given in writing but the Australian company cancelled their orders and in an action by the plaintiffs against the defendants, who refused to accept the goods, it was held that by their "confirmation" the defendants assumed the liability of a principal as between themselves and the plaintiffs and therefore were liable to the plaintiffs in damages. The following passage at page 150 in the judgment of Pearce J. deals with the position arising from the foreign character of the principal:

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[1] (11th ed., 1951) Article 92, at p. 195.

[2] (3rd ed. by Simonds), Vol. I (1952), pp. 218 and 230.

[3] (3rd ed., 1955) p. 132.

[4] [1955] 1 W.L.R. 146; [1955] 1 All E.R. 180.

> The fact that a person is agent and is known so to be does not of itself prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances. Where he contracts on behalf of a foreign principal there is a presumption that he is incurring a personal liability unless a contrary intention appears; and similarly where he signs in his own name without qualification.

The learned judge then went on to cite some remarks of Scrutton L.J. in *Brandt* v. *Morris*[5] on the effect of unqualified signatures. He continued by citing further from the same judgment of Scrutton L.J.:

> The other fact which I take into account is that Messrs. Sayles Bleacheries are foreigners, and while I think that one cannot at the present day attach the importance which used to be attached forty or fifty years ago to the fact that the supposed principal is a foreigner, it is still a matter to be taken into account in deciding whether the person said to be an English agent has or has not made himself personally liable.

This Pearce J. accepted as a correct statement of the present law on the question.

Other textbooks which take the same orthodox view are Pollock on Contract,[6] Salmond and Williams on Contract,[7] Benjamin on Sale[8] and Sutton and Shannon on Contracts.[9]

This body of recent and weighty opinion should, it is with respect suggested, be borne in mind when reading statements such as the following extract from a note in The Conveyancer and Property Lawyer on *Rusholme & Bolton & Roberts Hadfield*:

> The learned judge's statement that, where an agent contracts on behalf of a foreign principal, there is a presumption that he is incurring a personal liability unless a contrary intention appears, would, however, seem open to question. Although this view was held for some considerable time, it has generally been accepted that it no longer accords with the modern law.[10]

The authority generally relied upon by those who subscribe to this view is *Miller, Gibb & Co.* v. *Smith & Tyrer, Ltd.*[11] The facts of this case were that Smith & Tyrer Ltd. executed a document "by authority of our principals" which was expressed to be a "contract by which our principals sell through the agency of Smith & Tyrer Ltd. . . .". On this the Court of Appeal (Swinfen Eady and Bankes L.JJ., Bray J.) held that it was clearly intend-

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[5] [1917] 2 K.B. 784, at p. 797.
[6] (13th ed., 1950) p. 81.
[7] (2nd ed., 1945) p. 413.
[8] (8th ed., 1950) p. 248.
[9] (5th ed., 1956) p. 506.
[10] (1955), 19 Conv. (N.S.) 144, at p. 145.
[11] [1917] 2 K.B. 141.

ed that the agent was not to incur a personal liability. Thus Bray J. said at page 163:

> The usage by which the principal is not to be liable and the agent is to be liable is, in my opinion, excluded by the express and unambiguous terms of the contracts, and the presumption, if it exists, is completely rebutted.

Earlier at pages 162-163 Bray J. had discussed the continued existence of the presumption:

> Many years have elapsed since Blackburn J. stated that there was this usage. Trade has changed greatly and has increased enormously. My experience at the Bar and on the Bench in the Commercial Court leads me to doubt whether this usage still exists. British firms and companies do not hesitate to make contracts with foreign firms and companies, whether negotiated or not through British agents. British agents are loth to make themselves personally responsible for their foreign principals. Anything in the shape of a del credere commission is rare. But however that may be, according to the terms of the usage it seems only to apply when the foreign principal is buying. To apply it to such contracts as those which we are considering would be contrary to *Gadd* v. *Houghton*[12] and *Glover* v. *Langford*,[13] as well as to the passage I have quoted from Smith's Leading Cases. In my opinion the true view is, whether the foreign principal is a buyer or a seller, that the facts that the principal is a foreigner and that the agent has not disclosed his name are, as Coleridge J. said in *Lennard* v. *Robinson*,[14] circumstances to be considered, and when the facts are doubtful or, in the case of a verbal contract, in dispute, or when there is a written contract the terms of which are ambiguous, they are of some importance; but when there is a written contract the terms of which are unambiguous they are of no importance, and it is not true to say that there is a presumption of fact or law that the agent for the foreign principal is personally liable.

The denial of the existence of the presumption, it is submitted, refers merely to the situation where the contract is unambiguous, and the passage, by admitting the importance of the foreign character of the principal when there is an ambiguity, leaves at least a weak presumption of fact in existence in these circumstances.[15]

Neither of the other members of the court went out of his way to cast doubt upon the continued existence of the presumption and, as Pearce J. pointed out in *Rusholme & Bolton & Roberts Hadfield*, though *Miller, Gibb* was cited to the Court of Appeal later that same year in *Brandt* v. *Morris*, Scrutton L.J. took the view that the presumption still existed.

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[12] (1876), 1 Ex. D. 357.
[13] (1892), 8 T.L.R. 628.
[14] (1855), 5 El. & Bl. 125.
[15] This view appears to have commended itself to Cheshire and Fifoot in the first two editions of their Law of Contract. See *post* page 342.

However, as the extract from the judgment of Scrutton L.J. in *Brandt* v. *Morris* shows, the presumption has been of waning strength and there are not wanting both text writers and judicial opinions to lend support to the view expressed in the "Conveyancer" note. Thus Chitty on Contracts[16] and Scrutton on Charterparties[17] both deny the existence of a general presumption of personal liability and Scrutton queries *Rusholme & Bolton & Roberts Hadfield.* In his Principles of the Law of Agency (1952) Professor Hanbury says in discussing the case of *Universal Steam Navigation* v. *McKelvie*:[18]

> It is noteworthy that counsel for the owners do not appear to have attempted to make use of the argument that an agent contracting on behalf of a foreign principal ipso facto incurs personal liability; it is submitted that the decision has the oblique effect of killing such a suggestion for the future.[19]

This passage appears to be somewhat at odds with his treatment of *Brandt* v. *Morris* at pages 161 and 184. In the latter place he appears to accept Scrutton L. J.'s view of the force of the presumption which, as has been seen, was used by Pearce J. in *Rusholme & Bolton & Roberts Hadfield* as authority for the continued existence of the presumption. Professor Hanbury says of the presumption at page 184:

> though we are not yet entitled to ignore it, [it] cannot in view of *Miller, Gibb* v. *Smith & Tyrer* and *Universal Steam Navigation* v. *McKelvie,* be regarded as very robust.

This seems to be an admission that the killing in *McKelvie* left a ghost to haunt the precincts of the law.

Furthermore, in the *McKelvie* case, Viscount Cave L.C. at page 496 did allude to the foreign principal rule in terms which seemed to make it clear that the case turned upon the wording of the documents before the court and was not to be taken as an authority on mercantile customs:

> I think it desirable to add, in order to prevent misapprehension, that in the present case no evidence was given . . . of any custom of the trade or port that agents not disclosing the names of their principals at the time of making a contract were personally liable as principals; nor was it suggested (as in *Miller, Gibb & Co.* v. *Smith and Tyrer, Ld.*) that there was any general or special custom that an agent acting on behalf of a foreign principal undertook the liability of a principal.

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[16] (21st ed., 1955) Vol. II, pp. 56 and 60.
[17] (16th ed., 1955) pp. 39-40.
[18] [1923] A.C. 492.
[19] At p. 164.

This remark, it is submitted, indicates that Cave L.C. had not closed his mind to the possibility that the foreign character of the agent might be of importance when the court was asked to notice judicially a general custom or when a special custom was proved.

Further to the point that the *McKelvie* case was not fatal to the old rule about the foreign principal, it seems relevant to point out that in the three recent cases in which the foreign principal rule has been discussed no blighting influence was specially attributed to *McKelvie*. In *Holt & Moseley* v. *Cunningham*[20] and *Rusholme & Bolton & Roberts Hadfield* v. *Read* it was not even mentioned. In *Lester* v. *Balfour Williamson*[21] it was one of the principal authorities relied on, but counsel for both sides referred to the foreign principal presumption as being still alive (though counsel for the appellant did remark that it had less force today) and the court made no comment upon this acceptance of the presumption.

The case was an appeal from justices on the question whether brokers in England acting for disclosed principals in South Africa could be held criminally liable on the wording of a statutory instrument in respect of a contract which they had been instrumental in creating between their principals in South Africa and purchasers in England. It was held by the court that it was clear from the contract itself that the brokers were not intended to incur a personal liability on the contract and in consequence incurred no criminal liability under the terms of the statutory instrument.

Much reliance was placed on *Gadd* v. *Houghton*,[22] since the formula "on [or "for"] account of . . ." was used in both cases. Now Sankey J. in *Harper* v. *Keller*[23] treated *Gadd* v. *Houghton* as a case where "the evidence contained in the document itself" rebutted the presumption arising from the foreign character of the principal and, in view of this treatment of the fundamental authority used in *Lester* v. *Balfour Williamson*, it seems a reasonable deduction to treat that case too as an example of evidence rebutting the presumption. The *McKelvie* case was mentioned in *Lester* as giving House of Lords approval to the decision in *Gadd* v. *Houghton*.

Professor Powell is also to be numbered among those who do not believe in the continued existence of the presumption. In his Law of Agency (1952) at pages 207-208 he attributes the existence of the presumption to inadequate means of communication and transport and says:

[20] (1949), 83 Ll. L. Rep. 141.
[21] [1953] 2 Q.B. 168.
[22] (1876), 1 Ex. D. 357.
[23] (1915), 84 L.J.K.B. 1696, at p. 1698.

> . . . it was not surprising, therefore, that the Court of Appeal in *Miller, Gibb* v. *Smith & Tyrer* should doubt whether the presumption still existed.

He then cites a passage from the judgment of Pritchard J. in *Holt & Moseley* v. *Cunningham*[24] at page 145 in which the learned judge unequivocally stated that in his opinion the old presumption no longer existed and accepts the statement as correct of the modern position, saying:

> Whether the agent's authority exists, therefore, is a question of fact, and there is no longer any legal presumption that the authority does not exist.

Upon this statement it may be remarked that, if Professor Powell means that there is now no presumption of law that an agent for a foreign principal is personally liable, then it may be replied that, in strictness, there never was. In a passage which Professor Hanbury (Principles of Agency, p. 182) has referred to as the classic statement of the foreign principal presumption Blackburn J., in *Armstrong* v. *Stokes*, said:[25]

> It is true that this was originally (and in strictness, perhaps still is) a question of fact; but . . . we are justified in treating it as a matter of law. . . .

If, on the other hand, Professor Powell means that there is now no presumption of fact he would appear to come near to contradicting himself, for in a footnote to his discussion of this topic he says:

> Even today, the court may more readily infer that an agent accepts personal liability where he transacts business for a foreign principal; but the inference still depends on the facts in each case.

This seems to mean that the court may regard it as a "common probability of fact" that when an agent contracts on behalf of a foreign principal he accepts personal liability and, taking the definition of a presumption of fact in Wills on Evidence[26] as a "common probability of fact", there is therefore, in Professor Powell's footnote, a statement that there is a presumption of fact, albeit weak, that an agent transacting business on behalf of a foreign principal accepts personal liability. The footnote opens with the proposition:

> It is unlikely that a mercantile usage excluding the foreign principal's liability was ever recognised.

If, as Professor Powell says at page 207, the presumption operated

[24] (1949), 83 Ll. L. Rep. 141.
[25] (1872), L.R. 7 Q.B. 598, at p. 605.
[26] (3rd ed.) p. 44.

to negative authority in the agent, on what ground was the foreign principal to be held liable? This proposition also runs contrary to the statements in Anson on Contract:

> In any case the custom, if it exists, is one which makes the agent liable to the exclusion of the principal, . . .[27]

and in Salmond and Williams on Contract:

> In such a case the foreign principal does not become a party to the contract of purchase, and cannot sue or be sued upon it.[28]

It also seems to be contrary to the treatment of the authorities in *Miller, Gibb & Co.* v. *Smith & Tyrer Ltd.* by Swinfen Eady L.J. at page 150, "The custom to which the plaintiffs refer is a custom whereby the agent alone is liable to the exclusion of his principal", by Bankes L.J. at pages 154-155, and by Bray J. at page 160, "The agent is alone liable".

Cheshire and Fifoot in the later editions of their Law of Contract[29] take the same view as Professor Powell, but in an even more absolute sense, for there is no concession such as that contained in his footnote to the possibility that the foreign character of the principal may yet possess some special significance:

> The presumption, however, no longer exists, and the foreign principal no longer forms an exceptional case.

They cite as their authority *Holt & Moseley* v. *Cunningham* and the judgment of Bray J. in *Miller, Gibb* v. *Smith & Tyrer* and give much the same practical reasons for the disappearance of the presumption as Professor Powell—improvement in communications, a reluctance among English agents to accept personal responsibility and a greater readiness to rely on foreigners. These views, however, represent a substantial change from those given in their first and second editions.[30] In these it was stated:

> There is a presumption, which is not so strong now as in former days, that an agent is alone able to sue and be sued on a contract which he makes upon behalf of a foreign principal.

After citing *Miller, Gibb* v. *Smith & Tyrer*, which they then regarded as a case where the presumption had been rebutted, they went on to say:

> The modern position would appear to be this. When the issue before the Court is whether the principal or the agent is the contracting party, the foreign status of the principal is a relevant fact of importance. If the intention of the parties is doubtful or in dispute, or if

[27] (20th ed., 1952) p. 407. [28] (2nd ed.) p. 413.
[29] (3rd ed., 1953) pp. 386-387; (4th ed., 1956) pp. 394-395.
[30] 1945 and 1949 (1st ed., pp. 306-307; 2nd ed., p. 349).

the written contract is ambiguous, it is a fact that may be decisive in assigning rights and liabilities to the agent to the exclusion of the principal. But if the written contract unambiguously shows that the principal was intended to be the contracting party, then his foreign status is of no importance whatsoever, and there is not even a presumption against the exclusion of the agent. This is a fortiori the case if the presumption is inconsistent with the express terms of the contract.

The reason for relinquishing this position, which owed much to the judgment of Bray J. in *Miller, Gibb*, in which the presumption was assigned the useful function of resolving problems, but not of overriding the clearly expressed intent of the parties, is the judgment of Pritchard J. in *Holt & Moseley* v. *Cunningham*, which has already been referred to as Professor Powell's authority for abandoning the old view.

The facts of this case were that the plaintiffs incurred freight and insurance charges in respect of goods shipped to Indian principals, in accordance with instructions given by the defendants, who acted as buying agents for the Indian principals. The Indian principals having gone into liquidation, evidence was given that the plaintiffs had once dealt directly with them but that there had been an agreement between the Indian principals, the plaintiffs and the defendants by which the defendants were appointed buying agents and authorized to operate credits and to give shipping instructions to the plaintiffs. Pritchard J. held on the evidence that it was never intended that the defendants should become personally liable for the freight and insurance charges. The relevant passage runs thus:

In my judgment, this evidence concludes this litigation in favour of the defendants because it shows, beyond a doubt, that the plaintiffs and the defendants never contemplated that the defendants should become liable to the plaintiffs for freight and insurance except in so far as they might become liable to distribute the Indian company's credits in part to the plaintiffs.

In these circumstances, there is no room for the presumption for which the plaintiffs contend, namely, the presumption that the defendants contracted personally because they were home agents contracting for a foreign principal. Since the decision of the Court of Appeal in *Miller, Gibb & Co.* v. *Smith & Tyrer, Ltd.*, . . . the so-called presumption or trade usage to this effect cannot, I think, be regarded as existing as part of the law governing commercial contracts, and the true view seems to be merely this — that when a question is raised as to the legal position of an agent contracting for a foreign principal, it is in each case a question as to what the parties intended. The intention of the parties can only be ascertained from the facts as proved in evidence, and the nationality and whereabouts of the principal is

> no more and no less than one of the facts to which such weight will be given as in any particular case the Court thinks proper.
>
> In the present case having accepted the evidence of Sir Charles Cunningham that Mr. Holt assured him that the defendants would not incur personal liability but would be liable only to distribute the credits of the Indian company, the nationality of that company appears to me to be a matter of no moment at all.[31]

Thus this view of Pritchard J. flatly contradicts that advanced by Pearce J. in *Rusholme & Bolton & Roberts Hadfield* v. *Read.* It is submitted that the decision of Pearce J. is to be preferred for reasons both legal and practical. Firstly, Pritchard J. attributed a much more sweeping effect to *Miller, Gibb* v. *Smith & Tyrer* than the overwhelming majority of textwriters or that great commercial lawyer Scrutton L.J., as, indeed, Pearce J. remarked in *Rusholme & Bolton & Roberts Hadfield.* Secondly, none of the opponents of the presumption have committed themselves so far as to suggest that it is so completely out of touch with the realities of modern life as some old presumptions which may or may not still exist, for example, the presumption of a general hiring in the law of master and servant. If the foreign principal presumption is confined to the sphere marked out for it in the earlier editions of Cheshire and Fifoot, it would still seem to have useful work to do without distorting or cramping the legal relations of the parties. Thirdly, the practical reasons urged as accounting for the withering of the presumption—improvement of communications, greater readiness to trust foreigners, reluctance of English agents to assume personal liability—seem to lose much of their force if it is remembered that parties are now attempting to achieve by special contract the sort of scheme of rights and duties which the presumption tended to produce. In his article on "Confirmation in Export Transactions", Dr. C. M. Schmitthoff points out that the object of confirmation both in bankers' commercial credits and in the case of confirmation by confirming houses in respect of contracts of sale of goods is to transfer the international character of a transaction

> from a highly vulnerable area of conflict of interest to a less vulnerable one in which such conflict is less likely to occur. Under a bankers' commercial credit the international element is removed from the seller-buyer relationship to that existing between banks or a bank and its customer, and where a confirming house is used, that element is transferred to the relationship between principal and agent.[32]

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[31] (1949), 83 Ll. L. Rep. at p. 145.
[32] (1957), 1 Journal of Business Law 17, at p. 21.

This, too, was the object of the foreign principal presumption.[33]

If the foreign principal presumption is seen as a somewhat unsophisticated essay in "preventive conflict of laws" and not merely as a quaint survival from the days of sail and paddle-wheel, there might perhaps be less readiness to dismiss it too summarily to the limbo of legal history.

A. H. HUDSON*

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MUNICIPAL LAW—ASSESSMENT—ADMINISTRATIVE LAW—POWER OF COURT OF REVISION TO INSTITUTE A GENERAL REVIEW.—A news story in the Toronto Globe and Mail on February 14th, 1957, revealed an interesting case of administrative action that in all likelihood, because of its context, will not be tested in the Ontario Supreme Court. It is not out of place, therefore, to regard the administrative action as final.

The news story states that the Toronto Township Ratepayers Association had alleged that the Court of Revision of the Township of Toronto, in the course of its sittings, reduced assessments on a number of properties where no one had filed notice of appeal.[1] In one case "a 123-acre parcel of land owned by Charwick Estates Ltd. was assessed at $22,350 in last year's reassessment program. The assessment was reduced to $3,950 by the Court of Revision . . .".[2] Proceedings in a court of revision under the Ontario Assessment Act[3] are rather informal and, since the membership need not include a lawyer, it is not surprising that written opinions of the court are rarely published. In this case the court prepared a written report to the township council, but it contains no reference to the reductions or the legal basis for them. In another news story, however, the chairman of the court was reported to have said that the court's "lawyer had advised that the court can correct 'palpable errors' in the rolls—whether ap-

[33] Another recent case in which a confirming house was held personally liable is *Sobell Industries Ltd.* v. *Cory Bros. & Co. Ltd.*, [1955] 2 Ll. L. Rep. 82.

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[1] The Assessment Commissioner had commenced a reassessment of land values some time earlier and the reassessment was put into effect in 1956 for 1957 taxes. Over 17,000 assessed properties were involved and about 1,200 assessed persons appealed.

[2] Globe and Mail, Toronto, February 14th, 1957, p. 5, column 6.

[3] R.S.O., 1950, c. 24. Referred to hereafter simply as the Assessment Act or the act.

pealed or not".[4] It may be assumed that the court took the view expressed in the newspaper account of the chairman's statement. A court comprised mostly of laymen quite naturally is not as introspective as a court of lawyers trained to reflect on their own limitations.

A court of revision is clearly not without some jurisdiction to alter an assessment roll when there has been no appeal, but Manning, in his *Assessment and Rating*, says:

> Notice of appeal is a necessary foundation for the jurisdiction of the court of revision to act in respect of assessments, either by way of increase or reduction. Except to the limited extent permitted by s. 69(19) as to palpable defects the court of revision cannot of its own initiative and without formal appeal by a ratepayer and notice deal with any assessment, and the reasoning underlying this rule is obvious, for great inconvenience and frauds would be permitted in the absence of such a rule.[5]

Manning's view, which has remained unchanged through three editions,[6] is in direct conflict with the attitude of the court of revision in this case, and my purpose here is to re-examine the merits of his view and show that it is preferable to the one taken by the court.

Although the cases cited by Manning in support of his view are old (the earliest is 1866 and the most recent is 1918), that may merely mean that the essential justice underlying his view has long been recognized and that the view is accordingly unlikely to be disturbed.

Section 69(19) of the Assessment Act provides:

> Where it appears that there are palpable errors in the roll of any municipality or of any ward, which need correction, the court may at any time during its sitting correct the same, if no alteration of assessed values is involved, and if any alteration of assessed value is necessary, the court may extend the time for making complaints for ten days from a day named by the court and may then meet and determine the additional matter complained of, and the assessor may be or may be directed by the court to be, for such purpose, the complainant.[7]

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[4] The Telegram, Toronto, February 14th, 1957, p. 16, col. 1.

[5] (3rd ed.) p. 254.

[6] (1st ed., 1928) p. 231; (2nd ed., 1937) pp. 247-248.

[7] Section 69(19) has been in its present form since 1904, when it first appeared as s. 65(19) of the Assessment Act, 4 Edw. VII, c. 23 (Ont.). Prior to that it read "When it shall appear that there are palpable errors which need correction, the Court may extend the time for making complaints ten days further, and may then meet and determine the additional matters complained of, and the Assessor may, for such purpose, be the complainant". See the Assessment Act of 1869, 32 Vict., c. 36, s. 60(4). When a summary power to correct palpable errors was introduced in

This subsection refers only to the correction of "palpable errors", and it clearly contemplates two different procedures: one, a summary power applicable where "no alteration of assessed value is involved"; and another, "if *any* alteration of assessed value is necessary". Before looking at other possible sources of jurisdiction, the provisions of section 69(19) must be considered more closely.

Since there is no record available, one can only surmise the reasons for the court's reduction in the assessments, but it is a fair surmise that the difference of opinion over the value of the lands assessed arose out of a quite legitimate difference of opinion over the interpretation and application of section 33 of the act, especially section 33(2*a*).[8] Section 33(2*a*) is, to say the least, a difficult section, apparently intended to protect the owner of "farm lands used only for farm purposes by the owner . . . whose principal occupation is farming". The lands are to be valued only as farm lands and without regard to the value of land in the vicinity to which section 33(2*a*) does not apply. Farm lands in the vicinity not so protected, because, say, the owner's chief occupation is not farming, are governed by all circumstances affecting value, which would make recent sale prices to speculative land developers a relevant, although not a controlling factor.

Without a great deal of information not available, it is impossible to say whether the assessor or the court gave the proper weight to the various factors, but it is submitted that a value honestly arrived at on a reasonable, even if "wrong" interpretation and application of section 33(2*a*) is not a "palpable error".

What is "palpable"? The Shorter Oxford Dictionary offers "readily perceived by any of the other senses; perceptible; noticeable, patent; easily perceived; plain, evident, apparent, obvious". What is "error"? The same dictionary offers, from several meanings, two that might be considered: "The condition of erring in opinion; the holding of mistaken beliefs; a mistaken belief; false beliefs collectively;" and "Something incorrectly done through ignorance or inadvertence; a mistake". The first meanings come from the context of religion and philosophy and should be discarded. The conclusion is that "palpable errors" are "easily perceived inadvertent mistakes". The considered opinion of the assessor that a property should be assessed at $10,000 is not an

1904 it was expressly limited to cases where no alteration of assessed value is necessary.

[8] Section 33(2*a*) was added by 1955 (Ont.) c. 4, s. 8. Section 33 is a code of rules for valuing lands and buildings.

"easily perceived inadvertent mistake", but if the value of land were shown at $13,000 and the value of the buildings at $7,000 and the total at $10,000, there is a "palpable error", although it is not apparent on the face of it whether the error lies in the valuation for the land, or for the building, or in the simple arithmetic in reaching the total. But in *Tobey et al.* v. *Wilson et al.*,[9] a case cited by Manning, the Ontario Court of Appeal refused to say that a change from $8,000, first, to $10,000 by the assessor, with no colour of authority whatever, and then to $12,000 by the court of revision, was a "palpable error" under a predecessor of section 69(19). And, in any event, the court of revision cannot make this alteration of value without complying with the procedure set out in section 69(19).

It may be questioned whether the procedure set out is mandatory since the subsection says the court *may* extend the time and *may* then meet and determine and the assessor *may* be directed by the court to be the complainant. Under the Ontario Interpretation Act "may" is permissive.[10] But it is to be noted that "may", in its permissive sense, is necessary here because the subsection does not impose a duty to correct the "palpable errors". It is within the discretion of the court to correct or not, as it pleases, but, if it pleases, it must follow the proper procedure.[11] And, if it chooses to correct a "palpable error" that necessitates "any alteration of assessed value", surely it must extend the time for making complaints.[12] Otherwise, as Manning says, "great inconvenience and frauds would be permitted".

Extending the time for making complaints for ten days "from a day named by the court" means giving notice. Notice must not only be given *by* those who appeal, but also *to* those whose assessment is appealed.[13] There is also some significance to be attached to the fact that it is the time for making *complaints* that is extended. The court can only "meet and determine[14] the additional

[9] (1878), 43 U.C.Q.B. 230, at p. 235 (Ontario Queen's Bench).

[10] R.S.O., 1950, c. 184, s. 31(r).

[11] Cf. Armour J. in *Tobey* v. *Wilson*, *ante* footnote 9, at p. 236: "These provisions [of the predecessor of s. 69(19)], with regard to notice, are imperative. Such notice is the foundation of the jurisdiction of the Court. . . ."

[12] "May" can be mandatory; see Maxwell, The Interpretation of Statutes (10th ed.) pp. 238-244; Craies on Statute Law (5th ed.) p. 264; and, in recent cases, see MacDonald J. in *Re Labour Relations Board*, [1952] 3 D.L.R. 42, at pp. 49-53 (N.S.S.C. *in banco*).

[13] The Assessment Act, s. 69(1), (3) and (11).

[14] The court's lawyer may have taken some comfort from the fact that s. 69(19) authorizes the court to "meet and *determine*" in the cases of palpable errors, whereas s. 66 requires it to "meet and *try* all complaints in regard to persons . . . assessed at too high or too low a sum". But, since s. 69(19) refers to both a summary power and a power to be

matter complained of". There must be a complainant before there can be a matter complained of. The assessor may be.[15] If he isn't, he may be directed by the court to be. But it seems clear enough that until there is a complainant there is no jurisdiction in the court "if any alteration of assessed value is necessary".

The requirement of notice has been taken to a considerable extreme. In *Rogers Lumber Yards Ltd.* v. *Town of Estevan*,[16] where the owner sued to recover taxes paid "under protest" it was proved that he had appealed an assessment of $11,525 on the ground that it was too high. The court of revision revised it upward to $17,225. The Saskatchewan Court of Appeal held that the revision court had no notice of appeal that the assessment was too low, consequently it had no jurisdiction to raise it. It could only do what the appeal notice made relevant. Section 69(20) of the current Ontario act remedies this strict interpretation. It provides that:

> Upon an appeal upon any ground against an assessment, the court of revision may reopen the whole question of the assessment, so that omissions from, or errors in, the assessment roll may be corrected, and the accurate amount for which the assessment should be made and the person or persons who should be assessed therefor may be placed upon the roll by the court, and if necessary the roll of any particular ward or subdivision of the municipality, even if returned as finally revised, may be opened so as to make the same correct in accordance with the finding of the court.[17]

Useful as this subsection may be to avoid application of the *Estevan* case under the Ontario act, it does not authorize a wholesale revision by the court. It speaks only of an appeal against an assessment, and only that assessment may be changed as a result, although it may involve adding new persons to the roll where the appeal shows, say, a joint ownership, or a division of land not known to the assessor.

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exercised by extending the time for making complaints, presumably the lesser duty to "meet and determine" rather than "meet and try" must be read as subject to the earlier duty to determine "after hearing the complainant and the assessor or assessors and any evidence adduced and, if deemed desirable, the person complained against" set out in s. 69(16). Section 69(19) cannot be read except in conjunction with the rest of the act.

[15] Cf. Armour J. in *Tobey* v. *Wilson*, *ante* footnote 9, at p. 235: "Under this section [s. 60(4), see *ante* footnote 7] it was necessary that there should be a complainant, even if it were not essential that the assessor should be the complainant, there does not appear to have been any".

[16] (1916), 34 W.L.R. 402 (Sask. D.C.J.).

[17] Subsection (20) was introduced in substantially its present form by s. 8 of An Act to Amend The Assessment Act (1903), 3 Edw. VII, c. 21, s. 8 (Ont.). Before that an earlier version, introduced in the Assessment Amendment Act, 1881 (1881), 44 Vict., c. 25 (Ont.), provided: "In case any person appeals against his assessment upon any ground, the

Moreover, the subsection speaks of the court's "finding". A finding, in a legal sense, when used in respect of a court, implies that there must be a hearing, and clearly any person whose assessment position may be changed by the outcome of that hearing is entitled to have notice and to make representations.[18]

It can hardly be questioned that a court of revision is a body charged with a judicial responsibility[19] and it is elementary law that a judicial body must give all parties affected an opportunity to be heard. Subsections (2) to (16) of section 69 all deal with the requirements of notice and there is no reason to suppose that subsections (19) and (20) of section 69 are not to be read subject to the earlier general subsections.

The fact that assessment, whether high or low, inevitably affects the tax burden on other ratepayers if it is reduced or increased, and the fact that the powers of a court of revision are so carefully delineated throughout sections 68 to 71,[20] both point to the conclusion that no person's assessment may be changed without notice to him and an open hearing held at which he is entitled to be heard.[21] Where, as in this case, the court intends to correct a "palpable error" by reducing the assessed value, notice to the assessed person may be of little importance and the assessor is a respondent rather than a complainant, but section 69(16) requires the court, on the trial of a complaint, to hear the assessor whether he is a complainant or not. Nothing in the court's report to coun-

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court of revision or the judge of the county court, as the case may be, may reopen the whole question of the assessment, so that omissions or errors in the assessment may be corrected, and the accurate amount for which the assessment should be made be placed on the assessment roll by the court or judge before handing the same over to the clerk of the municipality". The 1903 amendment entitles the court to open up a roll returned as finally revised, but only to make the roll correct in accordance with the *finding* of the court. See also s. 83 of the current act as amended by 1956 (Ont.) c. 3, s. 14, conferring power on the court of revision "upon a complaint" to make any decision the assessor could or should have made.

[18] *Re Walkerville Assessment Appeals* (1916), 11 O.W.N. 25 (County Judge on appeal from Court of Revision).

[19] See Armour J. in *Tobey* v. *Wilson ante*, footnote 9, speaking of a court of revision, "its function is judicial" (at p. 234). This is not to say that it is the kind of judicial function that only county, district and superior court judges can perform under s. 96 of the B.N.A. Act. But clearly *certiorari* would lie to review the court's excess of its judicial powers.

[20] The act uses language such as "meet and try" (s. 66), "hearing the appeals" (s. 69(15)), "after hearing the complainant and the assessor or assessors and any evidence adduced, and, if deemed desirable, the person complained against, shall determine the matter" (s. 69(16)), "meet and determine" (s. 69(19)), "the finding of the court" (s. 69(20)).

[21] But compare *Re Rosback and Carlyle* (1892), 23 O.R. 37, especially at p. 42 (C.P.D.); and see s. 69(16) and (17).

cil or in the court's minutes suggests that the procedural provisions in section 69 were followed even if the assessed value in this case could possibly be regarded as a palpable error.

Two other provisions support Manning's view. Every member of the court must take an oath that he "will, to the best of my judgment and ability, and without fear, favour or partiality, honestly *decide the appeals* of the court of revision which may be brought before me for *trial* as a member of said court".[22] This oath only obliges the member to "decide the appeals". It does not oblige him to decide anything else, honestly or otherwise. It is most unlikely that major changes in assessment values were intended to be made by a court of revision under conditions where the oath would not apply, when the oath clearly applies to the most minor matters on a proper appeal.

Moreover, the act provides that "no alteration shall be made in the roll unless under a complaint formally made according to the above provisions".[23] Section 69(19) is, admittedly, an exception, but only as to "palpable errors" *and* "if no alteration of assessed values is involved", for, if an alteration in value is necessary, the "above provisions" are implicit in the terms of the section.

In fairness to the view taken by the court and its lawyer reference should be made to section 49 of the Assessment Act, which provides:

> It shall be the duty of the clerk to report to the court of revision the facts and particulars as to any errors or omissions in the assessment roll of which he may from time to time become aware, and the court of revision shall thereupon take such steps as the court shall deem advisable and necessary to cause such corrections to be made in the roll, and shall give such notice to persons interested as such corrections may render necessary.[24]

If a section referring to "palpable errors" does not contemplate a change in assessment values without a further hearing, it should hardly be necessary to labour the view that a section referring to "errors or omissions" with no reference to a possible change in assessed values would not authorize such a change. Yet section 49 admittedly poses its own problems. While the expression "errors and omissions" in the context of section 49, where no appeal lies,[25] seems no more apt than "palpable errors" to describe a

[22] Assessment Act, s. 63 (emphasis added).
[23] *Ibid.*, s. 69(6).
[24] Section 49 first appeared as a new section in 1904, 4 Edw. VII, c. 23, s. 50.
[25] Compare s. 69(1) where "error or omission" is used in the context

difference of opinion over the proper value to be assigned to land, if "error" can refer to a trifling mistake of assessed value, the court could alter an assessed value without complying with section 69 and no appeal could be taken. This point is perhaps not pertinent to this discussion, but my own view is that section 49 was never intended to deprive an assessed person of a right of appeal. A court of revision should rely on its jurisdiction under section 69 whenever it alters an assessed value. Section 49 appeared a year after the summary power was introduced in section 69(19) and it would appear to be merely an administrative complement to the procedural provision.

The "inconvenience" to which Manning refers is a real one. The proper procedure in assessment appeals under the Ontario act is first to appeal from the assessment to the court of revision,[26] thence to a county-court judge,[27] and thence to the Ontario Municipal Board.[28] In the present case it is by no means clear that an appeal would lie to the county-court judge. An appeal will lie, at the instance of the municipal corporation, of the assessment commissioner, of any person assessed or of any municipal elector, against a decision of the court *on an appeal to that court.*[29] Nothing suggests that the judge can hear an appeal that was not first taken before the court of revision.[30]

It would be inconvenient enough if an assessed person or, in this case, the assessment commissioner had to take a matter before a county-court judge when the matter might have been disposed of before the court of revision had there been a proper hearing by that court, but the assessment commissioner may be forced to the added inconvenience of resorting to *certiorari* and

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of appeal powers. In *Re Bayack* (1929), 64 O.L.R. 14 (C.A.), Riddell J.A., speaking of a predecessor of s. 69(1), said (at p. 18), "In reality, the question is as to the meaning of the words "error or omission". Do they mean a subjective error or omission in the assessor, or an actual error in the roll? . . . it means, I think, any existing error in the roll — the expression is objective not subjective — . . . the reference is wholly with regard to the state of the roll . . .". And Masten J.A. said (at p. 22), after quoting several sections, including a predecessor of s. 49, summarizing their effect: "(4) Any discrepancy between the statement in the roll and the actual *facts* constitutes an error or omission in the assessment." (The emphasis is mine. In this context, the assessor's considered opinion on value is hardly a "fact".)

[26] Assessment Act, s. 69(1) and (3). [27] *Ibid.*, s. 72(1).

[28] *Ibid.*, s. 80 as amended by 1956 (Ont.) c. 3, s. 12 (a new section 80 substituted).

[29] *Ibid.*, s. 72(1).

[30] See Middleton J.A. in *Re Williams*, [1935] O.R. 199, at p. 201, speaking for the Court of Appeal: ". . . the jurisdiction of the District Judge is based upon there having been, in the first place, an appeal to the Court of Revision".

prohibition before the Supreme Court, for neither the judge nor the Municipal Board can review an inferior tribunal.[31]

What is needed, of course, is a power to make the proper assessment if it should be established on a proper hearing that the assessor was wrong, and that is precisely the power the Supreme Court cannot exercise on *certiorari* or prohibition. The court could only hold that the change directed by the court of revision is *ultra vires* and void, and that the original assessment is valid, right or wrong, and direct the officials of the municipality to disregard the change. While this resort to the Supreme Court is presumably available to any assessed person, it is unlikely that he could bear the time and expense involved in preparing the case. Thus the only effective remedy, where any number of changes is involved,[32] would be by action taken by the council of the municipality.

Underlying the froth of statutory interpretation in this case is a real problem of public administration. How far can a court of revision take over the functions of the assessor in circumstances depriving an assessed person of his right of appeal? The court is a lay body exercising a judicial function, dependent upon the evidence presented to it by the complainant, the assessor, and the person assessed. It can make no claim to administrative *expertise*. The assessor, on the other hand, is a man, or department of men, supposedly professionally qualified to appraise property values after investigation of the facts, and subject to appeal. If, in the circumstances of this case, the court may reduce an assessment, it may also increase an assessment, without the protective right of appeal in the assessed person that exists in all other cases. It is submitted that the real intent of the Assessment Act is that the determination of "actual value" by the assessor should be final unless appealed, and summary powers to correct errors, palpable or otherwise, without a hearing on appeal should be limited to administrative routines and not authorize an attack on the judgment involved in determining actual value.

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[31] Judicial review is a traditional prerogative of the Supreme Court and s. 96 of the B.N.A. Act would preclude any provincially appointed judicial officer exercising the power under the current interpretation. See *Toronto* v. *Olympia Edward Recreation Club Ltd.*, [1955] S.C.R. 454, and Professor Laskin's illuminating and critical analysis of the case, Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case (1955), 33 Can Bar Rev. 993, especially at p. 1012.

[32] No statement has yet appeared showing the number involved in this case.

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