COMMENTS
COMMENTAIRES

TORTS—NEGLIGENCE—FORESEEABLE DAMAGE—RIGHT TO BE CARELESS AT OTHERS' RISK.—The decision of the Privy Council in *Overseas Tankship (U.K.) Ltd.* v. *Mort's Dock & Engineering Co. Ltd.*,[1] on appeal from the Supreme Court of New South Wales can hardly fail, whatever its precise status as a precedent, to have a profound influence on the law of negligence throughout the Commonwealth.

The facts were most unusual. The defendants, charterers of the ship "Wagon Mound", by the carelessness of their servants, allowed bunkering oil to spread over the surface of Mort's Bay, Balmain. The plaintiffs owned a timber wharf some six hundred feet from the wharf at which defendants' ship was moored. Some of the bunkering oil fouled the plaintiffs' slipways and interrupted the repair operations on which they were engaged. This damage was foreseeable and was a direct consequence of defendants' carelessness, but plaintiffs made no claim in respect of it.

Plaintiffs were advised that the bunkering or furnace oil would not burn when spread on water. They therefore continued their repair operations, which included welding and burning. Two days later some cotton waste or rag, lying on debris underneath the plaintiffs' wharf, was set on fire by metal falling from the wharf. The flames set the oil afire and the wharf was severely damaged. The plaintiffs made a claim in negligence for the damage so caused. It was found that the defendants "did not know and could not reasonably be expected to have known that it [the furnace oil] was capable of being set afire when spread on water".[2] On these facts the Supreme Court of New South Wales, affirming the judgment of Kinsella J., held themselves bound by the decision in *In re Polemis and Furness Withy & Co. Ltd.*,[3] and found for the plaintiffs. The Privy Council allowed the charterers' appeal and disapproved *Polemis*. They did so on the broad ground

[1] [1961] 2 W.L.R. 126, [1961] 1 All E.R. 404 (P.C.).
[2] *Ibid.*, at pp. 131 (W.L.R.), 407 C (All E.R.).
[3] [1921] 3 K.B. 560.

that a defendant in negligence is liable only for the damage which he can reasonably foresee. Before this is discussed, it may be as well to note two differences between the facts of the present case and those of *Polemis*. There is a third to which I shall return later.

The first is that in the present case, which it is convenient to call *The Wagon Mound*, in contrast with *Polemis*, there was a completed cause of action for negligence (what is sometimes called a "threshold tort"). The defendants' carelessness caused some foreseeable damage to plaintiffs' wharf and for this the plaintiffs could successfully have claimed had they been so minded. In *Polemis*, on the other hand, there was no finding that foreseeable damage, however slight, had been caused to the plaintiff's ship. Kinsella J., in the present case, attached importance to the existence of a threshold tort,[4] which, he thought, took the case out of the principles laid down in *Bourhill* v. *Young*[5] and brought it within those laid down in *Polemis*. The Privy Council, rightly it seems, rejected this argument: "to hold B liable for consequences, however unforeseeable, of a careless act, if, but only if, he is at the same time liable for some other damage, however trivial, appears to be neither logical nor just."[6]

The second difference concerns the reason why the damage was unforeseeable. In *Polemis* the defendants could not foresee the damage because they did not know the physical facts, the presence of petrol vapour in the hold of the ship. In the present case the defendants knew the physical facts, but did not know the scientific laws by virtue of which the furnace oil could burn when spread on water. According to most German writers on the adequate cause theory, a distinction is to be drawn between the defendants' knowledge of the physical facts and his knowledge of scientific laws. He is, it is argued, to be held to a stricter liability so far as scientific laws are concerned than he is so far as facts are concerned.[7] This is logical so far as the adequate cause theory is concerned, but does not rest on any rational principle of responsibility. The common law is surely right not to draw the distinction.

The Privy Council, then, proceeded on the view that the problem presented by *The Wagon Mound* was substantially the same as that litigated in *Polemis;* but, in a bold judgment, Viscount Simonds reached the opposite conclusion from that of the Court

[4] *Supra*, footnote 1, at p. 407, n. 1 (All E.R.).
[5] [1943] A.C. 92 (P.C.).
[6] *Supra*, footnote 1, at pp. 151 (W.L.R.), 415D (All E.R.).
[7] Hart and Honoré, Causation in the Law (1959), pp. 426-434.

of Appeal forty years earlier. In essence his reasoning is as follows: If the direct consequence rule is accepted, the courts are confronted with the "never ending and insoluble problems of causation".[8] To restrict the causal rule to "immediate physical consequences"[9] as was done in *The Edison*,[10] is to draw an illogical distinction. All are agreed that some limit must be placed on the consequences for which a negligent actor is to be held responsible. The choice lies between causation and foreseeability as limiting factors, and foreseeability must, in the light of current ideas of morality and justice,[11] be preferred.

But is it true that the courts must apply either the causal test in every case or the foreseeability test in every case, throughout the tort of negligence? To present such a black and white choice is, surely, to sacrifice too much to the claims of logic and uniformity. Not all the plaintiff's interests are of equal importance. His bodily safety clearly comes first, then the security of his property from physical invasion. Freedom from emotional disturbance, and the protection of financial interests rank somewhat lower. Loss arising from the plaintiff's lack of capital is, arguably, not deserving of compensation at all. The more vital the interest, the more it deserves the protection of the law against invasion by the carelessness of others. The merit of the law of negligence, as it stood before the present decision, was that, in practice, if not in theory, the courts were able to grade the plaintiff's various interests. While they applied the causal rule when the plaintiff's body or goods were physically invaded through the defendant's carelessness, they proceeded on the view that "the test of liability for shock is foreseeability of injury by shock."[12] Again, whereas a plaintiff who suffers personal injury has always been allowed to claim damages in negligence for loss of earnings, however abnormal,[13] courts have inclined to restrict the damages recoverable for damage to chattels to the normal or usual loss of earnings.[14] This wise discrimination, however tortuous the language which concealed it, is now, unfortunately, rejected in favour of a uniform rule for all types of damage. The test of liability for fire (insofar as such liability is not strict) is foreseeability of damage

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[8] *Supra*, footnote 1, at pp. 139 (W.L.R.), 413 I (All E.R.).
[9] *Ibid.*, at pp. 140 (W.L.R.), 414 C (All E.R.).
[10] [1933] A.C. 449 (P.C.).
[11] *Supra*, footnote 1, at pp. 138-9 (W.L.R.), 413 (All E.R.).
[12] *King and al.* v. *Phillips*, [1953] 1 Q.B. 429, per Denning L.J. at p. 441.
[13] *Phillips* v. *L.S.W.R. Co.* (1879), 5 C.P.D. 280.
[14] *The Soya*, [1956] 2 All E.R. 393.

by fire,[15] and so on, presumably, throughout the law of negligence.

Whatever one thinks of the argument for uniformity, it is certainty refreshing to find the Privy Council attaching importance to the moral considerations involved in civil liability. "It does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be 'direct'. It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.,"[16] says Viscount Simonds, and again, "Who knows or can be assumed to know all the processes of nature?"[17]

But is it as obviously just as the Privy Council supposes to restrict recovery to the foreseeable harm, even in the tort of negligence? The *Polemis* rule was hard on the defendant; but the *Wagon Mound* rule is equally hard on the plaintiff. The defendant has inflicted damage on the plaintiff: the defendant has fallen below the "minimum standard of behaviour" set by society for the protection of persons and property. The plaintiff has not. Is it obvious that the plaintiff ought to bear the risk that the defendant's carelessness will have more serious consequences than seemed probable? If so, a new and, it seems to me, immoral principle will have been established; that a man may act carelessly, yet count on limiting his liability towards his neighbours to a certain foreseeable amount of damage. Let us call this amount X. Up to X the defendant is careless at his own risk; above it he may be careless at his neighbour's risk. We do not, it is true, know all the processes of nature, nor all the facts about the world in which we act. Our actions, therefore, often have unforeseeable consequences. Ought not the risk of nature's unpredictable ways to lie on those who, for want of proper care, let the things committed to their charge escape from their control?

In criminal law the rule of *mens rea* is salutary. If by negligence, even gross negligence, I injure someone who, unknown to me, is a haemophiliac, it seems unjust that I should be guilty of

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[15] *Supra*, footnote 1, at pp. 141 (W.L.R.), 415 G (All E.R.).
[16] *Ibid.*, at pp. 139 (W.L.R.), 413 E (All E.R.).
[17] *Ibid.*, at pp. 142 (W.L.R.), 416 A (All E.R.).

manslaughter if he dies.[18] But if he sues me in a civil action for negligence, it seems self-evident that he should recover medical expenses, and damages for loss of earnings, pain and suffering, however unforeseeable the disability which has aggravated his loss. When compensation is in question, the court is concerned with distributing risks, and a fair solution requires that weight be given to the moral claims of the plaintiff, not merely the moral deserts of the defendant. Other things being equal, when A who is at fault harms B who is not at fault, A should compensate B — *quod usserit, fregerit, ruperit injuria,* as the Romans said. How surprised they would have been to learn that a man may burn another's ship or wharf by his *culpa,* yet escape liability.

Perhaps it is too late to voice these regrets. While the decision of the Privy Council may not be technically binding on English courts,[19] it probably has at least an unbinding effect on the Court of Appeal decisions in *Polemis* and *Thorogood* v. *Van Den Berghs & Jurgens Ltd.*[20] How are English courts, or indeed any courts, to apply *The Wagon Mound* in practice? A narrow and a wide interpretations are possible.

Supporters of a narrow interpretation may fasten on Viscount Simonds' statement that "it is not probable that many cases will . . . have a different result"[21] and on the fact that he divides the foreseeable damage into broad categories such as "fire" and "shock"[22] and hints that recovery might be allowed for damage which is of a foreseeable kind, but more extensive than could be foreseen, as in *Smith* v. *London & South Western Ry. Co.*,[23] where the fire caused by the defendant's negligence spread further than they could reasonably have expected.[24] If this is correct, what *The Wagon Mound* has done is to split the tort of negligence into a number of torts corresponding to the broad ways in which damage may be caused — damage by fire, by impact, by shock, by explosion

[18] *State* v. *Frazier* (1936), 98 S.W. 2d 707 decides that it may be manslaughter to commit a minor assault on a person who, unknown to the accused, is a haemophiliac and dies as a result. I am indebted to Dr. Cross for drawing my attention to this example.

[19] Contrast the treatment by English courts of *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*, [1926] A.C. 108 (P.C.), in *Port Line Ltd.* v. *Ben Line Steamers Ltd.*, [1958] 2 Q.B. 146 with the respect accorded to *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517 (P.C.), which was inconsistent with previous Court of Appeal decisions such as *Niboyet* v. *Niboyet* (1878), 4 P.D. 1. I am grateful to Dr. J. H. C. Morris for drawing my attention to this case.

[20] [1951] 2 K.B. 537.

[21] *Supra*, footnote 1, at pp. 138 (W.L.R.), 413 D (All E.R.).

[22] *Ibid.*, at pp. 141 (W.L.R.), 415 G (All E.R.).

[23] [1870] L.R. 6 C.P. 14.

[24] *Supra*, footnote 1, at pp. 133 (W.L.R.), 409 C (All E.R.).

and so on. For each of these, a plaintiff must make out a separate cause of action. If he claims for impact damage and fire damage he must show that some damage by impact and some damage by fire were respectively foreseeable; but he will not have to show that the actual extent of the damage by either was foreseeable. Admittedly, the difference between "type" and "extent" of damage is not always clear. Nevertheless, if this interpretation is accepted, the change in the law will be slight. The plaintiff with the egg-shell skull and the haemophiliac, run over by defendant's careless driving, will still be able to recover provided that some physical injury by impact was foreseeable. It is only in the freakish *Polemis, Palsgraf or Wagon Mound* type of case, which occurs no more often than once a decade, that physical damage will not be recoverable. On the other hand, the present restrictions on recovery for shock and for economic losses can be retained, since, it may be argued, such types of loss are usually unforeseeable. The truth is that foreseeability is an extremely elastic notion; so much depends on what degree of probability is required to make the damage foreseeable, at what time the foreseeability is to be judged, whether the notion is interpreted in a practical or theoretical sense, and so on.[25] It is to be hoped that no definite meaning will be attached to it by the courts; in this way the substance of the existing law can be retained, though under a new label, except in a few freakish cases.

But it must be admitted that a more radical interpretation of the Privy Council's decision is possible, both in regard to negligence, and in regard to tort liability in general. There are two ways in which the decision might be taken as effecting a radical change in the law of negligence. First, strictures are directed by the Privy Council at causal tests[26] and it is said that a defendant ought not to escape liability, however "indirect" the damage, if he could reasonably foresee the intervening events which led to its being done.[27] This might suggest that a defendant can now be held liable although his act did not cause the damage for which the plaintiff claims. It would be rash to draw this conclusion. In most cases an act which counts on causal principles as a *novus actus interveniens* will be unforeseeable, and an act which does not amount to a *novus actus* will be foreseeable. There may be a divergence in a case where a plaintiff suffers increased loss owing to the voluntary intervention of a third person, and the defend-

[25] Hart and Honoré, *op. cit., supra*, footnote 7, Ch. IX, *passim.*
[26] *Supra*, footnote 1, at pp. 139 (W.L.R.), 413 I (All E.R.)
[27] *Ibid.*, at pp. 142 (W.L.R.), 416 A (All E.R.).

ant had no duty to guard against such an intervention. Suppose that a defendant negligently knocks the plaintiff unconscious in the road. A passer-by steals the plaintiff's wallet. This is certainly foreseeable, in the sense of "not unlikely" given the initial accident, and on a wide interpretation of *The Wagon Mound*, the loss should be recoverable, whereas on causal tests it would not be.[28] The courts should be left free to consider, on the merits of each case, whether the defendant has a duty to guard against such interventions.

Secondly, the Privy Council asserts categorically that the same criteria should govern culpability and compensation, at least in the tort of negligence: Lord Sumner's famous dictum to the contrary[29] is expressly disapproved. If this is taken literally, the plaintiff cannot now recover for injury or damage unless the chance of such injury or damage would by itself have been sufficient to impose on defendant a duty to take the precaution which he neglected. On this basis, the plaintiff with the egg-shell skull will usually be out of court, because the chance that an injured person may suffer from this disability will usually be so small that, if it were the only danger to be guarded against, a defendant would seldom be bound to take precautions against it. In relation to culpability there is no doubt that damage is reasonably foreseeable if and only if the chance of its occurrence is great enough, in all the circumstances, to induce a reasonable man to take precautions against it. If this test were also held to govern remoteness of damage, *The Wagon Mound* would indeed be a revolutionary decision.

It would be still more revolutionary if the "principle of civil liability"[30] that a man is responsible for the probable consequences of his act and no more, were taken to set a rule for the whole law of tort. Viscount Simonds excepts from the scope of his judgment the rule in *Rylands* v. *Fletcher*.[31] The Privy Council has remitted to the Supreme Court of New South Wales the plaintiff's case in nuisance in the present case; so, presumably, it is not considered legally impossible for them to succeed in nuisance where they have failed in negligence. Most English torts, apart from negligence, have an element at least of strict liability, and

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[28] *Patten* v. *Silberschein*, [1936] 3 W.W.R. 169, while purporting to follow *Polemis*, really misunderstands it. Contrast *Duce* v. *Rourke*, [1951] 1 W.W.R. (N.S.) 305.

[29] *Weld-Blundell* v. *Stephens*, [1920] A.C. 956 (P.C.), at p. 984.

[30] *Supra*, footnote 1, at pp. 139 (W.L.R.), 413 E (All E.R.).

[31] (1868), L.R. 3 H.L. 330.

to them the foreseeability rule can hardly apply. On the other hand, the Privy Council has in many respects, albeit without acknowledgement, adopted Dr. Goodhart's views, and in his most recent article, Dr. Goodhart argues that even in torts based on wrongful intent the plaintiff is limited to intended or foreseeable damage.[32] If true, this would extend the defendant's licence to do wrong at others' risk to an extravagant extent. Fortunately, though there is little authority in English law,[33] there is ample American case law to support the principle that "the risk of such unintended and unforeseeable consequences should fall on the intentional wrongdoer rather than his victim".[34]

Finally, it is worth while returning to the facts of *The Wagon Mound* for a moment, for it is a case in which a more careful analysis of the facts might have saved a good deal of trouble. The fire which burned the wharf started two days after the escape of the oil, as a result of the conjunction of a number of factors. These were analysed by Manning J. in the Supreme Court of New South Wales as follows:[35] "The events which immediately preceded the fire did compose what must have been a most extraordinary and unusual combination. They were:

1. That when a piece of cotton waste fell from the wharf, it alighted upon a piece of debris which acted as a raft;
2. That the raft floated or drifted to a position near to where welding was being carried out;
3. That a piece of molten metal fell, struck the oil-soaked waste and stayed in contact with the waste for long enough to set it smouldering;
4. That, at the time, there was a wind of suitable strength and duration to fan the smouldering waste into flame;
5. That all these events should happen one after the other.

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[32] (1960), 76 L.Q. Rev. 567, at pp. 574-5.

[33] See however *Scott* v. *Shepherd* (1773), 2 W. Bl. 892; *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57; *Janvier* v. *Sweeney*, [1919] 2 K.B. 316.

[34] Harper and James, The Law of Torts (1956), Vol. I, p. 219; Restatement of the Law of Torts (1934), s. 16. The learned authors cite *Vosburg* v. *Putney* (1891), 80 Wis. 523, 27 Am. St. Rep. 47, 50 N.W. 403 and three other cases on assault and battery. On transferred intent, which depends on the same principle, they cite *Talmage* v. *Smith* (1894), 45 Am. St. Rep. 414 and five other cases, and on intentional trespass to land *Wyant* v. *Crouse* (1901), 127 Mich. 158, 86 N.W. 527 and three other cases including *Vanderburgh* v. *Truax* (1847), 4 Denio N.Y. 464, which Goodhart, *op. cit.*, *supra*, footnote 32 seeks to explain on the grounds of intention or negligence. But, so far as I know, there are no American cases, either on intentional assault or on intentional trespass to land, which adopt the Goodhart doctrine, whereas there are many to the contrary.

[35] [1959] 2 Ll. L.R. 697, at p. 709.

If a logical analysis is made of this series of events, there is very strong support for the view that there were intervening circumstances of a kind which render it impossible to say that the conflagration was a direct result of the oil spillage."

Nevertheless, Manning J. concluded that the fire was the direct result of the spillage and the Privy Council was inclined to agree with him. "Notwithstanding", said Manning J.[36] "that, if regard is had separately to each individual occurrence in the chain of events which led to this fire, each occurrence was improbable and, in one sense, improbability was heaped upon improbability, I cannot escape from the conclusion that if the ordinary man in the street had been asked, as a matter of common sense, without any detailed analysis of the circumstances, to state the cause of the fire at Mort's Dock, he would unhesitatingly have assigned such cause to the spillage of oil by the appellants employees."

This is an important finding, especially if the case should later be litigated on the issue of nuisance. Nevertheless, it is submitted that it is wrong. It is true that the uninstructed man in the street would have thought that the fire was caused by the spillage of oil, but his opinion would be based on the belief that the oil was combustible. Once he had listened to the scientific evidence, the man in the street, like the scientist, would surely have concluded that it was only the unusual conjunction of events analysed by Manning J. which made it possible for a fire to start. This conjunction was, it seems to me, such a coincidence as on the causal tests of everyday life to make the damage too remote. What causal tests require is a detailed analysis of the circumstances, not a guess based on ignorance.

A. M. HONORÉ*

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ALBERTA LAND TITLES ACT—MINERALS MISTAKENLY INCLUDED BY REGISGRAR IN TRANSFEREE'S TITLE—SUBSEQUENT VOLUNTARY TRANSFER—RIGHT OF REGISTRAR TO CORRECT MISTAKE—STATUTE OF LIMITATIONS—STATE INDEMNITY FOR LOSS OF TITLE.—A recent Alberta case, *Kaup and Kaup* v. *Imperial Oil Ltd. et al*[1]

[36] *Ibid.*, at p. 711 and *supra*, footnote 1, at pp. 140 (W.L.R.), 414 F (All E.R.).

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[1] (1960), 33 W.W.R. 117 (Alta. S.C.). As will be seen, this comment digresses into a discussion of some aspects of the famous *Turta* case. This may be inevitable in any rectification of title case, even one which, as does this one, correctly distinguishes *Turta*.

while unexceptional in result, calls attention to certain judicial blind spots in reference to mineral errors in land titles offices.

In 1919, John La Fleur, registered owner, as executor of the estate of Alexander La Fleur, deceased, of the "N½ 9 . . . , except coal", executed a transfer to Urbanie Kaup[2] of the said N½ 9 "reserving therefrom all mines and minerals". The land being in the North Alberta Land Registration District, the new title issued subject only to the coal exception, although on a mortgage back to the vendor, the full mineral reservation appeared. In 1924, Urbanie Kaup transferred the land to herself and her husband, Fred Kaup, in consideration of "$1 and . . . natural love and affection".

In 1943, this title was corrected by the registrar by adding the words "and reserving thereout all other mines and minerals", and "at some time" the estate title had added to the original cancellation "Ex. M. & M. . . . in different ink".

In 1947, the widow of Alexander La Fleur (and her four children, assignees of part interests in the minerals) leased the minerals to Imperial Oil Limited.

In an action by the Kaups for a declaration of ownership, the defendants said that the transfer from Urbanie Kaup to herself and her husband was voluntary and without valuable consideration and that the corrections were properly made "and that therefore the mines and minerals have always remained in an uncancelled certificate of title and have remained the property of the defendant". The court agreed with these contentions, finding:

> (1) That the vendor intended to reserve the mines and minerals in the transfer to Urbanie Kaup; (2) That the transfer from Urbanie Kaup to herself and her husband . . . was a voluntary transfer; (3) That the title was validly corrected by the registrar . . . and this case falls squarely within the provisions of *The Land Titles Act* which permitted such corrections.[3]

Finding (1) is both doubtful in fact and unnecessary. The facts are that the executor purported to reserve minerals in his application of transmission but accepted without complaint a title excepting only coal, then purported to reserve minerals in his transfer[4]

[2] The report does not indicate whether Urbanie Kaup was a beneficiary of the estate, or a purchaser for value. It is worth noting that the application for transmission into the estate had the same mineral exception as the transfer out, indicating that both transfer and application were drawn up by the same solicitor at the same time and that his mind never ran to minerals at all, but that his secretary had two forms: "minerals included" and "reserving therefrom all mines and minerals".

[3] *Supra*, footnote 1, at p. 123.

[4] As suggested in footnote 2, both transfer and transmission appear

but again accepted without complaint a total cancellation of his title and the vesting of the minerals in the purchaser. Further, in passing accounts he swore an affidavit listing undisposed assets of the estate with no mention of minerals. Mr. Justice Primrose comfortably disposed of this last point:

> It was an error and was probably made by the solicitor who prepared the petition (not an uncommon error, I would think, at the time when minerals had little value).[5]

In other words, the executor can benefit by the solicitor's error, when it is in his favour, but need not be embarrassed by responsibility for errors against his interest.[6]

The finding is unnecessary for two reasons. There was a clearly worded reservation of minerals in the transfer and when the words of the document are clear there is no reason to go behind them, and the intent, whatever it was, was merged in the new title: "It is the transfer which, when registered, passes the estate or interest in the land. . . ."[7]

Finding (2) is supported by Mrs. Kaup's own affidavit of consideration, and (3) naturally follows.

The registrar's powers of rectification, as set out in section 174(2) of the Alberta Land Titles Act, is to "so far as practicable *without prejudicing rights conferred for value*,[8] cancel or correct any error in the certificate or other instrument . . .".

Whether or not Urbanie Kaup was a volunteer or a purchaser for value, her title could have been corrected.[9] It is equally clear that the courts have seldom found much indefeasibility in the title of a volunteer.[10]

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to have been drawn up at the same time. Someone had drawn a line through the exception in the transmission.

[5] *Supra*, footnote 1, at p. 123. This suggests a good way to avoid your own affidavit. "My solicitor drew it up that way!"

[6] A better tactic by Mrs. Kaup might have been to sue for rectification of the transfer on the grounds of mutual mistake.

[7] *Knight Sugar* v. *Alta. Ry. & Irr. Co.*, [1938] 1 W.W.R. 234 (P.C.) per Lord Russell of Killowen, at p. 239.

[8] R.S.A., 1942, c. 205. Italics mine.

[9] "Between transferor and transferee any error can be corrected." *Turta* v. *C.P.R.*, [1954] S.C.R. 427, (1954), 12 W.W.R. 97, per Rand J., at p. 117.

[10] He may, in fact, be worse off than a volunteer at common law — where a voluntary settlement is effectual if, "the settlor has done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding on him". *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264, at p. 274, 45 E.R. 1185, at p. 1189, — with a bow to the formidable masterpiece of Mr. John Baalman, Commentary on the Torrens System in New South Wales (1951), pp. 128-9. See *Shetler* v. *Foshay* (1915), 8 S.L.R. 174; *Imperial Bank* v. *Esakin*, [1924] 2 W.W.R. 33, 18

The case goes some way to settle a question as to how many generations of volunteers might find their titles open to attack. A *Turta*-type[11] error could easily have been made in 1908, and the title to the land have since passed through a dozen new registered owners, but always within the family, by gift or devise without consideration. It appears that the person originally deprived could still demand rectification as against the present registered owner.

The plaintiffs also pleaded the Statute of Limitations, In disposing of this claim, the court extended the peculiar nullity rule relating to improper corrections invented by the late Mr. Justice Egbert:

> . . . that Act cannot apply to an action for declaration of title. The action of the registrar in purporting to pass the minerals to Urbanie Kaup, contrary to the express terms of the transfer, was a nullity, giving a mere cloud on the title. There was nothing to make a limitation period start to run.[12]

An abbreviated history of this doctrine is in order. In his *Turta*[13] judgment, Ebgert J., after having made a much approved ruling (which, if followed, would have applied equally to the registrar in this case), said:

> . . . there is nothing in the Act which will empower the registrar (except possibly where fraud exists) to revive a cancelled certificate of title, or to create a new instrument except by registration of the appropriate executed instrument stipulated by the Act.[14]

Having decided that the corrections were not authorized by the Act, he went on to say:

> I would go further and say that . . . the registrar had no power at all to make the alterations which were made, and his purported "corrections" of these titles was a complete nullity.[15]

The same learned judge developed the doctrine in *Shilletto* v. *Plitt*[16] in a way which would have prevented almost any correction:[17]

> . . . the registrar knowing that Stahn had become the registered owner, by a series of "corrections" deprived Stahn of his ownership, and conferred ownership on [others] . . . it is immaterial whether or not Stahn acquired the mines and minerals for value; what the registrar did is simply something he is not authorized to do. The fact that Stahn

S.L.R. 561 (C.A.); but *contra*, *McKinnon* v. *Smith*, [1925] 3 W.W.R. 290, [1925] 4 D.L.R. 262 (Man. C.A.).

[11] *Supra*, footnote 9.

[12] *Supra*, footnote 1, at p. 125.

[13] (1952), 5 W.W.R. (N.S.) 529.

[14] *Ibid.*, at p. 561.

[15] *Ibid.*, at p. 563.

[16] (1955), 16 W.W.R. 55 (Alta. S.C.)

[17] In this respect, the *Kaup* case is a valuable corrective to an unfortunate tendency.

> actually did acquire his interest for value merely strengthens the plaintiff's claim.
> . . . the registrar has no power whatever to make "corrections in cancelled certificates of title . . . sec. 174 . . . relates to current and existing documents".[18]

Egbert J. finally brought the doctrine to its full flower in *Morris* v. *Public Trustee*,[19] on which case Primrose J. relied. The corrections had been improperly made and the defence was based on the Statute of Limitations. Egbert J. said:[20]

> . . . since the alterations were unauthorized, and therefore, null and void they cannot form the basis of a defence based on the Statute of Limitations. The statute simply did not run at that time because there was nothing in existence to make it start to run. The alterations which were made, if the words "null and void" mean anything, were simply not in existence and nothing had been done to interfere with Kaup's ownership or with his title.

These were all cases of purported corrections. The *Kaup* case applies the same nullity doctrine to the original error. Although valuable in reasserting the registrar's right to rectify errors "so far as practicable without prejudicing rights conferred for value", it still is another step on the road to the complete elimination of the doctrine of indefeasibility of title, or at least of the "curtain-mirror" principle.[21] It is true that these cases all concern minerals, but the rules are applicable to all titles.

The "mirror" may prove to be a mirage, and the "curtain" must always be parted by the prudent conveyancer,[22] who then must pursue the dusty path back to the root of title. Once having found a discrepancy somewhere in the chain of title, he is faced with a number of questions: "Is the original error one which the courts say can be corrected by the registrar?" If so, the error is a nullity. "Is it one which the courts say they can correct?" Then it still may be a nullity. "Is it one the registrar cannot correct?" Then any attempt to correct it is a nullity. "How do I know who can correct it?" A few clues are to be found. Generally, if the title remains in the beneficiary of the error, the registrar can correct.[23] If all registered owners after such beneficiary are volunteers,

[18] *Supra*, footnote 16, at p. 67.
[19] (1958), 26 W.W.R. 471 (Alta S.C.).
[20] *Ibid.*, at p. 472.
[21] Baalman, *op., cit., supra*, footnote 10, pp. 320-1, 412-414; Ruoff, An Englishman Looks at the Torrens System (1957), pp. 8-13.
[22] The mineral certificate now demanded in Saskatchewan and Alberta. (The Land Titles Act, S.S., 1960, c. 65, s. 202; The Land Titles Act, R.S.S., 1955, c. 170, s. 176, does not go to indefeasibility but only to the liability of the assurance fund).
[23] The *Turta* case, *supra*, footnote 9 and its descendents.

the registrar can correct.[24] The courts can make any correction which judicial unpredictability may impose on counsel.[25] Otherwise all corrections are frozen and all errors established. If title has descended to a *bona fide*[26] purchaser for value from the said beneficiary, the error becomes indefeasible and any attempt at a correction will be nullity.[27] Once the registrar has made a correction, even though such correction violates all these rules and its cancellation none of them, he may not make the cancellation.[28]

Sir Robert Torrens, contemplating the "maelstrom of the Court of Chancery . . . resolved some day to strike a blow at that iniquitous institution".[29] It now appears that his old enemy, proving immortal, has, in addition to its traditional "spooks clad in the dignity of judicial decisions of many generations"[30] which have done so much to distort his system, now conjured up series of new spectres of uncertainty based on the system itself.

The nullity doctrine is unnecessary for the working of the registrar's or the court's powers of rectification and is, almost certainly, incorrect. The registrar's power to correct errors has, in the Acts,[31] one simple circumscription—it may be done only "so far as practicable with prejudicing rights conferred for value".[32] The court's powers are, generally, circumscribed only by what they "deem" fit or necessary,[33] although in practice they generally restrict themselves to the powers, given by the Acts, to the registrars.[34]

Nowhere in the Acts is there anything to indicate that an error made by the registrar in registering a document or a later attempt to correct an error is a nullity. Rather, it is an existing fact, a part of the register which may be open to attack, but is never a nullity.

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[24] The *Kaup* case, *supra*, footnote 1.

[25] R.S.M., 1954, c. 220, ss. 166-7; R.S.B.C., 1948, c. 71, ss. 234, 239; R.S.A., 1955, c. 170, ss. 187-8; S.S., 1960, c. 65, ss. 85-6.

[26] In Saskatchewan, at least, it is difficult not to be *bona fide:* see *Hackworth* v. *Baker*, [1936] 1 W.W.R. 32 (Sask. C.A.).; *Pfeifer* v. *Pfeifer*, [1950] 2 W.W.R. 1227 (Sask. C.A.); *T. M. Ball* v. *Zirtz* (1960), 32 W.W.R. 97 (Sask. C.A.).

[27] See the *Turta* case, *supra*, footnote 9.

[28] *Re Can. Gulf Oil Co. Appeal* (1955), 14 W.W.R. 130., [1955] 2 D.L.R. 51 (Sask. C.A.).

[29] Torrens' own words, quoted by Fox, The Story Behind the Torrens System (1949-50), 23 Aust. L.J. 489, at p. 490.

[30] *Peters* v. *Duluth* (1912), 119 Minn. Rep. 96, at p. 99.

[31] The courts have imposed several others.

[32] B.C. Act, s. 255, Alta. Act, s. 185, Man. Act, s. 23, Sask. Act, s. 76, *supra*, footnote 25.

[33] *Supra*, footnote 26. Ontario is an exception in that the registrar (Master) appears to be less circumscribed than the courts: R.S.O., 1950, c. 197, ss. 118, 119, 123.

[34] For instance, *Re Can. Gulf Oil Co. Appeal, supra*, footnote 28.

The fact that a new title in a *bona fide* purchaser for value is indefeasible indicates the opposite. Void marriages do not produce legitimate children. In order to avoid a defense based on the Statute of Limitations, the courts have imported an extraneous concept into the system. It is the *certificate of title* which is to be conclusive and it is the act of the registrar which produces the certificate of title. To say that, if the court disapproves of that act, the action and its result are void *ab initio*, is simply to say that no title can ever have any conclusiveness. In any case, it may be questionable whether better justice would not be arrived at by allowing a defence based on the Statute of Limitations. Then, at least, the person interested in the land would need only to search back for the statutory period to have a good root of title. The Alberta courts have no qualms about letting a squatter prevail over the registered owner,[35] so why not against an unregistered owner? The rule seems to be that whatever interest derogates from the certificate of title must prevail.

A possible result of the doctrine, which has not been mentioned, is the question of the limitation sections of the various Land Titles Acts, relating to the assurance fund. Generally, no action lies against the fund unless commenced within six years of the date of loss.[36] If no defence is available in a matter of title under the Statute of Limitations, should these sections be a defence in an action against the registrar based on a mistaken registration or a mistaken correction? There is a further problem. If the mistake is void, then it never occurred and there is no loss to recover. But perhaps the loss only occurred when the title passed into the hands of a *bona fide* purchaser and the "void" error suddenly became an actuality. The nullity doctrine solves no problems and creates many.

The final paragraph of the judgment illustrates a total disregard for the law developed as to claims against the fund—disregard shared by courts, commentators and committees alike. In disposing of the argument that the plaintiffs could recover their loss from the assurance fund, Primrose J. remarks that:[37]

> . . . while the original Act provided compensation, when it was found that such claims might amount to substantial sums, the legislature so amended and hedged the assurance fund sections, that a *bona fide*

[35] See *Harris* v. *Keith* (1911), 16 W.L.R. 433 (Alta.); *Shirtcliffe* v. *Lemon*, [1924] 1 W.W.R. 1059 (Alta.); also *Gatz* v. *Kizew*, [1959] S.C.R. 10, at p. 14.

[36] B.C. Act, s. 221, Man. Act, s. 177, Alta. Act. s. 175, Sask. Act, s. 198, *supra*, footnote 25.

[37] *Supra*, footnote 1, at pp. 125-6.

claimant against the fund would never be able to recover his full loss. (It was first amended to limit claims to $5000 and is now limited to $1000 per acre, *i.e.*, $160,000 for a quarter section which might be worth millions.) These amendments scuppered the real purpose of the assurance fund and put it beyond the possibility of complete compensation for large claimants.

Putting aside the thought that perhaps only in Alberta would $320,000.00 be not worth worrying about,[38] it seems important to consider some aspects of the law relating to state indemnity for loss of title or interest in land.

The Privy Council established in *Spencer* v. *Registrar of Titles*,[39] that the measure of damages is the value of the interest lost, and that the value of the land is to be taken at the time of the loss. In the case of a person under a disability or a remainderman, the time of the loss is the date at which the right of action accrued.[40] A considerable volume of case law has developed in Australia and New Zealand on the working out of these principles, but no cases refer to minerals.[41] The conversion of scrub desert land into an industrial suburb can work startling changes in the value of the land. It is clear however, that the question is always the actual market value at the time of loss.

There is nothing in the report of the *Kaup* case to indicate the present value of the land involved, except the suggestion that the sum of $320,000.00 is trifling, but the real question is its value in 1919—when the loss occurred. I suggest that the answer is zero. Mr. Justice Primrose himself, says "little value".[42]

To return to the *cause célèbre* in this field: enough tears have been shed[43] over the plight of the Canadian Pacific Railway Company in the *Turta* case to refloat the Bismarck. The dogma of the meaculpists seems to be that the minerals in the Turta quarter were worth $5,000,000.00, that the Canadian Pacific Railway had poured vast sums of money into the assurance fund, that without any fault or negligence on its part, the company lost the full $5,000,000.00 due to the misfeasance of the land titles staff, that

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[38] The land involved here consisted of 320 acres.

[39] [1906] A.C. 503; [1908] A.C. 235; (1911), 103 L.T. 647 (P.C.). These litigants were of a tenacity of which counsel dream.

[40] This situation has not arisen in any of the mineral cases.

[41] See *Wells & Johns* v. *Registrar-General* (1909), 29 N.Z.L.R. 101; *Heron* v. *Broadbent* (1919), 20 S.R. 101; (N.S.W.) *Russel* v. *Registrar-General* (1906), 26 N.Z.L.R. 1223; *Daly* v. *Papworth* (1906), 6 S.R. 572 (N.S.W.).

[42] *Supra*, footnote 1, at p. 123.

[43] See Ruoff, Torrens Titles to Minerals in Alberta (1957), 35 Can. Bar Rev. 308; Report of the Alberta Bencher's Special Committee (1956), (see Alberta Law Review Fall 1957, at p. 185); Ivan L. Head, The Torrens System in Alberta: A Dream in Operation (1957), 35 Can. Bar Rev. 1.

the assurance fund, having taken in at least $3,000,000.00 by the time the *Turta* case broke, could easily afford a $5,000,000.00 touch for one quarter section, but that through the iniquity of the legislature, all recovery had been barred, and finally, that under any other system of land registration, the Canadian Pacific Railway would have made full recovery.

What are the facts? The estimate of the value of the Turta minerals is no doubt reasonably accurate. Out of the approximately 10,000,000 acres of land granted to the Canadian Pacific Railway in Alberta, nothing had been paid into the assurance fund—that detail was taken care of by the transferee from the company.[44] There is no question that the primary error was in the land titles office, aided and abetted by indifference in the company itself. In an undisturbed (and undisputed) finding of fact, Egbert J. found that the company knew of the cancellation of its mineral title in September, 1910.[45] This must be one of the most ignored findings in history. Not only is it not mentioned in the comments listed under footnote forty-two, but we find Mr. Justice Bird, for the British Columbia Court of Appeals, saying in a judgment delivered on September 30th, 1960:

> The C.P.R. did not become aware of the registrar's error until about the time when Turta's action was brought against the C.P.R. . . .[46]

As late as 1950, the Canadian Pacific Railway leased to Imperial Oil, for a few cents per acre, eighty-seven and one-half per cent of all minerals under this quarter.

The panicky action of the Alberta legislature in 1949,[47] in limiting mineral claims to $5,000.00, later increased to $1,000.00 per acre,[48] plus purchase and development costs, is understandable, if not necessarily admirable.[49] With the realization that through the total indifference to minerals by government, landowners and conveyancers alike, many, perhaps thousands, of mineral mistakes had occurred in land titles offices, coupled with the boom psychology which attributed a value of perhaps millions to any given parcel of land, there was a real fear that the province might be bankrupted.[50]

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[44] See the Alberta Act, s. 161(1), *supra*, footnote 25. The procedure has remained constant from the beginning.

[45] (1952), 5 W.W.R. (N.S.) 529, at p. 545.

[46] (1961), 33 W.W.R. 385 (B.C. C.A.), at p. 399.

[47] S.A., 1949, c. 56, s. 5. [48] S.A., 1958, c. 34, s. 176.

[49] By the concurrent Mineral Interests Compensation Act, S.A., 1958, c. 43, allowing recovery back to September 1st, 1906, (with no built-in defences), the Canadian Pacific Railway has recovered $160,000.00 on the Turta quarter.

[50] Since Alberta is the only province not to make provision for pay-

Let us consider what might have happened to the losers of minerals in other jurisdictions. Suppose the Canadian Pacific Railway had undertaken to insure its mineral rights in the 25,000,000 acres granted in the Western provinces for the sum of $1,000.00 per acre, the sum deplored by Mr. Justice Primrose as being outrageously low.[51] They might have obtained such coverage at a price of three dollars per 1,000, or $75,000,000.00 for the total acreage. I doubt if the company would have cared to pay for it; or that John A. would have been able to find such a sum for them.

The strongest and (admittedly valid) criticism is directed at the six-year limitation on liability.[52] Mr. Ruoff states:[53]

> Having thus lost its valuable minerals through a registrar's error in 1908, the C.P.R. was (in the present state of the statute) debarred from claiming against the assurance fund so long as the early days of the first World War! What nonsense is this! And surely many similar injustices will arise unless the law is altered?

In other words, in England, the registrar would have handed over, in the 1950's, whatever percentage of $5,000,000.00 the company's interest amounted to, and the balance to their lessee. Section 83(11) of the English Land Registration Act of 1925, reads as follows:[54]

> A liability to pay indemnity under this Act shall be deemed a simple contract debt; and for the purposes of the Limitation Act, 1623,[55] the cause of action shall be deemed to arise at the time when the claimant knows, or but for his own default might have known, of the existence of his claim.

That is, as of September 1916, the Canadian Pacific Railway claim would have been outlawed in England.[56] In addition, subsection (5)(b) of the same section 83 states:

> No indemnity shall be payable under this Act . . . .
> On account of any mines or minerals or of the existence of any right to work or get mines or minerals, unless a note is entered on the register that the mines or minerals are included in the registered title.

I have never seen Canadian Pacific Railway Title number 424, the grant title in the *Turta* case, but unless the practice in what is

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ment out of the public funds of the province should the assurance fund prove insufficient—the above may not be strictly correct. However, the $5,000.00 limitation was no doubt intended to spread the claims around.

[51] *Supra*, footnote 1, at pp. 125-6. [52] *Supra*, footnote 36.

[53] *Op. cit., supra*, footnote 43, at p. 321.

[54] 15 Geo. 5, c. 21 (U.K.). [55] Now the Limitation Act, 1939.

[56] See *supra*, footnote 45. In the *Kaup* case, the date when the time would have started to run would have been, at the latest, Jan. 29th, 1923 when the executor swore an affidavit listing the undisposed of assets and listing no minerals. See *supra*, footnote 1, at p. 123.

now Alberta, was different from that in what is now Saskatchewan, there was no mineral endorsement on the title; and for this reason too, the registrar, in England, would have avoided payment.

In Ontario section 131(1) of the Act declares that:[57]

> No person shall be entitled to recover out of the Assurance Fund any compensation where, (c) the claimant has caused or substantially contributed to the loss by his act, neglect or default, and the omission to register a sufficient caution, notice, inhibition or restriction to protect . . . any unregistered interest or equity . . . shall be deemed neglect within the meaning of this clause.

In this province, the Canadian Pacific Railway would also have been unsuccessful in 1910 at the latest and the Kaups' on January 29th, 1923. Further, under section 129 of the Ontario Act,[58] recovery is limited to eight hundred times the amount paid in on initial registration, while, under section 127, the amount paid in is one quarter of one per cent of the value of the land. Recovery would be limited to twice the sworn value at first registration.[59] In perhaps every mineral error case that has come before the courts in Western Canada, that value would have been zero.

It is suggested, in conclusion, that, far from deserving the aspersions cast upon it in the *Kaup* case, the present Alberta statutory provisions for the recovery of damages arising out of the loss of minerals, must be the most liberal in the world, and it is unlikely that any jurisdiction with revenues less bouyant than those of the province of Alberta would care to go even that far.

HUGH R. RANEY*

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PROVINCE DE QUÉBEC—LOI DES SYNDICATS PROFESSIONNELS—VALIDITÉ DE LA FORMULE RAND—MÉTHODE D'INTERPRÉTATION DE L'EXPRESSION "CONDITION DU TRAVAIL".—Nous nous proposons d'attirer l'attention des lecteurs de la Revue sur une décision beaucoup plus intéressante que récente, *Le Syndicat catholique des employés de magasins de Québec inc.* v. *La compagnie Paquet ltée.*[1]

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[57] *Supra*, footnote 33. [58] *Ibid.*

[59] Oddly, these sections of the Ontario Act seem to be the only case wherein some kind of an actuarial outlook is maintained in the whole field of assurance fund legislation, in that idemnity recoverable is based on the value placed on the property and the fee paid.

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[1] [1959] S.C.R. 206.

L'objet immédiat concernait la validité de la formule Rand dans les limites de la province de Québec, mais cette question exigeait que l'on définisse le terme "condition du travail" tel qu'employé à l'article 21 de la Loi des syndicats professionnels.[2] La Cour suprême, renversant la décision de la Cour du Banc de la Reine[3] et de la Cour supérieure[4] de la province de Québec s'est prononceé, par quatre voix contre trois, en faveur de la légalité de la formule Rand. C'est précisément l'optique adoptée par chacun des deux groupes que nous voulons vérifier.

Le problème, tel que suggéré par les juges de la Cour d'appel du Québec, peut se résumer ainsi: un employeur et un syndicat, lorsqu'ils négocient une convention collective, ne sont pas libres d'y inclure toutes les clauses non défendues par la loi, mais seulement celles relatives aux conditions du travail. Cela en vertu de l'article 21 déjà mentionné. Donc, pour être permise au Québec, la formule Rand doit ou répondre à la définition de condition du travail, ou autrement être autorisée par un texte de loi.

Contrairement au Parlement fédéral[5] et à la législature d'Ontario[6] qui ont jugé à propos d'amender le texte de leur loi respective de façon à reconnaître expressément la légalité de la formule Rand, la législature de Québec n'a posé aucun geste du genre. De là, la Cour poursuit qu'en l'absence de texte explicite l'on doit rechercher l'intention du législateur, et M. le juge Pratte[7] rappelle cette présomption à l'effet que "le législateur n'a pas voulu accorder plus de droits ou de pouvoirs qu'il n'est nécessaire—pour assurer l'exécution de sa volonté, ni modifier sans nécessité des situations préexistantes, de droit ou de fait." Or la formule Rand constitue un avantage exclusif au syndicat, et n'apporte aucun intérêt aux employés comme tels. Donc, elle n'est pas une condition du travail—nous préciserions au sens strict du mot—et par conséquent elle n'est pas couverte par l'autorité accordée par le législateur aux parties discutant une convention collective.[8]

D'autre part, la Cour suprême, ou plutôt la majorité des juges,

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[2] S.R.Q., 1941, c. 162 et amendements.
[3] [1958] B.R. 275.
[4] Jugement rendu le 7 septembre 1956 par M. le juge Choquette de la Cour supérieure de Québec.
[5] S.R.C., 1952, c. 152, art. 1.
[6] R.S.O., 1960, c. 202.
[7] *Supra*, note 3, à la p. 281.
[8] Seul M. le juge Casey aborde la question sous un autre angle et suggère que ces déductions à la source seraient valides en autant qu'elles viseraient à rembourser le syndicat des frais encourus lors des négociations, ce qui n'est pas le cas de la formule Rand.

c'est à dire MM. les juges Kerwin, Cartwright, Abbott et Judson,[9] sont d'avis que la formule est légale parce qu'une condition de travail inclut tout ce qui se greffe sur les relations normales ayant cours entre employeurs et employés. Dans les mots de M. le juge Judson: "How can one validly infer that a compulsory check-off clause is not a necessary incident of employer-employee relations or is not the proper concern of those who are negotiating about these relations?"[10] Et la savant juge ajoute que la formule est déjà en usage depuis nombre d'années.

C'est à cet intéressant problème d'interprétation que nous nous limiterons, et les lecteurs nous pardonneront de négliger les autres aspects de la cause.

Pour définir une condition du travail, il fallait nécessairement opter pour l'une des deux méthodes suivantes: quel était le sens de ce terme au moment où la loi fut votée, ou quel est-il aujourd'hui alors que cette cause nous est soumise.

Les juges de la Cour supérieure et de la Cour d'appel ont préféré donner au terme une interprétation restrictive, et pour ce faire ils ont invoqué une technique idéale, à savoir qu'en cas d'ambiguité l'on doit rechercher l'intention du législateur. Or comme le législateur québecois s'est prononcé avant même que la formule Rand n'existât, il devenait difficile de prétendre qu'il avait autorisé la négociation de cette formule. Et M. le juge Hyde[11] avait beau jeu pour rappeller qu'au fédéral et en Ontario la formule est valide à cause d'une intervention directe du législateur.

D'autre part, il serait naïf de croire, que les juges n'ont pas songé à l'alternative. N'est-ce-pas M. le juge Pratte qui précisait qu'il s'en tenait à l'état actuel de notre droit, bien qu'il comprenne que certains puissent déplorer l'absence d'une telle mesure d'équité. Mais il distinguait là la fonction du législateur de celle du juge.[12]

La Cour suprême choisit l'autre interprétation. Il est bon de noter à cet effet qu'elle ne se soucie pas de l'intention du législateur, et que—d'une façon anglo-saxonne peut-être—elle mentionne l'effet prescriptif résultant à ses yeux de l'usage répété: "The clause is one that has been used in collective agreements, for some considerable time. This, in itself, is some indication that it has been found useful to and is accepted as desirable by those who are the interested parties in these agreements and I have already

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[9] MM. les juges Taschereau, Fauteux et Locke étant dissidents.
[10] *Supra*, note 1, à la p. 212.
[11] *Supra*, note 2, à la p. 298. [12] *Ibid.*, à la p. 284.

indicated that in my opinion, it is directly concerned with the regulation of employer-employee relations."[13]

Tout en admettant que la Cour suprême a peut-être rejeté trop facilement les arguments des juges des cours inférieures, qu'elle ne s'est pas attardée à les refuter mais a préféré affirmer les siens, essayons néanmoins de comprendre son attitude.

Les juges québecois ont beaucoup référé au droit privé pour justifier leur décision, or n'est-il pas possible de penser que par l'introduction de la législation ouvrière, qui relève du droit public, le législateur a voulu souligner l'avènement d'un contexte sociologique nouveau et rompre avec l'ancien système? N'est-il pas également permis de croire que ce système légal récent, pour avoir le maximum de valeur, doit coller le plus possible à cette réalité sociale et évoluer avec elle?

Ce problème n'est pas particulier au Québec ou au Canada: il existe en France. Le professeur Paul Durand lui-même rappelle que la notion de "condition du travail" peut s'employer au sens strict, ou au sens large, c'est à dire par référence au cadre "dans lequel les problèmes sociaux posés par le travail humain seront résolus".[14]

En 1950, les délégués à la convention internationale de Genève se sont aussi prononcés pour une conception libérale de cette notion, telle que révélé par leur définition de convention collective de travail.[15]

A l'interprétation stricte qui répète que la formule Rand concerne la sécurité syndicale et non les rapports employeur-employés, l'autre école peut possiblement objecter que cette interprétation freine l'évolution du droit. La Loi des relations ouvrières de 1944[16] n'a-t-elle pas constitué le syndicat représentant de tous les employés, n'a-t-elle pas définitivement consacré son droit de cité? De là il n'y a qu'un pas à faire pour admettre que l'existence appelle la croissance et la sécurité, et l'inclusion des clauses de sécurités syndicales dans la négociation d'une convention collective.[17]

Alors nous quittons le domaine du droit pur pour entrer dans celui de la sociologie et nous laissons les parties en présence négocier selon que le leur permette leur force économique. C'est une version plausible.

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[13] *Supra*, note 1, à la p. 212 (M. le juge Judson).
[14] Durand, Traité de droit du travail, vol. 3 (1956), pp. 401-402.
[15] 33e session, Genève 1950, p. 509. [16] S. Q., 1944, c. 30.
[17] A ce sujet, lire un article de Me Marc Lapointe, La sécurité syndicale et les conditions de travail (1948), 8 R. du B. 101.

En une phrase, la cause que nous étudions peut se résumer ainsi: conflit entre le dynamisme du droit et l'immobilisme d'un texte.

En conclusion, nous répétons que la solution exigeait une option entre deux techniques d'interprétation, l'une adoptée par les juges québécois, l'autre par la majorité des juges de la Cour suprême.[18]

RENÉ HURTUBISE*

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[18] Pour compléter le tableau, on peut se référer à la cause suivante, *Building Service Employee's International Union, Local 298* v. *Hôpital St-Luc et Jewish General Hospital*, [1960] B.R. 875, dans laquelle MM. les juges St-Jacques et Pratte reprennent en partie la discussion mais expliquent bien que la situation et les faits sont différents dans les deux cas.

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