# COMMENTS
# COMMENTAIRES

EVIDENCE—PROOF OF OWN WITNESS'S PRIOR INCONSISTENT STATEMENT WHERE "ADVERSE"—SECTION 24, EVIDENCE ACT (ONT.).—At common law the authorities conflicted on whether or not a party to an action had the right to prove at trial that one one of his own witnesses had made a prior statement inconsistent with his testimony given from the witness box.[1] In 1854, the English Parliament, adopting the recommendations of the Report of the Common Law Practice Commissioners, settled the issue in favour of allowing such proof to be made and in section 22 of the Common Law Procedure Act[2] provided that:

> A party producing a witness . . . may, in case the witness shall in the opinion of the judge prove adverse . . . by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony: but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

The substance of this provision is in the Canada Evidence Act[3] and in all of the common-law provinces' Evidence Acts.[4] Unfor-

[1] See Wigmore, on Evidence (3rd ed., 1940), Vol. 3, s. 905, note 1, where the cases up to 1855 pro and con are listed.

[2] (1854), 17 & 18 Vict., c. 125.

[3] R.S.C., 1952, c. 307, s. 9.

[4] R.S.A., 1955, c. 102, s. 27; R.S.B.C., 1960, c. 134, s. 19; R.S.M., 1954, c. 75, s. 19; R.S.N.B., 1952, c. 74, s. 16; R.S.Nfld., 1952, c. 120, s.8; R.S.N.S., 1954, c. 88, s. 51; R.S.P.E.I., 1951, c. 52, s. 15; R.S.S., 1953, c. 73, s. 34. The Ontario section, s. 24 of R.S.O., 1960, c. 125, reads in full as follows:

> "24. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make such statement."

In the Imperial Act of 1854 the words "in case the witness shall, in the opinion of the Judge prove adverse" preceded "contradict him by other evidence". Since it was well established prior to the passing of the

tunately, while settling the doubt at common law on the existence of the right, the wording of the statutory rule created two fresh uncertainties which stood in the way of its easy implementation. Firstly, what meaning should be ascribed to the term "proves adverse": did it refer to a witness whose testimony was merely unfavourable to the party calling him, or, did it refer to the witness who was hostile within the meaning of that word in the rule allowing a party, with leave of the judge, to cross-examine his own witness? Secondly, how was the judge to determine the hostility, if this was required, of the witness; was he to judge this quality solely from his conduct and demeanour in the witness box or could he avail himself of extrinsic material in order to form his opinion? The weight of authority favoured the view that "adverse" meant hostile and that the hostility was to be judged solely from the witness's demeanour.[5] The Ontario Court of Appeal in its judgment in the recent case of *Wawanesa Mutual Insurance Company* v. *Hanes*[6] quite soundly, on the basis of reason and practical effect, it is respectfully submitted, rejected this interpretation and held that adverse meant unfavourable and, in the alternative,[7] if

---

Act that a party had an absolute right to contradict one of his own witnesses by other witnesses or documentary evidence, whether or not he was adverse or hostile in the opinion of the court and without obtaining the leave of the court (". . . a right not only fully established by authority, but founded on the plainest good sense . . .", *per* Williams J. in *Greenough* v. *Eccles* (1859), 5 C.B. (N.S.) 786, at p. 803, 141 E.R. 315, at p. 322) this syntactic difference in the English Act has generally been considered "a great blunder". (Cockburn C.J. in *Greenough* v. *Eccles*, *ibid.*, at p. 806. See also Wigmore, *op. cit.*, footnote 1, pp. 401-2.) This difference is not material to the issue to the case under comment except that it is interesting to note that section 9 of the Canada Evidence Act and the equivalent sections in some of the provincial Acts still preserve this drafting error.

[5] The current of interpretative authority is contained in Wigmore, *op. cit.*, footnote 1, s. 905, note 2. And see Halsbury, Laws of England (3rd ed., 1956), Vol. 15, p. 447 and Phipson on Evidence (9th ed., 1952), p. 494.

[6] (1961), 28 D.L.R. (2d) 386, [1961] O.R. 495 (Porter C.J.O. and MacKay J.A., Roach J.A. dissenting). The judgment has been applied by the Ontario Court of Appeal, differently constituted, in *Boland* v. *The Globe and Mail Ltd.* (1961), 29 D.L.R. (2d) 401, [1961] O.R. 712.

[7] MacKay J.A. held that "adverse" should be given its ordinary meaning of "against the interest of the party calling him and not be construed as meaning hostile". *Ibid.*, at pp. 420 (D.L.R.), 529 (O.R.). Since the authorities were mainly contrary to this interpretation, he went on in his judgment to decide *how* the judge is to form an opinion that a party's witness is hostile. Porter C.J.O. held that the section referred to both unfavourable *and* hostile witnesses. *Ibid.*, at pp. 398 (D.L.R.), 507 (O.R.). It is well to keep in mind the actual difference between an unfavourable and a hostile witness. "An unfavourable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves an opposite fact. A hostile witness is one who is not desirous of telling the truth at the instance of the party calling him." Cross, Evidence (1958), p. 208.

the word should mean hostile, then the judge was not restricted to his observation of the witness's demeanour and could avail himself of other evidence, chief of which would be the prior inconsistent statement itself, in forming the opinion that the witness was hostile.

The weight of authority which the Court of Appeal rejected has its foundation in the judgment of the English Court of Common Pleas *in banc* in the case of *Greenough* v. *Eccles*.[8] The trial judge in the *Wawanesa* case and Roach J.A., dissenting in the Court of Appeal, regarded the *Greenough* case as binding upon them and Roach J.A. adopted the following portion of the reasons of Williams J. as supporting a more accurate construction of section 22 of the Common Law Procedure Act (section 24 of The Evidence Act (Ont.)):

> But there are two considerations which have influenced my mind to disregard these arguments. The one is that it is impossible to suppose the legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relevant to the issue—a right not only fully established by authority but founded on the plainest good sense. The other is, that the section requires the judge to form an opinion that the witness is adverse, before the right to contradict, or prove that he has made inconsistent statements, is to be allowed to operate. This is reasonable, and indeed necessary, if the word "adverse" means "hostile" but wholly unreasonable and unnecessary if it means "unfavourable".[9]

The first consideration is not, and was not intended to be a reason supporting the interpretation of "adverse" as "hostile" but was merely an answer to the argument that the "unfavourable" interpretation would render an earlier provision in the same section, which appeared to restrict the absolute right at common law to contradict one's own witness by other evidence, harmless by imposing a minimum fetter upon this right.[10] Williams J.'s short answer is that the legislature could not have intended to impose "any fetter whatever" on the right to contradict one's witness by other witnesses and that, therefore, the court should not be bothered by the harmful effects on the earlier part of the section of a "hostile" interpretation on the part dealing with proof of prior inconsistent statements.[11]

---

[8] *Supra*, footnote 4.

[9] *Ibid.*, at pp. 803-4 (C.B.), 322 (E.R.).

[10] The argument and the consideration on which it was disregarded both would have been non-existent were it not for the drafting error mentioned in footnote 4, *supra*.

[11] Although, on this particular point, the result of Williams J.'s holding is sound, one might query his bold treatment of the section as an illegiti-

The second consideration is a positive, but, it is submitted, inconclusive reason tending to support an interpretation of "adverse" as hostile. Williams J.'s assumption is that if a witness is giving testimony unfavourable to the party calling him, such a fact would be so obvious that the intervention of the judge's opinion to this effect would be unnecessary. In most cases, this assumption would be correct, but it is not difficult to conceive other cases whether the judge's carefully considered opinion of the legal issue or issues involved and the probative effects thereon of a witness's testimony would be necessary to determine whether the witness had proved "unfavourable". Counsel for the unsuccessful party argued this point. "It may often be a question of considerable nicety whether evidence is adverse or not in the sense of being detrimental. To constitute adverse testimony it must be positive testimony opposed to the interest of the party."[12]

In the *Wawanesa* case the majority members of the court considered the legislation afresh and gave "adverse" its normal dictionary meaning of unfavourable or opposed in interest. They reasoned that if the legislature had intended "adverse" to mean hostile it would have used the word "hostile". Common sense as well as the standard canons of interpretation support this conclusion.[13]

Chief Justice Porter referred to section 22 of the Evidence Act which provides for the proving of a witness's former inconsistent statement "upon cross-examination".[14] He was of the opinion that this section applied both to the other party's witness and one's own after the judge had declared him "hostile" and given leave to cross-examine. This reasoning led to the conclusion that the usefulness of section 24, requiring one's witness to be proven

---

mate technique of statutory interpretation. See Craies, A Treatise on Statute Law (4th ed., 1936), p. 92. Cockburn C.J. was even more cavalier in treating the provision under discussion "as altogether superfluous and useless". *Supra*, footnote 4, at pp. 807 (C.B.), 324 (E.R.). See Pound, Common Law and Legislation (1908), 21 Harv. L. Rev. 383, at pp. 397-98, on the question whether a new explicitly *affirmative* statutory provision should be construed as blanketing and repealing a similar common law-rule running in roughly the same direction.

[12] *Ibid.*, at pp. 800-801 (C.B.), 321 (E.R.).

[13] See Craies, *op. cit.*, footnote 11, pp. 68 and 151. See also the reasons of Schroeder J.A. in *Boland* v. *The Globe & Mail Ltd.*, *supra*, footnote 6, at pp. 421-424 (D.L.R.), 732-35 (O.R.).

[14] *Supra*, footnote 4: "22. If a witness upon cross-examination as to a former statement made by him relative to the matter in question and inconsistent with his present testimony does not distinctly admit that he did make such statement, proof may be given that he did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked whether or not he did make such statement."

adverse before such proof could be made, would be rendered nugatory if adverse meant hostile. Mr. Justice Roach disagreed with this interpretation of the scope of section 22 and held that it and section 21 [15] were intended to deal solely with proving that the *opposing* party's witnesses had made inconsistent statements. Once leave has been given by the judge to cross-examine one's own witness, it is difficult to appreciate this conclusion except that the collocation of the sections indicates that the legislature was directing its mind to three situations: proving an opposing witness's prior inconsistent oral statements;[16] proving his prior inconsistent written statements;[17] and proving one's own witness's prior inconsistent statements, both oral and written.[18]

Roach J.A. further reasoned that if it had been intended that the judge could conduct a *voir dire* to allow proof of adverseness from a prior inconsistent written statement, as was decided by Porter C.J.O. and MacKay J.A. following recent cases in other jurisdictions,[19] "then one would have expected that the Legislature would have included in section 24 a provision somewhat similar to that contained in section 21 where it is provided that, 'the judge . . . may require the production of the writing for his inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he thinks fit' ".[20] Further to this, he was of the opinion that to allow a party to prove that his witness had made a prior inconsistent statement, thereby proving him hostile to the satisfaction of the judge, in order to fulfill the condition allowing proof of the making of the statement before the fact finding tribunal, was arguing in a circle and fallacious. A British Columbia judge in an earlier case had agreed that this was "putting the cart before the horse".[21] With respect, it is suggested that first proving the making of the statement on a *voir dire* does wipe out

---

[15] *Ibid.*: "21. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relating to the matter in question, without the writing being shown to him, but, if it is intended to contradict him by the writing, his attention shall, before such contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of so contradicting him, and the judge or other person presiding at any time during the trial or proceeding may require the production of the writing for his inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he thinks fit."

[16] S. 22, *supra*, footnote 4. [17] S. 21, *supra*, footnote 15.

[18] S. 24, *supra*, footnote 14.

[19] *The People* (*Attorney-General*) v. *Hannigan*, [1941] Ir. R.252 (Irish Court of Criminal Appeal) and *R.* v. *Hunter* [1956] V.L.R. 31 (Full Court of the Supreme Court of Victoria).

[20] *Supra*, footnote 6, pp. 411-412 (D.L.R.), 520-521 (O.R.).

[21] Irving J.A. dissenting in *Rex* v. *May* (1915), 23 C.C.C. 471, at p. 475.

the fallacy despite Roach J.A.'s opinion to the contrary. The learned judge's opinion was that the word "proves", which in section 24 is used intransitively and strictly speaking means: "turns out to be", should be read transitively and actively and therefore that the provision meant "if he then and there *shows himself to be* adverse".[22] The word can with equal facility and with perhaps less strain in the context be read passively, and in such a case would mean "if he *is proven* adverse". Such a reading calls for a procedure in the nature of a *voir dire* to prove by some evidence, although not yet evidence in the cause, that the witness is adverse.

Although the weight of authority favoured the trial judge's and Roach J.A.'s interpretation of section 24, Porter C.J.O. and MacKay J.A. found support for their more liberal construction in fairly recent Irish,[23] Australian[24] and English[25] cases. No mention was made of *Rex* v. *Cohen*,[26] an earlier decision of the Ontario Court of Appeal, which indicates that the trial judge is not restricted to observing the witness's demeanour in forming an opinion on the adverseness or hostility of a witness.

Since hostility, in the legal sense, means a desire on the part of the witness not to tell the truth at the instance of the party calling him, the illogicality of relying solely on the witness's demeanour to ascertain this characteristic is fairly obvious. In this respect the following passage from a judgment of Mr. Justice O'Halloran,[27] quoted at greater length by MacKay J.A., is particularly applicable:

> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is

[22] *Supra*, footnote 6, pp. 411 (D.L.R.), 520 (O.R.).
[23] *The People (Attorney-General)* v. *Hannigan*, *supra*, footnote 19.
[24] *R.* v. *Hunter*, *ibid.*
[25] *R.* v. *Fraser*, *R.* v. *Warren* (1956), 40 Cr. App. R. 160.
[26] [1947] O.W.N. 336. The court in this case appears to have decided that a Crown witness was "adverse or hostile" (at p. 340) because her evidence at the trial conflicted with statements she had made at the time the offence was being committed; these statements had been held admissible as part of the *res gestae*. The result was that the Crown's right to cross-examine this witness as to a statement previously given by her to the police was affirmed. The reported argument indicates that section 9 of the Canada Evidence Act, *supra*, footnote 3, was applicable. The report of the case does not indicate whether the witness admitted upon cross-examination, that she had made the statement. If she did not then admit the making of the statement then section 9 would clearly have been applicable to enable the Crown to prove that she had made it.
[27] In *Faryna* v. *Chorny*, [1952] 2 D.L.R. 354, at p. 356. See the statement of Mellish, Q.C., *arguendo* in the *Greenough* case *supra*, footnote 4, at pp. 796 (C.B.), 319 (E.R.): "The testimony of a witness, if adverse, is only the more dangerous if he shows no hostile disposition."

> but one of the elements that enter into credibility of the evidence of a witness . . . .

In the absence of any conclusive legal reasoning to support the holding in the *Greenough* case, one would expect that there would be controlling policy considerations militating against a "favourable" interpretation and the resulting proliferation of situations in which a prior consistent statement might be proved. The court itself advanced no practical reasons in support of its interpretation and a survey of the factors involved strongly indicates that the dangers of excluding this type of proof far outweigh the dangers of its admission. The result, of course, was influenced by the long-standing general rule that "the party on whose behalf a witness appears *cannot himself impeach his witness in certain ways*".[28]

Quite apart from the fact that the proving of a contradictory statement does not amount to a general impeachment of one's witness,[29] Wigmore's analysis of the reasons for the general rule indicate that there is only one which "furnishes the only shred of reason on which the rule may be supported"[30] and that is that a party ought not to have the means to coerce his witnesses. A succinct statement of this reasoning can be found in Buller's Nisi Prius:

> A party never shall be permitted to produce general evidence to discredit his own witness, for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him.[31]

Wigmore goes on to say:

> But, after all, it is a reason of trifling practical weight. It cannot appreciably affect an honest and reputable witness. The only person whom it could really concern is the disreputable and shifty witness, and what good reason is there why he should not be exposed? That he would adhere to false testimony solely for fear of exposure by the party calling him is unlikely; because his reputation would in that case equally be used against him by the opponent. It therefore becomes merely a question which of the two parties may properly expose him. Is there any reason of moral fairness which forbids this to the party calling him? The rational answer must be in the negative.[32]

---

[28] Wigmore, *op. cit.*, footnote 1, p. 383.
[29] *Ibid.*, pp. 392-93. [30] *Ibid.*, p. 389. [31] P. 297.
[32] *Op. cit.*, footnote 1, p. 389. See also pp. 383-384 for the history of the rule. It had its origin when witnesses were "oath-helpers" in the primitive modes of the trial and not yet testifiers to facts. "According to the best professional thought, sweeping prohibition of impeachment by a party of his own witness is nonsense . . . ." Maguire, Evidence, Common Sense and Common Law (1947), p. 43.

Further to this minimization of the harmful effects of allowing a party to impeach his own witness, the statutory rule under discussion, with regard to proving prior inconsistent statements, provides a potential curb against abuse of the right conferred by making it operative only in the judge's discretion, even though the witness might have in his opinion, proven adverse.

What are the dangers[33] of admitting proof of this nature? First, according to an old English case, "the most obvious and striking danger is that of collusion. An attorney may induce a man to make a false statement without oath, for the mere purpose of contradicting by that statement the truth, which when sworn as a witness, he must reveal . . . . But there is another mode by which their wicked conspiracy could be just as easily effected. The statement might be made, and then the witness might tender himself to the opposite party, for whom he may be first set up, and afterwards prostrated by his former statement."[34] This danger is highly speculative both with respect to the incidence of its occurrence and the effectiveness of the stratagem under sharp judicial scrutiny.

Secondly, there is the danger that the contents of an inconsistent statement might be taken as admissible evidence in the cause. Being hearsay such a statement is technically inadmissible yet, in view of the opportunity of opposing counsel to cross-examine the witness on the statement, the main reason for the hearsay rule disappears and consequently the possibility of injustice is negatived.[35] In any event, the distinction between this and regularly admissible evidence is less abstruse than other distinctions juries have to keep in mind and can be clearly and simply put before the jury by the judge.

Thirdly, the admission of such evidence might tend to multiply issues. This is always a very practical consideration, yet the provision in the statutory rule requiring the judge to exercise his discretion on the admissibility of the evidence on the statement having been made enables a proper balance to be kept between a thorough investigation of the facts in issue and an unnecessarily long trial.

Finally, the admission of such proof may tend to induce a witness to maintain by perjury in court any false or hasty state-

[33] They were listed but not discussed by Porter C.J.O., *supra*, footnote 6, at pp. 394 (D.L.R.), 503 (O.R.).

[34] *Per* Lord Denman in *Wright* v. *Beckett* (1833), 1 M. & Rob. 414, at p. 419, 174 E.R. 143, at p. 145.

[35] See Wigmore, *op. cit.*, footnote 1, s. 1018; Maguire, *op. cit.*, footnote 32, p. 59; and Editorial Note, [1947] 3 D.L.R. 772.

ments made out of it. This danger would not affect the honest witness[36] who could explain the inconsistency and, similarly to the third danger, is rendered impotent by the existence of the judge's power to examine the circumstances surrounding the making of the statement and to exercise his discretion by excluding it. On this point, it is of interest to note that courts have frowned upon solicitors taking sworn statements from witnesses prior to trial, because of the tendency of such a practice to discourage them from varying their stories in court for fear of being prosecuted for perjury.[37] "[A] simple signed statement [is] . . . quite as effectual for any conceivable purpose."[38]

In opposition to these four "dangers" the controlling consideration dictates that proof of prior inconsistent statements, on balance, is a most necessary procedural right. It is clearly stated by MacKay J.A. as follows:

> The only purpose of a trial, in so far as the facts of a case are concerned, is to ascertain the truth of the matters in issue and it seems to me that this purpose might well be defeated if a party were not permitted to show that a witness called by him in good faith, on reliance of the witness's previous statement, has told a story in the witness box inconsistent with his previous statement in respect of the same facts. In such case it is of the utmost importance, in the interests of justice, that such a witness should be compelled to explain his change of story.[39]

Both before and after the "settling" of the law in 1854 by section 22 of the Common Law Procedure Act, there were many judicial and extra-judicial pronouncements cogently favouring the proof of prior inconsistent statements. In *Wright* v. *Beckett*[40] Denman L.C.J., described by Mr. Justice Riddell in an earlier Ontario case[41] as "that great master of the law of evidence" said: "But how can this [the general rule preventing the discrediting of one's own witness] prevent me from showing that he stated an untruth on a particular subject by producing the contrary statement previously made by him, which gave me cause to expect the repetition of it now . . . . Can any reason, then, be assigned why, when equally deceived by his denying today what he asserted yesterday, you should be excluded from showing the contradiction into which

---

[36] See the reasons of Wigmore, *ibid.*, against the general rule against impeachment.

[37] See *Northern Navigation Co.* v. *Long et al.* (1905), 11 O.L.R. 230, at pp. 237-8 and *Wilde* v. *Rausch*, [1957] 1 W.W.R. 365.

[38] *Per* Street J. in *Northern Navigation Co.* v. *Long et al.*, *ibid.*, at p. 238.

[39] *Supra*, footnote 6, at pp. 425 (D.L.R.), 534 (O.R.).

[40] *Supra*, footnote 34, at pp. 425-26 (M. & Rob.), 147 (E.R.).

[41] *Rex* v. *Duckworth* (1916), 37 O.L.R. 197, at p. 218.

(from whatever motive) he had fallen? . . . The inconvenience of precluding the proof tendered strikes my mind as infinitely greater than that of admitting it." "The ends of justice are best attained by allowing free and ample scope for scrutinizing evidence and estimating its real value; and that in the administration of criminal justice more especially, the exclusion of the proof of contrary statements may be attended with the worst consequences."[42] The Common Law Practice Commissioners in 1853 reported as follows: "The chief objection to the proposed evidence appears to be that a party, after calling a witness as a witness of credit, ought not to be allowed to discredit him. The objection proceeds on the supposition that the party first acts on one principle, and afterwards being disappointed by the witness turns around and acts upon another, thus imputing to the party something of double dealing or dishonest practice. But it is evident that this does not apply to the case where a party, having given credit to a witness, is deceived by him and first discovers the deceit at the trial of the cause. To reject the proposed evidence in such a case, and repress the truth would be to allow the witness to deceive both jury and party."[43] Wigmore says: "There ought to be no hesitation upon the propriety of this evidence."[44]

The Court of Appeal in the *Wawanesa* case, following its interpretation of section 24 of the Evidence Act (Ont.), laid down the following useful procedural guide for future cases in which the section may be applicable.[45] On an application by counsel to prove that one of his own witnesses has made a prior inconsistent statement:

(1) The trial judge should form an opinion on whether or not the witness is adverse. In forming this opinion he can consider: (a) the testimony of the witness; (b) his demeanour; (c) the inconsistent statement and (d) "all and any evidence relevant to [the witness's hostility]".[46] Considerations (c) and (d) should be dealt with in the absence of the jury.

(2) If the judge forms the opinion that the witness is adverse he then decides whether or not to allow the inconsistent statement to be proven. "The section does not contemplate the indiscriminate

---

[42] Taylor on Evidence (1st ed., 1948), s. 1047, quoted by Porter C.J.O., *supra*, footnote 6, at pp. 394 (D.L.R.), 503 (O.R.).

[43] Common Law Practice Commissioner's Second Report, p. 16, quoted on p. 395 of Wigmore, *op. cit.*, footnote 1.

[44] *Ibid.*, p. 396.

[45] What follows is an amalgam from the judgments of Porter C.J.O. and McKay J.A.

[46] *Supra*, footnote 6, *per* McKay J.A., at pp. 425 (D.L.R.), 534 (O.R.).

admission of statements of this kind."[47] "The inconsistency may relate only to matters not in issue or to such minor or irrelevant matters that it would be unfair to the witness and the opposite party to allow cross-examination and the trial Judge could only decide this if he had before him evidence as to the content of the alleged inconsistent statement; . . ."[48]

(3) If the judge exercises his discretion in favour of allowing the inconsistent statement to be proven, he should, in the presence of the jury, direct that the circumstances of the making of the statement be put to the witness and that he be asked whether he made the statement. If the witness admits making the statement that, of course, obviates having to prove this by other evidence. If the witness further admits that the facts in the statement are true then it becomes admissible evidence in the action.

(4) If the witness denies making the former statement then this can be proved by other evidence.

(5) The judge should instruct the jury that unless the witness admits that the former statement is true, the making of it is not evidence of the facts contained therein but is solely for the purpose of proving that the witness made the statement. The jury then must decide to what extent this new piece of evidence neutralizes the testimony given in the witness box.

J. W. MORDEN*

* * *

CONFLICT OF LAWS—CONTRACT—PROPER LAW—FOREIGN EXCHANGE CONTROL REGULATIONS.—In *Etler* v. *Kertesz*,[1] the evidence disclosed that the plaintiff and the defendant had both lived in Hungary and "now and then resided and worked in Vienna" where they met in 1949. At that time, the defendant, who was contemplating departure to the United States of America, needed five hundred dollars for the journey. He borrowed the money from the plaintiff who had in his possession some American dollars he had brought with him from Hungary, and agreed to repay him in Zurich, Switzerland, in the same currency. The loan not having been repaid, the plaintiff obtained a judgment in his favour in the Province of Quebec which he then sought to enforce against the defendant in Ontario. The Ontario Court of Appeal

[47] *Ibid.*, *per* Porter C.J.O., at pp. 399 (D.L.R.), 500 (O.R.).
[48] *Ibid.*, *per* MacKay J.A., at pp. 426 (D.L.R.), 535 (O.R.).
*J. W. Morden, of the Ontario Bar, Toronto.
[1] [1960] O.R. 672, *per* Porter C.J.O.

refused to give effect to the Quebec judgment, on the ground that the defendant had not been personally served with the writ of summons in the Quebec action and had entered no defence.[2] Thereupon, the court proceeded to hear argument on the merits.

The defendant maintained that the contract was unenforceable in Ontario, because, at the time when the loan was made, the law of Austria provided that contracts involving dealings in foreign currency, unless authorized by the Austrian National Bank or some special dealers, were "unenforceable, void, invalid and illegal. Such contracts were not allowed, they were prohibited and the offender was liable to punishment".[3] The contract, if governed by the law of Austria, was illegal at its inception under the Austrian exchange control legislation.

The issue before the court was a simple one: ". . . whether the proper law of the contract is the law of Austria, the *lex loci contractus*, or the law of Switzerland, the *lex loci solutionis*?"[4] In ascribing a meaning to the expression "proper law of a contract", the court quoted with approval Dicey's definition[5] to the effect that:

> In this Digest the term "proper law of a contract" means the law, or laws, by which the parties intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended or may fairly be presumed to have intended to submit themselves.

The parties not having expressed their intention, the court also quoted Dicey's *prima facie* presumption in favour of the *lex loci contractus* or the *lex loci solutionis*.[6] Great stress was placed on the often quoted remarks of Lord Simonds in *Kahler* v. *Midland Bank*[7] and *Bonython* v. *Australia*[8] and those of Lord Wright in

[2] Pursuant to ss. 52-54 of the Ontario Judicature Act, R.S.O., 1960, c. 197.

[3] *Supra*, footnote 1, at p. 678.

[4] *Ibid.*, at p. 680. Note that the law of Switzerland was not proved. The court said at p. 680, citing Dicey's Conflict of Laws (7th ed., 1958), p. 1116: "There being no evidence as to the Swiss law, the Court should, if the Swiss law were the proper law, apply the *lex fori*, which in this case would be the law of Ontario." *Quaere:* whether this presumption should apply to foreign statutory law?

[5] *Ibid.*, p. 717, rule 148.

[6] *Ibid.*, p. 738, rule 148, sub rule 3.

[7] [1950] A.C. 24, at p. 28: "The proper law of a contract means the law or laws which the parties intended, or may fairly be presumed to have intended, the contract to be governed."

[8] [1951] A.C. 201, at p. 219: "The *mode of performance* of the obligation may, and probably will, be determined by English law; the substance of the obligation must be determined by the proper law of the contract, *i.e.*, the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection. In the consideration of the latter question, what is the proper law of the contract, and therefore what is the substance of the obligation created by

*Vita Foods Products* v. *Unus Shipping Co.*,[9] and *Mt. Albert B.C.* v. *Australasian M.L. Ass. Soc.*[10] Since, to paraphrase Lord Wright in the last case, in a situation where the parties have expressed no intention at all, the court has to impute an intention or to determine for the parties what is the proper law which, as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract, the Court of Appeal for Ontario came to the conclusion that it should apply the law with which the transaction had its closest and most real connection. In an excellent analysis of all the relevant authorities, the court attempted to reconcile Dicey's views with Westlake's objective approach.[11] The court said:[12]

> The statement of Lord Simonds in the *Bonython* case follows Lord Wright as to contracts which expressly refer to the system of law to be applied and adopts the language of *Westlake* as appropriate to other contracts, presumably those where there was no expressed intention. There he adopted *Dicey's* rule as to intention, and presumed intention, and applied it to a contract in which there was no expressed intention. I do not think, however, that Lord Simonds' statement in *Bonython* is in any sense a departure from his statement in *Kahler*. At most, it is a refinement. It is not inconsistent with the proposition that the ultimate test is the presumed intention. A presumed intention is as Singleton L.J., put it in *The Assunzione*, [1954] P. 150, at p. 176,

---

it, it is a factor, and sometimes a decisive one, that a particular place is chosen for performance."

[9] [1939] A.C. 277, at p. 290: "It is true that in questions relating to the conflict of laws, rules cannot generally be stated in absolute terms but rather as *prima facie* presumptions. But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy."

[10] [1938] A.C. 224, at p. 240: "The proper law of the contract means that law which the English or other Court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary, criteria such as *lex loci contractus* or *lex loci solutionis*, and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts. It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case *prima facie* their intention will be effectuated by the Court. But in most cases, they do not do so. The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract. No doubt there are certain *prima facie* rules to which a Court in deciding on any particular contract may turn for assistance, but they are not conclusive. In this branch of law the particular rules can only be stated as *prima facie* presumptions."

[11] Private International Law (7th ed., 1925), s. 212.

[12] *Supra*, footnote 1, at p. 682.

"how a just and reasonable person would have regarded the problem." *Dicey*, p. 719, suggests as the most satisfactory formulation of the presumed intention that the proper law is the one with which the transaction has its closest and most real connection. See *Falconbridge*, Conflict of Laws, 2nd ed., p. 378, where it is pointed out that the:

> " 'intention' theory seems on its face to be purely subjective in character, but in effect, if the parties to a contract have not expressly selected the proper law, the practice of English Courts has been to ascertain the proper law objectively in the light of the facts and circumstances of each case, including the place of contracting, the place of performance, the places of residence or business of the parties respectively, and the nature and subject matter of the contract."

The most important part of the court's opinion from the point of view of juridical science, and one that will have a great influence on the development of conflict of laws in Canada, or at least in Ontario, deals with the test to be adopted in the field of contracts:[13]

> In seeking to ascertain the intention of the parties as to the proper law of the contract in the case at bar, in the absence of any expressed intention, and in the light of these authorities [English cases, Dicey, Westlake], I think that it should be determined as the one with which the transaction has its closest and most real connection.

At last, judicial approval is given in Canada to a sensible formula for determining, in the absence of expressed intention, the proper law. After placing much reliance on the *Kahler* case,[14] the

[13] *Ibid.*, at p. 683.

[14] *Supra*, footnote 7. The court said, *supra*, footnote 1, at p. 688: "After considering all the authorities above mentioned, I would regard the *Kahler* case as the one most closely approximating in its facts the case at bar, for here the parties were both personally present in Austria, entered into the contract there, and performed a substantial part of the contract there. I am of the opinion that upon these facts, the system of law with which the transaction has its closest and most real connection is the law of Austria."

It is surprising to note that in determining whether the contract had its closest and most real connection with the law of Austria or Swizerland, the court found it necessary to rely on precedent. This determination would appear to be a question of fact — and no two factual situations are alike. A contract may have factual links with several countries, each of which has some claim to be considered. There exists such a multiplicity of connecting factors, several of which are usually present in the same case (place where the contract was made, place of performance, domicile, residence or nationality of the parties, situs of the subject matter of the contract, and so on) that it is often difficult to select the most significant, the one which, in turn, will determine the proper law, let alone find a precedent on all fours with the case at bar. This is particularly true when a subjective approach is taken by the court.

The court could as well have relied on many other cases where the law of the place of contracting was held to be the proper law. Actually, although in both cases the law of the place of contracting contained exchange control regulations, the facts giving rise to litigation and the problems involved were quite different. Also, on the whole, there were more factors pointing to the law of Czechoslovakia in the *Kahler* case than pointing to the law of Austria in *Etler* v. *Kertesz*. As to whether the

court came to the conclusion that the contract had its closest and most real connection with the law of Austria. Dicey's rule that "a contractual obligation may be invalidated or discharged by exchange control legislation if (a) such legislation is part of the proper law of the contract"[15] was applied and the court held in favour of the defendant:[16]

> Since by the law of Austria the contract was invalid, void, and being prohibited by positive law, illegal and the promise to repay was thus an illegal consideration, the plaintiff is not entitled to recover upon the contract.

The Ontario Court of Appeal distinguished the *Torni*[17] the *Vita Food*[18] and the *Missouri*[19] cases,[20] to reject the plaintiff's contention that the proper law of the contract was that of Switzerland, where the loan was to be repaid. *Handel* v. *English Exporter Ltd.*[21] and *Chatenay* v. *Brazilian Submarine Tel. Co.*[22] were also held to be distinguishable from the present case, as the court refused to

---

proper law was correctly ascertained in the *Kahler* case, see (1950), 3 Int. & Comp. L.Q. Rev. 255 and Mann, Nazi Spoliation in Czechoslovakia (1950), 13 Mod. L. Rev. 206.

It is submitted that the passage quoted from Lord Simonds' speech and relied upon by the court:

> "What then is the proper law of the contract that was made with the Zivnostenska Bk., and that I have assumed to have been renewed with the Bohemian Bk? In my opinion, it was the law of Czechoslovakia. The contract was made in that country between an individual and a corporation both resident there. At the date of the contract and at the material times thereafter the law of Czechoslovakia included a law regulating transactions in foreign exchange substantially the same as that which prevailed at the date of the issue of the writ. At all material times it was illegal for the bank, Zivnostenska or Bohemian, to part with foreign securities in its custody without the consent of the National Bk. or other proper authority, whether those securities were at the date of the contract in fact situate in Czechoslovakia or in some other country. In these circumstances I cannot accede to the contention of the appellant that the proper law of the contract so far as it concerns the delivery of the securities is governed by the law of England or of any other country in which they may chance to be situate."

only shows the process his lordship followed in that case in order to reach the conclusion that the law of Czechoslovakia was the one most closely connected with the contract.

[15] *Op. cit.*, footnote 4, rule 178, p. 919.

[16] *Supra*, footnote 1, at p. 688.

[17] *The Torni*, [1932] P. 78.

[18] *Supra*, footnote 9.

[19] *Re Missouri S.S. Co.* (1888), 42 Ch. D. 321.

[20] *Supra*, footnote 1, at p. 685: "I think that the *Torni*, *Vita Foods* and *Missouri* cases are all distinguishable from the case at bar, first in that on the face of the contracts in question, the express or apparent intention of the parties was that the law of England should apply, and secondly, in that in each case by the foreign law under consideration, the contracts were invalid or void, but not illegal as being prohibited by a positive law."

[21] [1955] L1.L.R. 317.

[22] (1891), 1 Q.B. 79, *per* Esher M.R., at pp. 82-3.

give weight to a presumption that the parties to a contract would intend to make a valid one:[23]

> The last two mentioned authorities, in my opinion, are distinguishable from the case at bar on the facts. I do not think that either of these authorities laid down any general rule to the effect that the proper law of a contract as between the laws of two countries, by one of which it would be valid, and by the other it would be invalid, should be presumed to be in the country where the contract would be valid. Under certain circumstances such a consideration might have some weight viewed together with all the other evidence from which intention might be inferred.

Finally, the court was of the opinion that:[24]

> . . . the law of Austria relating to foreign exchange, under which the transaction, without the required consent would be illegal, is not in my opinion, a law of such a penal or confiscatory nature that it should be disregarded by the Courts of this country. This law is similar in its effect to the law in force in Canada in 1947, prohibiting dealings in foreign exchange except through certain authorized dealers.[25]

The great merit of the decision of the Court of Appeal for Ontario is that it clarifies the doctrine of the proper law of a contract, a doctrine that has been applied on several occasions in Canada.[26] There is, unfortunately, no unanimity in the common-law provinces on the exact meaning of the expression "proper law", especially in the absence of expressed intention. *Etler* v. *Kertesz*[27] now stands for the proposition that, in the absence of expressed intention, the system of law with which a contract has its closest and most real connection determines the question whether an obligation has been validly created.[28]

---

[23] *Supra*, footnote 1, at p. 687. Although the court could be criticized for relying so heavily on English authority, this rather mechanical approach can readily be understood in a field that has been called "the most confused subject in the conflict of laws": Morris, The Eclipse of the *Lex Solutionis* — A Fallacy Exploded (1953), 6 Vand. L. Rev. 505. Breaking new ground should be done carefully.

[24] *Ibid.*, at p. 688.

[25] The Foreign Exchange Control Act, 1946, c. 53, repealed in 1952 by The Currency, Mint and Exchange Fund Act, S.C., 1952, c. 40, s. 30, now R.S.C., 1952, c. 315.

[26] See Castel, Private International Law (1960), p. 196.

[27] *Supra*, footnote 1.

[28] The parties are *presumed* to have selected the law most substantially connected.

Not all matters affecting a contract should necessarily be governed by one law, although this principle seems to be implied from the general language of the court. See also an earlier decision of the Ontario Court of Appeal, *Charron* v. *Montreal Trust Co.*, [1958] O.R. 597, to the effect that capacity to contract is governed by the proper law. As Professor Cheshire, Private International Law (5th ed., 1957), p. 205, points out: "The correct inquiry is not — what law governs a contract? It is — What law governs the particular question raised in the instant proceedings? Different questions may well be determinable by different laws." Problems

An important step has been taken in Ontario, which accords with modern theories in the field of conflict of laws, and shows a complete departure from conceptualist theories. With one exception, the proper law of a contract is the law of the country in which it may be regarded as localized. This localization is indicated by the grouping of all the elements, factual or otherwise, in the transaction.

In this context the presumption in favour of the *lex loci contractus* or the *lex loci solutionis* is of little value. The contract must be regarded as a whole. "The proper course is not to begin with a presumption and then inquire whether there are rebutting circumstances, but to fall back on a presumption only when the circumstances, viewed as a whole, fail to reveal with reasonable certainty the law to which the contract naturally belongs." [29]

It is unfortunate that the Court of Appeal expressed the doctrine of the proper law in terms of presumed intention, so as to appear to reconcile the subjective and objective tests. How can the court infer from the terms and circumstances of the contract what the common intention of the parties would have been, had they considered the matter at the time when the contract was made? In order to be able to rely on the opinion of Lord Simonds in the *Kahler* case [30] and that of Lord Wright in *Mt. Albert*,[31] to the effect that the proper law means the law by which the parties intended or may fairly be presumed to have intended the contract to be governed, the court was forced to impute to the parties an intention to stand by the legal system which, "having regard to the incidence of the connecting factors and of the circumstances generally, the contract appears most properly to belong".[32]

It is a myth to regard the opinion of the court as the fulfillment of the common intention of the parties.[33] Reference to their pre-

---

of conflict of laws in the field of contracts must be broken down into groups, so that different types of social, economic, business and government interests may receive separate consideration. No single rule should be applied to all types of contract and to all its aspects. Yet a contract should not be split readily or without good reason. Lord MacDermott dissenting in the *Kahler* case, *supra*, footnote 7, at p. 42: "Though there is no authority binding your Lordships to the view that there can be but one proper law in respect of any given contract, it is doubtless true to say that the courts of this country will not split the contract in this sense readily or without good reason."

[29] Cheshire, *ibid.*, p. 211, referring to *Re Anglo-Austrian Bank*, [1920] 1 Ch. 69.

[30] *Supra*, footnote 7.

[31] *Supra*, footnote 10.

[32] Cheshire, *op. cit.*, footnote 28, p. 211.

[33] *Ibid.*, pp. 209-210. See also Lord Norman in the *Kahler* case, *supra*, footnote 7, at p. 37: "To ask what law the parties intended to govern the contracts is to ask a question that admits only one artificial answer."

sumed intention was not necessary and detracts from the persuasiveness and logical value of the principle laid down by the court. In most cases, the parties have not thought of the proper law at all. Why must the court, in the words of Lord Wright, impute an intention or determine for the parties what is the proper law which "as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract". A simpler formulation of this subjective approach is that adopted by Singleton L.J. in the *Assunzione* case,[34] where he says that a presumed intention is "how a just and reasonable person would have regarded the problem".

Let us do away with the criterion of presumed intention and say forthwith that the proper law of a contract is the law which the parties expressly intended to apply (subjective test) or, in the absence of expressed intention, that with which the contract has the most substantial connection (objective test). A rule that combines the expressed intention theory with the law most substantially connected is logical and gives desirable flexibility to the proper law doctrine. It allows for adequate consideration and weighing of all the social and economic factors involved in the situations presented for adjudication.[35] No greater certainty is needed. As Professor Cook points out,[36] the presumed intention theory seems, on the whole, to be a somewhat cumbersome and misleading way of expressing a rule that the law to be applied is that of the place with which the agreement on the whole has a substantial or vital connection. Conflicts specialists will no doubt regret that the court did not discard the presumed intention theory.

What still remains in doubt in Ontario, as well as in the rest of Canada, is the extent to which the parties to a contract may expressly select as the proper law any law in the world, or whether their choice must be restricted to some law with which the contract is already factually connected.[37] Several judicial dicta seem to admit unrestricted freedom of choice. In the celebrated *Vita Food* case, Lord Wright[38] thought that it is sufficient for the intention expressed to be "*bona fide* and legal". He did not believe that con-

---

[34] [1954] P. 150, at p. 176.

[35] Cook, The Logical and Legal Bases of the Conflict of Laws (1942), p. 431.

[36] *Ibid.*, p. 418.

[37] It is important to carefully distinguish the express selection of the proper law to govern a contract as a whole, from the quite different process of incorporation in the contract of certain domestic provisions of a foreign law.

[38] *Supra*, footnote 10, at p. 290.

nection with the law expressly selected is essential.[39] On the other hand, especially with respect to illegality, it is questionable whether the parties may expressly select a law that makes the contract valid, when it would be invalid by the proper law ascertained objectively. Recently, Upjohn J., in *re Claim of Helbert Wagg & Co. Ltd.*,[40] seemed to have been of the opinion that the courts should not necessarily be bound by the expressed intention of the parties, where the system of law chosen has no real or substantial connection with the contract, looked upon as a whole. Of course, there is no problem if the law expressly selected is also the proper law by application of objective standards.

It has been argued with great force that the preliminary question whether the parties are contractually bound the one to the other must, in the nature of things, be governed by a law independent of their volition, that is, by the proper law ascertained objectively.[41] The parties should not by any contractual provision render intrinsically valid a contract that is intrinsically invalid by its proper law ascertained objectively. The law expressly selected should have some connection with the agreement,[42] otherwise "allowing the parties to choose the law in this regard involves a delegation of sovereign power to private individuals".[43] In other words, the

[39] See also Lord Atkin, in *Rex* v. *International Trustee*, [1937] A.C. 500, at p. 529: "Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive."

[40] [1956] Ch. 323, at p. 341.

[41] Cheshire, *op. cit.*, footnote 28, p. 216, citing Wharton, The Conflict of Laws (3rd ed. by Parmele 1905), Vol. II, p. 900, s. 427e and *Boissevain* v. *Weil*, [1949] 1 K.B. 82, at pp. 490-1 where Denning L.J. said: "Notwithstanding what was said in *Vita Food Products* v. *Unus Shipping Co.*, I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined. Their intention is only one of the factors to be taken into account."

[42] See the new approach taken by the American Conflicts Restatement Second, ss. 332, 332a, 332b in Cavers, Re-Restating the Conflict of Laws: The Chapter on Contracts (XXth Century Comparative and Conflict of Laws (1961), p. 349). Also Batiffol, Traité élémentaire de droit international privé (3rd ed., 1959), s. 585, p. 638: ". . . la loi d'autonomie est celle qui se déduit de la localisation du contrat telle qu'elle résulte de la volonté des parties quant à la répartition territoriale et l'importance respective des differents éléments de leur opération." and s. 570, p. 618: ". . . Celle-ci [position traditionelle] consiste à notre sens en ce que la loi applicable au contrat est determinée par le juge, mais en raison de la volonté des parties quant à la localisation du contrat. L'explication de cette formule appelle le developpement des deux propositions qu'elle implique, à savoir: 1° la localisation du contrat dépend de son économie donc de la volonté des parties: 2° l'objet propre de la volonté des parties est la localisation du contrat, non le choix de la loi." See also s. 574, p. 624, "Liberté des parties dans la désignation de la loi applicable", and Batiffol, Public Policy and the Autonomy of the Parties: Interrelation Between Imperative Legislation and the Doctrine of Party Autonomy (The Conflict of Laws and International Contracts (1949), p. 69).

[43] Lorenzen, Validity and Effect of Contracts in the Conflict of Laws

creation of an obligation should not be a matter to be left to the discretion of the parties.[44]

In Canada, however, we are still bound by the decision of the Privy Council in the *Vita Food* case,[45] and it would seem that the parties are free to submit the validity of their contract to any law of their own choosing, so long as this choice is "*bona fide* and legal" and there is no reason for avoiding the choice on the ground of public policy. More than twenty years later, it is still not clear what meaning is to be attached to the words "*bona fide* and legal". Although it could be argued that the choice of the parties is not in good faith, if the transaction in question has no real and substantial connection with the state whose law is selected, this does not appear to be the logical conclusion to be derived from the *Vita Food* case.[46] Why should the parties be limited to choosing from the rules of decision found in the system of law in force in one of the legal units with which the agreement has a substantial or some connection?[47]

The application of the rule of expressed intent is limited, of course, by the principle that the forum may refuse to apply the stipulated law on the ground that it infringes the forum's public policy or because the parties could not have achieved the desired result under the foreign law applicable by the objective test. They must not try to evade the *imperative* provisions (that would make the contract illegal or void) of that legal system with which the contract has its most substantial connection and which, for this reason, the court would, in the absence of an expressed intention, have applied.[48] Professor Cheshire goes a step further and maintains that "the courts will not allow it [*Vita Food* case] to disturb the principle that the parties are not free to choose the law by which the validity of their contract is to be determined".[49] This attitude would seem reasonable if a distinction were made between

(1920), 30 Yale L. Rev. 654, at p. 658; *E. Gerli & Co.* v. *Cunard SS. Co.* (1931), 48 F. 2d. 115, *per* Learned Hand J., at p. 117.

[44] See *The Torni, supra,* footnote 19. *Contra: Vita Food Products* v. *Unus Shipping Co., supra,* footnote 9.

[45] *Ibid.* Although appeals to the Judicial Committee in civil matters were abolished in 1949, one must assume that this "does not affect the authority of its earlier decisions until and unless the Supreme Court of Canada, in its new role of sovereign and ultimate court of appeal for Canada, chooses to depart from them. . . ." Friedmann, Stare Decisis at Common Law and Under the Civil Code of Quebec (1953), 31 Can. Bar Rev. 723, at p. 731.

[46] *Ibid.*

[47] In general, for an analysis of the intention theory, see Cook, *op. cit.,* footnote 35, Ch. XV, p. 388 *et seq.*

[48] Dicey, *op. cit.,* footnote 4, rule 148, sub rule 1, p. 724 *et seq*

[49] *Op. cit.,* footnote 3.

questions of validity and questions of performance or construction. If the modern unitary approach to the proper law of a contract is taken, it appears to be somewhat extreme to limit the parties' express choice to a law having the most substantial or, for that matter, any contact with the case, when no evasion is contemplated.

That there must be some limits to the choice of law by the parties is admitted by all, including the Judicial Committee. The courts should not help the parties to evade the clear and strong public policy of any of the states connected with the agreement or at least that with which it is most substantially connected.[50]

It would seem reasonable to conclude that the contract should have some connection with the chosen law, and that the application of this law should not be contrary to a fundamental policy of the state that would be the state of the governing law in the absence of an express choice by the parties. Should the law chosen run counter to the law of another state which, but for the parties' choice, would possess some colour of having the most significant relationship with the contract, the parties favoured by the latter law could always compel the court to decide whether the state's colourable claim is valid and, if so, whether its law embodies a fundamental policy. Otherwise, there seems to be no theoretical or practical objection to giving effect to the expressed intention of the parties when the choice is limited to the law of some jurisdiction with which the agreement has some connection, whether substantial or not, and the public policy of the forum or that of the legal system most substantially connected does not indicate a contrary decision. To allow absolute freedom of choice would place a possibly inconvenient burden on the forum and perhaps too often lead to a clash with the public policy of the states having a direct interest in the agreement.[51]

The other point, deserving attention here, arises from a discussion by the court in *Etler* v. *Kertesz* of the *Handel*[52] and *Chatenay* cases,[53] which were cited by the plaintiff as supporting the view that "the proper law of a contract as between the laws of two coun-

[50] For instance, where, by the law most substantially connected with the agreement entered into, the making of that kind of agreement is a criminal offence, the parties may not make it valid by choosing a law which does not forbid such an agreement. Note that in the *Vita Food* case, *supra*, footnote 9, the law of Newfoundland was said not to ". . . make the contract illegal so as to nullify the contract. There was no sufficient ground for refusing to give effect to the express or implied intention of the parties that the proper or substantive law of the contract, that is, the law by which it was to be enforced and governed should be English law." *Per* Lord Wright, at p. 299.

[51] Cook, *op. cit.*, footnote 25, p. 418.

[52] *Supra*, footnote 27. [53] *Supra*, footnote 28.

tries, by one of which it would be valid, and by the other it would be invalid, should be presumed to be in the country where the contract would be valid".[54] The Court of Appeal was of the opinion that these cases did not lay down such a wide proposition and were distinguishable from the present case. Porter C.J.O. was careful, however, to point out that "under certain circumstances, such a consideration might have some weight viewed together with all the other evidence from which the intention might be inferred".[55] In fact, one would be tempted to say that the circumstances were such as to make the *lex validitatis* (Switzerland) the proper law of the contract.

It has often been said that the courts may incline towards applying a system of law that validates the contract, on the ground that the parties cannot be assumed to have intended the contract to be governed by a law making it invalid. If one adopts the approach taken by the Ontario Court of Appeal, that it is the law presumably intended by the parties that must be ascertained and applied, one could not imagine the parties ever selecting a law that would make their contract illegal and void. How could the parties be presumed to have contemplated a law that would defeat their engagements?[56] Only on a purely objective determination of the proper law would such a consideration be irrelevant.

The application of the *lex validitatis* is not without eminent supporters, both ancient and modern.[57] In the United States of

[54] *Supra*, footnote 1, p. 686. [55] *Ibid.*, p. 687.

[56] *Pritchard* v. *Norton* (1882), 106 U.S. 134, at p. 137. See also the *Kahler* case, *supra*, footnote 7, *per* Lord MacDermott, at p. 41: "Why should he intend that his right to deal with his securities abroad should be regulated by those restrictions? I can see no ground for attributing any such intention to him. On the contrary, it is I think but reasonable to assume that his confidence and hope in regard to these securities must have rested on the laws of the countries where they were placed and where as yet there was freedom and peace."

[57] As early as 1879, Roger (American Interstate Law (1879), p. 50) wrote that when the validity of a contract involves the laws of two or more states, and it is not expressly apparent which the parties had in view, then that law which is most favourable to validity will be regarded as the law of the contract. See also Savigny to the effect that ". . . it is certainly not to be presumed that the parties intended to subject themselves to a local law entirely opposed to their purpose." The Conflict of Laws (2nd ed. rev., Guthrie trans., 1880), pp. 223-4.

Wharton was also of the opinion that: "It is always to be presumed that persons agree effectually to do that which they contract; and if so, this agreement becomes part of the contract, overriding such local law as does not rest on a ground distinctly moral or political. And when there is a conflict of possible applicatory laws, the parties are presumed to have made part of their agreement that law which is most favourable to its peformance." (*op. cit.*, footnote 41, p. 945, s. 429); and see Lorenzen, Selected Articles on the Conflict of Laws (1947), pp. 298-299; Stumberg, Conflict of Laws (2nd ed., 1951), pp. 225, 237-240; Cavers, A Critique of the Choice of Law Problem (1933), 47 Harv. L. Rev. 173, at p. 190.

America, Professor Ehrenzweig states:[58]

> The principle that a contract will be upheld whenever possible — the *favor negocii* — is well established in the municipal laws of all countries. Whenever the court's choice is between the application of an invalidating rule and a validating rule, it will apply the latter. The *lex validitatis* in conflict cases is only an application of this almost self-evident postulate. . . .

and he adds:

> Once it is conceded that a forum, in enforcing a foreign contract, is not limited to enforcing rights vested under the foreign law, and that courts will endeavour to give effect to the parties' intention wherever possible, the invalidation of any foreign contract that is valid under the *lex fori* should be expected to occur only in very exceptional circumstances.

Courts have often applied the *lex validitatis* in an unorthodox fashion and without openly acknowledging the fact, by selecting that law, among the possible laws applicable, under which the contract could be held valid in accordance with the parties' presumed intention. It is in this way that one could interpret the passages quoted from the two cases cited by the plaintiff in *Etler* v. *Kertesz*.[59]

An examination of the facts of *Etler* v. *Kertesz* reveals the following points of contact with Austrian law: the loan was made in Vienna and was illegal there, and the parties "at times resided and worked in Vienna".[60] The claim to the application of Swiss law was based on the fact that the loan was to be repaid in Zurich and was valid by the law of that country. If we look at the other elements present, we find that the loan was in United States dollars to be repaid in the same currency. Austrian currency was never involved in the transaction,[61] and the dollars had been obtained

[58] Contracts in the Conflict of Laws. Part One Validity (1959), 59 Col. L. Rev. 973, at pp. 992, 1021, footnotes omitted.

[59] *Hendel* v. *English Exporters Ltd.*, *supra*, footnote 21, and *Chatenay* v. *Brazilian Submarine Tel. Co.*, *supra*, footnote 22. The *Missouri* case, *supra*, footnote 19, could also be put in this category. And see *Hamlyn* v. *Talisker Distillery*, [1894] A.C. 202. In the British Columbia case of *Rosencrantz* v. *Union Contractors* (1960), 31 W.W.R. 597, 23 D.L.R. (2d) 473 (comment in (1961), 39 Can. Bar Rev. 93), the *lex validitatis* seems to have been rejected. Perhaps cases involving illegality should be subject to considerations different from those obtaining when other problems are involved.

[60] Dates are not disclosed, *supra*, footnote 1, p. 675.

[61] This fact could indicate that the parties intended the law of the United States to govern the contract.

It is interesting to note that no attempt was made to invoke the *lex fori* (Canada) in order to prevent the enforcement of a contract made in violation of the law of a member of the International Monetary Fund. It is well established that, whatever their proper law and wherever they are to be performed, exchange contracts are unenforceable if they involve

by the plaintiff before coming to Austria.[62] The opinion of the court does not disclose the nationality of the parties, which one may assume to be Hungarian, nor their actual residence and place of business at the time of the loan. Furthermore, the defendant was about to leave Austria for the United States of America. It seems, therefore, reasonable to conclude that the connection with the law of Austria is not as decisive as it might first appear to be. The result would have been just as convincing if the court had found that the proper law of the contract was that of Switzerland. In fact, what the court did was to apply the presumption in favour of the *lex loci contractus* and to justify it on the ground that it was most closely connected with the transaction. Support for the conclusion reached by the court rests on the fact that the validity of the contract was at stake. The court must also have felt disinclined to apply the law of Switzerland, which validated the contract, on the ground that, to do so, would condone the violation of the exchange control regulations of Austria, a friendly country, when these regulations were neither penal nor confiscatory, and thereby possibly jeopardize the good relations existing between Canada and Austria.

Professor Ehrenzweig is forced to recognize that, in practice,

---

the currency of any member of the International Monetary Fund and if they are contrary to the exchange control regulations of any member. Dicey, *op. cit.*, footnote 4, rule 178. Canada and Austria are members of the Fund and article VIII (2)(b) which provides that: " Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member . . .", is part of the law of Canada (The Bretton Woods Agreement Act, S.C., 1945, c. 11, now R.S.C., 1952, c. 19).

Thus, as far as Canadian law is concerned, respect for foreign exchange control restrictions is statutory. Article VIII (2)(b) applies, however, only where the regulations are those of the member whose currency is "involved", which was not the case here. See "Interpretation of Art. VIII (2)(b) of the International Monetary Fund Agreement by the Board of Executive Directors of the International Monetary Fund (made pursuant to Art. XVIII)", Annual Report of the International Monetary Fund (1949), p. 82 *et seq.* See also (1954), 3 Int. & Comp. L. Q. Rev. 262: Are these rules of interpretation binding on Canadian courts asked to deal with a Canadian statute? By finding that the law of Austria was the proper law, the court avoided the difficulty. Austrian exchange control legislation was applied by virtue of a conflict-of-laws rule of the forum and not by reason of membership in the International Monetary Fund. It could be argued that the court should have regarded the Austrian restrictions creating illegality as a temporary expedient to deal with an emergency situation. Such restrictions would not affect the substantive obligations to pay but merely defer the date of payment.

[62] The loan could not, therefore, have done any harm to the Austrian economy (except perhaps in the sense that, if the plaintiff had exchanged his dollars for Austrian currency, he would have strengthened the schilling).

the courts have been inclined to give effect to the invalidating policies of foreign countries. He says:[63]

> "Comity of nations" while nearly defunct as a general theory has been quite effective in this field with regard to certain kinds of contracts. Among the cases most frequently arising are those involving the currency laws of other nations, and Lord Mansfield's famous dictum that "foreign revenue laws" will not be noticed has been significantly counteracted. Whether because of a certain international solidarity in financial matters, or because of special international agreements, American courts seem to be willing to strike down contracts concluded in violation of the currency laws of foreign countries, even when the political relations with the foreign country are not conducive to comity. Similarly, many cases in which English courts have purported to apply the "proper law" for the purpose of invalidating a contract involved currency laws or similar regulatory measures of foreign countries . . . .
>
> *Even in this field, however, the Rule of Validation prevails when governmental interests recede. This is true, for instance, when neither party owes allegiance to the invalidating law, or when a domestic contact with the transaction, such as the forum is being the place of performance, creates a competing domestic private interest. Principally, the forum will not permit a debtor to hide behind foreign currency laws to escape a morally cogent obligation.*[64]

From the point of view of conflicts theory, there is no doubt that *Etler* v. *Kertesz*[65] is of great importance. In spite of its deficiencies, mainly its nominal adherence to the fiction of presumed intent, it will certainly rank among the leading cases in the field, and it is hoped that, with some qualifications, it will be followed elsewhere in Canada.[66]

J.-G.C.

* * *

CONTRIBUTORY NEGLIGENCE AND THE FATAL ACCIDENTS ACT—LIABILITY OF THE DECEASED'S ESTATE.—Every year thousands of Canadians suffer financial loss as the result of fatal accidents. In a large proportion of these cases contributory negligence on the part of the deceased was a factor in the mishap. Following the decision of the Supreme Court of Canada in *Littley* v. *Brooks and Canadian National Ry. Co.*,[1] persons who bring an action under

[63] *Op. cit.*, footnote 58, at p. 1022, footnotes omitted.
[64] Italics mine.
[65] *Supra*, footnote 1.
[66] The court should be commended for its liberal attitude as to who may be a competent witness. The decision is also of value on the question of enforcement of Quebec judgments in Ontario, and the doctrine of identity where the foreign law has been alleged but not proved.
[1] [1932] S.C.R. 462.

one of the fatal accidents statutes, have their claim for damages reduced in accordance with the degree to which their deceased was himself contributorily negligent. It is submitted that the decision of the Supreme Court is wrong in principle and can only be explained on the basis of the then existing statutory provisions.

The action under the Fatal Accidents Act[2] is no mere continuation of the action for personal injuries possessed by the deceased at the moment of his death. After some dubious first attempts[3] the courts firmly declared that the action brought under the Fatal Accidents Act, or its English progenitor, Lord Campbell's Act,[4] was entirely distinct from any cause of action possessed by the deceased.[5] The position cannot be stated more succinctly than it appears in the judgment of Haultain C.J.S., in *Burlington* v. *G.T.P. Ry.*[6]:

> The personal representative is only the nominal plaintiff. The right of action is given not for the benefit of the estate, but for the benefit of the persons mentioned in the statute, as individuals, and not as a class. The money recovered is not assets, and does not pass to the administrator as personal estate but is divided among the individuals entitled in such shares as may be determined at the trial. The statute does not transfer a right of action from the deceased to his representatives, but gives the latter an entirely new right of action based on different principles. The condition that the person injured, if death had not ensued, could have maintained an action and recovered damages, does not refer to the loss or injury sustained by him, but to the circumstances under which that loss or injury was sustained, and the nature of the wrongful act, neglect or default complained of. The Act creates a special right of action and prescribes by whom and on whose behalf the action may be brought. The personal representative of the deceased is made the nominal plaintiff, and special provision is made by the Act for cases where there is no personal representative.

It is clear that the cause of action under the Fatal Accidents Act is conditional upon the person injured, if death had not ensued, having an action for damages in respect of the injury.

---

[2] R.S.S., 1953, c. 102. This Act is representative of Canadian fatal accident legislation. Subsequent references to sections of the Fatal Accidents Act in this comment shall refer to the Saskatchewan Act unless otherwise indicated.

[3] *Read* v. *The Great Eastern Railway Company* (1868), L.R. 3 Q.B. 555, *per* Blackburn J., at p. 558, and Lush J., at p. 558; *Griffiths* v. *The Earl of Dudley* (1882), 9 Q.B.D. 357, at p. 363; *England* v. *Lamb* (1918), 42 O.L.R. 60, *per* Middleton J., at p. 61.

[4] (1846), 9 & 10 Vic., c. 93.

[5] See *Seward* v. *The Vera Cruz* (1885), 10 App. Cas. 59, *per* the Earl of Selborne L.C., at p. 67, and *per* Lord Blackburn, at pp. 70-71; *British Electric Railway Company* v. *Gentile*, [1914] A.C. 1034, in which the Judicial Committee of the Privy Council followed *Seward* v. *The Vera Cruz* in interpreting the Families Compensation Act, R.S.B.C., 1911, c. 8.

[6] [1923] 2 W.W.R. 1161, at p. 1163.

As was stated by Lord Dunedin in *British Electric Railway Company* v. *Gentile*:[7]

> Their Lordships are of opinion that the *punctum temporis* at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute. If, therefore, the deceased could not, had he survived at that moment, maintained, *i.e.* successfully maintained, his action, then the action under the Act does not arise.

Once this condition is satisfied, a new cause of action is born, and defences available against the deceased, which went only to the measure of damages and not the existence of the deceased's action, are clearly not available in the new cause of action, unless the deceased's negligence can be imputed to the plaintiff by the common law, or some statutory enactment protects the defendant.

Such being the case, on what basis can the decision of the Supreme Court in *Littley* v. *Brooks and Canadian National Ry. Co.*[8] be justified? In that case, the action was brought under the Ontario Fatal Accidents Act,[9] for the benefit of the plaintiff Laura Littley and her son, Stanley Littley, to recover damages for the deaths of the husband and three children of the said Laura Littley, who were occupants of a motor car, the deaths resulting from a collision between the motor car and an electric train of the defendant company. In a trial before Raney J., the jury found the defendant company twenty-five per cent to blame and the deceased driver of the automobile seventy-five per cent to blame for the accident. Raney J. thereupon gave judgment to the plaintiffs for twenty-five percent of their full loss. On an appeal by both sides the Appellate Division set aside the judgment and ordered a new trial. The plaintiffs appealed to the Supreme Court of Canada, asking the judgments of both lower courts be set aside and judgment be entered for the plaintiffs for the full amount of their respective losses. Only Rinfret J. dealt with the problem of whether the claim of the beneficiaries under the Fatal Accidents Act was affected by the contributory negligence of the deceased.[10]

---

[7] [1914] A.C. 1934, at p. 1041. While it appears to be an inescapable conclusion that the deceased must have had a right of action at the moment of his death before any right of action arises under the Fatal Accidents Act, the logic of the provision may well be doubted. It is interesting to note that the courts do not appear to have taken such a strict approach in interpreting article 1056 of the Quebec Civil Code which uses language similar to that of the fatal accidents legislation in common-law provinces: see *Robinson* v. *Canadian Pacific Ry. Co.*, [1892] A.C. 481.

[8] *Supra*, footnote 1. [9] R.S.O., 1927, c. 183.

[10] One might query what weight should be given to the decision to apply apportionment, in view of the fact that it is the decision of only two Supreme Court judges. Five of the nine judges heard the case. Of the five,

He concluded that the defendant was liable for damages only in proportion to his degree of fault:

> When, therefore, we have a verdict such as we have here, and the jury finds that the fault of each party contributing to the accident should be apportioned in the ratio of twenty-five per cent for the defendants and seventy-five percent for the other party, the meaning of the Act [The Contributory Negligence Act[11]] and the intention of the legislature is that, the defendants having been found guilty of fault or negligence contributing to the accident only in the proportion of twenty-five per cent, their liability for the consequences of that accident is limited to twenty-five per cent, and they are answerable only to that extent towards the person claiming damages resulting from the accident. In such a case, says the Act, "the plaintiff shall have judgment only for so much thereof as is proportionate to the degree of fault imputable to the defendant". The injurious participation by the defendants in the wrongful acts which caused the accident having been in the proportion found by the jury, they are to contribute towards the compensation for the damages in that proportion. They are to pay only that proportion of the damages which they have caused, — and they are not responsible for more. The Act applies to "any action or counterclaim" (section 2) and, by definition (section 1), the plaintiff in any such action or the defendant in any counter-claim "*shall have judgment* only for so much (of the entire amount of damages) as is proportionate to the degree of fault imputable to the defendant".[12]

It can be seen that Rinfret J.'s decision is based on the wording of the Contributory Negligence Act. Section 2 of that Act provided:[13]

> 2. In any action or counterclaim for damages, which is founded upon fault or negligence, if a plea of contributory fault or negligence shall be found to have been established, the jury, or the judge in an action tried without a jury shall find:
>
> First: The entire amount of damages to which the plaintiff would have been entitled had there been no such contributory fault or neglect.
>
> Secondly: The degree in which each party was in fault and the manner in which the amount of damages found should be apportioned so that *the plaintiff shall have judgment only for so much thereof as is proportionate to the degree of fault imputable to the defendant.*

Thus, although the plaintiffs had an entirely new cause of action against the defendants, the defendants' liability was expressly limited by the italicized words of the Contributory Negligence Act. This limitation on the scope of the Supreme Court decision

---

Newcombe J. died before delivering his judgment; Lamont J. wrote a strong dissenting judgment; Anglin C.J.C. agreed in the result on other grounds; Smith J. wrote no judgment at all but concurred with Rinfret J.

[11] R.S.O., 1927, c. 103. [12] [1932] S.C.R. 462, at pp. 475-476

[13] *Supra*, footnote 11. Italics added.

has been recognized by LeBlanc J., in *Campbell* v. *Perry*,[14] but generally in cases of claims arising under fatal accidents legislation, where the deceased was contributorily negligent, the courts have applied apportionment to the claims either without comment[15] or with approval of the decision in *Littley* v. *Brooks and Canadian National Ry. Co.*,[16] regardless of the express words of binding legislation.[17]

It is submitted that the contributory negligence legislation existing in most of the provinces today bears little resemblance to that considered by the Supreme Court of Canada in *Littley* v. *Brooks and Canadian National Ry. Co.*,[18] and we should therefore reconsider the question of apportionment in cases brought under tatal accidents legislation. The following provision taken from the Contributory Negligence Act of Saskatchewan is representafive of this legislation:[19]

> 3. Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree in which each was at fault, and where two or more persons are found at fault they shall be jointly and severally liable to the person suffering damage or loss, but as between themselves, in the absence of any contract express or implied, they shall be liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

The balance of this comment is devoted to a discussion of the probable meaning and effect of this section in the light of the rules of statutory interpretation and decided cases.

It is submitted that the effect of section 3 is:

(1) To make the defendant liable to the innocent beneficiaries under the Fatal Accidents Act for the full amount of their loss;

---

[14] (1939), 14 M.P.R. 89, at p. 101. LeBlanc J.'s decision was reversed on the facts. In *Lair* v. *Laporte*, [1944] R. L. 286, Can. Ab. Consolidation, Vol. 8, column 276, Loranger J. expressed the opinion that the contributory negligence of the deceased, in an action based upon a fatal accident, should not affect the right of recovery of those who sued as plaintiffs, since they sued for their own loss resulting from negligence.

[15] See *Noble* v. *Bath, Bristol, etc. Dist. Commrs.*, [1935] 4 D.L.R. 271; *Dowhy* v. *Lamontagne*, [1945] 1 W.W.R. 81; *McDonald* v. *Mason* (1953), 8 W.W.R. (N.S.) 553.

[16] *Supra*, footnote 1.

[17] See *Foster* v. *Kerr*, [1940] 1 W.W.R. 385; *Stewart* v. *Ottawa Electric Railway Company and Hollis*, [1945] O.W.N. 639; *Wiksech* v. *General News Company and Leith*, [1948] O.R. 105; *Butler* v. *O'Brien* (1954), 34 M.P.R. 121.

[18] *Supra*, footnote 1.

[19] R.S.S., 1953, c. 83, s. 3. Similar provisions are found in R.S.A., 1955, c. 56, s. 3; R.S.B.C., 1960, c. 74, s. 5; R.N.S., 1952, c. 159, s. 3; R.S.O., 1960, c. 261, s. 2. *Cf.* English position: the Law Reform (Contributory Negligence) Act (1945), 8 & 9 Geo. 6, c. 28, s. 1(4) expressly provides for apportionment in such cases.

(2) To give the defendant a right of contribution from the estate of the deceased in proportion to the deceased's contributory negligence;
(3) Perhaps to render the estate of the deceased liable to an action by the deceased's dependants for loss of necessaries.

The first proposition clearly appears to be the correct interpretation of that part of section 3 preceding the word "but". Where two or more persons are "found at fault" they are jointly and severally liable to the person suffering the damage or loss. In actions brought under the Fatal Accidents Act, the court can and often does find that the defendant and the deceased were each at fault in the accident. Therefore, each *prima facie* is liable as a joint tortfeasor to the injured person for the entire amount of the damage or loss.

While several provinces have enacted provisions varying in no material particular from section 3 of the Saskatchewan Contributory Negligence Act,[20] as a matter of historical digression it is noted that the provision has gone through a process of evolution, in various provinces at various times. In Ontario, for example, its earliest ancestor was the Contributory Negligence Act of 1927.[21] That section expressly limited the liability of the defendant in accordance with his degree of fault. When the Contributory Negligence Act was repealed and replaced by the Negligence Act, 1930,[22] section 3 of the latter Act contained phraseology similar to that now used by section 3 of the Saskatchewan Contributory Negligence Act but used the words "where two or more persons are found *liable*"[23] instead of "found at fault". The provision retained this form until 1935 in Ontario[24] when it was changed to read "found at fault". It is submitted that this change was of considerable importance because when the provision read "where two or more persons are found liable", it probably did not apply to actions brought under the Fatal Accidents Act inasmuch as the deceased could not be held *liable* in tort for a loss resulting from his own death. Since only the defendant would be *liable*, the provision for joint liability would not apply and the case would have to be decided by applying the common law which would probably treat the defendant as only severally liable.[25]

[20] *Supra*, footnote 19.
[21] *Supra*, footnote 11.
[22] S.O., 1930, c. 27.
[23] Italics added.
[24] S.O., 1935, c. 46, s. 2(1).
[25] The provisions in R.S.P.E.I., 1951, c. 30, s. 2 and R.S.M., 1954, c. 266, s. 4(2), do not contain the words "where two or more *persons* are *found* at fault" (italics added). The Prince Edward Island provision uses the words "found liable" instead of "found at fault", while the Manitoba

In changing the wording of the provision from "found liable" to "found at fault", the legislature appears to have acted with the intention of protecting innocent third parties by making a person found at fault liable for the entire loss even though the other person at fault has a special defence. Unlike section 2 of the Contributory Negligence Act of Ontario, 1927,[26] which was before the Supreme Court in *Littley* v. *Brooks and Canadian National Ry Co.*,[27] section 3 neither expressly nor implicitly limits the liability of the defendant to innocent third parties in proportion to the defendant's degree of fault. Indeed, the Act only limits the defendant's liability in three cases, namely: where he is being sued by a party who is himself contributorily negligent;[28] where the plaintiff was a gratuitous passenger in another car and has no cause of action against the driver or owner of the car in which he was riding;[29] where the plaintiff was the spouse of one of the persons found to have been contributorily negligent.[30] Applying the maxim *expressio unius est exclusio alterius* as a criterion of the intention of the legislature, the existence of these three sections indicates that the defendant's liability is not limited in other cases.

Nevertheless, the defendant may be able to escape liability in respect of the deceased's contributory negligence if that contributory negligence can be imputed to the plaintiff-beneficiaries under the Fatal Accidents Act. The doctrine of "imputed negligence" or "identification" was applied in certain old English cases[31] and appears to have been accepted by some of the Canadian courts.[32] Even though it was reversed on other grounds by the Privy Council, the decision of the Supreme Court of Canada in *Oliver Blais Co. Ltd.* v. *Yachuk*[33] is perhaps the most pertinent example of acceptance of the doctrine of imputed negligence. In

---

provision says: "Where two or more defendants are found negligent. . . ."

[26] *Supra*, footnote 11.

[27] *Supra*, footnote 1.

[28] *Supra*, footnote 19, s. 2.

[29] *Ibid.*, s. 8.

[30] *Ibid.*, s. 9.

[31] For instance, *Waite* v. *North Eastern Ry. Co.* (1858), E.B. & E. 719.

[32] In the following cases a father was identified with the contributory negligence of his child: *McKittrick* v. *Byers* (1925), 58 O.L.R. 158; *Bowes* v. *Hawke*, [1938] 1 D.L.R. 791; *Graham* v. *Toronto Transportation Commission*, [1945] O.W.N. 904; *Oliver Blais Co. Ltd.*, v. *Yachuk*, [1946] S.C.R. 1, *per* Estey and Hudson JJ. A husband was identified with the contributory negligence of his wife in *Knowlton* v. *Hydro-Electric Power Comm. of Ontario* (1925), 58 O.L.R. 80; *Dority* v. *Ottawa Roman Catholic Separate School Trustees*, [1930] 3 D.L.R. 633; *Young* v. *Otto*, [1947] 2 W.W.R. 950. For a very thorough discussion of the doctrine of imputed negligence see MacIntyre, The Rationale of Imputed Negligence (1944), 5 U. of T. L.J. 368.

[33] [1946] S.C.R. 1, reversed on other grounds [1949] A.C. 386.

that case, a child, by telling a lie, was able to obtain five cents worth of gasoline from one of the defendant's employees. Subsequently, the child suffered severe burns while playing with the gasoline. The child's father brought an action on the child's behalf for personal injuries and on his own behalf in respect of medical and other expenses. In the Supreme Court of Canada, after referring to section 2(1) of the Negligence Act of Ontario[34] which is similar in language to section 3 of the Saskatchewan Contributory Negligence Act, Estey J., with whom Hudson J. concurred, said that while the father was in no way associated with the events that inflicted the injury suffered by the infant-plaintiff and although he had a separate and distinct cause of action, his had been regarded as a consequential or dependent action and treated upon much the same basis as the infant's action.

> The contributory negligence of the latter was a bar to his recovery at common law. It seems, therefore, to follow that under *the Negligence Act* the principle that his action is affected by the negligence of the infant should be recognized and his damages therefore apportioned on the same basis as that of the infant.[35]

It is noteworthy that Estey J. did not cite any cases for the proposition that the father's action was a dependent action and that at common law the contributory negligence of the child would have defeated the claim by the father. A possible reason for his omission to cite authorities is that there are no satisfactory authorities in support of this proposition. Some authorities[36] have attempted to treat the situation involving husband and wife or parent and child as being on all fours with the master and servant relationship where, in an action by the master for loss of his servant's services, the contributory negligence of the servant affected the master's right of recovery. However, the master's claim was only thus affected when the servant's contributory negligence occurred in the course of the servant's employment.[37] In English law of a century or two ago, no doubt, wives and children were considered to be little more than vassals, hence the laws relating to master and servant were fairly applicable. But that position

---

[34] R.S.O., 1937, c. 115. [35] [1946] S.C.R. 1, at p. 16.

[36] *Knowlton* v. *Hydro-Electric Power Comm. of Ontario* and *McKittrick* v. *Byers, supra*, footnote 32. Other cases have followed these decisions without analysing the underlying principle.

[37] Ilsey C.J. makes this quite clear in *MacDonald and MacDonald* v. *McNeil*, [1953] 1 D.L.R. 755. The point does not appear to have been considered by the Manitoba Court of Appeal in *Wasney* v. *Jurazsky*, [1933] 1 W.W.R. 155 or the Supreme Court of Canada in *A.-G. Canada* v. *Jackson*, [1946] S.C.R. 489.

of servility can scarcely be said to apply today.[38] Therefore, in the ordinary case where no agency or master and servant relationship exists, the action of the husband or parent should not be affected by the contributory negligence of the wife or child.

The English courts long ago in *Mills* v. *Armstrong: The Bernina*,[39] discarded any notion of imputed negligence where there is no true master-servant relationship and it has been rejected by at least two Canadian courts in *Wasney* v. *Jurazsky*,[40] and *MacDonald and MacDonald* v. *McNeil*.[41] It is submitted that despite authorities to the contrary, the doctrine of identification, except in cases of a genuine master-servant relationship, does not exist in our law today, and therefore there is no reason to limit the defendant's liability in a claim under the Fatal Accidents Act in proportion to his degree of fault.

This leads us to the second proposition, that section 3 of the Contributory Negligence Act[42] gives the defendant a right of contribution against the estate of the deceased in proportion to the deceased's degree of fault.

One reason for hesitating to give the beneficiaries under the Fatal Accidents Act a right of full recovery against the defendant is that it seems unfair to saddle him with the whole loss when he was only partially to blame. To do justice to the defendant, he should be liable for a percentage of the total damages equivalent to his measure of fault. This, however, would mean that innocent third parties would be out of pocket. It is morally preferable that where one of two persons must suffer prejudice it should be the party who has contributed to the loss rather than the one who is totally free from fault; hence, the common law treated each joint tortfeasor as being responsible for the entire loss, even though by the curious decision in *Merryweather* v. *Nixan*[43] the joint tortfeasor selected as defendant had no right of contribution against his fellow joint tortfeasors.

The first half of section 3[44] establishes the defendant's status as joint tortfeasor, and thus provides compensation in full for the innocent third party's loss. The second half of section 3 appears to destroy the rule in *Merryweather* v. *Nixan*[45] by providing a right of contribution against other persons found at fault,

[38] Some men would be willing to testify that the position has been completely reversed.

[39] (1888), 13 App. Cas. 1. The doctrine was further rejected in *Oliver* v. *Birmingham and Midland Motor Omnibus Co.*, [1933] 1 K.B. 35, and in *Mallet* v. *Dunn*, [1949] 2 K.B. 180.

[40] *Supra*, footnote 37.

[41] *Ibid.*

[42] *Supra*, footnote 19.

[43] (1799), 8 T.R. 186.

[44] *Supra*, footnote 19.

[45] *Supra*, footnote 43.

> . . . but as between themselves, in the absence of any contract express or implied, they shall be liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

It is an open question whether this provision gives a right of contribution against the deceased's estate. If the right of contribution in this case is classified as being a tortious action then unless statutory provisions grant a right of action against the deceased's estate the maxim *actio personalis moritur cum persona* applies. As the statutory provision only gives a right of action against the estate "if a deceased person committed a wrong to another in respect of his person or his real or personal property. . . ."[46], it is doubtful whether any action lies in these circumstances. The immediate cause of the defendant's loss was not any wrongful act of the deceased but the deceased's death. Furthermore, unless you classify the act of causing a person to pay money damages as "a wrong to another in respect of his . . . personal property", clearly no action lies against the estate. The other, and, it is submitted, the correct view is that the right of contribution given by statute is not to be classified as an action in tort and is therefore not subject to the maxim. The right of contribution between joint tortfeasors is purely statutory and gives rise to a special sort of right which survives against the estate. As Thurlow J. put it in *Schwella* v. *The Queen and The Hydro Electric Power Commission of Ontario et al.*:[47]

> As already mentioned, the right here sought to be enforced is a right to *contribution or indemnity*. It is neither contractual nor delictual in its nature but is simply a right created by statute.

The Supreme Court of Pennsylvania explains the principle behind the statutory right of contribution this way:

> The theory is that as between the two joint tortfeasors the contribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done.[48]

The justice of such a conclusion is obvious: the defendant will never have to pay more than his share of the damages except where the deceased died insolvent.

This may appear to have the same result financially as reducing the beneficiaries' measure of damages, because ordinarily the

---

[46] The Trustee Act, R.S.S., 1953, c. 123, s. 53, is taken as representative.
[47] [1957] Ex. C.R. 226, at pp. 234-235.
[48] *Puller* v. *Puller* (1955), 110 A. 2d. 175, at p. 177. Most jurisdictions have now enacted legislation to overcome the maxim *actio personalis moritur cum persona*, for instance, the Trustee Act, *supra*, footnote 46.

beneficiaries under the Fatal Accidents Act are going to be the objects of the deceased's bounty. Plainly, however, this will not invariably be the case. Surely, where there is a conflict between the claims of those who were dependent upon the deceased for maintenance and support and the claims of those who were not so dependent, the courts should favor the former.[49] It may be suggested that the legislature has already enacted dependants' relief legislation[50] and that nothing more need be done. The dependants' relief legislation, however, does not cover as extensive a group of dependants as the Fatal Accidents Act, nor does it compensate for the loss suffered by the dependants when the deceased was a young person with fine prospects but a small estate. In the latter event somebody must suffer: should it be the wrongdoer or the innocent dependants? In such a case, it is submitted that until we have a thorough system of social insurance the wrongdoer should bear the loss even though he is unable to obtain contribution from the estate of the deceased.

Finally, it must be considered whether section 3,[51] which makes the defendant and the deceased joint tortfeasors, gives the deceased's dependants an action directly against the estate of the deceased.

The suggestion that the dependants might enforce their expectations against the estate of the deceased is a novel one. Anglin C.J.C., in *McLaughlin* v. *Long*,[52] suggested that in a parent-child relationship, where the parent suffered loss as a result of the fault of the child of the defendant, there was not a little to be said for the view that *quoad* the father the child and the defendant were in the position of joint tortfeasors.

If the section has the effect of turning the persons at fault into joint tortfeasors *quoad* the party suffering loss, is there any reason to restrict the section to certain types of loss only? If as the result of the combined fault of A and B, C, the twelve-year old son of A, sustained severe bodily injuries, C could claim substantial general damages against either or both of the wrongdoers in respect of such heads of damage as loss of expected earnings or loss of expectation of life. C's expectations have been just as materially interfered with when as the result of the accident A is killed and C loses the support and maintenance which his father

[49] *Hicks* v. *Jefferys*, [1942] 2 W.W.R. 481, *per* Donovan J., at p. 482, suggests that a claim by the beneficiaries under the Fatal Accidents Act should take precedence over claims by the estate.

[50] The Dependants' Relief Act, R.S.S., 1953, c. 121, and amendments thereto.

[51] *Supra*, footnote 19.

[52] [1927] S.C.R. 303, at p. 311.

was accustomed to provide. As far as C is concerned either injury is going to cost him money in the future. What is more, the father was just as much under a legal obligation to provide his son with necessaries as he was to abstain from causing him physical injury. The same applies in respect of a wife or a dependent parent.[53] Therefore, logically, a claim should lie against the estate for loss of necessaries. But, legally, does it lie?

Section 3 of the Contributory Negligence Act[54] may give dependants suffering loss through the death of the deceased a right of action in one of two ways. First, since the section renders the deceased jointly and severally liable, the dependants may have an action against the estate of the deceased under the Fatal Accidents Act. But a prerequisite for an action under the Fatal Accident Act is that the deceased should have an action against the wrongdoer. The deceased could hardly have an action against himself, so unless the deceased's right of action against the other wrongdoer is deemed to satisfy this prerequisite, no direct action against the estate would lie. Second, the said section 3 may create an entirely new right of action, which did not exist at common law, and which is separate and apart from the dependants' action under the Fatal Accidents Act.

Would either of these possible actions against the estate be subject to the maxim *actio personalis moritur cum persona*? If an action lies under the Fatal Accidents Act, it is submitted the maxim would not apply as the Act was intended to overcome the maxim. If section 3[55] gives an entirely new right of action, separate and apart from the Fatal Accidents Act, then the courts may treat this new action as not being an action in tort but a special statutory right similar to the statute-granted right of contribution between joint tortfeasors.[56]

Assuming some form of action exists against the estate directly, what measure of damages can be recovered in the action? If the father was providing the son with considerably more than just the basic necessaries he was legally bound to supply, could the son bring an action against his father's estate in respect of loss of this excess? It seems strange to think that the father, who could not be compelled to continue providing these luxuries in his lifetime, by his death created an estoppel binding his estate to provide

[53] See the Deserted Wives' and Children's Maintenance Act, R.S.S., 1953, c. 305, and the Parents' Maintenance Act, R.S.S., 1953, c. 308. Similar statutes exist in other provinces.

[54] *Supra*, footnote 19.

[55] *Ibid.*

[56] *Supra*, footnotes 47 and 48.

them. The estate should be able to plead all the defences that the deceased could have used in his lifetime.

This leads to a rather anomalous situation. The child is unable to recover more from the estate than provision for necessaries. On the other hand, in an action under the Fatal Accidents Act against the defendant, the child is able to recover in full for lost expectations, whether these expectations had a legal foundation or otherwise. The defendant is by the section given a right of contribution against joint tortfeasors, which it is submitted above includes a right against the estate of the deceased. Therefore the estate will have to pay contribution to the defendant in respect of the claim for luxuries, because what is a good defence against the child is not a good defence against the defendant.[57]

This anomaly and the hardship that it imposes on the estate, or on the defendant in the event that the estate is insolvent and unable to pay contribution to the defendant, should be examined from the point of measure of damages under the Fatal Accidents Act.

EDWIN A. TOLLEFSON*

---

[57] See *Dube et ux.* v. *Saville*, [1952] 2 D.L.R. 382. In this case, Mrs. Dube was injured in an automobile collision as the result of the negligence of her husband (the plaintiff, Dube) and Saville. Under section 5 of the Contributory Negligence Act, R.S.B.C., 1948, c. 68, which is essentially the same as section 3 of the Contributory Negligence Act, *supra*, footnote 19, Manson J. awarded the female plaintiff judgment for the full amount of her loss against the defendant but allowed the defendant to claim contribution from the male plaintiff in respect of the latter's degree of negligence.

*Edwin A. Tollefson, of the College of Law, University of Saskatchewan, Saskatoon.