COMMENTS
COMMENTAIRES

FAIR EXCHANGE — JUSTIFICATION FOR INDUCING BREACH OF CONTRACT — APPLICATION OF THE RULES OF ESSENTIAL JUSTICE TO THE OPERATION OF DOMESTIC TRIBUNALS — IMPLICATIONS FOR LABOUR RELATIONS. — The mammoth judgment of Gale J. (as he then was) in the *Posluns* case,[1] given on 28th April, 1964, is an important contribution to the law relating to the tort of inducing breach of contract and to the operation of domestic tribunals. The turning point of the judgment is the conclusion that the Board of Governors of the Toronto Stock Exchange were justified in inducing a breach of a contract of employment between the plaintiff and R.A. Daly & Company Limited, the brokerage firm of which the plaintiff was shareholder, director, officer and employee. From a review of the authorities the judgment derives three general grounds for justification for inducing breach of contract: some impersonal or disinterested motive; the public interest; and the exercise of a statutory or contractual privilege. The justification of the action of the Board was found to reside in the third ground, specifically in an implied consensual power in the Board, arising from the plaintiff's request for the Board's approval of him as a customers' man, to discipline the plaintiff by a proper exercise of authority. The case also involves many points of law, peripheral or incidental to the issue of justification, which merit consideration in their own right. They relate to the operation of domestic tribunals and particularly to the application of the rules of natural or essential justice.

A. *The Facts.*

The recital of the facts takes forty-six pages of the judgment.[2] The following account, limited to facts relating to the litigants directly, necessarily does not recount a good many details.

Posluns was approved by the Toronto Stock Exchange under its by-laws as a shareholder and customers' man of the brokerage

[1] *Posluns* v. *Toronto Stock Exchange and Gardiner* (1964), 46 D.L.R. (2d) 210 (Ont. H.C.).
[2] Pp. 215-260.

firm of Burns Brothers & Co. Limited in May, 1957. In 1958 the plaintiff entered with one Shulman and others into a partnership known as Lido Investments, in which the plaintiff held a one-sixth interest, for the purpose of trading in stocks and stock options. The options in which the firm was interested were traded not on an Exchange but through members of a recognized Exchange. Lido sold options which it originated to a number of brokerage firms in Canada and the United States, including Burns. The plaintiff left Burns and joined the Daly firm in January, 1960, at which time the Ontario Securities Commission consented to the transfer of his registration as a salesman from Burns to Daly. On joining the Daly firm the plaintiff became a shareholder, director and employee. The Toronto Stock Exchange approved his admission as shareholder and director, although it did not specifically approve his employment as a customers' man. Thereafter Daly began to act as broker in selling Lido options in New York, and Lido began to act as middleman, as distinct from originator, in trading options. During 1960 another seller of options, one Lynch, a client of Daly's, sold options through Daly's to Lido, who resold in New York at a higher price. The plaintiff as a partner in Lido shared in the profits. That fact raised the issue whether the plaintiff as director of Daly's violated any duty owed to Lynch for whom the Daly firm acted as agent. Gale J. found that Shulman "knew all that was being done".[3] He found that Lynch "was quite confused as to some of the particulars of the way in which the transactions were being handled",[4] but that Lynch knew the plaintiff was a partner in Lido and was a director of Daly's; he found also that Lynch was satisfied with the services of the Daly customers' man who served him and knew that the customers' man checked option prices in New York before dealing with Shulman. His lordship found that the plaintiff "knew nearly as much, if not as much, as Dr. Shulman about the nature of the Lynch-Daly-Lido dealings and their consequences to all those who were involved in them".[5]

In January, 1961, the head offices of branches of two banks which had executed bank guarantees to secure the Lynch transactions decided to stop the practice. Daly and another firm stood to lose heavily should the banks not honour certain guarantees, and so advised the Toronto Stock Exchange. The banks subsequently agreed to honour these guarantees. But the Exchange was now apprised of possible wrongdoing, and ordered an examination

[3] *Supra*, footnote 1, at p. 229.
[4] *Ibid.*, at p. 231.
[5] *Ibid.*, at p. 232.

of the Daly records. Following interviews between the president of the Exchange and members of the Daly firm, the Board of Governors of the Exchange decided to hold a meeting to determine whether R. A. Daly, Jr., the member of the Exchange for the Daly company, was guilty of any offence under the by-laws or rulings of the Exchange. The president of Daly also sought an airing of the situation, and notice of hearing was given for 28th February, 1961. At the hearing evidence and argument were received. Subsequently the Governors voted unanimously that the Daly firm had in fact been guilty of failing in its duty to Lynch, and agreed to assess a fine of $5,000.00 against the member of the firm who had a seat on the Exchange.

The event then occurred that gave rise to the litigation. The Board resolved that all prior consents given to the plaintiff as a director, officer and shareholder of Daly be terminated forthwith. Up to that point, Gale J. finds, the plaintiff "could not have realized that he was in personal jeopardy".[6] At the request of the plaintiff's solicitor the Board agreed to meet with the plaintiff and his solicitor on 2nd March, 1961. The chairman opened by reading a statement of facts. Plaintiff's counsel "indicated that as he understood there was no dispute as to the evidence but that he would proceed to review it and then deal with the interpretation placed by the Board upon that evidence".[7] After the hearing the Board concluded that the plaintiff's approval should be recalled and that the object of the Exchange would be served if he were allowed to resign. "The plaintiff apparently having decided not to submit his resignation",[8] the president of the Exchange informed Daly in writing that the Board terminated all prior consents to the plaintiff's being "a director, officer, shareholder or employee"[9] of Daly, and requested that immediate action be taken "as may be necessary to conform to such termination of approval".[10] The plaintiff was removed as a director and was discharged as an employee; he sold his shares in Daly to other shareholders in accordance with a prior agreement. The plaintiff sued the Exchange for inducing breach of his contract of employment with Daly, for a declaration that the Board's order was without authority, and for damages (ordinary and punitive) for conspiracy. The action was dismissed with costs.

B. *Inducing Breach of Contract.*

Seventy-three pages of the judgment are concerned with the tort of inducing breach of contract.[11] The judgment commences

[6] *Ibid.*, at p. 249. [7] *Ibid.*, at p. 253. [8] *Ibid.*, at p. 257.
[9] *Ibid.* [10] *Ibid.* [11] *Ibid.*, at pp. 260-333.

by setting out five essential elements to the tort:[12] (1) that there be a contract between the plaintiff and another; (2) that the defendant know of the contract; (3) that the defendant procure a breach of the contract by the other person (this is where, it is respectfully submitted, the Ontario Court of Appeal in the *Hersees* case[13] misreads the requirements); (4) that the defendant effect a breach by wrongful interference; and (5) that damage to the plaintiff flow from the breach. His lordship had no difficulty in finding that the first and second elements were met (detailed knowledge of the terms of the contract not being necessary: see *Body* v. *Murdoch*),[14] and it may be said here that the fifth element of proof of damage presented no particularly unique problem. As to the third element, that the defendant procure the breach, the judgment concluded that there was an implied term in the plaintiff's contract of employment allowing Daly to terminate it, and that whether there was wrongful breach or lawful termination depended on whether the defendant followed its rules and those of natural or essential justice; for if the Board did not do so, it destroyed the implied right of termination in Daly, and the Board would be vicariously liable for Daly's wrongful breach. Interesting though the point is (and termination of the contract would not excuse the defendant from liability if the termination were a consensual resolution of what would otherwise have been a breach[15] or was a unilateral termination effected by notice),[16] it becomes swallowed up in the resolution of the fourth element which involves the question of justification with which this comment started.

1. *Wrongful interference.*

As to the fourth element that there be "wrongful interference", what these words conceal, as was once remarked of a Mother Hubbard dress, is more interesting than what they reveal. What *is* wrongful interference? The judgment combines under this one element the inculpatory ingredient of intent and the exculpatory ingredient of justification. On the question of intent, the judgment points out that malice in the sense of spite is not required; but it may be observed that malice in the sense of knowing or being pre-

[12] *Ibid.*, at p. 262.
[13] *Hersees Ltd.* v. *Goldstein* (1963), 35 D.L.R. (2d) 616, appeal allowed 38 D.L.R. (2d) 449 (Ont. C.A.).
[14] [1954] O.W.N. 334, at p. 337.
[15] *Klein* v. *Jenovese and Varley*, [1932] 3 D.L.R. 571 (Ont. C.A.); *Newell* v. *Barker and Bruce*, [1950] 2 D.L.R. 289 (S.C.C.).
[16] This involves the tort of intimidation, as to which see *Rookes* v. *Barnard*, [1964] 1 All E.R. 367 (H.L.).

sumed to know the probable consequences of one's act is.[17] At this point the judgment introduces the element of illegal means, the implication being that the use of illegal means precludes justification. Thus, if the Exchange offended its rules or those of essential justice, it used unlawful procedures in contradistinction to the exercise of a vested right.

2. *Illegal means; intimidation.*

In considering the use of illegal means to induce a breach of contract the *Posluns* judgment comes within an ace of considering the tort of intimidation. After establishing that conduct which is *per se* a crime or a tort constitutes illegal means, the judgment notes that "certain conduct not of itself actionable as a tort, has been looked upon as creating liability if a breach of contract between others is its consequence".[18] Two illustrations are given: a threat to commit a tort; and uttering false statements, although not otherwise actionable as a tort. The first of these illustrations is borne out by the judgment of the House of Lords in *Rookes* v. *Barnard*,[19] which was decided about three months prior to the *Posluns* judgment. There the plaintiff was held to have an action in damages against the defendants who induced the employer lawfully to dismiss the plaintiff by threatening the employer with breaches of contracts of employment. But that case is not an action for inducing breach of contract; it is an action founded in the tort of intimidation; and it would appear to be a severer law than that which says that a threat to commit a tort is an unlawful means of inducing a breach of contract. The second illustration, uttering false statements, is taken from *Orchard* v. *Tunney*.[20] It is respectfully submitted that the phrase "though not otherwise actionable as a tort" is insufficient to describe the law there being considered. Locke J. in *Orchard's* case (in whose judgment Nolan J. concurred) cites McCardie J. in *Pratt's* case[21] that the intentional use of unlawful means to inflict damage is actionable even though the unlawful means are not *per se* actionable, and cites McCardie J.'s illustration of fraud. But in the *Pratt* case McCardie J. gives illustrations of the use of unlawful means actionable at the instance of the person against whom the means are used, that person being the instrument for inflicting harm on the plaintiff. One of the il-

[17] *E.g.* Lord Halsbury in the *Glamorgan Coal Ltd.* v. *South Wales Miners' Federation*, [1903] 2 K.B. 545 (C.A.).
[18] *Supra*, footnote 1, at p. 269. [19] *Supra*, footnote 16.
[20] (1957), 8 D.L.R. (2d) 273 (S.C.C.).
[21] *Pratt et al.* v. *British Medical Ass'n.*, [1919] 1 K.B. 244.

lustrations is taken from the *National Phonograph* case,[22] in which the defendant by fraud induced factors (agents) of the plaintiff to sell the defendant goods in breach of their contractual duty to the plaintiff. The false statements made by Houle and Orchard in *Tunney's* case, which led to the latter's dismissal, may well have been actionable *per se*. The judgment of Rand J., in which Cartwright and Abbott JJ. concur, puts the case on quite a different basis. Tunney was held to have acquired a right through his contract of membership in the union "to engage in all work for which the union mark is a requisite; and where a union or a closed shop agreement is entered into with an employer, union membership secures to each member the right to continue in that employment free from improper interference on the part of the union or its officers".[23] The totally unauthorized act of the defendants in expelling the plaintiff and informing the employer so as to work the plaintiff's dismissal was "a direct infringement of or trespass upon" the plaintiff's "legal right as a union member to continue in the employment specifically of the employer, a dairy company, and generally of a union shop".[24]

3. *Justification in a legal privilege.*

However, the question in *Posluns'* case whether the defendants used illegal means is also swallowed up in a consideration of whether there was justification based on the exercise of a legal privilege, a question which is resolved in part at least by considering whether the Exchange used unlawful procedures.

The judgment warns: "The limits of the doctrine of justification as it applies to the tort under discussion have never been defined with any degree of precision."[25] It then cites a significant passage from the *Glamorgan Coal* case.[26] In that case the South Wales Miners' Federation called "stop-days" in the mines to limit the production of coal, in order to maintain the market price to which rates of wages were attached by a sliding scale. In an action for damages for inducing breaches of contracts of employment the trial judge found that there was no cause of action because the sole object of the defendants was to benefit the men, not to injure the plaintiff employers; and, indeed, having been asked for advice the defendants had a "duty" and a "right" to give advice and to secure its acceptance. This judgment was reversed on appeal by a majority

[22] *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335, at pp. 360, 368.
[23] *Supra*, footnote 20, at p. 282.
[24] *Ibid.*, at p. 283.
[25] *Supra*, footnote 1, at p. 270.
[26] *Supra*, footnote 17.

only. An appeal to the House of Lords was dismissed essentially for the reasons given in the Court of Appeal.[27] The dissent in the Court of Appeal (Vaughan Williams L.J.) found that the defendants were mere advisors, not inducers. But the majority found otherwise, rejecting both the view of the trial judge that justification is provided by the pursuit of self-interest and his conclusion that the defendants had a duty to the members to do what they did. Both Romer and Stirling L.JJ. (for the majority) acknowledged that there is mischief in trying to define justification and that what constitutes justification depends on the circumstances. Romer L.J. stated:[28]

> In analyzing or considering the circumstances, I think that regard might be had to the nature of the contract; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach.

Of these six considerations Gale J. turns particularly to the means used to procure the breach and the object of the procurer, on the premise that if the purpose and means are lawful, and absent conspiracy to injure (which would involve an unlawful object or unlawful means: its inclusion here as a qualifying consideration is, it is submitted, tautologous), no vindication is required. "If, on the other hand, unlawful intervention has been the source of harm, justification must be shown if the claim is to be avoided."[29] The use of the term "unlawful" here needs interpretation. His lordship appears to intend to include direct procuration by persuasion where the conduct is not excused by extenuating circumstances. The question still involves "justification", and we are at this point no further ahead in determining what that word means.

4. *The bases of justification.*

The judgment then lists the general circumstances of justification: where the interference is promoted (1) by impersonal or disinterested motives; (2) in the public interest; or (3) through the exercise of some statutory or contractual interest. The first of these requires explanation, for it would be strange if mere disinterest were to provide justification for inducing breach of contract. The judgment gives the illustration of the actor's being "under the influence of some great moral or religious force",[30] which would appear to support the excuse of a self-imposed moral or religious "duty",

[27] [1905] A.C. 239 (H.L.).
[28] *Supra*, footnote 17, at p. 574.
[29] *Supra*, footnote 1, at p. 270.
[30] *Ibid.*

and the illustration of a doctor causing a patient to break a contract for reasons of health.[31] There appears to be a slender line between this source of justification and the unsuccessful claim of the defendants in the *Glamorgan* case that they had a "duty" to give advice when it was solicited and to see that the advice was made effective. But the line is there. The second source of justification, upholding the public interest, was within the judge's grasp, but his lordship let it go, finding that the predominant purpose of the Governors was to discipline the plaintiff and Daly among others.[32] Yet the judgment reads:[33]

> I believe that the governors, in their proper concern for the welfare of the public who deal with member firms, were thoroughly justified in making sure that a director of a member broker ought not to be interested in a firm which purchases securities from a client of a broker, and resells those securities, either immediately before the purchase or immediately after, at a higher price.

And again:[34]

> Unquestionably, the withdrawal of Mr. Posluns' approvals and the decision to force him to sever his connections with the Daly Company was a form of punishment; but it is quite wrong to construe those matters in such a way as to suggest that the governors acted simply for the purpose of inflicting punishment. What they were trying to do was to protect the other members of the Exchange and the investing public, and in the process Mr. Posluns had to be hurt. They did not use the hearing as a vehicle for punishment; that was the result only.

These passages, it is submitted, contend with the conclusion that the purpose was to discipline the plaintiff. The object of protecting other members of the Exchange may be the discredited pursuit of self-interest, but the purpose of protecting the investing public at least invites the conclusion that the Board *was* "primarily engaged in upholding the public interest". Nevertheless, the invitation is declined, and the judgment proceeds to set forth the third source of justification, the exercise of a statutory or contractual privilege, which is refined as a right or a duty. This analysis involves fairly obvious problems in terminology. It also involves a question of substance. In the *Read* case,[35] Darling J., who is cited at this point, suggests on another page of that judgment[36] that justification is to be found in an equal or superior right. In terms of equality of right, the exercise of a contractual right would justify interference with

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[31] *Ibid.*, at p. 271.
[32] *Ibid.*
[33] *Ibid.*, at p. 283.
[34] *Ibid.*, at p. 339.
[35] *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland & Wales*, [1902] 2 K.B. 88 and 732.
[36] *Ibid.*, at p. 96.

the contractual rights of another. Where two "rights" of the same class conflict they appear to be reduced to the status of a privilege, which can be exercised with impunity but which will not be protected at law—let the harm lie where it falls. This, virtually, is where the judgment in *Posluns'* case comes out.

5. *Justification in a contractual right.*

As stated near the beginning of this comment, the justification of the action of the Board was found to reside in an implied consensual power in the Board, arising from the plaintiff's request for the Board's approval of him as a customers' man, to discipline him by a proper exercise of authority. The judgment states that the Board had a duty, correlative with its power, to act within its rules and those of essential justice.[37] This is not the correlative duty of which Lord Brampton speaks in *Quinn* v. *Leathem*,[38] nor that which legal analysts have grown accustomed to using or recognizing since Hohfeld;[39] here it describes not a duty in one member to a legal relationship which is correlative to the right in the other member to the relationship, but merely the limits of the Board's implied power (the correlative to the power being Posluns' liability to its being exercised to create, modify or destroy a right-duty relationship involving Posluns, such as his contract of employment with Daly).

The judgment now raises the first question derived from the judgment of Romer L.J.: "Was the Board's decision justified as to purpose?"[40] This question is, with respect, too cryptic. The judgment is concerned here not with identifying the purpose of the Board, but with determining whether there was a factual basis for exercising the implied power of discipline, being the third of the three sources of justification earlier outlined. Indeed, the whole thrust of the next fourteen pages of the judgment[41] is that on the facts the defendant was justified (in terms of purpose) in what it did and that the justification was a complete defence, subject to a consideration of whether the means were illegal, that is, whether the Board exceeded the powers given by its own rules or prescribed by the standards of essential justice.

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[37] *Supra*, footnote 1, at p. 272

[38] [1901] A.C. 495, at p. 525 (H.L.).

[39] Hohfeld, W.N., Fundamental Legal Conceptions (1923, W.W. Cook ed.) and see Corbin, A.L., Legal Analysis and Terminology (1919), 29 Yale L.J. 163. For a contemporary refinement see Dias, R.W.M., Jurisprudence (2nd ed., 1964), p. 226 *et seq.*

[40] *Supra*, footnote 1, at p. 272. [41] *Ibid.*, at pp. 272-286.

6. *Judicial review of a domestic tribunal.*

On this question of fact (uneasily described as purpose) the judgment raises the question of the basis on which a court will review a decision of a domestic tribunal. The requirement of adherence to the standard of good faith is found fairly consistently in the precedents. But a disparity is found between the view that the court will not examine the evidence at all so long as the tribunal acted honestly (typified in *Leeson's* case)[42] and the view that the court will look to see whether the tribunal had before it any evidence that was reasonably capable of supporting the offence (typified in *Allinson's* case).[43] The disparity is not resolved, for Gale J. finds that the severer test is met, noting on the way that although the rules of the Exchange gave it discretionary power to terminate the plaintiff's approval as a customers' man and therefore did not require reasons, where reasons are given a reviewing court will examine them (*Hayman's* case):[44]

> . . . the evidence, taken as a whole, was reasonably capable of justifying the Board of Governors in concluding that Mr. Posluns' action, having regard to the standards of ethics and morality required to induce public confidence in the Toronto Stock Exchange, was such as warranted the termination of his approvals.[45]

7. *Essential justice.*

On the first question of law, whether the Board adhered to its own rules, the court concluded that on March 2nd, 1961, the defendant acted within its by-laws and regulations.[46] Consideration of the second issue of law, whether there was a breach of the rules of essential justice, covers forty-four pages[47] and is broken into six questions.

(i) Are domestic tribunals subject to the rules of natural justice?[48] The judgment distinguishes an administrative tribunal, which is the creature of statute and is in effect an arm of the government, from a domestic tribunal, which may be constituted by legislation or agreement and is typified by professional, trade, sporting and social groups and clubs. The judgment thus ascribes a functional characteristic to the administrative tribunal but not to the domestic tribunal. Indeed, within this latter class are included a wide range of functions; Denning L.J. in *Lee's* case[49] was

[42] *Leeson* v. *General Medical Council* (1890), 43 Ch. D. 366.
[43] *Allinson* v. *General Council of Medical Education & Registration*, [1894] 1 Q.B. 750, per Lord Esher.
[44] *Hayman* v. *Governors of Rugby School* (1874), L.R. 18 Eq. 28.
[45] *Supra*, footnote 1, at p. 280.
[46] *Ibid.*, at pp. 289-290.
[47] *Ibid.*, pp. 290-333.
[48] *Ibid.*, pp. 290-298.
[49] *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.).

prepared to apply different standards of conduct within this class depending on the impact which the tribunal had on an individual's freedom to earn his livelihood. As to the administrative, or non-domestic, tribunal, the judgment states that the rules of natural justice apply if it is exercising a judicial function, that is, where it is concerned largely with individuals, but not if it is exercising an executive function, that is, where it is concerned with general government policy and the interests of the individual are not paramount. The judgment concludes that the Board of Governors is not an executive tribunal.

The judgment then reviews cases relating to social clubs, trade unions, and statutory domestic tribunals in which, unlike the case of the Toronto Stock Exchange in the present instance, the rules stipulated the grounds on which the tribunal might act. All the cases cited supported in effect the maxim *audi alterem partem*, which was translated into a requirement that the person be given notice of the charge and an opportunity to meet the case against him. Because the rules of the Toronto Stock Exchange did not so limit the exercise of the Board's power to revoke the plaintiff's recognition as a customers' man these cases were not immediately applicable. However, the defendant's agreement on March 1st to give the plaintiff a hearing was held to create an implied contract that the hearing would accord with the rules of natural justice.[50] The answer to the first question therefore is that the rules apply to the defendant Exchange.

(ii) Need a hearing be granted where dismissal is in the discretion of the tribunal?[51] This question was answered yes; and it does not matter that the order of the tribunal did not sever a relation between the defendant and the plaintiff but followed the indirect means of severing a relation between the plaintiff and Dalys.

(iii) Can the express rules of an association validly exclude the rules of natural justice?[52] At one time it was thought that the contract theory of the relation between the individual and the group would allow such a bargain. In recent years the precedents have been closing in on the proposition and asserting that public policy requires that the rules of natural justice should prevail. However, the judgment sails around this issue by taking the course that in the absence of an express provision the courts will not construe rules to exclude the rules of natural justice.[53]

(iv) How are the rules of natural justice to be applied?[54] Here

[50] *Supra*, footnote 1, at p. 298.
[51] *Ibid.*, pp. 298-308.
[52] *Ibid.*, pp. 308-313.
[53] *Ibid.*, at p. 313.
[54] *Ibid.*, pp. 313-319.

it is concluded that each case must rest on its own facts, the nature of the issue, and the type of tribunal involved. Gale J. cites with particular approval the statement of Harman J. in *Byrne's* case[55] that the person know the charge and have a chance to state his case, and that the tribunal act in good faith. But perhaps of more general value is the standard cited from the judgment of Lord Reid in the *Ridge* case:[56] ". . . what a reasonable man would regard as fair procedure in the circumstances. . . ." The application of the standard clearly requires a conclusion or inference of fact.

(v) Were the rules of natural justice followed on February 28th, 1961?[57] Clearly, no. The plaintiff was not on charge. The tribunal changed its direction after the event of its own hearing, without giving the plaintiff an opportunity to know and meet the charge against him.

(vi) Did the hearing on March 2nd, 1961, cure the prior defect?[58] This was answered yes. The court concluded that in order to purge itself of its first and improper act the tribunal must in the second hearing meet the standard of a *bona fide* desire to do what is right. It need not formally annul or countermand its first decision. The judgment noted that the Board in fact made a different disposition of the plaintiff's case at the second hearing and that the plaintiff concurred in the holding of the second hearing, and found as a fact that the defendants were not influenced by their first decision.[59]

The sixth question takes the judgment into the question of the nature of bias. So far as a non-domestic judicial tribunal (that is, an administrative tribunal performing a judicial or quasi-judicial function) is concerned, the least pecuniary interest creates bias. In a domestic tribunal, however, the judgment recognizes an essential and pervading bias to maintain the existence of the association; and the tribunal may inescapably have a pecuniary interest in the issue it is called upon to resolve. With respect, the judgment seems to err in citing the *Kuzych* case[60] as an illustration of such extreme bias as to warrant the disqualification of the tribunal. The opinion of the Judicial Committee states that "their Lordships will deal with the matter on the basis that severe condemnation of the methods followed in the proceedings under review is fully

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[55] *Byrne* v. *Kinematograph Renters' Society Ltd.*, [1958] 1 W.L.R. 762, at p. 784. (Ch.D.).
[56] *Ridge* v. *Baldwin*, [1963] 2 All E.R. 66, at p. 71 (H.L.).
[57] *Supra*, footnote 1, pp. 319-322.
[58] *Ibid.*, pp. 322-333. [59] *Ibid.*, at p. 333.
[60] *White et al.* v. *Kuzych*, [1951] 3 D.L.R. 641 (P.C.).

justified".[61] It is submitted that the Privy Council assumed for purposes of argument, without deciding, that the tribunal in that case misconducted itself. But the judgment went on to decide that there nevertheless was a "decision" within the meaning of the union constitution which Kuzych was obliged by another term in the constitution and by his contract of membership in the union to appeal internally, as a condition precedent to his being free to issue a writ and have his case heard in a court of law. The particularly relevant point in the *Kuzych* case is the one noted above from the *Posluns* judgment: that it would be an error to demand of a domestic tribunal the high standard of impartiality demanded of a judge:[62]

> What those who considered the charges against the respondent and decided whether he was guilty ought to bring to their task was a will to reach an honest conclusion after hearing what was urged on either side, and a resolve not to make up their minds beforehand on his personal guilt, however firmly they held their conviction as to Union policy and however strongly they had shared in previous adverse criticism of the respondent's conduct.

C. *Declaration and Damages.*

Three questions remain in the judgment: the claim for a declaration, the claim for damages for conspiracy, and the claim for punitive damages. The first and third of these may be considered summarily: the defendant was held to be morally justified in acting and legally empowered to act as it did and therefore the plaintiff was not entitled to a declaration;[63] and there was no basis in the defendant's conduct for the assessment of punitive damages.[64]

D. *Civil Conspiracy.*

The second question, the claim based in conspiracy, invites comment. As I understand the law of civil conspiracy, the term covers two distinct causes of action. The first involves a combination to accomplish an object that is *per se* illegal or to use means which are *per se* illegal, the conspirators being liable in damages to anyone injured by the execution, in part at least, of the combination.[65] The second cause of action involves a combination to pursue a course of conduct of which neither the means nor the end is

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[61] *Ibid.*, at p. 468.

[62] *Ibid.*, at p. 646.

[63] *Supra*, footnote 1, at pp. 333-334.

[64] *Ibid.*, at pp. 337-347. As to punitive and aggravated damages see the judgment of Lord Devlin in *Rookes* v. *Barnard*, *supra*, footnote 16, at pp. 407 *et seq.*

[65] *E.g. Southam Co.* v. *Gouthro*, [1948] 3 D.L.R. 178 (B.C.S.C.).

per se unlawful; the combination becomes unlawful if the predominant object is to cause harm.[66] The intriguing feature of this tort in the present context is that the pursuit of self-interest precludes liability, whereas in the tort of inducing breach of contract the pursuit of self-interest falls far short of justification. However, in the latter case it can be said from a conceptual point of view that inducing breach of contract is *per se* unlawful, the exculpatory qualification merely indicating the limits of the tort, just as Gale J.'s "correlative obligation"[67] in the Board merely surveyed the limits of the Board's implied contractual power of control over the plaintiff as a customers' man.

The judgment appears to fuse the two branches of the law of conspiracy:[68]

> It need hardly be said that a conspiracy consists of an agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. Thus, the tort of conspiracy is committed if a person is damaged by a combination which is formed for the purpose of harming him in his trade, business or other interests, whether or not a breach of contract is the result, or if that damage is caused by an unlawful act on the part of those acting in concert.

This passage suggests to me that the existence of improper purpose, or object, constitutes the conduct an unlawful act. It does not make clear that the unlawfulness of the act can have two disparate qualities, one relating to the nature of the act and the other to the intent of the actors. The same analysis is apparent also in the interpretation of argument of counsel for the plaintiff:[69]

> . . . the two defendants and the other governors, for the malevolent purpose of hurting the plaintiff and by the use of improper means, conspired together to cause the order of his dismissal to be issued to the Daly company with resultant damage to him.

The conjunctive "and" appears to complete the fusion. However, the fact that the judgment does not make the distinction is not essential to the result, for the conclusion is reached that there was among the members of the Board no agreement in any sense relating to conspiracy.[70] The vote of the Board respecting the disposition of the case revealed only that the individual members were independently of the same frame of mind.

E. *The Application of Posluns' Case.*

The *Posluns* case essentially involves activities relating to the imposition of economic loss and to the operation of a domestic

[66] *Quinn* v. *Leathem*, *supra*, footnote 38.
[67] *Supra*, footnote 1, at p. 272.
[68] *Ibid.*, at p. 334.
[69] *Ibid.*
[70] *Ibid.*, at p. 337.

tribunal created consensually through the constitution and by-laws of an unincorporated association. In comparatively rare cases has reported litigation arising out of these activities related to business practices or commercial competition or to professional or business associations such as a law society, a real estate board or a stock exchange. The bulk of the cases have concerned trade unions (1) where efforts to induce a boycott by picketing or other means, in pursuit of collective bargaining goals, have caused breaches of contracts of supply or of employment, and (2) where a member has been expelled or otherwise disciplined by a union tribunal or by a membership meeting for conduct allegedly incompatible with his obligations to the union. What, then, is the value of the *Posluns* case as a precedent for those incidents that are most likely to arise as a source of litigation?

The path taken by the *Posluns* judgment has many forks, both of fact and of law. Naturally, wherever the fork is a factual one, a question either of direct fact finding or of inference or conclusion of fact, the value of the judgment as precedent will depend on the closeness of the factual resemblance of *Posluns*' case to the one then at Bar. On the facts may depend the choice of legal forks, some of which the judgment leaves unsurveyed and along which the going may be unsmooth. Obviously cases are always distinguishable on their facts. But as I see them the main potential points of departure are seven in number, four involving issues of fact and three issues of law. The first two considered below relate primarily to the tort of inducing breach of contract, the first (in three parts) being a matter of law and the second being a matter of fact. The next five points relate to judicial review of the actions of a domestic tribunal, the first three being matters of fact and the last two matters of law.

(1) The judgment states three heads of justification for inducing breach of contract: where the interference is promoted (a) by impersonal or disinterested motives; (b) in the public interest; or (c) through the exercise of some statutory or contractual interest. All three are legal standards which contain considerable uncertainty both as to their meaning and in their application.

(a) As suggested earlier, disinterested motive *per se* is hardly an adequate justification for inducing breach of contract. If self-interest is rejected as an exculpatory factor—and it would be strange if a person could claim a freedom to interfere with another's contractual rights on the ground that he stands to gain by it—the absence of interest hardly improves the defence. The typical illustra-

tion, given by Viscount Simon in the *Crofter* case,[71] is of a father who induces his daugher not to marry a rogue. But here the father is not disinterested, not even, perhaps, in a pecuniary sense. The judgment in the *Posluns* case gives the illustration of acting under "the influence of some great moral or religious force", which the case of the parent fits. But, just as the distinction between negligence and gross negligence presents difficulties in drawing differences not in kind but in degree, so it may not be easy to discriminate between a great force and a lesser one. Certainly a self-imposed duty—as all moral duties are—without more is inadequate justification; and altruism by itself is not likely to be any more acceptable as justification than is the white lie or the pious fraud in the tort of deceit. "A great moral or religious force" may imply an element of immorality in the contract the breach of which is induced. But this involves a new set of considerations that were not explored in the *Posluns* judgment. It is submitted that the scope of this head of justification will likely prove to be narrow indeed.

(b) Justification for inducing a breach of contract in the public interest may appear on its face to be a sound proposition. But it presents two sets of problems. First, what is the nature of the public interest? A good many interests often claimed as public turn out to be nothing more than the sum of identical or similar private interests. The farmers of Canada may each have a personal interest in the sale of wheat to a foreign country. Does that of itself make the sale in the public interest? Entrepreneurs have an interest in private enterprise. But it can be said with reasonable assurance that free competition as distinct, say, from monopolistic competition is in the public interest only because the government of the day accepts it and protects it though legislation. A different "public interest" would derive from, or be reflected in, a different legislative policy. The "investing public" which the *Posluns* judgment states the Board of Governors were trying to protect is the sum of private citizens served by the Exchange. Does the totaling of their private interests make the sum a public interest? Is there a public interest broader than that of the "investing public" in the operation at a high ethical level of this component of the money market? When it comes to preserving a language or a culture or a national identity it is submitted that quite different considerations come into play. Second, the public has an interest in the sanctity of contracts; that is why there is a law making it tortious to induce a breach of con-

[71] *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch et al*, [1942] A.C. 435 (H.L.).

tract. At best, therefore, one must choose between two competing public interests. It is significant that although the judgment twice refers to "the welfare of the public who deal with member firms"[72] and "the investing public",[73] this head of justification is not relied on. Cases where this head will be useful may be few and far between.

(c) In the *Posluns* case the Board's contractual right to discipline prevailed over the plaintiff's contract of employment with Dalys. The right that justifies the breach need not, however, be contractual. The judgment suggests it might be statutory, and in theory there seems to be no reason why the right might not derive from an executive or administrative order or generally from the common law. In any event this note suggests earlier that the justification should be derived from the fact that when two "rights" compete neither can seek protection at law. Where "rights" are of the same class *prima facie* there is no basis for establishing an order of priority; jurisprudential "hands off" seems the only rationale for the result. But Darling J. in the *Read* case[74] speaks of finding justification in the exercise of an equal or superior right. Suppose the rights in conflict are of different classes: must one be dominant and the other subservient? Must the "right" to trade take precedence over the "right" to use economic sanctions in collective bargaining, as suggested in *Dusessoy's* case,[75] *Hersee's* case,[76] and *Caruso's* case?[77] What warrant is there for putting the obvious public policy of free competition (evidenced, for instance, in combines legislation) and the equally obvious public policy of collective bargaining (evidenced, for instance, in criminal and civil labour legislation) in this order of priority? In any event what is often asserted to be a right (the implication being that its exercise will be protected at law, that is, that it will support a cause of action) turns out to be a mere privilege or "liberty" or "freedom" the doing of which is permissible but which will not be protected from the exercise of a competing privilege. To set up priorities of privilege is not meaningful. It is submitted that, in the area of the use of economic sanctions at least, there has yet to be an intellectually satisfactory settlement of the law relating to this head of justification for inducing breach of contract.

(2) The judgment finds that Posluns submitted himself to the

[72] *Supra*, footnote 1, at p. 283.
[73] *Ibid.*, at p. 339.
[74] *Supra*, footnote 35.
[75] *Dusessoy's Supermarket St. James Ltd.*, v. *Retail Clerks' Union Local 832 et al* (1961), 30 D.L.R. (2d) 51 (Man. Q.B.).
[76] *Supra*, footnote 13.
[77] *Acton Excavating & Contracting Co.* v. *Caruso et al*, C.C.H. Canadian Labour Law Reporter, P. 14,006.

jurisdiction of the Toronto Stock Exchange when he applied to become and was approved as a customers' man. The judgment concludes that Posluns "thereby impliedly agreed that so long as he continued under the aegis of the Exchange, he would submit to any control *properly* exerted by it".[78] This power of control is described in the same paragraph as an "implied contractual right". The power to discipline is thus found to be an implied term of a contract the existence of which is inferred from the actions of the parties. Earlier in the judgment consideration is given to the question whether Dalys had a right to terminate the contract of employment. The judgment finds an implied term to that effect. The implication is drawn on the basis of the application of the "of course" standard set out in the *Shirlaw* case,[79] the words being the testy suppression by both parties of an officious bystander who raises a point that so far as the parties are concerned "goes without saying". It is a high standard, calling for an inference or conclusion of fact relating to the intent of the parties. Assuming that the inference is properly drawn in the *Posluns* case, it is not so clear that it will be drawn in labour cases, particularly where the issue relates to the disciplinary power of a union over its members. Where a union constitution is silent, most cases deny to unincorporated associations such an implied power to discipline; if it is not expressed it is non-existent.[80]

(3) The judgment reviews the conflicting authorities on the extent to which a court will examine the evidence or the adequacy of the evidence before a domestic tribunal. This question of law is not resolved in the *Posluns* case because the severer standard was found to have been met. The issue may be unavoidable in a subsequent case.

(4) The judgment reviews the authorities on the question whether parties are capable at law of contracting out of the requirement that a domestic tribunal hew to the rules of natural or essential justice. Again the question is avoided by the conclusion that "in the absence of an express prohibition, the court will not construe the rules of an association as to impliedly exclude, where

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[78] *Supra*, footnote 1, at p. 272. The italics are in the judgment.

[79] *Shirlaw* v. *Southern Foundries (1926) Ltd.*, [1939] 2 K.B. 206, at p. 227, cited in the *Posluns* case at p. 264.

[80] *Morrison* v. *Ingles et al.*, [1920] 2 W.W.R. 50 (B.C.S.C.), citing Jessel M.R. in *Dawkins* v. *Antrobus* (1881), 17 Ch.D. 615; *Sykes* v. *McCallum*, [1940] 4 D.L.R. 413 (Man. K.B.); *Bimson* v. *Johnston* (1957), 10 D.L.R. (2d) 11 (Ont. H.C.); and Denning L.J. in *Lee's* case, *supra*, footnote 47. *Contra: Cantwell et al.* v. *Newfoundland Labourers' Union et al* (1961), 29 D.L.R. (2d) 217 (Nfld. S.C.).

they would otherwise be applicable, the rules of natural justice".[81] Since the power of the Exchange to discipline Posluns was held to arise out of contract by inference, the question did not have to be decided. Again, in a subsequent case the question may not be avoidable. The trend may be expected to continue that freedom of contract must defer here to the demand of public policy that the rules of essential justice be followed.[82]

(5) The judgment raises the question of how the rules of natural justice are to be applied in a particular case and records the standard referred to earlier: "what a reasonable man would regard as fair procedure in the circumstances." Its application calls for a conclusion of fact. "It is for the judge to draw the necessary inferences whether adequate notice of the charges was given to the person who is in essence accused of misconduct, and whether he has had sufficient opportunity to present his case."[83] It is not clear in this passage whether Gale J. intended this issue to be retained by the judge in a jury trial. Although it is a question of fact involving the standard of the "reasonable man", it is a highly sophisticated question, and one which a good many laymen may never have been called upon to consider. The reports are full of cases in which lay tribunals, some of them at least composed of men of good will, intelligence, education and experience, have acted contrary to the requirements of essential justice. If the application of the standard requires an appreciation of fair hearing which persons unskilled in such matters may be insensitive to, it would seem wise that the issue be retained by the judge even though it be a question of fact. Furthermore, different cases will produce different results, depending at least on the severity of the impact of the decision on the person prejudiced by it. It makes a difference whether the association is a social or fraternal organization, a sports club, a business association, a professional society or a trade union. Denning L.J. in *Lee's* case[84] clearly rejected the submission that he should follow the "club" cases in deciding how far a court should intervene in the case of a trade union or association where membership is a condition of being able to earn a livelihood. The standard to be required is bound to vary with the full circumstances of the case, and precedent may be of little value for some time to come.

(6) The judgment notes that an element of bias is bound to be present in the working of a domestic tribunal. When does bias go

[81] *Supra*, footnote 1, at p. 313.
[82] The authorities are collected on pp. 308-312, *ibid.*
[83] *Ibid.*, at p. 319.
[84] *Supra*, footnote 49.

too far? The standard commonly accepted, and referred to in the *Posluns* judgment,[85] is that the tribunal will be disqualified "if a real likelihood of bias is shown", presumably beyond the bias of "the voluntary association of the members".[86] It is a tricky question, but one which appears in the first instance to be a question of fact: is there, in the circumstances, a real probability of bias? Again, circumstances will affect results.

(7) The judgment reviews the authorities relating to the question whether the tribunal that has offended its rules or those of natural justice can purge itself of its error by holding a second hearing. The court prescribes for the second proceeding the standard of a *bona fide* intent to do that which is right. The judgment asserts that a tribunal can purge itself without formally annulling the first order. However, it is submitted that failure to annul may be evidence contributing to a conclusion that the tribunal was in fact still under the influence of its former decision. Once again the legal standard calls for a conclusion of fact that is bound to fluctuate with the circumstances of the case.

A. W. R. CARROTHERS*

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LABOUR LAW—PICKETING ON SHOPPING CENTRES.—The ancient market place was more than a private commercial complex: it was the hub of social intercourse and the forum for public debate and controversy. The modern shopping centre, seeking to emulate the commercial and social functions of the market place, has become as well the reluctant host of controversy.

Picketing by labour unions on shopping centre premises has recently been reviewed in three cases in the courts of British Columbia and Saskatchewan.[1] These cases throw into bold relief both the conflict between the public and private functions of the shopping centre and the difficulty of forcing public law pegs into private law pigeonholes.

The conflict between the public and private functions of the shopping centre stems from the fact that private ownership of side-

[85] *Supra*, footnote 1, at p. 329.

[86] *Ibid.*, at p. 330.

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[1] *Zeller's (Western) Ltd.* v. *Retail Clerks Union, Local 1518* (1962), 36 D.L.R. (2d) 581 (B.C.C.A.); *Zeller's (Western) Ltd.* v. *Retail Clerks Union, Local 1518* (1963), 42 D.L.R. (2d) 583 (B.C.C.A.); *Grosvenor Park Shopping Centre Ltd.* v. *Cave* (1963), 40 D.L.R. (2d) 1006 (Sask. Q.B.); *rev'd.* (1964), 49 W.W.R. 237 (Sask. C.A.).

walks, driveways, parking lots, and other areas is retained by the shopping centre operator, subject to the right of merchants to have access for themselves, their employees, their customers and their suppliers to the leased premises. Yet the success of the shopping centre for both operator and merchant, depends on the presence of the public in these very areas. When members of the community grow accustomed to coming to the shopping centre for their recreation, for social contact or to patronize a particular store, they are more likely to patronize all of the stores in the complex. Thus no attempt is made to ensure that persons entering the centre are prospective patrons of a particular merchant; rather all are welcome whether they come to shop or to stroll.

When a labour dispute arises between a merchant and his employees, it is natural that they will wish to picket near the locus of the dispute, their employer's business premises. There they can reach fellow-employees, customers and suppliers, and appeal for sympathy and support. Traditionally, this type of industrial warfare takes place on public sidewalks and streets, but in the shopping centre such areas are privately owned. May the pickets, then, reach the public where the public congregates, despite their intrusion on the private property interests of the operator and the merchant? The recent cases give an affirmative answer.

The *Zeller's* litigation[2] arose from the suit of a tenant to enjoin all picketing by his striking employees on a sidewalk in front of his store, on the ground that such picketing constituted illegal interference with his easement. The court of first instance granted an injunction against all picketing, but expressly refrained from enjoining conduct permitted by the British Columbia Trade-unions Act.[3] That Act allows picketing during the course of a legal strike, and "without acts that are otherwise unlawful". The union argued that shopping centre picketing, otherwise unobjectionable, was within the protection of the statute. With this contention the appellate court disagreed. Tysoe J.A. held:

> The difficulty in the way of this objection of the appellant is that substantial interruption of passage along a right-of-way is an unlawful act. The appellant has no more right to enter upon the lands over which the respondent has easement rights and to so interfere with those rights as to injure the respondent than it has to enter upon lands without the consent of the owner of those lands. The very purpose of picketing in the passageway and on any of the several lands over which the respondent has easement rights must be to hinder and deter employees of the respondent and its customers and prospective customers and other

[2] *Ibid.* [3] R.S.B.C., 1960, c. 384, s. 3(1).

> persons who may have business with it from going to and from the respondent's store premises by the means available to them, namely, by using the passageway. As I have earlier said this constitutes, in my opinion, an unlawful interference with the easement rights. I cannot conceive that any picketing of the nature which I suspect the appellant desires to engage in would not constitute such an unlawful interference. If, however, it would not, the restraining order does not stand in the appellant's way.[4]

On the narrow ground that "a right of action in respect of obstruction of an easement . . . will only lie where the entry amounts to an obstruction causing injury to the plaintiff",[5] Wilson J.A. dissented. As he noted:

> . . . if we are to support that part of the injunction which prohibits any picketing on the area covered by the easement, we must surmise that legal picketing there will cause injury or damage. This may well be true, but we are not, I think, entitled to act on this sort of prophecy.[6]

Apparently determined to test the point, the union continued to picket on the sidewalk. The tenant moved to have the pickets committed for contempt of the injunction, and the trial judge made a finding that there had been a violation of the order forbidding picketing ". . . upon the lands and premises . . . over which . . . the plaintiff has an easement . . . or from doing any act amounting to a nuisance". From this finding, the union appealed.

Davey J.A., speaking for a unanimous court,[7] set aside the conviction for contempt. Citing *Williams* v. *Aristocratic Restaurants*[8] as authority for the proposition that peaceful picketing does not, *per se*, constitute a nuisance, he refused to vindicate the private property interests of the plaintiff.

> I have difficulty in understanding how, on the material before us, conduct that would have been lawful upon a public sidewalk and so within the saving clause of the injunction became unlawful and in breach of the injunction because it occurred on a private sidewalk over which the respondent had an easement appurtenant to the store that was being picketed. I can see no essential difference between a public road and respondent's private easement that could produce that change in legal result.[9]

That the case depended on recognition of the public character of a shopping centre, despite private ownership, is evidenced by an *obiter* dictum to the effect that the pickets were stationed in an area

[4] (1962), 36 D.L.R. (2d) 581, at p. 584 (Sheppard, J.A. concurring).
[5] *Ibid.*, at p. 585.
[6] *Ibid.*, at p. 586.
[7] (1963), 42 D.L.R. (2d) 583. The court included Sheppard J.A., who had concurred in the majority decision of Tysoe J.A. in the original litigation.
[8] [1951] S.C.R. 762.
[9] (1963), 42 D.L.R. (2d) 583, at pp. 585-586.

"to which the public are invited" and that there was no evidence that the pickets "were exceeding the terms of the invitation to use the sidewalk held out to the public by the owner of the fee".[10]

The court's holding in the contempt proceeding, in effect, thus reversed the holding on the original injunction application by permitting picketing where it had formerly been forbidden. However, Davey J.A. did leave open the legality of the picketing when viewed as trespass in the context of an action by the shopping centre owner. Such an action, of course, would present squarely for decision the choice between the public and private character of a shopping centre.

This very issue arose in the Saskatchewan courts in *Grosvenor Park Shopping Centre* v. *Cave*.[11] Here a shopping centre owner sued to restrain picketing by a tenant's striking employees on the parking area and sidewalks. In answer to the owner's complaint of trespass, the union pleaded that the parking area and sidewalks should be treated as "quasi-public in nature" and as having "lost their identity as private property".[12] Rejecting an American case cited in support of this legally difficult proposition, Bence C.J.Q.B. held:

> I am of the opinion that in this Province there is no such thing as *quasi*-public property. It is either public or private, and in this instance it is indisputably private. The plaintiff has the right to refuse access by persons to any property owned by it over which it has retained control. This would be all of the unleased portion of the shopping centre.[13]

Accordingly, an injunction was granted against trespass upon the plaintiff's land.

At this juncture, the first *Zeller's* case had decided that shopping centre picketing was enjoinable at the suit of the tenant; the second *Zeller's* decision had not yet reversed this position. The trial decision in *Grosvenor Park* thus merely extended to the owner the right possessed by his tenant to have shopping centre picketing enjoined. However, with the second *Zeller's* decision, the anomalous situation arose that such picketing was either permitted or forbidden, depending on the identity of the plaintiff—permitted at the suit of the tenant, forbidden at the suit of the owner.

On appeal, the anomaly was erased. In a rather surprising judgment, the Saskatchewan Court of Appeal held that the owner could not maintain an action in trespass.[14] Culliton C.J.S. held:

> The area upon which it is alleged the appellants have trespassed is part

[10] *Ibid.*, at p. 586.
[11] *Supra*, footnote 1.
[12] *Ibid.*, at pp. 1008-1009.
[13] *Ibid.*, at pp. 1009-1010.
[14] *Supra*, footnote 1.

> of what is well known as a shopping centre. While legal title to the area is in the respondent, it admits in its pleadings that it has granted easements to the many tenants. The evidence also establishes that the respondent has extended an unrestricted invitation to the public to enter upon the premises. The very nature of the operation is one in which the respondent, both in its own interests and in the interests of its tenants, could not do otherwise. Under these circumstances it cannot be said that the respondent is in actual possession. The most that can be said is that the respondent exercises control over the premises but does not exercise that control to the exclusion of other persons. For that reason, therefore, the respondent cannot maintain an action in trespass against the appellants.[15]

Whereas Davey J.A. in the second *Zeller's* case had indicated that an action might be framed not in nuisance but in trespass, Culliton C.J.S. suggested, *obiter* dictum, that the proper remedy was not trespass but nuisance. But the combined effect of the second *Zeller's* case and *Grosvenor Park* is that peaceful picketing during a lawful strike on the public areas of a shopping centre is enjoinable by neither landlord nor tenant. Implicit, indeed explicit, in this result is a recognition of the public nature of the shopping centre. Disputes, controversies, public appeals, may be conducted there as well as commerce. The market place of wares has become again the market place of ideas.

Yet neither those who applaud nor those who decry the results of these two cases can be entirely happy with the technique of analysis that produced them. In the second *Zeller's* case, the language of the court was that of "invitation to the public . . . by the owner of the fee";[16] in *Grosvenor Park* the court found that the owner "did not have that degree of possession essential to an action in trespass".[17] With respect, the attempt to shackle the analysis of labour relations problems with the ancient bonds of real property law is inappropriate—whatever the results of the cases. Much to be preferred is the approach of the Supreme Court of California in *Schwartz-Torrance Investment Corp.* v. *Bakery Workers' Union Local No. 31.*[18] The facts of this case were almost identical with those of *Grosvenor Park:* a suit by the owner of a shopping centre to enjoin otherwise lawful, peaceful, picketing of a tenant's premises. Tobriner J., for a unanimous court, declined to grant the injunction:

> We conclude that the picketing in the present case cannot be adjudged in the terms of absolute property rights; it must be considered as part of the law of labor relations, and a balance cast between the opposing

[15] *Ibid.*, at p. 242. [16] (1963), 42 D.L.R. (2d) 583, at p. 586.
[17] *Supra*, footnote 1, at p. 242. [18] (1964), 394 P. 2d 921.

> interests of the union and the lessor of the shopping center. The prohibition of the picketing would in substance deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion; the place of the involved business. The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage.[19]

There remains, then, the task of weighing up the competing interests of the labour union and the picketed tenant or landowner in the special context of shopping centre picketing. In the ordinary industrial dispute, of course, public policy acknowledges the union's interest in peacefully advertising the existence of a labour dispute through picketing. Such picketing is lawful even though it interferes with the use and enjoyment of the picketed property. To this extent, shopping centre picketing presents no special problem. Likewise, minor, casual, impediments to pedestrian and vehicular traffic may accompany both ordinary and shopping centre picketing, and are not wrongful where they are not deliberate. Even the risk of accidentally (but not purposely) causing inconvenience to adjacent shopowners is common to both situations, and can be handled by requiring the pickets to confine their activities to the immediate vicinity of the dispute.

The special factor in shopping centre picketing is the landlord, a neutral in the labour dispute. First, he is responsible for the maintenance of orderly traffic movement in the public areas of the shopping centre. Whereas the expenditure of tax funds on public roads and sidewalks may justify a little interference with traffic flow to serve the greater public good of publicizing labour controversies, no such justification exists in the shopping centre. The landlord spends his own money on the public areas of the shopping centre, and does so for the sole purpose of making a profit. Second, while public authorities may, on behalf of the community, strike a reasonable balance between traffic and picketing on public sidewalks and streets, the shopping centre owner can hardly be expected to make such a choice: he has no authority to speak for the community; to grant picketing or parading privileges to all would invite chaos, while to do so selectively would invite commercial reprisals. He is thus driven to adopt a highly restrictive approach to granting permission to groups who wish to parade or picket in the shopping centre.

Set against these two legitimate concerns of the landlord is the union's contention that unless picketing is allowed on the public

[19] *Ibid.*, at p. 926.

areas of the shopping centre, it cannot take place at all. The theoretical alternative, of course, is picketing on the adjacent public highways. To such picketing there are both legal and practical obstacles. Legally, the risk is that picketing on the perimeter of the shopping centre will be construed as illegal pressure against all of its tenants, no matter how explicit the picket signs.[20] Practically, the difficulty is that many more pickets are required to patrol the perimeter of the entire shopping centre than the immediate vicinity of the tenant's store.

Weighing these considerations in the scales of public policy, it is hard to say that peaceful informational picketing should be forbidden in shopping centres. The flow of traffic may be protected by requiring that the pickets remain few in number, well-behaved, and in a confined area; both the landlord and the union are better served by the legal rationale adopted in California, which does not depend on the owner's permission or invitation to picket; the union is not exposed to the legal and practical disadvantages of perimeter picketing. Happily the appellate courts of Saskatchewan and British Columbia appear to have struck this balance, whether consciously or otherwise.

H. W. ARTHURS*

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CONFLICT OF LAWS—STATUS—CAPACITY TO MARRY—RECOGNITION OF PRIOR FOREIGN DIVORCE—THE INCIDENTAL QUESTION. —The deceptively simple fact pattern in the recent case of *Schwebel* v. *Ungar*[1] provided the Supreme Court of Canada with an opportunity to review a number of problems in conflict of laws. In the judgment appealed from, the Ontario Court of Appeal had had occasion to discuss the conflicts principles relating to domicile, status, recognition of foreign divorces, and capacity to marry. Moreover, the unique sequence of events which gave rise to the litigation constituted a textbook example of another problem which has occasioned a measure of debate in academic circles but which has been left virtually untouched by judicial decision in the

[20] *Blue Star Lines* v. *I.W.A.* (1959), 29 W.W.R. 337 (B.C.S.C.); *Pacific Coast Terminals* v. *I.L.A.* (1959), 29 W.W.R. 410 (B.C.C.A.). See also *Hersees of Woodstock* v. *Goldstein*, [1963] 2 O.R. 81 (C.A.), (visual impact of picketing directed at goods of struck manufacturer found to extend to all goods of picketed neutral retailer; picketing held unlawful).

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[1] [1963] 1 O.R. 429, 37 D.L.R. (2d) 467, (Ont. H.C.); [1964] 1 O.R. 430, 42 D.L.R. (2d) 622 (Ont. C.A.), aff'd (1965), 48 D.L.R. (2d) 644 (S.C.C.).

common law jurisdictions. *Schwebel* v. *Ungar* is one of the very few reported cases which squarely presents the so-called incidental or preliminary question in the conflict of laws.

The action took the form of proceedings by the plaintiff husband for a declaration of nullity on the ground that the defendant wife was a party to a valid and subsisting marriage to one Waktor. The essential facts were these. Waktor and the defendant were married in Budapest in 1945, the parties at all times up to the marriage having retained their Hungarian domicile of origin. Shortly after the marriage they escaped from Hungary with the intention of settling in Israel. For the succeeding three years they moved from one refugee camp to another and while in one such camp in Italy in 1948 they were divorced according to the recognized procedure under Jewish law, that is, by Waktor delivering a "gett", or bill of divorcement, to the wife before a rabbinical court. A few weeks after this divorce the parties reached Israel. Waktor continued to reside in Israel at all material times thereafter. The defendant lived with her parents in Israel for seven and one half years before coming to New York and Toronto for a visit, during the course of which she met the plaintiff in Toronto. In 1957 the plaintiff (an Ontario domiciliary) and the defendant were married in Toronto. One child was born of this marriage.

At trial McRuer C.J.H.C. held that at the time of delivery of the gett the parties were still domiciled in Hungary, and this finding was not disturbed on appeal. Evidence was led to show that the divorce would not be recognized in Hungary or in Italy. By the law of Israel, on the other hand, the marriage would be treated as dissolved by any such divorce conforming with the requirements of the Jewish religion, regardless of the view taken by the law of any other country with which the parties may have been connected—by domicile, nationality, or in any other way—at the time of delivery of the gett. In Israel, therefore, the defendant and Waktor would be regarded as possessing the status of unmarried persons.

On these facts the Ontario court was confronted with two initial problems. First, had the defendant wife acquired an Israeli domicile at some time prior to the date of her marriage to the plaintiff? Second, if she had, to what extent was the law of Israel applicable to determine questions relating to her eligibility to contract the Ontario marriage to the plaintiff? McRuer C.J.H.C. answered the first question in the negative and was therefore able to grant the declaration of nullity without embarking upon an

analysis of the second problem. The appeal was allowed by the Ontario Court of Appeal and its decision has now been upheld by the Supreme Court of Canada. The appellate courts disagreed with McRuer C.J.H.C.'s conclusion with respect to the first question, finding that the defendant wife had in fact acquired an Israeli domicile.[2] This necessitated consideration of the second problem formulated above and the object of this comment is to evaluate the significance of the judgments delivered on appeal in terms of the specific conflict of laws rules discussed in connection therewith. Consideration is also given to the problem of the incidental question, a topic not isolated for discussion in general terms by any of the courts in which this case was argued.

The judgment of the Ontario Court of Appeal was delivered by MacKay J.A. Having arrived at the conclusion that the defendant wife was domiciled in Israel at the time of her re-marriage to the plaintiff, the learned judge went on to consider the further question of her eligibility to contract this second marriage in terms of three distinct principles or rules: (1) the general principle that status is a matter for the *lex domicili;* (2) the particular conflict of laws rule governing capacity to marry; and (3) the conflict of laws rule respecting recognition of foreign divorces. The extent to which the Court of Appeal and the Supreme Court of Canada relied on one or other of these approaches, or a combination of them, cannot be said to be altogether clear from the terms of their

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[2] On the question of domicile, McRuer C.J. referred only to *Trottier* v. *Rajotte*, [1940] S.C.R. 203, a decision following the line of English cases, exemplified by *Winans* v. *Attorney-General*, [1904] A.C. 287 (H.L.), and *Ramsay* v. *Liverpool Infirmary*, [1930] A.C. 588 (H.L.), in which the courts have defined the *animus manendi* required to be shown to displace a domicile of origin in favour of a domicile of choice in terms emphasizing the finality of the decision of the *propositus* to remain in the second country for the rest of his days. A more liberal test of the requisite intention was propounded in *Lord* v. *Colvin* (1859), 4 Drew. 366, at p. 376: "That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home."

This less exacting definition of the *animus manendi* has been preferred in the comparatively recent decisions of the Saskatchewan Court of Appeal in *Gunn* v. *Gunn* (1956), 2 D.L.R. (2d) 351, at p. 353, and of the Supreme Court of Canada in *Osvath-Latkoczy* v. *Osvath-Latkoczy*, [1959] S.C.R. 751, at p. 752. In the instant case this latter test has also been adopted in terms by the Ontario Court of Appeal and implicitly by the Supreme Court of Canada. The difficulties resulting from the approach taken in the line of cases applied in *Trottier* v. *Rajotte*, *supra*, has been sufficiently canvassed elsewhere — see, for example, Cheshire's Private International Law (6th ed., 1961), pp. 165-171 — and further relegation of the *Trottier* case by the appellate courts in *Schwebel* v. *Ungar* is to be welcomed.

judgments. The consideration accorded these suggested bases for the judgments is examined under headings (1) to (3) below, and some observations respecting the incidental question are made under heading (4). The discussion necessarily centres on the reasoning of MacKay J.A. since Ritchie J., delivering the reasons of the Supreme Court, largely confined his comments to the question of domicile and was content to adopt the reasoning of MacKay J.A. with respect to the other issues. The only relevant passage in Ritchie J.'s judgment is set out under heading (3) below.

(1) *Status and the law of the domicile.*

MacKay J.A. commenced his analysis by stating the problem in terms of status in the following passage:

> Having come to the conclusion that at the time of her marriage to the plaintiff in 1957 the domicile of the defendant was Israel, I turn now to that aspect of the case stated by the learned Chief Justice as follows:
>
> "The unique problem that arises in this case may be stated thus. If the defendant became domiciled in Israel she obtained the status of a single woman and according to the law of her domicile was eligible to remarry. Notwithstanding this, the question is, did she on coming to Ontario revert to the status of a married woman according to Ontario law?"
>
> One of the requirements for a valid marriage in Ontario is that the parties entering into the marriage have the status of single persons and the question here is whether the personal status of the defendant was that of a married or single person at the time she entered into the marriage contract with the plaintiff in 1957.
>
> If we determine the question by asking, (1) What was her domicile at that date? and (2) What was her personal status under the law of her country of domicile? the answer clearly is that she was domiciled in Israel; her status was that of a single person and therefore her marriage in 1957 was a valid marriage.
>
> On the other hand, if we say her status in Israel is one based on the recognition by the law of Israel of a divorce obtained in another country where she was not domiciled and that divorce was one not recognized as valid by the law of her country of domicile at the time it was obtained, should we say, "The status you claim of being a single person is valid only in Israel and cannot be recognized in Ontario". In other words, should our enquiry as to personal status extend beyond the simple enquiry as to what was her status under the law of her country of domicile at the date of her marriage in 1957 in Ontario? Do we accept that law as establishing her status in Ontario?[3]

The learned judge went on to cite from a number of cases dealing with divorce jurisdiction and with recognition of foreign divorces which have either been granted by the courts of the country in

[3] [1964] 1 O.R. 430, at pp. 434-435, 42 D.L.R. (2d) 622, at pp. 626-627.

which the parties are domiciled or which would be recognized in the country of domicile.[4] He then considered the discussion in Dicey[5] concerning the relationship between personal status and the *lex domicili*, and in particular Dicey's Rule 28:

> Rule 28 —Subject to rule 29, the existence of a status under the law of a person's domicile is recognized by the court, but such recognition does not necessarily involve giving effect to the results of such status.[6]

However MacKay J.A. would apparently go considerably further in referring questions of status to the *lex domicili* than would the editor of Dicey. In the text accompanying Rule 28, the editor sets out three views concerning the relation between status and domicile. MacKay J.A. sets out the first view—that a person's status depends wholly on the law of his domicile—and the commentary thereon, in full, and this appears to be the view favoured by the learned judge.[7] The editor of Dicey rejects this view in favour of a compromise position which would enable the forum to recognize a status acquired under the *lex domicili* but without treating the *lex domicili* as conclusive on questions of capacity arising from status.[8] In explanation of this latter principle, which is described as that intended to be expressed by Rule 28, the commentary in Dicey is concluded with the following passage:

> When the bearing of our Rule is understood, it becomes apparent that although it is all that can be extracted by way of principle from decided cases, the Rule is so vague as to be of comparatively little use for practical purposes. The fact that the existence of a particular status under a person's *lex domicili* is generally recognised does not answer the important question how far the capacities or incapacities of an individual under the law, for example, of his French domicile will be allowed by English courts to affect any particular transaction. The answer to this inquiry must be sought for in the rules deducible from English decisions with regard to the systems of law which govern individual types of transaction, and the most fruitful method of approach is probably to distinguish status (determinable in general by the *lex domicilii*) from capacity (determinable by the legal system governing the transaction in issue, which may or may not be the *lex domicilii*).[9]

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[4] *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; *Armitage* v. *Attorney-General*, [1906] P. 135; *Mountbatten* v. *Mountbatten*, [1959] P. 43; *Har-Shefi* v. *Har-Shefi*, [1953] 2 All E.R. 373 (P.D.A.).

[5] Dicey's Conflict of Laws (7th ed., 1958), Ch. 10.

[6] *Op. cit.*, *ibid.*, p. 223.

[7] MacKay J.A. also sets out (without the commentary) a second view which is directly opposed to the first. The second view is, however, obviously inconsistent with his lordship's reasoning and appears to have been included in the quotation from Dicey in error or simply for the sake of completeness.

[8] *Op. cit.*, footnote 5, pp. 225-226.

[9] *Op. cit.*, *ibid.*, p. 226.

MacKay J.A. did not advert to this latter view adopted in Dicey; nor do any of the cases referred to in his judgment appear to go to the criticism of the first view expressed by the editor of Dicey.[10]

In short, although MacKay J.A. relied largely on the discussion of status in Dicey, the result of applying the approach suggested by the editor of that work to the fact pattern in *Schwebel* v. *Ungar* would seem to result in formulating the problem not in terms of the general question of the wife's status according to her *lex domicili*, but in terms of her capacity to carry out the "transaction" in issue—that is her capacity to contract a valid marriage with the plaintiff.

(2) *Capacity to marry.*

Following his general discussion of status, MacKay J.A. did touch upon the narrower question relating to the specific choice of law rule governing capacity to marry, but only to the extent of setting out Dicey's formulation of the test in Rule 31 together with Exception 2 to that rule. The rule and exception read as follows:

> Rule 31: —Subject to the exceptions hereinafter mentioned, a marriage is valid as regards capacity when each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other.[11]
>
> Exception 2: —A marriage is, possibly, not valid if either of the parties is, according to the law of the country where the marriage is celebrated, under an incapacity to marry the other.[12]

Apart from the above-quoted passages, the question of capacity to marry does not attract further comment in the judgment under consideration. Three observations might be made in this connection

First, the dual domicile theory of capacity to marry as expounded in Dicey was accepted without a review of the authorities and without consideration being given to the alternative theory advanced by Cheshire to the effect that capacity to marry is a matter for the law of the intended matrimonial home. According to the latter theory, the basic presumption is that capacity to marry will normally be referable to the law of the husband's domicile at the

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[10] With reference to the first view, apparently adopted by MacKay J.A., the editor of Dicey observes, *op. cit.*, *ibid.*, p. 225, that: "This principle has never been fully accepted by our courts although some judges have paid lip service to it, and a recent *dictum* of the Court of Appeal rejects it. Moreover, the growing tendency of the courts both to pronounce and recognize judgments altering status regardless of their recognition at the domicile, renders it clearly impossible to maintain an exclusive reference to the *lex domicili* in matters affecting status."

[11] *Op. cit.*, *ibid.*, p. 249. [12] *Op. cit.*, *ibid.*, p. 256.

time of marriage, although this presumption is rebuttable if it be shown that at the time of the marriage the parties intended to establish their home in a certain country and in fact did establish it there.[13] On the facts in *Schwebel* v. *Ungar*, a choice between these competing theories was a pivotal factor since the plaintiff husband's domicile and the matrimonial home were in Ontario. Hence, according to Cheshire's version of the choice of law rule for capacity to marry, the defendant wife's capacity to marry was a question not for the law of her domicile (Israel) but for the law of Ontario. Accordingly, on the latter theory, the wife must have been found to lack capacity to marry unless her divorce from Waktor would be recognized by *Ontario's* conflict rules respecting recognition of foreign divorces.[14] The arguments for and against the dual domicile doctrine on the one hand and Cheshire's theory on the other cannot be adequately explored here. Since the controversy could not have been regarded as concluded by authority, however, it is unfortunate that the possibility of adopting an alternative to the dual domicile doctrine was allowed to pass by default both in the Ontario Court of Appeal and later (as was the case) in the Supreme Court of Canada.[15]

Second, the terms of Exception 2[16] to Dicey's Rule 31, quoted by MacKay J.A., have an apparent relevance to the facts of *Schwebel* v. *Ungar*, inasmuch as by the law of the jurisdiction in which the marriage was celebrated—Ontario—one of the parties *would* be under an incapacity to marry the other unless, once again, the wife's prior divorce could be recognized under Ontario's conflict of laws rule relating to recognition of foreign divorces.[17] Dicey's Exception 2 is expressed in tentative terms[18] and no clear authority is cited in support of it. If MacKay J.A.'s quotation of

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[13] Cheshire, *op. cit.*, footnote 2, p. 316 *et seq.*

[14] As to the conflicts rule for recognition of foreign divorces, see discussion under heading (3) *infra.*

[15] The relative merits of the two suggested choice of law rules for capacity to marry are adequately canvassed in the two textbooks referred to and elsewhere. It is sufficient to note here that there are marked disadvantages in any theory, such as that formulated in Dicey, which requires reference to more than one system of law. Much of the criticism levelled against Cheshire's formulation is directed at the uncertainty arising out of his suggested reference to the intended matrimonial home and this criticism could be avoided by simply stating the rule in the terms of the husband's domicile at marriage (and not merely in terms of a rebuttable presumption which is subject to being displaced by a subsequent change in domicile).

[16] See text accompanying footnote 12.

[17] *Cf.* footnote 14 and accompanying text.

[18] *Cf.* Cheshire, *op. cit.*, footnote 2, p. 316.

Exception 2 is to be taken as approval of it, it is unclear why the exception was not applied in the instant case.

Third, accepting the dual domicile doctrine as the appropriate test for capacity to marry, an argument might nevertheless be advanced to the effect that the marriage between the plaintiff husband and the defendant wife was defective in point of capacity in that the plaintiff husband lacked capacity by the law of his Ontario domicile to marry a married person, the wife having married status by Ontario law.[19] This argument is suggested by way of analogy to *Pugh* v. *Pugh*[20] where the court had to consider the validity of a marriage celebrated in Austria between a domiciled Hungarian girl aged fifteen and a domiciled Englishman. By Austrian and Hungarian law the marriage was valid. However section 1 of the English Age of Marriage Act, 1929 provided that "A marriage between two persons either of whom is under the age of sixteen shall be void". After a review of the authorities Pearce J. concluded that:

> It is clear that this marriage was not valid since by the law of the husband's domicile it was a marriage into which he could not lawfully enter.[21]

The result, that is to say, was that although the husband was of age by the law of his domicile (and by the law of all other countries concerned), and the "wife" by the law of her domicile, the marriage was defective because the husband lacked capacity to marry any person under sixteen. In this area, at least, Dicey's rule for capacity to marry might be re-stated so as to refer not to capacity of *each of the parties* according to the law of his or her *respective* domicile but to capacity of *both* parties by the law of *both* domiciles. An analogous line of reasoning in *Schwebel* v. *Ungar* would suggest the possibility that the defendant wife's capacity was a question to be submitted not only to the law of Israel but also to the law of Ontario.[22]

(3) *Recognition of the foreign divorce.*

Assuming that in the instant case the defendant wife's status or her capacity to marry or both was a matter for the law of

[19] Including Ontario's conflict of laws rule respecting recognition of foreign divorces. That rule is considered *infra* but it is assumed for purposes of the present argument that the prior divorce would not be recognized in Ontario.

[20] [1951] P. 482. [21] *Ibid.*, at p. 494.

[22] This sort of problem cannot arise where the alleged defect is marriage within the prohibited degrees—the type of incapacity raised for consideration in most of the relevant English conflicts cases on capacity to marry.

Israel, and that her status and capacity turned on the validity of her earlier divorce from Waktor, was the validity of that divorce tested by the law of Israel or by the Ontario conflicts rule respecting recognition of foreign divorces? If the latter, *Schwebel* v. *Ungar* must be taken as representing an extension of the rule in *Armitage* v. *Attorney-General*[23] which has heretofore been understood to call for recognition of a divorce decree granted in a country where the parties are not domiciled only if the decree would be recognized in the country where the parties were in fact domiciled *at the time of the divorce decree.* In *Schwebel* v. *Ungar* the parties were domiciled in Hungary at the time of the divorce decree and by Hungarian law the decree would not have been recognized. Accordingly the divorce could not have been recognized in Ontario unless Ontario's conflict rule for recognition of foreign divorces be interpreted as requiring recognition of the divorce because the parties *sometime after the date of the divorce* acquired a domicile in a country by the law of which the divorce was valid.[24] The judgments of the appellate courts in the present case provide material both for and against such an interpretation.

MacKay J.A. stated the problem before him in terms which suggest that the decisive question was not the validity of the divorce by Ontario law. He said:

> The decision in the present case turns on the marital status of the defendant at the time of her marriage to the plaintiff. To determine that status, I think our enquiry must be directed not to the effect to be given under Ontario law to the divorce proceedings in Italy as at the time of the divorce, but to the effect to be given to those proceedings by the law of the country in which she was domiciled at the time of her marriage to the plaintiff in 1957, namely, Israel, a domicile that she retained until her marriage to the plaintiff was actually performed, or, to put it another way, *the enquiry is as to her status under the law of her domicile and not to the means by which she acquired that status.* To hold otherwise would be to determine the personal status of a person not domiciled in Ontario by the law of Ontario instead of by the law of that person's country of domicile.[25]

Later in his reasons, however, the learned judge used language which does appear to express the question in terms of the Ontario conflicts rule for recognizing foreign divorces. He stated:

[23] *Supra*, footnote 4.

[24] On the facts of the case under consideration there was, of course, no question of the divorce being recognized in Ontario under the principle in *Travers* v. *Holley*, [1953] P. 246, *i.e.* that the foreign "court" was exercising a non-domiciliary jurisdiction similar to that which may be exercised by an Ontario court under the Divorce Jurisdiction Act, R.S.C., 1952, c. 84.

[25] *Supra*, footnote 3, at pp. 441 (O.R.), 633 (D.L.R.). Italics mine.

> I do not overlook the fact that in the *Le Mesurier* case it was stated that the only satisfactory rule to adopt on the matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. In the present case the Waktors were divorced in a country in which they were temporarily resident but not domiciled and by whose laws the divorce was not recognized as a valid divorce, nor was it recognized as such in the country of their domicile of origin. In this respect this case differs from any reported case I have found. It was, however, recognized as valid by the laws of the country in which they later became domiciled and *I think must be regarded as an exception to the general rule that a divorce is not valid under the law of Ontario when it is not recognized as valid by the laws of the country of the domicile of the parties at the time it was obtained.* This is so because the defendant subsequently, before coming to Ontario, and before she acquired a domicile in Ontario by her marriage to the plaintiff, acquired a domicile in a country by whose laws the divorce was recognized as a valid divorce.[26]

Further support for interpreting the present judgment as an authority on the scope of the *Armitage* rule may be derived from the fact that the cases cited by MacKay J.A. in support of his analysis are ones concerning the validity of a divorce.[27]

The reasons for judgment of the Supreme Court of Canada import the same apparent ambiguity as to whether or not the instant case may be taken as an authority on the scope of Ontario's conflict of laws rule respecting foreign divorces. As noted above, Ritchie J. addressed himself primarily to the question of domicile and the whole of his comments on the remaining issues are contained in the following two paragraphs at the end of the judgment:

> I am accordingly of opinion that at the time of her marriage in Toronto the respondent had the capacity to marry according to the law of the country where she was then domiciled. This does not, however, solve the whole problem because *as a general rule, under Ontario law a divorce is not recognized as valid unless it was so recognized under the law of the country where the husband was domiciled at the time when it was obtained,* and although the validity of the Jewish divorce was at all times recognized in Israel where the Waktors established a domicile of choice within three weeks of it having been granted, it was never so recognized according to the law of the husband's Hungarian domicile of origin.
>
> *The Court of Appeal of Ontario has treated these singular circumstances as constituting an exception to the general rule to which I have just referred.* In the course of his reasons for judgment Mr. Justice MacKay has thoroughly and accurately summarized and discussed the authorities bearing on this difficult question and it would in my view be superfluous for me to retrace the ground which he has covered so well.

[26] *Ibid.*, at pp. 441-442 (O.R.), 633-634 (D.L.R.). Italics mine.
[27] See footnote 4, *supra*.

> I adopt his reasoning in this regard and agree with his conclusion that, for the limited purpose of resolving the difficulty created by the peculiar facts of this case, *the governing consideration is the status of the respondent under the law of her domicile at the time of her second marriage and not the means whereby she secured that status.*[28]

In the above-quoted passage, the first paragraph and the first part of the second paragraph are stated in terms of an exception to the general rule (of Ontario conflict of laws) that foreign divorces not recognized by the country of domicile will not be recognized in Ontario. However the last sentence of the passage, adopting the language of MacKay J.A., is expressed in terms of the wife's status under the law of her domicile "*and not the means whereby she secured that status*". The means whereby her status was secured must, of course, refer to the divorce. The problem remains. Either the wife's capacity to re-marry depended on the validity of the divorce by Ontario's conflict rules, or it did not. If it did so depend, it must follow that the rule for recognition of foreign divorces must be stated in terms which sanction recognition of such a divorce which, though not valid by the *lex domicili* at the time of the decree, is valid by the law of a later domicile acquired by the parties. If the wife's capacity to marry did not depend on recognition of the divorce by Ontario's conflict rule but only on her capacity as an incident of status determined by foreign (Israeli) law, then, of course, Ontario's rule for recognition of foreign divorces remains unaffected. It is difficult to assert with confidence which approach is the better interpretation of the judgment in the Court of Appeal and of the cryptic comments of Ritchie J. quoted above.

If *Schwebel* v. *Ungar* does, in fact, represent an extension of *Armitage* v. *Attorney-General*, then (in the absence of other authority and of judicial comment in the instant case) the scope of the new rule is doubtful. The sort of problem raised may be illustrated by taking a hypothetical case in which H and W, being domiciliaries of country A, obtain a divorce in country B. By the law of country A the divorce would not be recognized. In the absence of further facts, the divorce would clearly not be recognized in Ontario.[29] Subsequently H and W become domiciled in country C by the law of which the divorce would be recognized. This is the *Schwebel* v. *Ungar* situation and on the interpretation of that case now under consideration, Ontario would recognize the di-

[28] *Supra*, footnote 1, at p. 649. Italics mine.

[29] As is the case elsewhere in this comment, the principle of *Travers* v. *Holley*, *supra*, footnote 24, need not be considered.

vorce proceedings in Ontario, at least if the question arose at a time during which H and W continued to be domiciled in country C.

Next, suppose that the validity of the divorce is raised in Ontario not while H and W continue to be domiciled in C but after they have abandoned their domicile in C and either acquired a new domicile in D, by the law of which the divorce would not be recognized, or resumed their domicile of origin in A where, *ex hypothesi*, the divorce decree would not be recognized. Does the validity of the divorce in the eyes of the Ontario court depend on the domicile *for the time being* at commencement of the proceedings in Ontario? If so, the divorce would not be recognized in Ontario. A consequence of stating the rule in this way, therefore, is that the Ontario courts might be compelled to reach different conclusions about the validity of the divorce in proceedings initiated at different times and when the issue is raised in different contexts. The alternative possibility is that once the parties have acquired their domicile in C, this operates to validate the divorce decree (in the eyes of the Ontario court) regardless of supervening changes of domicile. The result of this latter rule would appear to be to attribute the very finality of effect to the law of country C which was denied to the law of country A, the *lex domicili* at the time of the divorce. The rationale of such a rule could only be explained in terms of a policy of the forum favouring recognition of foreign divorces. Certainly an Ontario court would not refuse recognition to the divorce in a converse situation—that is, if the divorce in country B *would* be recognized in country A, although it would not be recognized in country C where H and W later acquired a domicile.

(4) *The incidental question.*

The assumption made for purposes of the following discussion is that *Schwebel* v. *Ungar* is *not* to be explained on the basis of an extension to *Armitage*[30] rule concerning recognition of foreign divorces. If it be also accepted that the question of the wife's capacity to marry was properly referable to Israeli law, as the law of her domicile, the next problem for consideration is whether Israeli law was also applicable to determine the validity of her prior divorce. The problem may be re-stated in this way. If the Ontario court referred to Israeli law on the question of capacity to marry, it would find that the law of Israel on point is the same as that of Ontario, namely, that a person who is a party to a valid

[30] *Supra*, footnote 4.

subsisting marriage has no capacity to contract a marriage with a third person. The law of Ontario and the law of Israel differ not as to the rule regarding capacity to marry but as to the rule respecting recognition of foreign divorces. Ontario law, on the present hypothesis, will refuse recognition to any divorce that would not be recognized by the *lex domicili* of the parties at the time of the divorce. Israeli law apparently recognizes any Jewish divorce wherever granted and irrespective of the parties' personal law in terms of domicile or nationality, so long as the requirements of the Jewish religion are followed. The question is seen to depend on Israeli law governing capacity to marry, therefore, only in the sense that the Ontario court *may* wish to adopt Israel's view of the validity of the divorce in preference to its (Ontario's) own view. The validity of the divorce being a question which has conflict rules of its own available for supplying a solution, the fact pattern in *Schwebel* v. *Ungar* raises a perfect example of the so-called incidental or preliminary question in the conflict of laws. The circumstances which give rise to the incidental question are concisely stated in Dicey as follows:

> In order that a true incidental question may squarely be presented, it is necessary first that the main question should by the English conflict rule be governed by the law of some foreign country; secondly, that a subsidiary question involving foreign elements should arise which is capable of arising in its own right or in other contexts and has choice of law rules of its own available for its determination; and thirdly, that the English choice of law rule for the determination of the subsidiary question should lead to a different result from the corresponding choice of law rule adopted by the country whose law governs the main question.[31]

In *Schwebel* v. *Ungar* the main question is the defendant wife's capacity to marry and the Ontario conflicts rule (it is assumed) refers that question to the law of Israel. The subsidiary question capable of arising in its own right and which has its own conflict rules is, of course, the validity of the divorce. Finally the Ontario conflicts rule for recognition of the divorce leads to a conclusion different from that of Israel whose law governs the main question. On the explanation of *Schwebel* v. *Ungar* now under consideration that case becomes an authority for the proposition that the law governing the principal question (Israeli law), and not the conflicts rules of the *lex fori* (Ontario law) are applicable to govern the incidental question (the validity of the divorce).

There is no general agreement on the question of whether, as

[31] *Op. cit.*, footnote 5, p. 58.

a general proposition, the incidental question ought to be governed by the system of domestic law indicated by the law governing the main question (*lex causae*), including its conflict rules, or by that system of domestic law indicated by the conflict rules of the forum. Case authority is sparse and the interpretation of such cases as appear to be relevant is disputed.[32] Moreover arguments drawn from those cases are built on inferences from the result arrived at on particular facts, not from judicial pronouncement; in none of the cases has the incidental question been identified and discussed in general terms. Further, academic opinion is divided. Some would submit the incidental question, on principle, to the *lex causae*,[33] while others support reference to the conflict rules of the *lex fori*.[34] In each case exceptions to the general principle are admitted. A third view is that no general conclusion is possible as to the law governing the incidental question and that each case in which the problem arises must be considered in view of the type of questions raised by the particular facts.[35]

There is a measure of agreement on certain guiding considerations—whether expressed in terms of exceptions to a general principle or in terms of reasons for rejecting the search for a general principle as illusory. One situation giving rise to such special considerations is where the main question is one on which the forum would apply the English doctrine of total renvoi (or the "foreign court" theory of renvoi)—for example, a question of title to foreign immovables. The doctrine of total renvoi represents an attempt to arrive at precisely the same solution as would be reached by a court in the country where the immovables are situate, and it is consistent with this attempt that the conflict rules of the *lex causae* be applied to determine any incidental question that might arise. A second type of situation demanding special treat-

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[32] The cases are collected and analyzed in the leading article on the subject of the incidental question: see Gotlieb, The Incidental Question in Anglo-American Conflict of Laws (1955), 33 Can. Bar Rev. 523, at pp. 534-541. The subject is also treated comprehensively in Robertson, Characterization in the Conflict of Laws (1940), Ch. 6.

[33] Robertson, *op. cit.*, *ibid.*; Wolff, Private international Law (2nd ed. 1950), p. 206 *et seq.*

[34] Cheshire, *op. cit.*, footnote 2, pp. 85-86; Falconbridge (1939), 17 Can. Bar Rev. 369, at pp. 377-378; Cormack (1941), 14 So. Cal. L. Rev. 221.

[35] Gotlieb, *loc. cit.*, footnote 32; Dicey, *op. cit.*, footnote 5, pp. 62-63. The view expressed in the 7th edition of Dicey differs from that in the 6th. In the earlier edition, reference to the conflict rules of the *lex fori* was favoured, albeit with some hesitation. In the 7th edition the editor adopts Gotlieb's view that "there is really no problem of the incidental question, but as many problems as there are cases in which incidental questions may arise". Gotlieb, *ibid.*, footnote 32, at p. 555.

ment arises from the fact that considerations of public policy may intrude into particular cases. Suppose for instance, that H and W1 are divorced in X, the country of their domicile. H later acquires a domicile in Y and while still domiciled in Y, H marries W2 in X or in a third country. Suppose further that by the law of Y, the divorce will not be recognized. Now if the validity of H's marriage to W2 falls to be decided in X, the courts of X might well refuse, as a matter of public policy, to accept the view of the law of Y as to H's capacity, because the alleged incapacity results solely from a refusal to take cognizance of the divorce decree obtained from a court in X.

The fact situation in *Schwebel* v. *Ungar*, however, does not obviously fall within either of the exceptional categories mentioned above. With regard to the first, capacity to marry, unlike the question of title to immovables, cannot be said to be a question which is generally conceded to require application of the total renvoi doctrine. In the property context, the rationale for the total renvoi doctrine rests ultimately on the principle of effectiveness; there is little point, the argument runs, in the forum deciding questions of title to property differently from the way in which the question would be answered by the courts of the *situs* since, in the end, enforcement of claims to property depends on the machinery controlled by the courts of the *situs*. This reasoning has no application in questions relating to the validity of marriage. With reference to the second exceptional situation, it may be noted that in *Schwebel* v. *Ungar*, the court was not confronted with the bald question of public policy which must arise when the forum is asked to accept a foreign court's rejection of an earlier judgment in rem issued by a court in the country of the forum.

One is therefore driven back to first principles in considering whether the law to be applied to the incidental question in *Schwebel* v. *Ungar* ought to have been decided by the law governing the principal question. In conflict of laws a paramount objective must always be to achieve uniformity of result. The problem in applying this criterion in the context of the incidental question, as Wolff has pointed out, is that "*international* harmony is . . . dearly bought at the price of *internal* dissonance".[36] In terms of the problem raised in *Schwebel* v. *Ungar* the dilemma is this. If the Ontario forum applies its own conflict rules to the incidental question (the validity of the divorce) it will be compelled to conclude that the defendant (W) was not validly divorced from Waktor (H1) and

[36] *Op. cit.*, footnote 33 p. 209.

therefore lacked capacity to marry the plaintiff (H2). The result of this line of reasoning is that the forum may arrive at a different conclusion as to validity of the marriage than would be arrived at by the courts of country X which (let us suppose) has the same choice of law rule for capacity to marry as does Ontario but which has a different rule respecting recognition of foreign divorces, so that W's divorce from H1 would be recognized and her marriage to H2 would be regarded as valid in country X. The result of the forum applying its own conflict rules to the incidental question would be disparity in result on the principal question as between Ontario and country X. If, on the other hand, the conflict rules of Ontario and country X agreed in submitting the incidental question to Israeli law as the law governing the principal question, then of course international uniformity of result on the particular question raised,—the validity of W's marriage to H2—would be achieved.

The cost of such international uniformity on the question of the validity of the second marriage, however, is that the Ontario forum might be compelled in other proceedings in Ontario to hold that W's marriage to H1 has *not* been dissolved. Suppose, for example, that H1 were to acquire an Ontario domicile, and while domiciled in that province married a domiciled Ontario woman. If the validity of this marriage came in question before an Ontario court, Ontario law would be applied to the principal question—H1's capacity to marry. In these circumstances Ontario's conflict rules would necessarily be applied to the validity of the divorce from W, Ontario law being both the law governing the principal question and the *lex fori*, and on these facts there would be no connecting factor pointing to the law of Israel. That being so, the Ontario court would presumably have to conclude that H1's second marriage was invalid due to his lack of capacity (just as the same conclusion must have been arrived at with respect to the defendant wife in *Schwebel* v. *Ungar* had she acquired an Ontario domicile prior to her marriage to H2). In these circumstances the Ontario court would be put in the invidious position of denying H1's capacity to re-marry on the grounds of his subsisting marriage to W1, though in *Schwebel* v. *Ungar* W1 had been found to be validly married to H2.

The possibility of internal dissonance is not, of course, confined to questions that might arise out of H1's purported re-marriage at a time subsequent to abandonment of his Israeli domicile. It may arise whenever the principal question is one which is referred to the law of any country other than Israel and when determination

of the principal question hinges on whether or not the marriage between H1 and W was validly dissolved, for instance where the question is one of the right of H1 to succeed to the movable or immovable property of W as the husband of W when W dies domiciled elsewhere than in Israel, or where the immovable property is situated elsewhere than in Israel. The court would again be presented with a problem in which the connecting factor for the principal question pointed elsewhere than to the law of Israel —and if all incidental questions were to be determined by the law governing the principal question, the result would likely be that the divorce would be denied recognition.[37]

Uniformity of result is perhaps an untrustworthy guide in the present context. It may be noted, however, that attainment of the elusive goal of uniformity at the international level here depends on the very doubtful proposition that in a case involving capacity to marry most countries would refer the incidental question of a prior divorce to the conflict rules of the *lex causae*. Furthermore, it must be remembered that failure to achieve international harmony is a consequence with which the courts are not unfamiliar, whereas inconsistency of result as between domestic decisions is rare, and the risk of such internal disharmony will presumably exert a stronger influence on the court's selection of alternatives than the probably inevitable risk of reaching a result different from that which might be arrived at in another country. These general considerations might have been expected to influence the courts in *Schwebel* v. *Ungar* to apply the conflict rules of the forum, rather than those of the *lex causae*, to the incidental question; particularly since the facts were not such as to call for a renvoi approach.

Finally, apart from consistency of result, it must be observed that the net effect of *Schwebel* v. *Ungar* was to subordinate Ontario's conflict rule respecting recognition of foreign divorces to Israeli law. Recognition of the divorce by Israeli law was not in accordance with a true conflict of laws rule or principle but resulted from a willingness on the part of the Israeli courts to accord recognition to any divorce conforming with the requirements of Jewish religious law, whenever and wherever the decree was granted, without reference to any of the connecting factors generally

[37] The suggestion that the divorce would be denied recognition in most countries other than Israel is, of course, based on the fact that in *Schwebel* v. *Ungar*, the divorce would not have been recognized by Hungarian law, which was both the *lex domicili* and the *lex patriae* at the time of the divorce decree.

adopted in private international law. This consideration might also have been expected to weigh against the result actually achieved in *Schwebel* v. *Ungar*.

In summary, the decision in *Schwebel* v. *Ungar* appears to raise more questions than it answers. The initial problem is whether or not the result owes anything to Ontario's conflict rule for recognition of foreign divorces, for the explanations offered under heads (3) and (4) *supra* are, of course, alternative explanations. Logically only one or other of these interpretations of *Schwebel* v. *Ungar* can be accepted; however, both must be considered since the reasons delivered in the appellate courts appear to straddle both approaches to the problem. In any event the immediate result of the case appears to be that a divorce in accordance with Jewish religious form will command universal recognition whenever (1) the parties have subsequently acquired a domicile in Israel (or in any other country that recognizes such religious divorces), and (2) the validity of that divorce is raised in the context of the parties' capacity to re-marry. The extent to which the wider implications herein discussed will prove to be of significance must, for the present, remain conjectural.

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