COMMENTS
COMMENTAIRES

RESTITUTION — UNCONSCIONABLE TRANSACTION — UNDUE ADVANTAGE TAKEN OF INEQUALITY BETWEEN PARTIES. — A peculiarly exacting duty of fairness and disinterestedness has occasionally been demanded of persons who transact business with others dealing with them on less than an equal footing, whether through a disparity of commercial experience or native intelligence or otherwise. Professor L. A. Sheridan in an admirable piece of research, collected all the cases involving this little-appreciated jurisdiction of equity.[1] The fascinating and exasperating feature of these cases is their refusal to be harmoniously integrated into a general theory of the enforceability of promises given for good consideration, for in them courts of equitable jurisdiction have relieved promissors from their bargains where there has been no misrepresentation, no mistake or duress, no fiduciary obligation or any other special characteristic such as one party being an expectant heir or the like.[2] As Professor Sheridan remarks,

> . . . probably the only safe generalization is that the court considers each case on its individual merits to see whether one party has taken advantage of the weakness or necessity of the other to an extent which strikes the judge as being a greater advantage than the current morality of the ordinary run of business men allows.[3]

There have been a handful of Canadian examples of this jurisdiction as well, and our judges have been as unhelpful in defining its scope as their earlier English counterparts. As an example, Chancellor Boyd in one fairly early Ontario case was content simply to say:[4]

> If two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of dis-

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[1] Fraud in Equity (1956).
[2] *Op. cit., ibid.*, p. 73. [3] *Ibid.*
[4] In *Waters* v. *Donnelly* (1884), 9 O.R. 391, at p. 401 quoting Sullivan L.C. from *Slator* v. *Nolan* (1876), 11 I.R. Eq. 367.

> tress or recklessness, or wildness or want of care and . . . one *has* taken undue advantage of the other . . . a transaction resting upon such unconscionable dealing will not be allowed to stand.

The jurisdiction of equity to set aside bargains contracted by persons under influence is well known. But what is referred to here is something distinct from that.[5] It is also technically distinct from the simple refusal of the courts to grant specific performance where the contract has been obtained by sharp practice.[6] In the cases now under discussion the courts intervene to rescind the contract whenever it appears that one of the parties was incapable of adequately protecting his interests and the other has made some immoderate gain at his expense.[7] If the bargain is fair the fact that the parties were not equally vigilant of their interest is immaterial. Likewise if one was not preyed upon by the other, an improvident or even grossly inadequate consideration is no ground upon which to set aside a contract freely entered into. It is the combination of inequality and improvidence which alone may invoke this jurisdiction. Then the onus is placed upon the party seeking to uphold the contract to show that his conduct throughout was scrupulously considerate of the other's interests.[8]

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[5] Because it arises in relationships giving rise to no presumptions of undue influence, while at the same time it apparently requires no proof of actual inducement by the dominant party. See *Morrison* v. *Coast Finance Ltd.*, (1966), 54 W.W.R. 257 (B.C.C.A.).

[6] *E.g.*, *Hnatuk* v. *Chretian* (1960), 31 W.W.R. 130 (B.C.). While it is true that there is a technical distinction between a court denying specific performance to a person guilty of overreaching or sharp practice on the one hand and rescinding the entire transaction at the suit of the weaker party on the other (since a denial of the equitable remedy would not necessarily involve a judgment that no remedy is available at common law—*e.g.* damages); the jurisdictions are obviously closely related and cases illustrating both are discussed here together, in the main, without differentiation. In all the specific performance cases here cited the court so disposed of the issues between the litigants that the over-reaching party was effectively precluded from all other remedies theoretically available. For instance, in *Hnatuk* v. *Chretian*, *ibid.*, since no mention was made in the case as reported of damages being pleaded in the alternative, nor of any amendment being requested to that end, it seems to be a fairly safe assumption that the denial of specific performance finally disposed of the issue between the parties, and that the result would probably have been the same if the action had been initially brought for rescission.

[7] Although the language in these cases is not explicit on the point it would seem arguable that the motivating principle here could safely be identified in modern terms as unjust enrichment. Certainly "undue advantage" and "immoderate gain" bear a recognizable similarity to the increments of enrichment now recoverable in actions of restitution *eo nomine* in Canadian courts. See *Deglman* v. *Guaranty Trust Co. and Constantineau*, [1954] 3 D.L.R. 785, [1954] S.C.R. 725; *County of Carleton* v. *City of Ottawa* (1965), 52 D.L.R. (2d) 220 (S.C.C.).

[8] *Waters* v. *Donnelly*, *supra*, footnote 4, per Boyd C., at p. 401; *Anderson* v. *Morgan* (1917), 34 D.L.R. 728 (Alta C.A.).

The most recent example of this line of cases comes from the British Columbia Court of Appeal in *Morrison* v. *Coast Finance Ltd.*[9] In this case the plaintiff, described by the court as "an old woman 79 years of age and a widow of meagre means" was persuaded to borrow from the defendant finance company a few hundred dollars to be secured by a first mortgage upon her home. She had no means of repaying this loan which was to help her roomer, Lowe, to rehabilitate himself from a condition of alcoholism by investing in a used car business owned by his friend, Kitely. Accordingly, the transaction was arranged so that Lowe and Kitely would make the monthly repayments to the finance company. When the papers were drawn up and presented to plaintiff, at the offices of the finance company, the amount of the loan had been substantially increased to $4,800.00 at the direction of Lowe and Kitely. Plaintiff at first demurred and asked the solicitor for the finance company whether she should sign. He explained the mortgage to her but advised her to take independent advice. In the end she said she supposed that it was all right and signed. The proceeds were given to her, immediately, several days before the mortgage was registered. She then endorsed the cheque over to Lowe and Kitely who endorsed it back to the finance company in settlement of Lowe's past indebtedness and as payment in full for two used cars which they had obtained that day from Vancouver Associated Car Markets Ltd., a company related to the defendant finance company and having the same individual as office manager. This office manager, one Crawford, was present at all material times and well understood the real significance of the transaction to the parties involved. Crawford prepared for plaintiff, apparently not at her request, a promissory note by Lowe for the amount secured by the mortgage and a conditional sales contract covering the two cars for which he had just received payment in full out of the proceeds of the mortgage.[10]

The used car business of Lowe and Kitely was never begun. No payments were ever made on the mortgage by them or by plaintiff. With Lowe in the penitentiary and Kitely's whereabouts unknown, the finance company began to press plaintiff for repayment under the mortgage. She took legal advice for the first time at this

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[9] *Supra*, footnote 5.

[10] While it might be thought that these acts of Crawford could be evidence of fraud the court apparently took the contrary view inasmuch as the "securities" were only proferred after the transaction was complete in its essentials and were no part of the consideration promised Mrs. Morrison, nor held out as any inducement to her.

point and began action to have the mortgage rescinded, but did not join either Lowe or Kitely as defendants.

The learned trial judge dismissed the action on the grounds that the relationship between the parties was not such as to create a presumption of undue influence and that none had been proved in fact. It was also held that there was nothing in the terms of the mortgage to make it an unconscionable transaction.

Notwithstanding this finding of no undue influence, the British Columbia Court of Appeal felt able to set aside the mortgage and the whole transaction as it affected plaintiff. Sheppard J.A. labelled defendant's conduct "constructive fraud" within the meaning of the classical catalogue of equitable frauds enunciated by Lord Hardwick in *Earl of Chesterfield* v. *Janssen*,[11] a variety of fraud inferable in the case at bar "from the transaction itself, because the inequality of the parties and the inadequacy of the consideration to the plaintiff indicate that an advantage had been taken of her".

Davey J.A. said:[12]

> The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger; and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable . . . or perhaps by showing that no advantage was taken.

The court being convinced that there was no doubt about the inequality in the positions of the plaintiff on the one side and the finance and used car companies and Lowe and Kitely on the other, scanned the evidence for some indication that the defendants had displaced the onus thus placed upon them and concluded that there was none.

There was a difference of judicial opinion over the choice of an appropriate remedy. Davey and Bull JJ.A., were inclined to set the whole transaction aside, but felt unable since neither Lowe

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[11] (1750), 2 Ves. Sr. 125, at pp. 155-157, 28 E.R. 82, at pp. 100-101.
[12] *Supra*, footnote 5, at p. 259.

nor Kitely had been made parties and the used cars were thought to have been wrecked or irrecoverable. Davey J.A. stated:[13]

> That has troubled me. On reflection I have concluded that it will be sufficient to set aside the mortgage, without requiring the appellant to repay the money since, as was intended, that part which was not immediately repaid to or retained by the finance company was immediately returned on other accounts to the companies who were acting in concert. That will allow the sale of the automobiles and the payment of Lowe's debt to stand. The automobile company loses nothing and justice will be done to the finance company by requiring the appellant as a condition of relief to transfer to it Lowe's promissory note and the conditional sales agreement that the [companies' common agent, Crawford] secured for her.

Sheppard J.A., preferred a slightly more orthodox procedure. Reasoning that Lowe and Kitely might be considered to have been fiduciary agents of plaintiff to arrange a loan, Sheppard J.A. had no difficulty in concluding that they had allowed their fiduciary duties and their selfish interests to conflict and had appropriated their principal's credit to their own purposes. This breach of fiduciary obligation had been knowingly participated in by the two defendant companies through the activities of Crawford. It followed that the defendants were themselves constructive trustees of the proceeds for the plaintiff as defrauded principal and so could not be heard to enforce the mortgage in their own names beneficially.

Now, if the case only involved a breach of a fiduciary obligation it would be trite law. What is fascinating about it is that neither Davey nor Bull JJ.A., mentions fiduciaries, and Sheppard J.A., an equity lawyer of no inconsiderable reputation, does so only by way of an alternative. In the main the Court of Appeal is quite content to rely upon the cases establishing this equity to remedy undue advantage taken, represented by the court's citation of *Fry* v. *Lane*[14] and *Hrynyk* v. *Hrynyk*.[15]

It will be appreciated from the quotations set out above from Sheridan and Chancellor Boyd that the scope of this jurisdiction is extremely difficult to define. In *Waters* v. *Donnelly* the plaintiff, described as "weak minded and very easily led", was relieved from an improvident exchange of properties made with the defendant,

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[13] *Ibid.*, at p. 262.

[14] (1888), 40 Ch.D. 312. Actually the court's citation is eclectic drawing without apparent distinction from cases involving fiduciaries and expectant heirs, both usually considered as "categories" *sui generis* as well as from the pure cases of over-reaching a weaker party. See Sheridan's classification and comment, *op. cit.*, footnote 1.

[15] [1932] 1 W.W.R. 82 (Man. C.A.).

"described even by friendly witnesses as a shrewd, keen business man".[16] The properties involved were plaintiff's peach orchard valued at $7000.00 and defendant's livery stable valued at the most at $5000.00 with a cash payment by plaintiff carried at interest of nine percent. In *Gladu* v. *Edmonton Land Co.*[17] an illiterate, ignorant half-breed North American Indian in needy circumstances was able to avoid a sale of land by him to the defendant, an experienced speculator in land in the district. The price to Gladu had been $2000.00 and the resale price on contracts lined up by defendant in the neighbourhood of $20,000.00. *In Hrynyk* v. *Hrynyk*[18] the plaintiff, "an aged, ignorant and worn man" transferred his farm land to his son, the only consideration being a lease to plaintiff for thirty years of a small house and garden plot (part of the land conveyed) and an undertaking to supply the plaintiff from time to time with certain foodstuffs. In all three cases the transactions were labelled improvident, foolish, wanton, reckless, rash *et cetera* and set aside, usually upon terms designed to right the imbalance between the parties.

One of the dangers in all this is, of course, that while it may have an appealing "natural justice" flavour, it is terribly uncertain in practice. Balance sheets such as have been suggested for the three illustrations here are of no real help for while they may substantiate an argument that undue advantage has been taken in cases approximating them on their facts, it must be apparent that they would be a much less reliable guide as to what might constitute "inequality" between the parties. The jurisdiction may only be successfully invoked when both elements are present in compelling degree.

The probable result in an extreme case such as *Gladu*[19] may be relatively predictable but it is clear from other decisions that illiteracy alone is not sufficient,[20] nor is ignorance nor age and poor health[21] nor lack of experience in the business transacted.[22] In fact,

[16] *Supra*, footnote 4, per Boyd C., at p. 403.
[17] (1914), 19 D.L.R. 688 (Alta.).
[18] *Supra*, footnote 15.
[19] *Supra*, footnote 17.
[20] *Calmusky* v. *Karaloff*, [1946] 2 D.L.R. 513 (Sask. C.A.).
[21] *Brock and Petty* v. *Gronbach*, [1952] 3 D.L.R. 490 (Man. C.A.) reversed [1953] 1 D.L.R. 785 (S.C.C.) and relief denied. The court also relied upon the epigram of Evershed M.R., in *Tufton* v. *Sperni*, [1952] 2 T.L.R. 516, at p. 519: "Extravagant liberality and immoderate folly do not of themselves provide a passport to equitable relief." It is interesting as an aside, to speculate what would have been the fate of the $8000.00 payment exacted as consideration for the release in the *Gronbach* case, if it had been exacted under a forfeiture clause written into the contract initially.
[22] *Gissing* v. *Eaton* (1911), 25 O.L.R. 50 (C.A.); and see Sheridan, *op. cit.*, footnote 1, p. 125 *et seq.*

the results in these cases are strongly reminiscent of the old "Chancellor's foot" standards of the earlier equity. One young woman is released from a contract to buy (at an enhanced price) a large set of china and kitchen utensils because high-pressure sales techniques temporarily deprived her of her ability to read and fully understand the contract.[23] Another young woman is bound to a vastly more onerous contract by which she agreed to pay one-half of her year's salary for dancing lessons.[24] The fact that the dancing instructor had used highly questionable tactics to induce the contract (trading very freely upon the romatic situation to profit by the girl's infatuation[25]) was immaterial. It is true that in the pots case a price more than double the fair market value was charged and there was no evidence that Miss Grieshammer paid any more than any other client of the studio wishing to learn how to dance to that level of proficiency. But the test of the court's jurisdiction is repeatedly said to be the *improvidence* of the contract. By that measure price would be of less importance than ability to pay. The pots, while overpriced were within the reach of the first girl—the dancing lessons a luxury far beyond the means of the other. The factor of fair price may perhaps in part explain the differing attitudes of the judges in the two cases, but cannot possibly justify the results.[26]

The problem can be made even more difficult if one opens the range of inquiry slightly to include cases involving not businessmen pitted against young girls or foolish old ladies but other businessmen. The idea here is similar if not precisely the same. It would be seldom that one would encounter a businessman whom a judge

[23] *W. W. Distributors & Co. Ltd.* v. *Thorsteinssen* (1960), 33 W.W.R. 669 (Man. C.A.). This was not a prime instance of the jurisdiction here under review because elements of misrepresentation and breach of warranty were also relied upon in the judgment of the court. It is clear, however, that the tactics of high pressure salesmanship and confusion employed, castigated by the court, were an important element.

[24] *Grieshammer* v. *Ungerer* (1958), 14 D.L.R. (2d) 599 (Man. C.A.) where, note, the court was not acute as was the British Columbia Court of Appeal in the *Morrison* case, *supra*, footnote 5, to the distinction pleaded in both actions between undue influence and unconscionable advantage taken of weakness. It might have been a distinction, although surely not a proper one and it is not made explicit in the *Grieshammer* case, that the girl's "weakness" was rather temporary and fairly narrowly channelled.

[25] The significance of this piece of evidence increases greatly if one appreciates that this technique is scrupulously instilled in these instructors and systematically rehearsed by them in procedures actually prescribed in the equivalent of their "sales manual". See P. Berton, The Big Sell (1963). The same is of course true of the pot huckster's tricks in the *Thorsteinssen* case, *supra*, footnote 23. Berton, *op. cit.*, *ibid.*

[26] It is probably more significant as noted above that even although the influence was continuing the contract for dancing lessons was considered on three separate occasions before being signed.

would openly brand as ignorant, weak and feeble minded. But there can be no doubt that businessmen do not always deal on a footing of equality, either of resources or skills, and that advantage may be acquired and employed in a thousand degrees and shades of subtlety. The freedom of the marketplace is, of course, equally a freedom to coerce. The courts have somewhat reluctantly undertaken to referee the game but there is such uncertainty about the rules that one finds enough difficulty in trying to align these cases with some statement of principle without embarking upon the larger task of integrating them with the cases earlier referred to.

In these "businessman" cases as well, it seems it may not be possible to discover who is the stronger and who the weaker party until after the bargain itself is analyzed.[27] Two cases taken from the Supreme Court of Canada will indicate the nature of the problem. In *Knutson* v. *Bourkes Syndicate*,[28] Knutson knowing that the ability of the financially stronger real estate syndicate was seriously handicapped by its contractual commitments to third parties held out for certain additional payments over and above those in fact due to him, knowing that the syndicate would yield and pay rather than incur the heavier liability to the third party by way of damages for breach of its contract. The headnote sufficiently summarizes the grounds of the Supreme Court's decision ordering repayment by him of his undue advantage:

> Defendant [appellant] had no right to the said additional payments; . . . they were made under protest and under circumstances of practical compulsion . . . even though defendant's demand was made in the belief that he had a right to them.

In *Peter Kiewit Sons Co.* v. *Eakins Constr. Ltd.*[29] however, the threats of the head contractor to one of his sub-contractors that

[27] Another obvious distinction which could justify placing "business" cases on a ground apart if so desired, is that it is very seldom that the "weaker party" does not go down kicking and screaming over the alleged injustices which are being done to him. Exceptions are rare but they have occurred. For instance see the differing attitudes of the courts in *Hochman* v. *Ziglers Inc.* (1946), 50 A. 2d 97 (N.J.); *Gill* v. *Reveley* (1943), 132 F. 2d 975 (10th Cir.). This change in the facts gives a footing for talk in the judgments of compulsion, duress and payments made under protest, whereas in the cases such as *Morrison* the little old lady is usually finessed so thoroughly that it is not until much later that she discovers what has actually been done to her. Surely notwithstanding this, the problems are sufficiently similar that a direct correlation ought to be observable in the results. The fact that the tyrant tycoon forces through his desired objective in the teeth of the protesting victim is only stronger evidence of his overpowering advantage. In the words of Davey J.A. quoted, *supra*, footnote 12, "an inequality arising from . . . the need or distress of the weaker, which left him in the power of the stronger" is sufficient to invoke this jurisdiction.

[28] [1941] S.C.R. 419.

[29] [1960] S.C.R. 361.

he would "call in the bonding company" (apparently tantamount to industrial murder) unless extra pile-driving was done in accordance with the former's interpretation of the contract specifications, were thought by the majority to be no more than what the average businessman must tolerate in the daily friction of trade. The differences of judicial opinion are adequately indicated in the following excerpts. Judson, J. was of the opinion that:[30]

> If Eakins had asked the engineer for a written order for the performance of the work which it claimed to be beyond the sub-contract and that had been refused and Kiewit had persisted in its attitude Eakins might then have treated the contract as repudiated and sued for damages.[31]

Cartwright, J., after calling the head contractor's threats and tactics "practical compulsion" within the meaning of the *Knutson* case[32] said:

> I can discern no difference in principle between compelling a man to pay money which he is not legally bound to pay and compelling him to do work which he is not legally bound to do. . . . It would, I think be a reproach to the administration of justice if we were compelled to hold that the courts are powerless to grant any relief to a plaintiff in such circumstances.[33]

Returning to the actual problem in the *Morrison* case,[34] it must be obvious that the other difficulty with a jurisdiction so uncertain is that it may seriously reduce the ability of little old ladies to borrow

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[30] *Ibid.*, at p. 369.

[31] *I.e.*: committed industrial suicide. At the grave risking of widening the scope of this comment's inquiry entirely too far, consider in this context the language of the majority of the Supreme Court in *The Queen* v. *Premier Mouton Products Inc.* (1961), 27 D.L.R. (2d) 639, a case of suit to recover a revenue tax paid at the unwarranted demand of an infinitely stronger party: "Instead of seeing their business ruined, which would have been the inevitable result of their refusal to pay this illegal levy they preferred as there was no alternative, to comply with the threatening summons of the inspectors", per Taschereau J., at p. 642. And compare *Morton Constr. Co. Ltd.* v. *Corp. of City of Hamilton* (1961), 31 D.L.R. (2d) 323 (Ont. C.A.). The dispute arose in connection with sidewalks laid by the company in accordance with contract specifications but which were suffering inordinate damage from salting and freezing. The company was informed by certain members of the municipal council that it would not be considered for future contracts unless it replaced them at its own expense. The company replaced the sidewalks and sought reimbursement, alleging that it had informed the municipality before commencing the work that it reserved the right to claim compensation. It was held that the company was not entitled to recover. "The municipality had made clear it had no intention of paying for the repairs. There could be no implication that the parties intended or understood that the company would be compensated. The company's consent to do the work was not rendered involuntary by reason of the threat of the municipal councillors, who were legally entitled to make such a threat and to carry it out. Hence the doctrine of unjust enrichment could have no application." (Headnote).

[32] *Supra*, footnote 28.

[33] *Supra*, footnote 29, at pp. 380-381.

[34] *Supra*, footnote 5.

upon security even when they honestly want and need to. As Wilson J. was careful to point out before awarding relief against specific performance of a conveyance of land at a gross underprice:

> Not every man who knowingly buys a property for less than it is worth is to be penalized. Trade and commerce survive by the application of this idea and to buy in the anticipation of a profit on resale is perfectly respectable. What must be controlled is the victimization of the ignorant by the knowing through the application of undue influence.[35]

There is no doubt that the two jurisdictions are distinct and need not be confused. There is, for example, no evidence that the Unconscionable Transactions Relief Act of Ontario[36] has brought about a reduction in the amount of money lent on the security of mortgages in that province every year. But of course, compared with attempts to measure inequality of bargaining positions, the standards of fairness administered under that Act are much more readily susceptible of abstraction by the judges and evidence can be called as to the rates of interest, bonus provisions and so on, being paid to other mortgagees by persons in similar situations.[37] How can a practising lawyer predict how "unequal" his client may appear to be to the judge who hears the evidence and sees both the parties? It might well be a very difficult point for counsel and unfortunately we do not have the guidance of the British Columbia Court of Appeal on this for it did not arise in quite such an abstract fashion in the case under discussion. The court in *Morrison*[38] was careful to point out that it was not dealing with just an ordinary loan transaction. Davey J.A. said:[39]

> It was a loan to the appellant to advance the interests of the companies as well as Lowe and Kitely by providing her with money to lend. . . [neither] the appellant [nor] Lowe and Kitely retained one cent of the money advanced, although the two men got delivery of the two automobiles they bought with the money. The extreme folly of this old woman . . . is self evident. [The argument] was neatly put by appellant's counsel. He said it would not be wrong for a bank to lend money to an old and ignorant person upon usual banking terms, for his own purposes, but quite wrong to lend him money on those terms so that he might lend it to an impecunious debtor from whom the bank intended to recover it in payment of a bad debt.

To the extent that this reasoning actually does protect the position of the *bona fide* financial institution giving value in reliance upon standard commercial documents there would seem to be

[35] *Hnatuk* v. *Chretian*, *supra*, footnote 6, at p. 132.
[36] R.S.O., 1960, c. 410.
[37] *Shedler* v. *Jackson*, [1954] O.W.N. 245; *Re Scott & Manor Investments*, [1961] O.W.N. 210.
[38] *Supra*, footnote 5. [39] *Ibid.*, at p. 260.

little reason for the commercial community to fear the future instances in which the "little old lady" cases may lap over into the business context.[40]

Although they are worlds apart in theory, one cannot help being reminded of and making at least a passing reference to the recent cases qualifying the position of finance companies as holders in due course of promissory notes given for consumer credit to fly-by-night sales promoters.[41] The dangers there, fully apprehended by the court, were not only of unsettling the enforceability of promises given for good consideration[42] but also impeaching the integrity of bills of exchange, robbing them of their value as currency by requiring those taking them to make inquiries to establish their authenticity. Not unexpectedly, neither of these dreadful consequences has yet become apparent.[43]

On balance, although such jurisprudence is necessarily of uncertain application, it is probably better that the court have a power to nullify these unconscionable bargains than not.[44]

The morality of the market-place may yet come in for a judicial facelifting.

BRADLEY E. CRAWFORD*

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JUVENILE DELINQUENTS ACT (CAN.)—MEANING OF SUPPORT—A CASE STUDY IN THE ADMINISTRATION OF JUVENILE JUSTICE.—In February 1964 a judge of the Juvenile and Family Court of Metropolitan Toronto found that a young girl, Christine Landry,[1]

[40] Compare the wording of the Restatement of Restitution (1938), §167. Where the owner of property transfers it to another being induced by fraud, duress or undue influence of a third person, the transferee holds the property upon a constructive trust for the transferor, unless before notice of the fraud, duress or undue influence the transferee has given or promised to give value.

[41] The leading example is *Federal Discount Corp. Ltd.* v. *St. Pierre* (1962), 32 D.L.R. (2d) 86 (Ont. C.A.). See I.R. and K. Feltham, Retail Instalment Sales Financing (1962), 40 Can. Bar Rev. 461.

[42] Although less directly than here, by allowing set-off by promissor of claims technically available only against the endorser.

[43] It would be welcome if the courts should discover through cautious experiment of this nature that there are few areas of the common law in which we could not benefit through the re-introduction of the more lenient, ameliorating notions of equity.

[44] See an interesting comparative study on these lines by Newman, Equity and Law (1960).

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[1] The facts are reported in *Re Landry*, [1965] 2 O.R. 614 (C.A.). Is there a justifiable need to identify a child in proceedings of this nature? Under the Child Welfare Act, S.O., 1965, c. 14, s. 46, proceedings are in camera; the same is term of proceedings under the Training Schools Act,

was delinquent. Christine Landry was committed to the care of the Catholic Children's Aid Society,[2] with the understanding that she would be placed in Warrendale, a residential treatment centre for emotionally disturbed children.[3] The judge made an order that the municipality to which the child belonged—Toronto—pay the charge for the cost of care at Warrendale.[4]

The City of Toronto appealed this order to Schatz J. who affirmed without written reasons. A further appeal was then taken to the Ontario Court of Appeal.[5] In that court no one appeared to defend the order of the Juvenile and Family Court although notices of appeal had been served on the Attorney General of Ontario and on the Crown Attorney for the County of York. The Court of Appeal reversed in an opinion by Aylesworth J.A. The basis for the opinion can be found in two short statements made by the court:[6]

> The word "support" when used with reference to a human being means to supply with the necessaries of life . . . .
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> The order . . . includes a substantial provision for "treatment" as contrasted with "support" and cannot be justified. . . .
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> . . . [T]he Juvenile Delinquents Act is legislation of the Dominion . . . I would be reluctant to construe the word "support" in s. 20(2) so as to permit the imposition by the Government of Canada under the guise of criminal law of an obligation higher than that imposed upon a parent by . . . [provincial legislation].

It is the purpose of this brief comment to examine the soundness of the Court of Appeal's reasoning in the light of the statutory framework that exists for the handling of juveniles whose conduct disturbs the community.

I. *The Statutory Framework.*

Christine Landry had been brought before the Juvenile Court on the allegation that she was a delinquent in that she had violated a provision of the Criminal Code; she was a vagrant. The finding

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S.O., 1965, c. 132, s. 8(5). The Juvenile Delinquents Act, R.S.C., 1952, c. 160, s. 12(3) precludes publicity or identification of the child except in very special circumstances. The evident policy motivating all the legislation concerned with children becomes negated by the simple fact of judicial review.

[2] This was a permissible disposition under the Juvenile Delinquents Act, *ibid.*, s. 20(1)(h).

[3] At the time of the proceedings in the Juvenile and Family Court, Warrendale treated emotionally disturbed girls; it is now coeducational.

[4] The judge purported to act under s. 20(2) of the Juvenile Delinquents Act, *supra*, footnote 1.

[5] The appellate procedure is prescribed by the Juvenile Delinquents Act, *ibid.*, s. 37.

[6] *Supra*, footnote 1, at pp. 616-617.

made by the Juvenile Court on this aspect of the case is beyond attack: Christine Landry had been found sleeping in empty tool sheds, vacant garages and unoccupied cars; she was unable to accept the situation in her father's home (the mother had deserted and the father was now living in a common law union with another woman.)

But the state could have intervened in this girl's life on the basis of provincial legislation. Under the Training Schools Act then in force[7] she could have been brought before the Juvenile Court because she was "found wandering and has not . . . proper guardianship"[8] and because she has proved "unmanageable".[9] One can be fairly certain that this statute was not invoked because of the extremely narrow choice open to the court: send the girl to training school or dismiss the action.

Perhaps the same analysis explains the refusal to invoke the Child Welfare Act.[10] It is clear that Christine Landry was neglected: she was "a child who, without sufficient cause, habitually absent(ed) (her)self from (her) home or school".[11] Unfortunately, the only powers of the court on making a finding of neglect were to return Christine Landry to her home or to commit her to a foster home under the supervision of a children's aid society or to commit her permanently or temporarily to the care and custody of a society.[12] Committal to a foster home was inappropriate: she was now fifteen years old; she was emotionally disturbed;[13] she could not relate in the intimacy of such a home. According to the best evidence available she needed the benefits of a residential treatment centre for emotionally disturbed children.

The problem was how to achieve this goal. The very few public institutions of this character had intake criteria which the girl could not meet.[14] The relatively few private residential centres had rates that were extremely high. One—Warrendale—agreed to accept her on condition that their fees would be paid. To achieve this goal Christine Landry was declared delinquent and the muni-

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[7] Training Schools Act, R.S.O., 1960, c. 404. The same results would follow under the new statute. See Training Schools Act, *supra*, footnote 1, s. 8(1).

[8] *Ibid.*, s. 7(1)(b). [9] *Ibid.*, s. 7(1)(g).

[10] Child Welfare Act, R.S.O., 1960, c. 53.

[11] *Ibid.*, s. 11(1)(e)(ix). [12] *Ibid.*, s. 17(9).

[13] The juvenile court judge relied upon the following evidence: a psychiatric examination by the psychiatrist attached to the court, an assessment examination by the Toronto Psychiatric Hospital and a report from the Observation and Detention Home attached to the court.

[14] For a description of the shortage of residential treatment centres see, Residential Treatment Centres In Canada For Emotionally Disturbed

cipality to which she belonged, Metropolitan Toronto, was ordered to pay the costs of her stay in Warrendale.

II. *The Soundness of the Court of Appeal's Reasoning.*

Two grounds are advanced by the court for holding that the Juvenile Court lacked the power to order the municipality to pay the cost of Christine Landry's care at Warrendale: Firstly, as a matter of ordinary usage the word "support" in the statute does not encompass treatment; moreover, giving "support" this interpretation is justified because of its context in a federal statute.

It is true that the *Shorter Oxford Dictionary* defines "support" as "2. The action of keeping from failing, exhaustion or perishing, esp. the supplying of a living thing with what is necessary for subsistence". Yet, if this were the true meaning of the word a legislative command to parents to "support" their children would mean that they were only obligated to provide food, clothing, lodging and medical care in some situations. And a testamentary direction to trustees to provide "support" for the testator's wife out of income would preclude them from giving her funds to contribute to charity or to take holidays. Such an interpretation is unsound.

It is unsound for the reason that "As applied to persons the word . . . is a general term of broad signification, and like most words, has a variety of meanings. It is not a word of art . . . its meaning is necessarily flexible".[15] Proof of the accuracy of this statement can be found in the range of interpretation given the word "support" in the following cases:

(1) Expense of supporting a child does not in the ordinary plain meaning of the words include charges for treatment in a public hospital.[16]

(2) "It does not appear to be open to doubt that the services supplied by the hospital were within the term necessaries of life."[17]

(3) "The trustees may increase the allowance to (X) . . . for each of her infant daughters in order to meet the expenses of their education, for that is included in their maintenance and support."[18]

(4) A will providing for a child's maintenance was held to

Children, Department of National Health and Welfare, Mental Health Division. Report Series: Memorandum No. 5, April 1962.

[15] (1953), 83 C.J.S. 906.

[16] *Re Hexter*, [1944] O.W.N. 144 (C.A.)

[17] *In Re Oberth and the Hospital Aid Act*, [1936] 3 W.W.R. 474 (Man. K.B.).

[18] *In Re Breed's Will* (1875-6), 1 Ch.D. 226.

allow the court to authorize payment of a sum to local charities.[19]

(5) " 'to apply for their support' is equivalent to appropriate for their benefit."[20]

(6) A son who gave his parents fifty dollars per month for room and board as well as thirty dollars per month for general housekeeping was held to provide for their support even though the parents' income was sufficient for their every necessity.[21]

If "support" can be given a variety of meanings, which is appropriate in the context of this statute? Surely that given in matrimonial causes actions: "the necessaries, comforts and advantages incidental to her station in life".[22] We can test the soundness of this approach by considering a simple hypothetical case: Suppose Christine Landry's father were wealthy but nevertheless refused to provide her with the necessary institutional treatment. Would he not be guilty of neglect within the terms of the child welfare legislation?[23]

It is true that on the particular facts of the instant case the father would not be guilty of neglect—but only because he lacked funds to provide treatment. When the Juvenile Delinquents Act[24] empowered the juvenile court judge to order the municipality to provide for a child's support it could not rationally have intended that power to be limited by the poverty of the parents. In other words, a child was entitled to support of a certain standard even though his or her parents were unable to satisfy that standard. If this be so we come then to the nub of the case: what limits, if any, could an appellate court impose to control a trial court intent on helping a child in difficulty?

The answer suggested must be wrong because it seems too easy—where a statute grants power without any express limitation, the person to whom the power is delegated can do whatever he feels is necessary unless his action is motivated by a purpose not in keeping with the statutory goals.[25] More narrowly, the action should be held valid if it is reasonable. There is no evidence that the Juvenile Court ordered payment by the city for an improper

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[19] *In Re Walker*, [1902] 1 Ch. 879. [20] *Re Nolan*, [1912] 1 I.R. 416.

[21] *Geschwandtner* v. *Sask. Gov. Ins. Office* (1962), 38 W.W.R. 15 (Sask. Q.B.).

[22] *Acworth* v. *Acworth*, [1943] P. 21.

[23] Child Welfare Act, *supra*, footnote 10, s. 11(1)(e)(x). See also Child Welfare Act, *supra*, footnote 1, s. 19(1)(b)(x).

[24] *Supra*, footnote 1.

[25] *Cf. Shawn* v. *Robertson* (1964), 46 D.L.R. (2d) 363 (Ont. H.C.).

purpose, for example because of the court's dislike of the municipality. The purpose of the payment was also reasonable in the sense that it was hoped that Christine Landry after receiving the benefits of a stay at the institution would not engage in further anti-social activities. The amount of the payment was reasonable; it was not substantially greater than would be charged by other residential treatment centres in Ontario or elsewhere in North America.

What probably led the Court of Appeal to conclude that the particular order was invalid was the one fact not stated in its judgment. If Christine Landry had been sent to a training school the municipality would have had to pay less than two dollars per day; if she had been committed to the Catholic Children's Aid Society without any order for institutional treatment the municipality would have had to pay less than four dollars per day. In effect, the Court of Appeal has held the amounts allowed for these methods of disposition sets the standard of reasonableness. This is quite ironical in light of the court's reasoning: The per diem cost in a training school includes not merely the cost of food and lodging but also the cost of "training" and the part-time psychiatric services provided to the residents of those schools.

There was, then, nothing inherent in the nature of things nor in the precedents that forced the court to reach its particular conclusion. Nor is its conclusion bolstered by the constitutional argument that "support" in a federal statute must be construed according to its meaning in provincial law. In the absence of a contrary indication in the federal statute this is surely the sound approach. But if one reads the Juvenile Delinquents Act[26] as empowering the court to order support beyond permissible provincial levels there does not seem to be any constitutional prohibitions against the power. Suppose as a result of parental cruelty a child suffered a severe character disturbance. Could not the federal government validly order the parents—as part of the criminal sanction—to provide psychotherapy for the child? Would it be unconstitutional for the federal government to empower a criminal court on convicting an accused to order restitution to the victim of the crime?[27]

III. *The Future.*

The whole field of legislation relating to children is being re-

[26] *Supra*, footnote 1.

[27] *Cf.* Juvenile Delinquents Act, *ibid.*, s. 22(1); Combines Investigation Act, R.S.C., 1952, c. 314, ss.30 and 31, as am. by S.C., 1960, c. 45, s. 12.

examined. Ontario has a new Training Schools Act[28] as well as a new Child Welfare Act.[29] In due course one would expect the report of the Minister of Justice's Departmental Committee on Juvenile Delinquency to be made available.[30] Nevertheless, there is a need for a searching inquiry into the philosophical basis of what can be characterized as compulsory welfare. And the best place to begin that inquiry is in the law schools from which will come the men who will draft, enact and interpret the compulsory welfare legislation. One of the questions these men should consider is this: should the state have the right to intervene in a child's life against his or her wishes unless the state can show that its actions in the end will not have greater adverse than beneficial effects? The other question that seems crucial should not be reserved for consideration by law schools alone: why is it that our child-caring services are so poverty-stricken and what should be done to reduce the extent of society's hypocrisy?

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[28] *Supra*, footnote 1. [29] *Ibid.*
[30] It is now available to the public (ed.).
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