COMMENTS
COMMENTAIRES

THE LIFE INSURANCE TRUST IN ESTATE PLANNING.—In the process of planning an individual's estate, solicitors, from time to time, have been instructed to prepare life insurance trusts, which trusts follow various forms. In a typical case the settlor agrees to the payment of certain fixed annual sums to be expended by the trustee as premiums on a policy of insurance on the life of the settlor. Upon the death of the settlor the trustee is required to hold the proceeds of the policy together with all bonuses, additions, profits and premium refunds upon certain trusts for the issue of the settlor. The trust instrument is declared to be irrevocable and the trustee given the power to vary the investments of the trust and, upon certain conditions, the trustee has the right to surrender the policy. Provision might well be made for the settlement of further assets in the trust subject to the same trust conditions.

Members of the Canadian Bar active in the estate planning field have recently become concerned about the possibility that these trusts might be subject to estate tax on the death of the settlor. In fact, the Department of National Revenue has indicated that such trusts would be so taxed presumably under section 2 or section 3(1) (j) (apart from any liability under section 3(1) (m)) of the Estate Tax Act.[1] In order to determine the liability for tax it is necessary to examine the English statute and cases and then relate them to the Canadian statute and cases.

England

The English Act[2] by section 1 purports to tax "all property, real or personal, settled or not settled, which passes on the death" of a person. The Act by section 2 deems certain property to be property passing on death including:

> . . . any annuity or other interest purchased or provided by the deceased . . . to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

[1] Estate Tax Act, S.C., 1958, c. 29.
[2] Finance Act, 1894, 57 & 58 Vict., c. 30.

The Finance Act, 1934[3] provides in part that for the purposes of section 2 (1) (d) "the extent of any beneficial interest therein accruing or arising by survivorship or otherwise on the death of the deceased shall be ascertained and shall be deemed always to have been ascertainable, without regard to any interest in expectancy the beneficiary may have had therein before the death".

Under Section 1 of the Act

It has been said "Money payable under a life policy (which is an inchoate chose in action) cannot be said to pass, in the sense of changing hands, on the death of the assured, since it has no separate existence before that event".[4] Rather alarming developments in the cases seem to indicate that this might not in fact be the true state of the law today and tax may be levied under the general charging section of the Act.

The Finance Act does not further define "passing on death" and we must examine the cases for such definition. The first case of significance is that of *A.G.* v. *Milne*[5] in which Lord Parker of Waddington observed:[6]

> The expression "passing on the death" . . . is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death. For the purpose of this section it is absolutely immaterial to whom or by virtue of what disposition the property passes.

Lord Warrington of Clyffe in the case of *Adamson* v. *A.G.*[7] observed that "emphasis in this statement is on the words 'as a whole' that is to say, for the purposes of section 1, it is irrelevant to consider the several interests of the persons beneficially entitled". Lord Russel of Killowen was of the opinion "that the mere turning of a contingent interest into a vested interest, or a defeasible interest into an indefeasible interest was not a passing of property".[8]

Where the same people were interested in a trust after the settlor's death as before, though each had a somewhat different interest no property passed at death for the purposes of section 1.[9]

In the case of *Re Hodson's Settlement*[10] it was held that where a contingent interest in a fund became a vested interest in possession in the income from the fund on the death of the settlor the

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[3] 24 & 25 Geo. 5, c. 32.
[4] Hanson, Death Duties (10th ed., 1956), p. 258.
[5] [1914] A.C. 765. [6] *Ibid.*, at p. 779.
[7] [1933] A.C. 257, at p. 277. [8] *Ibid.*, at p. 281.
[9] See also *A.G.* v. *Lloyds Bank Ltd.*, [1935] A.C. 382.
[10] [1939] 1 All E.R. 196.

principal value of the fund was included in the property passing on death. Clauson L.J. observed:[11]

> In order to arrive at a correct decision, attention must be focussed upon a comparison between the persons beneficially interested in the fund the moment before the relevant death and the persons so interested the moment after the death, and upon the question whether the death affected an alteration in rights as distinguished from merely removing the possibility of an alteration.

In the case of *Child's Trustee Company* v. *I.R. Commrs*[12] certain insurance policies on the life of the father were assigned to trustees upon certain trusts for the father for life and after his death to the son for life with various remainders over. On the death of the father, Cross J. held that no property passed, the interest of the son which had been a reversionary life interest was now a life interest in possession.

The *Child's Trustee* case was distinguished in the case of *General Accident Fire & Life Assurance Corpn. Ltd.* v. *Inland Revenue Commrs.*[13] In the *General Accident* case a life insurance policy was assigned to trustees upon the trusts and subject to the powers as to the balance of the trust estate. Prior to the death of the settlor (by clause 4) an annuity was to be paid to the wife of the settlor's son and part of the remainder of the income was to be paid to the son, the son's wife or the son's issue as the trustees thought fit and to accumulate the balance. After the death of the settlor (by clause 5) the annuity was to to be paid to the son's wife and the balance of the income was to be held on protective trusts for the son. Plowman J. held that aside from the policy of insurance there was a passing, observing:[14]

> . . . I ask myself whether immediately after the settlor's death it was the same group interested under the same trust and fulfilling the same qualifications as a condition of membership, which was beneficially entitled as was entitled before his death.

In considering whether or not the policy monies came within section 1 of the Act, Plowman J. referred to the *Child's Trustee* case.[15] and said:[16]

> In other words, Cross J. reached the conclusion that, on the true construction of the settlement with which he was concerned, the only trusts on which the policies or the policy monies were settled were the trusts subsisting at the settlor's death.

There might be some question that the only trust in the *Child's*

[11] *Ibid.*, at p. 209.
[12] [1960] 2 All E.R. 209.
[13] [1963] 1 W.L.R. 421.
[14] *Ibid.*, at p. 433.
[15] *Supra*, footnote 12.
[16] *Supra*, footnote 13, at p. 440.

Trustee case created was a trust arising on the death of the settlor. It could be argued that a resulting trust in favour of the settlor occurred until the settlor's death.[17]

At any rate, Plowman J. held that the property in the policies passed on the death of the settlor and the amount of the policy was taxable under section 1 of the Act. He observed:[18]

> If, for example, the insurance company issuing the policy had been wound up during the settlor's lifetime and a payment made to Trustees in the liquidation, the clause 4 beneficiaries would, in my opinion, have been entitled to have such payment amalgamated with the trust fund and the income made available for their benefit.

Support for the contention that a property interest can subsist in life insurance policies prior to the death of the assured is to be found in the case of *Westminster Bank Ltd.* v. *Inland Revenue Commissioners. Wrightson* v. *Same.*[19] In the *Westminster Bank* case by a settlement made in 1929 a settlor assigned to a trustee on trusts declared in the settlement, two policies of insurance on his life. Both were fully paid up at the date of the settlement. The settlor also paid to the trustee £12,000 in cash. By clause 2 of the settlement the trustee, out of the proceeds of the policies, was to pay all death duties leviable on the settlor's death in respect thereof and invest the residue and was to invest the £12,000 forthwith in specified investments. By clause 3, the trustee was to accumulate the income of the trust fund until June 30th, 1942. By clause 4, the trustee was to "pay the income of the trust fund and the accumulations thereof and of the investments for the time being representing the same (the said policies and the proceeds thereof however, not to be treated as income bearing until the amounts payable in respect thereof shall have been received and invested)", in the events which happened, to the settlor's nephew J.B. for life. The income of the trust fund was accordingly paid to J.B. from June 30th, 1942.

The settlor died in 1961, and bonds and cash amounting to £20,000 approximately, having been received by the trustee in satisfaction of the policies, estate duty was claimed. The House of Lords held that the beneficial interest in the policies was transferred at the date of settlement and that no beneficial interest accrued or arose on the death of the deceased.

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[17] See Megarry & Wade, The Law of Real Property (2nd ed., 1959), p. 196.

[18] *Supra*, footnote 13, at p. 441.

[19] [1958] A.C. 210.

The editors of Green, *Death Duties*,[20] discussed these cases and observed:[21]

> It appears that a life interest in possession can subsist in a settled policy even while it is not productive of income and that . . . liability may arise by reference to section 1 of the 1894 Act in respect of the policy as passing on the death.

It would then appear that to determine liability for tax of an insurance settlement (or any settlement for that matter) under Section 1 of The Finance Act in England, one must ask:

> Is the same group interested under the same trust and fulfilling the same qualifications as a condition of membership, beneficially entitled both before and after the death?

To ensure that estate tax under this section of the Act could be avoided no reference must be made in the trust to the death of the settlor. It is conceivable that even if the settlor's death is referred to in the trust, estate tax would not be payable. Such a reference appears, however, to be simply tempting fate.

Under Section 2(1) (d) of the Act

For some time there was considerable question whether a policy of insurance fell within the definition of "other interest" in section 2(1) (d) of the Act. However, in the *Westminster Bank* case[22] it was *expressly* held that a policy of insurance fell within the definition of "annuity or other interest". It is to be noted that The Finance Act, 1894,[23] by section 2 (1) (c) does also deal separately with the taxation of insurance policies.

In the case of *Adamson* v. *A.G.*[24] the facts simply put were as follows: A settlor by a settlement directed that the trustees were to apply the income or capital of the fund to the children of the settlor as the settlor might appoint. Upon the settlor's death and in default of appointment two-fifths of the fund was to be given to the son and three-fifths to the other children of the settlor. The House of Lords held that no property passed within section 1 of the Act (the same group of people were interested after as before the death of the settlor and to the same extent) however, the court held that the increase in value of each child's interest upon the death of the settlor was subject to tax under section 2 (1) (d). This increase was the difference between the actual value after death and the value, if any, of the expectant beneficial interest of each child before the settlor's death. As Lord Wright put it:[25]

[20] (5th ed., 1963), p. 172.
[21] *Op. cit., ibid.*, p. 33 and Dymond, Death Duties (12th ed., 3rd cum. supp., 1958), p. 57.
[22] *Supra*, footnote 19.
[23] *Supra*, footnote 2.
[24] *Supra*, footnote 7.
[25] *Ibid.*, at p. 288.

> It is clear that the children's interest became increased in present value when the risks of defeasance and of failure to survive ceased to affect them, as happened on the settlor's death.

Of course, as has been indicated above, The Finance Act, 1934[26] was enacted to increase the dutiable value of the beneficial interest accruing or arising on death. The effect of this Act is to ignore any value which existed prior to the death of (in the *Adamson* case)[27] the settlor.

In the case of *D'Avigdor Goldsmid* v. *Inland Revenue Commissioners*[28] the deceased transferred an insurance policy to a trust in favour of his son absolutely. After the transfer the son paid all of the premiums on the policy. The House of Lords held that the "interest purchased or provided" within section 2 (1) (d) was the benefit of the policy and not the proceeds of the policy; the "beneficial interest" referred to in the paragraph was a beneficial interest in the policy; the whole passed to the son in 1934 and, therefore, no beneficial interest in the policy "accrued or arose on the death of the deceased".

Perhaps the leading case in the area is that of *Westminster Bank Ltd.* v. *Inland Revenue Commissioners, Wrightson* v. *Same*[29] In the *Westminister Bank* case the settlor assigned to a trustee two fully paid up policies of insurance together with £12,000 in cash. By clause 3 of the settlement the income was to be accumulated until June 30th, 1942, and subsequent to that date by clause 4 of the settlement the trustee was to pay the income of the trust fund (the said policies and the proceeds thereof, however, not to be treated as income bearing until the amounts payable in respect thereof shall have been received and invested) in the events which happened to the settlor's nephew for life. The settlement contained no power for the bank to sell or surrender any of the policies. On his death in 1951 estate duty was claimed on the proceeds of the policies. The House of Lords held that no estate duty was payable under section 2 (1) (d). Lord Keith of Avonholme said:

> I draw no distinction between the policies and their proceeds. If a beneficial interest arose in the proceeds at the death, it arose, I think in the policies at the death, and if it did not arise in the policies at death, it could not, as I see it, arise in the proceeds at the death .... Whatever he provided he provided at the date of the settlement and that was undoubtedly the policies, but inherent in the policies was the right to obtain the sums covered by the policies at the due date.[30] ...

[26] *Supra*, footnote 3.
[27] *Supra*, footnote 7.
[28] [1953] 1 All. E.R. 403.
[29] *Supra*, footnote 19.
[30] *Ibid.*, at p. 234.

> As I understood the argument for the Revenue, it was that where an insurance policy on the settlor's life had to be held by trustees until the death of the settlor, so that a life-tenant could not enter into enjoyment of the life-interest of the proceeds of the policy until the settlor's death, a beneficial interest arose or accrued in the life policy to the life-tenant on the death of the settlor. As it was put, if the life tenant could not demand of the trustees that the policy should be converted into an interest bearing asset during the lifetime of the settlor, there was in the life-tenant only an interest in expectancy, which became an interest in possession of the life-tenant on surviving the settlor. This, it was said, was a beneficial interest in the policy provided, that accruing or arising by survivorship on the death of the settlor.
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> My Lords, this seems to me to make the question turn, not upon the terms of the settlement, but upon the nature of the asset put into the settlement, I am unable to accede to this argument.[31]

The *Wrightson* case goes even further, perhaps. There by a settlement dated June 21st, 1932, a settlor assigned to trustees four fully paid life insurance policies on his life, directing them on receipt of the policy monies, to divide them into six equal parts. Three of these were to be paid to the trustees of another settlement, the N. Hall settlement, to be held as capital monies thereunder on the trusts affecting the N. Hall estate. (At the time of the settlor's death his eldest son J.G.W. was tenant for life under this settlement.) Each of the other three equal parts was to be invested and the income thereof was to be applied for the benefit of the settlor's three younger sons, P.W., R.W. and O.W. respectively. The settlor having died in 1950, the policy monies were got in as directed. The House of Lords held that estate duty was not payable under section 2 (1) (d). Lord Keith of Avonholme said:[32]

> I had at first some doubt whether this case could not be distinguished from the case of the *Westminster Bank* on the view that no beneficial interest accrued or arose in the policies to anyone until the death of the settlor. I am now satisfied, however, that from the time the policies were assigned to the trustee there was a beneficial interest in the policies in the group of persons who were ultimately to take as life-tenants on the death of the settlor and that this beneficial interest remained unchanged in character from the date of the settlement.

Two cases *In re Parkes Settlement*[33] and *Parker* v. *Lord Advocate*[34] considered somewhat similar facts which were essentially as follows: A settlor transferred certain investments to trustees to be held and the income paid to his children. On the death of the settlor the capital was to be divided and paid to the settlor's

[31] *Ibid.*, at p. 236.
[32] *Ibid.*, at p. 239.
[33] [1956] 1 W.L.R. 397.
[34] [1960] A.C. 608.

children in equal shares. In each case the court held that duty was payable under section 2 (1) (d) because the rights which accrued at death were substantially different in kind from any previously enjoyed. A rather interesting case further dealing with this type of situation is *Morgan* v. *Inland Revenue Commissioners*.[35]

In the case of *Child's Trustee* v. *Inland Revenue Commissioners*[36] Cross J. considered the following facts. By clause 28 of a re-settlement Captain Estcourt assigned certain fully paid policies on his life and "all monies assured by or to become payable thereunder" to the trustees in trust that the trustees "shall as soon as may be after the maturity of the said policies respectively get in and receive the money to become payable thereunder . . . and shall stand possessed of the net residue thereof after discharging all costs and expenses of recovering and receiving the same" on the trusts thereinafter declared. The policy monies were directed to be held on such trusts as Captain Estcourt and his son Desmond should by deed appoint and subject thereto on the trusts on which capital monies or investments would have been held. The capital monies or investments were directed to be held to pay £500 per annum to Desmond during his life and otherwise on trust for Captain Estcourt for life and after his death for Desmond for life with various remainders over. Estate duty was claimed in respect of the monies which became payable under the policies on the death of Captain Estcourt.

Cross J. construed the settlement to mean that the policy monies were to be held on the trusts of the settlement subsisting at Captain Estcourt's death and that Captain Estcourt had no interest in the policies. He further held that no property passed on the death of Captain Estcourt, however, the policy monies were subject to estate duty under section 2 (1) (d) because Desmond's life interest in the policies arose only on Captain Estcourt's death.

I disagree with the decision in this case. It would appear that prior to the death of Captain Estcourt he had a property interest in the policies, as did Desmond and the remaindermen. After his death this property interest passed to Desmond and the remaindermen, thus attracting estate duty under Section 1 of this Act. It also, of course, attracted tax under section 2 (1) (d) of the Act because of the change of interest realized by Desmond on Captain Estcourt's death, that is, he became entitled to the whole of the monies earned under the settlement.[37] Perhaps the capital of the

[35] [1963] 2 W.L.R. 416. [36] *Supra*, footnote 12.

[37] Note however that the claim for tax would be restricted to a claim under section 1. See Hanson, *op. cit.*, footnote 4, p. 7.

fund required to pay a £500 annuity to Desmond might be deducted following the line of reasoning in *General Accident Fire & Life Assurance Corporation Ltd.* v. *I.R.C.*[38]

In that case by a marriage settlement the father of the husband settled 10,000 shares in Ansell Brewery Limited on trust during the lifetime of the settlor to pay the wife £200 a year so long as she remained the wife or widow of the husband, and to pay to the husband or wife or issue of the husband so much of the remainder of the income as the trustees thought fit and to accumulate the balance. After the death of the settlor the trustees were to continue to pay the wife £200 per year and, subject thereto to hold the income on protective trusts for the husband during his life with a gift over.

The settlement further provided that the settlor assigned unto the trustees a policy of assurance on his own life and all monies, bonuses and other benefits which might become payable upon trust "that the trustees shall as soon as may be after the death of (the settlor) get in and receive all monies to become payable under the said policy as and when the same shall become payable and stand possessed thereof . . . upon the trusts" provided for the Ansell Brewery Limited shares. This trust was varied by order on the dissolution of the marriage but for our purposes the facts remain the same. Plowman J. held that apart from the policy monies a passing under section 1 of the Act occurred. He then turned to the question of the policy and observed:[39]

> Did the Clause 4 beneficiaries (those entitled to the income during the life of the settlor) have a beneficial interest in the policy during the settlor's life? If so, duty is payable under Section 1 as in the case of the rest of the trust funds: if not, then section 2 (1) (d) applies and Section 1 does not.

He also discussed the *Child's* case[40] and said:[41]

> In other words, Cross J., reached the conclusion that, on the true construction of the settlement with which he was concerned, the only trusts on which the policies or the policy monies were settled were the trusts subsisting at the settlor's death. . . .
>
> I return now to Clause 2 of the marriage settlement in the present case. Mr. Bagnall calls attention to the fact that the trust after the solemnization of the marriage is a trust, not of the policy, but to get in the monies to become payable thereunder and to stand possessed of those monies (which became payable only after the settlor's death) upon the trusts concerning the shares thereby settled or such of the same as are subsisting and capable of taking effect, and he submits that in the circumstances the *Child's* case is indistinguishable.

[38] *Supra*, footnote 13.
[39] *Ibid.*, at p. 434.
[40] *Supra*, footnote 12.
[41] *Supra*, footnote 13, at p. 440.

I therefore ask myself whether, on the true construction of clause 2, the referential trusts relate exclusively to the trusts of the settled brewery shares subsisting at the settlor's death and excludes the trusts of those shares declared during the period of the settlor's lifetime. In my judgment, they do not. The words "subsisting and capable of taking effect" are immediately followed by the words "and so as to form one fund therewith", and the effect of this, in my judgment, is to incorporate the trusts limited to take effect during the settlor's lifetime just as much as those limited to take effect afterwards. If, for example, the insurance company issuing the policy had been wound up, during the settlor's lifetime, and a payment made to the trustees in the liquidation, the clause 4 beneficiaries would, in my opinion, have been entitled to have such payment amalgamated with the trust fund and the income made available for their benefit.

In the circumstances, I can see no reason which constrains me to distinguish the present case from the *Wrightson* case.

In the result, therefore, I reach the conclusion that estate duty is payable under Section 1 on the whole of the property comprised in the marriage settlement less the "slice" required to provide the wife's annuity.

On appeal to the Court of Appeal[42] the Court of Appeal held that there was a passing on the settlor's death under Section 1 of The Finance Act.

The editors of Dymond, *Death Duties*,[43] have criticized the decision of Cross J. in the *Child's Trustee* case.[44] Cross J. in the case of *Re Kilpatrick's Policies Trusts*[45] refers to this criticism and defends his position in the *Child's Trustee* case. In the *Kilpatrick* case, Stewart Kilpatrick effected fourteen policies on his life. Each policy provided that subject to the conditions of the policy the insurers would on the death of the life insured pay the specified sum insured together with bonuses representing participation in profits to the person or persons entitled to receive the same, and contained further provisions creating trusts of the policy and policy monies. The relevant further provisions contained in the policies are more or less as follows:

(1) This policy is effected under the provisions of the Married Women's Property Act, 1882, for the benefit of Rochelle Edith Kilpatrick the wife of (Mr. Kilpatrick) if she shall survive (Mr. Kilpatrick) for more than one month.

(2) If the said Rochelle Edith Kilpatrick shall not survive (Mr. Kilpatrick) for the period of one month then this policy shall be for the benefit of the two sons of (Mr. Kilpatrick), namely Stewart Kilpatrick Junior and Allen James Kilpatrick otherwise known as Allan James Kilpatrick in equal shares.

[42] [1963] 1 W.L.R. 1207. [43] (4th supp. to 13th ed., 1960), pp. 38-44.
[44] *Supra*, footnote 12.
[45] [1965] 2 All E.R. 673, aff'd [1966] 2 All E.R. 149 (C.A.).

(3) (Mr. Kilpatrick) has appointed himself and the said Rochelle Edith Kilpatrick to be the trustees of this policy and all monies payable hereunder. The expression "the trustees" hereinafter employed includes the said trustees and other the trustees or trustee for the time being (whether original or substituted) hereof.

(4) As between the company and the trustees the trustees shall have power to enter into or effect any arrangement or transaction whatever as though they were absolutely and beneficially entitled to this policy. Without prejudice to the generality of the foregoing provision the company shall not be concerned to enquire for what purpose any money may be borrowed under the provisions of this policy or otherwise.

(5) The trustees shall in relation to all monies or other property for the time being in their hands have the following powers in addition to all relevant powers and privileges conferred upon them by law or by this policy, but so that the company shall not in any way be concerned with such powers or the exercise thereof;

(a) Power at any time to invest monies upon the acquisition or security of movable or immovable property of any nature and in any place and whether involving liability or not and with the like absolute power of varying such investments from time to time so that the trustees shall have the same unrestricted power in all respects of making and transposing investments as if they were absolutely and beneficially entitled to the trust funds.

(b) Power at any time in their discretion to borrow any money required for any of the purposes of this policy and these trusts (including mere investment) on the security of the trust funds or any part thereof in such manner and on such terms as they shall think proper and no mortgage or lender shall be concerned to enquire as to the propriety or amount or purpose of any such borrowing.

Cross J. said:[46]

> The question, however, remains whether this vested interest only fell into possession on her husband's death so as to entitle her to the income of the policy monies as from that date only, or whether it was in possession throughout so as to entitle her during her husband's lifetime to any income which for any reason was derived from the policies or their proceeds before his death.

He then discussed his decision in the *Child's* case and the criticism of it and observed that as opposed to the *Child's* case:[47]

> The position here is, however, in my judgment, very different. The trust in favour of Mrs. Kilpatrick is not expressly limited to arise only on the death of her husband. It is a trust of the policy—not only of the money yielded by it on maturity—for her benefit .... The provisions of the trust show clearly that the trustees who were Mr. and Mrs. Kilpatrick, were under no obligation to retain the policies in specie. It was in the settlor's contemplation that they might be sold or surrendered or money raised on them for the purpose of investment and that

[46] *Ibid.*, at p. 679. [47] *Ibid.*, at p. 680.

> the trust fund might come to consist of or include income-producing securities. In such circumstances, I can see no sufficient reason for implying any trust to accumulate such income. I think that if it had arisen it would have been payable to Mrs. Kilpatrick. Indeed, I think that the arguments against an implied trust to accumulate are stronger in this case than they were in the *Barbour* case. In the result, therefore, I come to the conclusion that no beneficial interest in these policies arose on Mr. Kilpatrick's death since Mrs. Kilpatrick had a beneficial interest in possession in them both before and after his death which entitled her to receive any income produced by them and that this beneficial interest was not changed in any way by her husband's death.

It is probably fair to say that only with difficulty can one glean a common principle from the cases arising under section 2 (1) (d) of the English Act. The *Westminster Bank* case[48] seems to decide that if a policy of life insurance on the settlor's life is transferred to a trust, whether or not the trustee can sell or surrender the policy, and whether or not the beneficiaries are determined at the date of the creation of the trust, as long as the absolute ownership of the policy has been transferred to the trust, there can be no beneficial interest accruing or arising on the death of the deceased. The decision of Cross J. in the *Child's*[49] case presents the only difficulty in arriving at this conclusion and I submit that that case was wrongly decided.

Canada

The Estate Tax Act[50] provides as follows:

> 2(1) An estate tax shall be paid as hereinafter required upon the aggregate taxable value of all property passing on the death at any time after the coming into force of this act, of every person domiciled in Canada at the time of his death.

It is to be noted the words in the English Statute "settled or not settled" are not included in this section. Property is defined by section 58 (1) (o) which states:

> "Property" means property of every description whatever, whether real or personal, movable or immovable, corporeal or incorporeal, and without restricting the generality of the foregoing, includes any estate or interest in any such property, a right of any kind whatever and a chose in action; . . .

and property passing on death is defined by section 58 (1) (p) as follows:

> "Property passing on the death" includes property passing either originally or by way of substitutive limitation, either certainly or contingently and either immediately on the death or after an interval

[48] *Supra*, footnote 19. [49] *Supra*, footnote 12. [50] *Supra*, footnote 1.

> determinable by reference to the death and without restricting the generality of the foregoing, includes any property the value of which is required by this Act, to be included in computing the aggregate net value of the property passing on the death.

The Act further includes certain assets as property passing on death which assets might not otherwise be so included. These assets include such things as property owned by joint tenants, gifts within three years of death, and insurance payable to a named person, as well as annuities or other interests as provided by section 3 (1) (j):

> There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,
>
> (j) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest therein arising or accruing by survivorship or otherwise on the death of the deceased; . . .

The Act further provides by section 3 (4) (a):

> For the purpose of paragraph (j) of subsection (1), where any annuity or other interest was purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, the extent of the beneficial interest therein arising or accruing by survivorship or otherwise on the death of the deceased shall be ascertained without regard to any interest in expectancy that the successor to such interest may have had therein immediately prior to such death.

Section 3 (1) (j) and section 3 (4) (a) do not vary materially from their English counterparts.

I cannot discover any Canadian cases interpreting section 2 (1) of the Estate Tax Act. Furthermore, there are no cases (with the exception considered below) considering section 3 (1) (j) of the Act. In the cases of *Re Macphadyen*[51] and *Re Gasston*[52] the question whether the insurance policies there passed on death was considered but in neither case did the policies form part of the assets of a trust.

In the case of *Wurtele Estate* and *M.N.R.*[53] certain policies of life insurance were transferred to a trust which provided that on the settlor's death $20,000.00 was to be paid to the wife and the balance to be held for the wife for life and on her death to her children. Dumoulin J. held that the insurance monies could

[51] [1944] 1 D.L.R. 542 (Ont. H.C.).
[52] [1943] 2 D.L.R. 220 (Man. K.B.). [53] [1963] D.T.C. 1124.

not be likened to "any annuity or other interest purchased or provided by the deceased". No reasons were given for this decision.

W. Ivan Linton, The Administrator of Estate Tax in *A Review of the Estate Tax Act* observed:[54]

> Passing to 3 (1) (j) you will find that this is the same provision as existed in the first part of section 3 (1) (g) in the Old Act—that is eliminating all the latter part of it having to do with pensions and superannuations which are dealt with in another subsection here. Something perhaps should be said about the words "other interest" here. The words are: "annuity or other interest purchased or provided by the deceased"; and it has been held in England in construing a similar section that "other interest" can include certain types of insurance on the deceased's life. So there has been a certain amount of concern that perhaps this Act imports into this section some reference to life insurance. We have given this a good deal of thought, but it is our conclusion—at the moment anyway—that "other interest" in this section cannot be construed as referring to any ordinary kind of insurance on the deceased's life, and this for two reasons. One is that we now have in this Act very specific provisions for taxing life insurance. They are provisions entirely different from those in corresponding British legislation, different not only in wording but also in principle and we do not think that even if we wanted to we could use the words "other interest" in (j) as imposing a tax in conflict with the tax on life insurance in 3 (1) (m). Nor do we want to, inasmuch as a new principle has been adopted for taxing insurance—which, roughly speaking, could be said to be insurance owned or controlled by the deceased—and to use (j) would be to go back to the old principle of taxing insurance provided by the deceased. There is no desire to ride both horses, so at least tentatively "other interest" in (j) will not be considered to refer to insurance on the deceased's life.

It would now appear that the Department has changed its position (which it can do but which would be done only at some considerable embarrassment to Mr. Linton). Certainly, the wording of the Act is wide enough to catch any property passing on the death of the deceased whether the deceased owned it or not.[55] It might well be argued that to avoid an absurdity the property passing on death subject to tax under section 3 (1) must be property in which the deceased had some interest at his death unless otherwise specified. Because the words "settled or not settled" would appear to have been deliberately omitted from the Canadian Act it might be said that property transferred to a trust by a settlor should not be subject to estate tax at the death of the settlor.

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[54] Delivered at Estate Tax Meetings convened by the Canadian Tax Foundation in February 1959, p. 4.

[55] See C.C.H. 1 Canadian Estate & Gift Tax Reporter 586, and *Re Hodson's Settlement* v. *A.G.*, *supra*, footnote 10, at p. 209.

Conclusion

Assuming that property transferred to a trust might be included in a deceased settlor's estate for the purpose of estate tax and assuming that the English cases would be followed in Canada (which latter probably would be the case) what must be done to avoid attracting estate tax on the death of the settlor?

(a) To avoid tax under section 2, changes in the interests of the beneficiaries must not occur on the death of the settlor.[56]

(b) To avoid tax under section 3 (1) (j) it is necessary to transfer the entire beneficial interest of the settlor to the trust. It appears to make no difference whether the beneficial interest of the beneficiaries arises at some future time.[57]

In drafting the trust agreement the solicitor might well consider creating a trust of an asset such as a government bond to be held by the trustee upon certain trusts as to the income accruing from time to time as well as to the capital. For example, the income might be paid to the wife for life with a gift over of the capital to certain named children. The trust could further permit the settlor to transfer additional real and personal property to the trust including, among other things, monies to purchase insurance policies on the life of the settlor, which additional property would be held on the same trusts as the government bond. It would appear that a trust of this type should certainly avoid estate tax on the death of the settlor.

D. L. McKILLOP*

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TRUST INSTRUMENTS AND WILLS—LIMITATIONS IMPOSED ON DISCRETION GIVEN TO AN EXECUTOR OR TRUSTEE.—Expressions such as "Trustees may in their discretion", "shall use their discretion", "in their absolute discretion", "in their uncontrolled discretion", are found in many wills and trust instruments. Perhaps it may not be amiss to attempt to determine what they mean. At one time it was thought that *Gisborne* v. *Gisborne*[1] had decided there was a difference between a discretion simply and one that was qualified by the adjective "absolute" or "uncontrolled" or, as in one case, 'irresponsible".[2] Now the better opinion seems to be that all

[56] See *Adamson* v. *A.G.*, *supra*, footnote 7.
[57] See *Westminster Bank* v. *I.R.C.*, *supra*, footnote 19.
*D. L. McKillop, of the Alberta Bar, Calgary.
[1] (1877), 2 App. Cas. 300, 46 L.J. Ch. 556.
[2] See for example *Tabor* v. *Brooks* (1878), 10 Ch. Div. 273, 48 L.J. Ch. 130.

discretions are subject to much the same rules regardless of what adjectives are found in the particular instrument. In *Ward* v. *James*,[3] Lord Denning M.R., speaking of the absolute discretion given to the judge in making or varying an order as to the mode of trial, stated: "What does the word 'absolute' mean here? Does it add anything to the word 'discretion'?"[4] In *Whipps* v. *Powell Duffryn Engineering Company Limited*, Harman L.J. said:[5] "Every discretion is absolute if you do not confine it and, for myself, I do not think the word 'absolute' adds to the matter at all", and in *Hennell* v. *Ranaboldo*,[6] Diplock L.J. said the same thing. Similarly, in *Re Bell*,[7] Middleton J. was of the opinion that: "In some of the decided cases, emphasis is placed on the words absolute and uncontrollable, but these adjectives add nothing when what is given is in truth an absolute discretion."[8]

If, some limitations must be imposed on a discretion given to a trustee, what are those limitations? Obviously, the first one is that the court will construe the gift of a discretion to mean an honest discretion and if, to take an extreme case, the trustee selects an investment because he has been bribed to do so, not only will he be surcharged with any loss, but he will be forced to account for the amount of the bribe he has received.[9] The requirement of honesty, however, probably has implications that go a good deal further. In *Seymour* v. *Pratt*,[10] Riddell J. with a characteristic display of learning stated: "As was said hundreds of years ago, 'discretion' is a science or understanding to discern between falsity and truth, between right and wrong, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections: for as one saith, *talis discretio discretionem confundit*".[11] Later in the same case he said: "A direction given to pay is not to be disregarded and counted as nothing because the direction is to pay at discretion."[12]

Certainly, the trustee cannot safely ignore the existence of the discretionary power and either refuse to exercise it at all or, alternately, purport to exercise it without giving the matter any consideration or obtaining the necessary information. If, for example,

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[3] [1965] 2 W.L.R. 455.
[4] *Ibid.*, at p. 463.
[5] Unreported, 1963, W. No. 178 (C.A.), at p. 3F.
[6] [1963] 3 All E.R. 684 (C.A.).
[7] (1923), 23 O.W.N. 698.
[8] *Ibid.*, at p. 699.
[9] *In re Smith*, [1896] 1 Ch. 71.
[10] (1925), 57 O.L.R. 278.
[11] *Ibid.*, at p. 282, quoting *Rooke's* case (1598), 5 Co. R. 99(b), at p. 100(a).
[12] *Ibid.*

the trustee has a discretionary power of sale, he may render himself liable for negligence if he fails to give proper consideration to an opportunity of selling.[13] And in the case of a power to make advances or pay income, enquiries should be made to ascertain whether the advance will be beneficial,[14] or what the needs of the beneficiaries actually are.[15]

Not only must trustees accept the discretionary power given to them in the sense that they must decide to exercise it or not, but any decision to exercise the power in some particular way must be their own decision; they may consult others but they must not allow others to overbear them. In *Fraser* v. *Murdock*,[16] Lord Blackburn put it this way:[17]

> And I further agree that trustees are to exercise their own discretion. But I think they may inquire as to what are the wishes and opinions of others, especially of those who are interested, before they finally determine what, in the exercise of their own discretion, they think expedient.

Similarly, in the same case, Lord Selborne L.C. said:[18]

> I am satisfied that the trustees acted in good faith and that their decision to retain this stock was an honest exercise of the discretion given to them by the will. It would be extremely dangerous to hold that trustees, having such a discretion to exercise, might not freely discuss with the beneficiaries the reasons for and against a particular decision without running the risk of being held to act against their own judgment if they should disregard, in the end, objections to which they had thought it right in the first instance to direct attention.

Not only must a trustee make up his own mind but he must be prudent in doing so. What does the word "prudent" mean in this context? The question arises most often in regard to investments and it is sometimes said that a trustee must use the same care he would take with his own affairs. But this test will not do for many successful men are known to speculate, on occasion. Sometimes that is how they became successful. A better test is that suggested by Lord Lindley in the Court of Appeal in *Re Whitely*,[19] a decision later affirmed by the House of Lords *sub nom Learoyd* v. *Whitely*.[20] Lord Lindley expressed the opinion that:[21]

> The duty of a trustee is not to take such care only as a prudent man

[13] *Re Wilson*, [1937] O.R. 769 (C.A.); *Re Nicholls* (1918), 29 O.L.R. 206 (C.A.).
[14] *In re Powles*, [1954] 1 All. E.R. 516; *in re Pauling's Settlement Trusts*, [1963] 3 All. E.R. 1, [1964] 1 Ch. 303 (C.A.).
[15] *In re Gourju's Will Trusts*, [1943] Ch. 24.
[16] (1881), 6 App. Cas. 855
[17] *Ibid.*, at p. 867.
[18] *Ibid.*, at p. 864.
[19] (1886), 33 Ch. D. 347.
[20] (1887), 12 App. Cas. 727.
[21] *Supra*, footnote 19, at p. 355.

> would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide.

Bearing this principle in mind, to what considerations should a trustee have regard in selecting an investment or deciding to retain one—in addition, of course, to the fundamental considerations of safety of principal and regularity of income? The American *Restatement of the Law of Trusts*[22] lists ten, as follows:

1. The marketability of the particular investment;
2. The length of the term of the investment; for example, the maturity date, if any, the callability, if any;
3. The probable duration of the trust;
4. The probable condition of the market with respect to the value of the particular investment at the termination of the trust, especially if at the termination of the trust the investment must be converted into money for the purpose of distribution;
5. The probable condition of the market with respect to reinvestment at the time when the particular investment matures;
6. The aggregate value of the trust estate and the nature of the other investments;
7. The requirements of the beneficiary or beneficiaries, particularly with respect to the amount of the income;
8. The other assets of the beneficiary or beneficiaries, including earning capacities;
9. The effect of the investment in increasing or diminishing liability for taxes;
10. The likelihood of inflation.

As pointed out by Scott in his work *On Trusts*,[23] none of these matters is, of course, controlling. They are various circumstances which may be of some importance in guiding the conduct of the trustee. No one of the factors is so determinative that the trustee is guilty of a breach of trust if he makes an investment without regard to some one of these factors. Nevertheless, a disregard of a number, or possibly all, of these factors might easily be considered to be negligence.

Turning to discretionary powers to advance capital either to those entitled to income only, or to those entitled to some future

[22] American Law Institute, Restatement of the Law of Trusts (2nd ed., 1959), s. 227, comment o, p. 535.

[23] (2nd ed., 1956), Vol. 3, ss. 227-227.16, pp. 1660-1707.

interest, an indication of the manner in which the courts would require such powers to be exercised was given in *In re Pauling's Settlement Trusts*.[24] In the Pauling settlement the power was described by the court as consisting of two limbs, "first, a power with the consent of the mother in her lifetime to raise any part or parts not exceeding in the whole one-half of the expectant, presumptive or vested share of any child, and to pay the same to him or her for his absolute use, and secondly, the usual power to pay or apply the same for his or her advancement or otherwise for his or her benefit in such manner as the bank might think fit".[25] It was suggested in argument that the power contained in the first limb was wider than that in the second but the court thought both powers were fiduciary and there was no substantial difference between them. No question arose of the mother's consent which had been given to all the advances complained of. Those advances, while technically made to the children, had been made, not because of any particular need of the children, but for a variety of collateral purposes which can be described generally as permitting the parents to live beyond their means. Commenting on the manner in which the powers had been exercised, Wilmer L.J. said:[26]

> On the other hand, if the trustees make the advance for a particular purpose which they state, they can quite properly pay it over to the advancee if they reasonably think they can trust him or her to carry out the prescribed purpose. What they cannot do is to prescribe a particular purpose, and then raise and pay the money over to the advancee leaving him or her entirely free, legally and morally, to apply it for that purpose or to spend it in any way he or she chooses, without any responsibility on the trustees even to inquire as to its application.
>
> Failure to appreciate this was one of the root causes of the trouble, for in the first opinion of counsel in 1948 (to which we shall later refer) he advised that the trustees could make an advancement out and out for the purpose of a purchase of a house in the Isle of Man, but he said this purchase "depends on a voluntary act by the children, and they should, I think, be separately advised on this point. So far as the trustees are concerned, they will be paying the money to the children for their own absolute use". This, we think, was the wrong approach. At that time both Francis and George were studying at University, and it was not suggested that they required any sum for their maintenance there; the only possible justification for advancing the very substantial sum of £5,000 to each of the two boys, one of them 27 and the other just 22, who had no other possible proper use for this money, was to invest it in a house in the Isle of Man, as the settlement powers were insufficient and the advancement could be justified only for that purpose. This error was perpetuated later by the children's solicitor,

[24] *Supra*, footnote 14.
[25] *Ibid.* at p. 333 (Ch.).
[26] *Ibid.*, at pp. 334-335.

> who got into the habit of advising them that, although purported advancements were, for example, for the repair of a house or for the purchase of furniture, they were sums which the children could "blue" for example, on a horse.
>
> This was wrong and misleading advice. If money was advanced for an express purpose by the bank, the advanced person was under a duty to carry that purpose out, and he could not properly apply it to another. We are not concerned with the question whether in such circumstances the bank could recover money so misapplied, but this much is plain, that if such misapplication came to their notice, they could not safely make further advances for particular purposes without making sure that the money was in fact applied to that purpose, since the advancee would have shown him or herself quite irresponsible.

Applying these tests the court thought all the advances had been made in breach of trust. The difficulty that the children had in each case consented to the advance was circumvented by finding that the children had been subject to the undue influence of their father.

Within these limits the court will not interfere nor will it substitute its judgment for the discretion given to the trustees either in the matter of a particular investment,[27] or a proposed exercise of a power to make an advance.[28]

When the trustees find themselves unable to agree whether a particular action should be taken or not, the situation may be different depending on the terms in which the discretion is given. If, for example, there is a direction to sell but with a power to retain at the discretion of the trustees, and the trustees cannot agree to retain, the direction to sell remains paramount.[29] If, on the other hand the two powers are in fact two sides of the same coin, and the question is simply to sell or not to sell a particular asset at a particular time, and the trustees cannot agree, the court will decide,[30] but only with respect to a particular transaction, not with respect to a line of conduct to be followed when each decision must depend on its own circumstances;[31] and not if the provisions of the trust instrument indicate action can be taken only if the trustees are unanimous.[32]

TERENCE SHEARD*

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[27] *Re McLaren* (1921), 51 O.L.R. 538, at p. 547; *Re Fulford* (1913), 29 O.L.R. 375; *Re Boukydis* (1927), 60 O.L.R. 561.

[28] *Re Banco* (1958), 12 D.L.R. (2d) 515 (Ont. H.C.).

[29] *Re Hilton*, [1909] 2 Ch. 548; *Re Rogers* (1928-29), 63 O.L.R. 180.

[30] *Re Haasz*, [1959] O.W.N. 395 (C.A.).

[31] *In re Allen-Meyrick's Will Trusts*, [1966] 1 W.L.R. 499, 1 All E.R. 740.

[32] *Re Bell*, *supra*, footnote 7.

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CONFLICT OF LAWS—CONTRIBUTORY NEGLIGENCE AND THE RULE IN *The Halley*.[1]—It is stated in Dicey's *Conflict of Laws*[2] that: "On the customary interpretation of the Rule [in *Phillips* v. *Eyre*][3] any defence which is valid under English law is available to the defendant, although it is not accepted under the *lex loci delicti*, and conversely any defence which is valid under the *lex loci delicti* is also available to him, irrespective of the *lex fori*, unless it is a procedural defence. This applies to common law defences: . . . Contributory negligence would—within the limitations of the [English] Law Reform (Contributory Negligence) Act, 1945—be a defence to a claim for negligence, although it would not as such be admitted by the *lex loci delicti*. On the other hand, if by that law a successful plea of contributory negligence was a complete answer to the claim (as it was in England before 1945), the action would fail in the English court . . . ."

The recent decision of the High Court of Australia in *Anderson* v. *Eric Anderson Radio and T.V. Pty Ltd*,[4] on appeal from the Full Court of the Supreme Court of New South Wales,[5] will be of extreme interest to conflict lawyers in the light of the fact that there is such scanty authority on contributory negligence in conflict cases in the Commonwealth.[6] It is, in fact, the penultimate sentence of the quotation from Dicey that the case centres around. The facts were that the plaintiff, a New South Wales resident, was employed as a union organiser and was driving a motor vehicle in that capacity in Canberra in the Australian Capital Territory, when his vehicle was hit by a large van being driven by an employee of the defendant company. The van driver was a resident of Canberra and the defendant company was incorporated in New South Wales doing business in that state, and, it would seem, in the

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[1] (1868), L.R. 2 P.C. 193. This note is intended as a postscript to Brownlie and Webb, Contributory Negligence and The Rule in Phillips v. Eyre (1962), 40 Can. Bar Rev. 79.

[2] (7th ed., 1958), pp. 959-960.

[3] (1870), L.R. 6 Q.B. 1 (Exch. Ch.). In the words of Rule 181 in Dicey, *op. cit.*, *ibid.*, p. 940, this reads "An act done in a foreign country is a tort and actionable as such in England, only if it is both (1) actionable as a tort, according to English law, or in other words, is an act which, if done in England, would be a tort; and (2) not justifiable, according to the law of the foreign country where it was done." The rule was approved and applied by the Australian High Court in *Koop* v. *Bebb* (1952), 84 C.L.R. 629, at p. 642.

[4] [1965-66] 39 A.L.J.R. 357.

[5] *Sub. nom. Eric Anderson Radio & T.V. Pty Ltd* v. *Anderson*, [1964-65] N.S.W.R. 1867.

[6] See, however, *Brown* v. *Poland* (1952), 6 W.W.R. (N.S.) 368, as dealt with in Brownlie and Webb, *loc. cit.*, footnote 1, at pp. 85-87. It was not cited in the present case.

Capital Territory. The plaintiff sued the defendant company in Sydney in the District Court of the Metropolitan District for damages for the personal injuries he had suffered in the accident. The defendant company defended, denying negligence and alleging contributory negligence on the plaintiff's part. The latter's counsel argued that section 15 of the Law Reform (Miscellaneous Provisions) Ordinance 1955 (A.C.T.) applied. This provision of the *lex loci delicti* enacted that contributory negligence upon the part of a plaintiff in a negligence action, was not a complete defence to such an action but that the damages recoverable by him should be reduced to such an extent as the court thought just and equitable having regard to his share in the responsibility for the damage. This provision is in direct contrast to the common law of New South Wales, the *lex fori*, which is to the effect that a plaintiff's contributory negligence affords a complete defence to the defendant. Thinking that section 15 governed the question before him, the trial judge put certain questions to the jury. The jury then found (a) that the van-driver, for whom the defendant company was answerable, had been negligent (b) that the plaintiff had been contributorily negligent,[7] and (c) that the damages recoverable by the plaintiff should in consequence be reduced by ten per cent. Judgment having been entered for the plaintiff accordingly, the defendant company appealed to the Full Court, arguing that the conflict of laws rules should have been applied, so that the plaintiff must not only show that the wrong was not justifiable by the Australian Capital Territory law, the *lex loci*, but also that it was actionable in the *lex fori*, the law of New South Wales. Thus, it was urged on the Full Court, in view of the finding of contributory negligence, the company had a complete defence and judgment should have been entered for it. A majority of the court[8] took the view that it has never been the law that the *lex loci delicti* alone applied in the case of a tort committed outside the jurisdiction, however much might be said for the view that this should be the case, and regarded itself as bound to accede to the defendant company's argument.[9] The case was thus one of those rarer examples

[7] Brereton J., *supra*, footnote 5, at p. 1869, said: "The finding against the plaintiff, in the light of the summing up, was not a finding of contributory negligence in the sense of a failure to take care for his own safety; it was a finding of failure to take reasonable care *simpliciter*, and specifically a failure to keep a proper lookout, amounting to 'a contribution to the totality of the negligence involved in this case.' The two fields are not necessarily coextensive; but I have no doubt that in this case they were."

[8] Brereton and Hardie J.J., *ibid.*

[9] *Ibid.*, see at pp. 1869-1870, per Brereton J., at pp. 1872-1876, per

of tort cases in which the plaintiff failed because he was unable to fulfil the "first arm" of the Rule in *Phillips* v. *Eyre*[10]—in other words, could not extricate himself from the ratio of *The Halley*.[11] To Hardie J., for instance, it could not matter whether the Australian Capital Territory Ordinance was substantive, as the trial judge had thought, or procedural: while the laws of that Territory might be relevant to determine the nature and extent of the driver's duties, the defendant's negligence and the plaintiff's contributory negligence, they were "not decisive on the crucial question as to whether contributory negligence, if existing, defeated the plaintiff's claim or merely operated to reduce the *quantum* of damages recoverable; that was a matter for determination under and in accordance with the law of New South Wales".[12]

The plaintiff eventually appealed to the High Court. It was said in *Koop* v. *Bebb*[13] that it seemed clear that the last word had not been said on the subject. Here, then was an opportunity to bring maximum artillery upon the whole superstructure of torts in the conflict of laws with a view to reducing it to ruins and to erecting a more satisfactory edifice. The chance was not taken, as witnessed by the words of Kitto J.: "The whole subject may perhaps need to be re-examined some day, but we would not be justified in calling into question a doctrine upon which the courts both in England and in this country have acted for almost a century unless, at least, in a case in which it has been directly challenged and made the subject of full argument. In this appeal the correctness of the doctrine in English law has not been questioned, and I think we must proceed on the basis that it is sound here unless considerations peculiar to this country displace it."[14] Quite clearly, therefore, it

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Hardie J. The dissenting judge, Jacobs J., evidently agreed with this: see at pp. 1876-1877. It is of some comfort that all the judges were critical of the Rule in *Phillips* v. *Eyre*, *supra*, footnote 3.

[10] *Ibid.* It is referred to as such hereafter.

[11] *Supra*, footnote 1. This is not the first case to have followed and applied *The Halley* by any means; see, *e.g.*, *O'Connor* v. *Wray*, [1930] S.C.R. 231, 2 D.L.R. 899 (S.C.C.); *McElroy* v. *McAllister* 1949 S.C. 110 (Court of Session). It has been blessed in passing, too, on several occasions, as witness *McLean* v. *Pettigrew*, [1945] S.C.R. 62, 2 D.L.R. 65, at p. 77 (S.C.C.); *Koop* v. *Bebb*, *supra*, footnote 3.

[12] *Supra*, footnote 5, at p. 1876. Reverting to the "permutations" listed in Brownlie and Webb, *loc. cit.*, footnote 1, at p. 82, the present case would seem to be a IX (c) case; the plaintiff is solely to blame for his own injuries in the eyes of the *lex fori* and is contributorily negligent in the eyes of the *lex loci*. As suggested on pp. 83-84, he must, as the Full Court and High Court decided, lose for failure to fulfil the first "arm" of the *Phillips* v. *Eyre* rule.

[13] *Supra*, footnote 3, though admittedly more with the second "arm" of the *Phillips* v. *Eyre* rule in mind.

[14] *Supra*, footnote 4, at p. 360.

is idle to scan the judgments in the hope of discovering the means of breaking away from the shackles of the Rule in *Phillips* v. *Eyre*. All the judges were unanimous in holding the trial judge to have been wrong in applying the Capital Territory law exclusively and that the Full Court had been correct in reversing his decision.[15]

The judgment likely to prove most attractive to the academic is that of Windeyer J. He agreed that the van driver's conduct was "not justifiable" in the Capital Territory and that it was "wrongful", but continued: "The matter important in this case is thus the first condition, expressed to be that the tort sued upon is of such a character that it would have been actionable if committed in New South Wales."[16] This he took "to mean that the acts that a plaintiff alleges were done must be such that had they been done in the country of the forum, here New South Wales, they would have given him a good cause of action there against the defendant according to the *lex fori*, here the municipal law of New South Wales."[17] Two academic writers have in the past suggested in this *Review* that the first "arm" of the Rule in *Phillips* v. *Eyre*—the requirement of actionability in English law—relates only to the so-called "threshold" question of entertaining the action, that is to say to the question of jurisdiction. Thus they say that English law does not have to be the applicable substantive law to determine liability.[18] The learned judge was unable to persuade himself to accept this interpretation of the ratio of Willes J. That the parties' rights in respect of a foreign tort must be decided as they would be in an action based on a similar event happening within the jurisdiction of the forum—in other words, that the substantive law determining liability must be English—was to him self-evident[19] from *The Halley*.[20] In particular he cited the statement of Selwyn L.J., that: "It is . . . alike contrary to principle and to authority to hold that an English court of justice will enforce a foreign municipal law and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

Windeyer J., then turned to the facts of the case and posed himself the question: was the wrong one which, by the *lex fori*, would

[15] *Ibid.*, at p. 358, per Barwick C.J.; at pp. 359-361, per Kitto J.; at pp. 363, per Taylor J.; at p. 364, per Menzies J.; at pp. 365-367, per Windeyer J.
[16] *Ibid.*, at p. 365. [17] *Ibid.*
[18] See Yntema, (1949), 27 Can. Bar Rev. 116; Spence, Conflict of Laws in Automobile Negligence Cases (1949), 27 Can. Bar Rev. 661.
[19] *Supra*, footnote 4, at p. 366. In accord, Falconbridge, Conflict of Laws (2nd ed., 1954), p. 812; Wolff, Private International Law (2nd ed., 1950), p. 493.
[20] *Supra*, footnote 1.

have been actionable if committed in New South Wales? One view was that, since the plaintiff was contributorily negligent, there was never an actionable wrong, so that he "never got over the threshold of the New South Wales Court".[21] Another possible view was that he was complaining of a wrong actionable in New South Wales law, that his case was properly triable there, that it must be tried by applying the domestic law of New South Wales and that his claim must be defeated by his having been contributorily negligent. "In one sense", said the judge, "it does not matter, if the case be regarded simply as one of the conflict of laws, which of these two views is correct. On either the appellant's action should have failed. But the distinction has some bearing on later aspects of the argument".[22] His Honour queried whether it was correct to regard an absence of contributory negligence on the plaintiff's part as an ingredient in the tort of which he complained, as an element that is in the cause of action for negligence. Such could be maintained, he thought, if the common law of contributory negligence were to be explained simply in terms of causation, as sometimes it had been.[23] In the judge's view, however, since the onus of establishing contributory negligence lay with the defendant, it was preferable to regard an allegation of contributory negligence as "a matter of defence, more in the nature of a plea in confession and avoidance than of a traverse".[24] Having considered the passage in Dicey with which this note opens, Windeyer J., considered Professor Glanville Williams' suggestion that where a foreign tort is litigated in England, questions of contributory negligence are governed by the *lex loci*.[25] Unhappily this earned the reputation of an incautious statement and the judge dismissed it as deriving from the United States position, "where the substantive law by which liability is determined is the law of the place of the wrong".[26] Having, like his brethren, dismissed a constitutional legal argument to the effect that the Australian Capital Territory law was applicable,[27]

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[21] *Supra*, footnote 4, at p. 366. [22] *Ibid.*

[23] *Ibid.* He cites by way of example Bowen L.J., in *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685, at p. 697; *Bridge* v. *Grand Junction Rly. Co.* (1838), 3 M. & W. 244; and see Brownlie and Webb, *loc. cit.*, footnote 1, at pp. 80-82.

[24] *Ibid.*, at pp. 366-367, citing *Henwood* v. *Municipal Tramways Trust (S.A.)* (1938), 60 C.L.R. 438, esp. at p. 458; *Wakelin* v. *L. & S.W. Rly. Co.* (1886), 12 App. Cas. 41, esp. at pp. 47 and 51; *Williams* v. *Commissioner for Road Transport & Tramways (N.S.W.)* (1933), 50 C.L.R. 258; *Curran* v. *Young* (1965), 38 A.L.J.R. 452.

[25] *Ibid.*, at p. 367. The reference is to Joint Torts and Contributory Negligence (1951), p. 339; see also Brownlie and Webb, *loc. cit.*, footnote 1, at p. 89, *et seq.*

[26] *Ibid.*, at p. 367. [27] *Ibid.*, pp. 367-368.

His Honour repeated some of the strictures made upon the Rule in *Phillips* v. *Eyre* in the court below and concluded as follows: "It may be that looking to the *lex loci delicti*, as the governing law, as is the rule in America, is the more logically satisfactory solution of the question that arises when laws conflict. But, of course, it does not necessarily produce a more just result; for the *lex loci delicti* may not be the law that best serves the needs of justice. What is really needed is not a different choice between conflicting laws, but an elimination of the conflict, so that Australians, being one people, should not be troubled by differing laws on a topic such as negligence on which the law could well be made uniform. That in Australia collisions between motor vehicles should give rise to difficult problems of conflicting laws is regrettable. But this is not a matter that courts can put right. By co-operation the Commonwealth and the States could make principles of law that directly affect so many Australians the same for all of them."[28] However, whereas his brethren had been content simply to dismiss the appeal, Windeyer J., considered a new trial should be ordered on the ground that the trial judge, having considered that Australian Capital Territory law applied, had never instructed the jury on the New South Wales law as to contributory negligence.[29]

There is, indeed, little to be content or complacent about in this decision. If we blindly accept the correctness of the Rule in in *Phillips* v. *Eyre*, we can say we have been afforded a copybook example of the operation of the first "arm" of it. We can, moreover, rejoice that it lies in a new field. We cannot, however, quarrel with the result. We may duly applaud Professor Rheinstein for saying: "English courts continue to apply English law, with the important modification, however, that an alleged tortfeasor will not be subjected to liability, when his conduct, though actionable under English law, is not disapproved by the law of the place where it is carried on. This technique is of easy application, it protects justified expectations, and it appears eminently satisfactory, in spite of criticism."[30] Those, however, who disagree with this view will more probably feel that the New South Wales court should have been reminded of the famous utterance of Cardozo J.: "If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing the plaintiff what belongs to him. We are not so provincial as to say that every solution of a

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[28] *Ibid.*, at p. 367. [29] *Ibid.*

[30] Place of Wrong; A study in the Methods of Case Law (1944), 19 Tulane L. Rev. 4, at p. 23.

problem is wrong because we deal with it otherwise at home."[31] It would, alas, be wrong to yield to the temptation to give vent to that feeling while it continues to be held that it is the *lex fori* and not the *lex loci delicti* which affords the plaintiff his cause of action. One's first reaction after reading the case was naturally to express the pious hope that the New South Wales legislature would soon see fit to follow the example of the Capital Territory and forthwith introduce legislation providing for apportionment of responsibility. Given, however, that this hope has since been fulfilled by the passing of the Law Reform (Miscellaneous Provisions) Act, 1965,[32] by the New South Wales legislature, it would still have to be the *lex fori*—that is to say the new legislation in New South Wales—that would apply and not section 15 of the Law Reform (Miscellaneous Provisions) Ordinance, 1955, (A.C.T.), notwithstanding that Willes J., said in *Phillips* v. *Eyre* that "the civil liability arising out of a wrong derives its birth from the law of the place and its character is determined by that law".[33] One cannot but agree with Jacobs J., in the Full Court when he said of the conflict rule that, "it would seem only to be explicable by bearing in mind the time and place of its origin; it is perhaps understandable that the courts of England in the late nineteenth century, confident in the perfection of that body of principles which had become the English law of torts, would find it difficult to conceive that a plaintiff should have a cause of action for a wrong done to him which was worthy of recognition by an English court although such a cause of action formed no part of English municipal law. The nature of a federal system makes this rule, developed by the English courts in a different age, an incongruous and unsatisfactory one, and it may be this fact which has led to its virtual abandonment in the United States in favour of a rule determining the nature and extent of liability in accordance with the *lex loci actus*".[34] In the result, therefore, the words of a writer in an earlier number of this *Review* are fully vindicated: "The English law of foreign torts is no more than an appendix to its domestic law of torts. . . . The sole foundation of a tort action in England is actionability by the law of England. If the defendant's act is not actionable by that law, the plaintiff fails, regardless of the fact that under the foreign law an action lies."[35]

[31] *Loucks* v. *Standard Oil Co.* (1918), 204 N.Y. 99. [32] (1965), No. 32.

[33] *Supra*, footnote 3, at p. 28. The existence of this statement appears often to be overlooked, though see *Koop* v. *Bebb*, *supra*, footnote 3, at pp. 642-643.

[34] *Supra*, footnote 5, at p. 1877.

[35] J. Willis, (1936), 14 Can. Bar Rev. 1, at p. 20; *cf.* P.B. Carter, (1954-1956), 3 Univ. of W. Aust. Ann. L. Rev. 67, at pp. 75-67.

Windeyer J., it will be recalled, stated that the matter was not one that the courts could put right. With respect, this is an unfortunate attitude, although it must be admitted that the High Court was not really pressed by counsel to depart from the orthodox rule. It is, in fact, very surprising that the modern American doctrine was not put before the court; nothing in any of the judgments suggests that the judges had been made aware of the new "grouping of contacts" approach, involving a departure from the *lex loci*, as exemplified in cases such as *Babcock* v. *Jackson*[36] and *Kilberg* v. *Northeast Airlines Inc.*[37] Nor does it seem that it was ever suggested that the court might ascertain the proper law of the tort.[38] One is, indeed, left with the impression that American jurisprudence has stood still since the 1934 *Restatement*. No reference was made to the second *Restatement*[39] and the views of Professors Ehrenzweig[40] and Currie[41] might as well never have been uttered. However this may be, it should be recalled that Professor Goodrich wrote thirty years ago that: "Fairness to the parties requires that the obligations created between them remain unchanged by fortuitous changes in the geographical location of either until such obligations are settled or otherwise discharged."[42] It is certain that while the Rule in *Phillips* v. *Eyre* continues to reign supreme it will

[36] (1963), 12 N.Y. 2d 473, 191 N.E. 2d 279; 240 N.Y.S. 2d 743. See too, *Hardman* v. *Helene Curtis Industries Inc.* (1964), 198 N.E. 2d 681; *Griffith* v. *United Air Lines Inc.* (1964), 9 C.C.H. Aviation Cases 17, 225.

[37] (1961), 9 N.Y. 2d 34, 172 N.E. 2d 526; 211 N.Y.S. 2d 133, and see Webb, (1964), 9 Villanova L. Rev. 193; E. F. Roberts, (1964), 9 Villanova L. Rev. 200.

[38] As urged by J. H. C. Morris, The Proper Law of a Tort (1951), 64 Harv. L. Rev. 881. If one were satisfied that the law of New South Wales were the proper law of the tort, as well might be the case in view of the facts of the case, then the result of the case is fair from the conflict of laws standpoint and the only complaint can be the State's failure to enact a contributory negligence statute. And see J. A. C. Smith (1957), 20 Mod. L. Rev. 447; *cf.* Gow, (1949), 65 L.Q. Rev. 613, at p. 616.

[39] Section 379 of which reads "(1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort. (2) Important contacts that the forum will consider in determining the state of the most significant relationship include:
(a) the place where the injury occurred,
(b) the place where the conduct occurred,
(c) the domicile, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centred.
(3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort and the relative importance of the tort rules involved." (Tentative Draft No. 8, 1963).

[40] See, *e.g.*, A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach" (1965), 18 Okla. L. Rev. 340 and material there cited and his Treatise on the Conflict of Laws (1962).

[41] See, generally, his Selected Essays on the Conflict of Laws (1963).

[42] (1936), 36 West Va. L. Q. 156, at p. 164.

continue to constitute a direct negation of this principle. Seeing that the opportunity has been lost to a Commonwealth court to abrogate the rule when the opportunity offered, the only other alternative is to suggest that the rule be cut off root and branch at its English source. Reform of the conflict of laws is doubtless not the type of law reform calculated to attract votes in parliamentary elections, but if Commonwealth courts are to be dogged by the dead hand of this execrable rule, then the sooner it secures the attention of the English Law Commission, the better will it be. It is certain that a swift quietus is called for and the topic is quite as important socially, if not more so, as the recognition of foreign divorce and nullity decrees which that body is reported as being about to examine.[43]

P. R. H. WEBB*

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CONSTITUTIONAL LAW—FEDERALIZING THE JUDICIARY.—Professor Albert Abel has pointed out, in a recent article in the *Alberta Law Review*,[1] that the Canadian constitution is not consistently federal in nature. At the legislative level, the British North America Act grants exclusive law-making powers over some matters to the federal Parliament, and over others to the provincial legislatures; and the distribution of executive powers has been held to be based on the same pattern.[2] But at the judicial level, the provinces have no areas of exclusive control, since an appeal lies, even in matters under provincial legislative jurisdiction, from the highest provincial courts to the Supreme Court of Canada.[3]

A much different situation prevails in the United States, where the jurisdiction of federal courts, including the Supreme Court, generally embraces only disputes that have, for one reason or another, a federal flavour (constitutional issues, matters within federal legislative competence, cases involving citizens of different states, and so on).[4] In many matters the state courts exercise ex-

[43] See, *e.g.*, [1965] 10 C.L. 127b.

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[1] The Role of the Supreme Court in Private Law Cases (1965), 4 Alberta L. Rev. 39.

[2] *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A.C. 566, at p. 580.

[3] The province cannot prohibit an appeal to the Supreme Court: *Crown Grain Company* v. *Day*, [1908] A.C. 504.

[4] See Hart and Wechsler, The Federal Courts and the Federal System (1953), pp. 18-29.

clusive jurisdiction. Professor Abel has proposed that a substantially similar practice be adopted in Canada:

> . . . outside of the federal fields, the law of the several provinces ought to be left for the provinces to determine judicially, as it is legislatively.[5]

It is not just a yearning for consistency that lies behind this proposal. The chief advantage of such a system would be, in Professor Abel's opinion:

> . . . the greater responsiveness of the law to the different needs and sentiments of the provinces. The geography or the sociology of British Columbia and of Nova Scotia are not, for example, so featureless that it is inadmissible for those communities to regard differently the position of one hazarding himself to the driving of a drunken companion. Family cohesiveness, the sophistication of bargainers, the incidence of urbanism, patterns of informal communication—these are some of the many circumstantial elements relevant to a different, but equally valid, development within the general framework of the common law amongst the provinces. One gets a feel for these matters only by living in a community.[6]

This argument assumes that provincial courts would, if given a free hand, pay considerable heed to prevailing community attitudes when determining disputes coming before them. In view of the widespread tendency of judges to deny that their decisions are based on policy considerations, there is little hope that this would be done openly. If past experience is a reliable guide, it is also unlikely that it would be done covertly or unconsciously. Many differences in judge-made law already exist from province to province. In the case of Quebec, these are no doubt largely the result of cultural factors. Even in the common-law provinces, some of these discrepancies probably reflect general differences in outlook from one part of the country to another. However, Quebec aside, most of the inconsistencies seem rather to stem from other factors, such as the wide range of judicial philosophy, temperament and ability that prevails within each of the provinces. Liberally inclined judges in Nova Scotia and British Columbia are more likely to agree with each other than they are with their conservative brethren in their own provinces.[7] It is a matter of considerable doubt, therefore, that the change Professor Abel advocates would have the result he forecasts.

This is not to say that the proposal is wholly unattractive. Professor Abel's article lists a few "collateral benefits":

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[5] *Loc. cit.*, footnote 1, at p. 39. [6] *Ibid.*, at p. 47.

[7] It is true that judges in some provinces are more likely to be liberal or conservative in outlook than in others, but the degree of homogeneity is not sufficient to produce a consistent provincial judicial approach.

> The reduction in work load would contribute to allowing participation by the full bench in all cases, thus reducing the inherent uncertainties as to the predictive force of divisional decisions and, what is perhaps more important, bringing to each case the collective deliberation and wisdom of all the judges. Moreover, concentration on questions of federal law, as to which there is typically a wider public sensitiveness, might well enhance the status of the court in our governmental system. While it already has the passive respect, it does not have the active interest of the nation, and serves less effectively than it might as a symbol of common Canadian purpose. By narrowing the range of its concerns, it could very well be that it would widen its institutional effectiveness.[8]

Another advantage would be that by eliminating the final level of appeal in many types of case, the delay and expense of litigation would be somewhat reduced.

Perhaps the most attractive feature of the plan is that it would, paradoxically, make the fields of law under provincial control at once more predictable and more amenable to change. Although many areas of law are badly in need of improvement, Canadian legislatures have been reluctant to undertake significant law reform. The primary responsibility for keeping law in step with the times has, therefore, fallen by default to the courts. Unfortunately, the courts have been hampered in this task by, among other things, the existence of appeals to the Supreme Court of Canada. This is not because of any unwillingness by the Supreme Court to engage in judicial law reform; it is because so few cases are appealed to the Supreme Court that it frequently takes a long time for a particular problem to receive the court's attention. In the meantime, the matter is likely to have been considered by more than one of the ten provincial judicial hierarchies, each of which may have solved the problem differently. The result is often a lengthy period of uncertainty about the state of the law.

A good illustration of this is provided by the way Canadian courts have handled the question of whether an award of damages for lost earnings should be based on the plaintiff's gross earnings, or only the net earnings, after deducting the amount of income tax the plaintiff would otherwise have paid. The traditional view was that income tax is *res inter alios acta*, and should not be deducted from damage awards.[9] However, the House of Lords decreed in *British Transport Commission* v. *Gourley*,[10] in 1956, that income tax should be deducted. In Canada, before the effect of the *Gourley*

[8] *Loc. cit.*, footnote 1, p. 47.
[9] *E.g.: Bowers* v. *Hollinger*, [1946] O.R. 526.
[10] [1956] A.C. 185.

case was considered by the Supreme Court, it received the attention of courts in five provinces, where it met with three different responses. In Newfoundland, Alberta and Saskatchewan, it was followed.[11] In Manitoba, it was rejected.[12] In Ontario, it was distinguished, on the ground that it is not clear in Canada that an award of damages for lost wages is not itself taxable.[13] In the ten years that passed before the Supreme Court finally rejected the *Gourley* decision,[14] no Canadian lawyer was able to advise a client confidently about the effect of income tax on damage awards.

If Professor Abel's suggestion were accepted, problems of this kind would become less common. If the provincial courts of appeal had the final word, necessary changes in law could be made (and unacceptable changes rejected) quickly in a given province, without years of uncertainty awaiting the pleasure of the Supreme Court of Canada.

In spite of these considerable advantages, however, I believe that it would be unwise to adopt Professor Abel's proposal. The attendant disadvantages would, I submit, heavily overbalance the benefits.

As Professor Abel acknowledges, the quality of the judges of the Supreme Court of Canada "has been over the years superior to that of any other court in Canada".[15] The loss to many important areas of law of the talents of the country's most able judges would be a very serious detriment. Granting greater responsibility to the provincial courts might produce better judges, and it might also encourage them to take account of the social facts that Professor Abel thinks are so important; but this is far from being a certainty.

Placing important aspects of the administration of justice exclusively in provincial hands would involve certain risks. There would always be the danger (though experience shows it to be a slight one) that bonds of friendship between trial judges and members of the provincial appeal courts might prevent the latter from exercising their functions with complete impartiality. There would also be a possibility that if a certain locality entertained

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[11] *Power* v. *Stoyles* (1958), 17 D.L.R. (2d) 239 (Nfld. S.C.); *Widrig* v *Strazer* (1963), 41 W.W.R. 257 (Alta., S.C. App. Div.); *Smith* v. *C.P.R* (1964), 41 D.L.R. (2d) 249 (Sask. Q.B.).

[12] *Soltys* v. *Middup* (1963), 44 W.W.R. 552 (Q.B.).

[13] *Jennings* v. *Cronsberry* (1965), 50 D.L.R. (2d) 385 (C.A.).

[14] *The Queen* v. *Jennings and Cronsberry* (1966), 57 D.L.R. (2d) 644. The situation prior to the Supreme Court decision is described in Gordon Bale, *British Transport Commission* v. *Gourley*, Reconsidered (1966), 44 Can. Bar Rev. 66, esp. at p. 97 *et seq.*

[15] *Loc. cit.*, footnote 1, at p. 45.

strong prejudices against a particular litigant or class of litigant, it would be difficult to obtain a fair hearing in the provincial courts. In such unusual, but not inconceivable, circumstances, the lack of an appeal to a tribunal not likely to be influenced by local biases would be unfortunate.

A "federal" judicial system could be very complicated, especially if the American model were followed. Formulation of rules to determine whether particular disputes fall within the jurisdiction of provincial courts would be difficult. Would they, for example, have the final word in cases involving *both* federal and provincial law? What if the plaintiff and defendant reside in different provinces? Would every case involving a federally incorporated company be beyond provincial jurisdiction? Scores of similar questions come to mind.

The problem would become much more complex if we were to establish new federal courts below the Supreme Court level. Professor Abel's article does not indicate whether he would welcome a system of federal trial courts and intermediate appeal courts, like that which exists in the United States, but such a change would seem to follow from his proposal. If provincial problems would be best dealt with by provincial courts which could give effect to local variables, would federal problems not be best dealt with by federal courts, which could provide a consistent approach to matters of national concern? If so, it would not make sense to restrict federal jurisdiction to the final appeal level; federal courts of first and second instance would be needed. However, as the American experience demonstrates, there are countless procedural difficulties involved in a dual system of courts. Dean Erwin N. Griswold, of the Harvard Law School described some of these problems in the 1964 Hamlyn Lectures, and commented:

> Undoubtedly our system is too complicated. . . .[16]
>
> If the American lawyer could only get outside the confines of his own system, in which he is so largely entrapped from the beginning of his studies of government and of law he would see how absurd it really is.[17]

The worst feature of Professor Abel's proposal is that it would, in my opinion, result in excessive discrepancies among the various provincial legal systems. Canada's population is becoming increasingly mobile, and its economy increasingly integrated. Every inconsistency in the laws of the various provinces creates incon-

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[16] Law and Lawyers in the United States (1964), p. 102.
[17] *Ibid.*, p. 79.

venience. Such differences should, therefore, be tolerated only where there appear to be compelling reasons for them. I agree that the preservation of regional cultural characteristics would be a compelling reason, and I acknowledge that provincial legislatures must therefore have the right to make such changes in provincial laws as appear necessary for that purpose. In Quebec, where the legal system itself is one of the major cultural differences sought to be preserved, I believe that restricting appeals to the Supreme Court would also be justified. But in the common law provinces, where such a change would result in many more interprovincial legal discrepancies than could be attributed to cultural differences, I submit that Professor Abel's proposal would be harmful.

It appears, therefore, that although it might be logical to extend the principle of federalism from the legislative and administrative spheres of government to the judiciary, it would not, on balance, be wise.

DALE GIBSON*

* * *

DELEGATION AND DISCRETIONARY POWERS—BILL S-9—AN ACT TO AMEND THE INTERPRETATION ACT.[1]—In the mammoth government departments of today, there is constant danger that the minister *and Parliament* will become the prisoner of *the appointed* officials *and their ever-increasing delegated discretion.*

A somewhat similar statement was made by Professor J. A. Corry in the Presidential Address delivered to a joint meeting of the Canadian Historical Association and the Canadian Political Science Association in June, 1955.[2] We have come a long way in the last eleven years!

The purpose of this comment is to draw attention to the ever-increasing delegation of authority by Parliament to the Cabinet, to administrative departments and Boards and individual officials. This delegation and the use of discretions may be necessary in the great expansion of our economy but leave our dedicated civil servants and other officials in the position of autocrats, whether or not they wish to be such. Lawyers in Canada should realize that this basic change has taken and is taking place and question the reason for the change, the way it is being done and obtain an

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[1] R.S.C., 1952, c. 128.

[2] The Prospects for the Rule of Law (1955), 21 Can. J. of Eco. and Pol. Sc. 405, at p. 412.

answer as to how such discretionary power can be controlled by Parliament for the protection of the public.

To point out how Parliament might be further delegating its powers or altering and confusing the established law, let us examine a few sections of Bill S-9 entitled An Act to revise and consolidate The Interpretation Act and Amendments thereto, which read as follows:

2. (1) In this Act,
(a) "Act" means an Act of the Parliament of Canada;
(b) "enact" includes to issue, make or establish;
(c) "enactment" means an Act or a regulation or any portion of an Act or regulation;
(d) "public officer" includes any person in the public service of Canada
(i) who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or
(ii) upon whom a duty is imposed by or under an enactment;
(e) "regulation" includes an order, regulation, order in council, order prescribing regulations, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, instrument, proclamation, by-law, resolution or other instrument issued, made or established
(i) in the execution of a power conferred by or under the authority of an Act, or
(ii) by or under the authority of the Governor in Council; and . . . .

3. (1) Every provision of this Act extends and applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

(2) The provisions of this Act apply to the interpretation of this Act.

(3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable thereto and not inconsistent with this Act.

11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

19. Where an Act requires a report or other document to be laid before Parliament and, in compliance with the Act, a particular report or document has been laid before Parliament at a session thereof, nothing in the Act shall be construed as requiring the same report or document to be laid before Parliament at any subsequent session thereof.

In the first Parliament after Confederation, The Interpretation Act was Chapter 1 of the Revised Statutes of Canada. It is suggested it still should be Chapter 1 as it was for so many years.

The Department of Justice has stated "The purposes of an

Interpretation Act are to establish uniform definitions and modes of expression, to eliminate repetition in the statutes and to facilitate the drafting and construction of statutes".[3] *It is maintained that the contents of Bill S-9 do much more than that.* Since Confederation there has not been a general revision of The Interpretation Act by Parliament until this Bill, which has been before Parliament for at least the last two sessions without being dealt with, was passed by the Senate on June 30th, 1966, with minor inconsequential amendments. At the time of preparing this comment, Bill S-9 still has to go before the House of Commons. The final passing of this Bill with or without further amendments, will bring no votes, but its effect on the law of Canada without such amendment could be serious if there is any substance to the following interpretation thereof.

I believe that the House of Commons, the Canadian Bar Association and the public should be disturbed about some of the clauses in the proposed new Interpretation Act.

1. It is not known what the Government or those who drafted this Bill had in mind as to the possible use that could be made of these new clauses, but it is suggested their use could be abused and if so, could alter drastically the law of Canada—despite any present statement of a Minister or Deputy or explanatory notes to the contrary, as such statement is not permitted to be mentioned or used in the courts of Canada when any statute, including the Interpretation Act itself, is being used or interpreted. This is an ancient common law rule still followed in the courts of Canada. Perhaps it is outdated! It has been suggested it was instigated by Charles I of England when he did not want the courts or the public to know what was being said in the Parliament of those days.

It would be interesting to find out why these changes are deemed necessary and by whom they are requested. It is even suggested that no political party, no Bar Association, no court nor the public were demanding or in need of any such changes—so why are the changes being made?

2. It has become normal to accept a statute which is expressed in general terms to implement some general policy and to accept the power expressed therein to in turn delegate this power to make regulations. However, are we in Bill S-9, by any chance, passing a statute which will allow law to be made not by statute but by an "enactment" which is defined as a regulation and this term "regulation" in turn is defined as *including* an order, regulation, order

[3] Explanatory Note to Bill S-9.

in council, order prescribing regulations, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, instrument, proclamation, by-law, resolution or other instrument issued, made or established *by* the Governor in Council.

On plain reading of section 2 of Bill S-9, this means the Governor in Council (that is the Cabinet) can pass any such enactment which includes the extensive definition of regulation without the authority of a statute of Parliament.

However, does it only mean that the Governor in Council (that is the Cabinet) can pass such regulation as defined without the authority of a statute of Parliament if the Governor in Council has a prerogative right to do so.

If declaratory new law is to be put into the Interpretation Act in this vague manner, then one of the great needs in Canada is to have all prerogative rights itemized and spelt out and what better place than in the Interpretation Act. No one seems to know what all these prerogative rights are. The Government could very well claim it had such rights and nobody might know the difference. Everybody should know or have available a source of record of all these prerogative rights still in existence. For instance, who knows about the prerogative "Writ of Extent" which we have in Canada—long since abolished in England!

3. The first question then arises—why is this new definition of "enactment" brought into the Interpretation Act?

4. The second question is—why are the following words in the present Interpretation Act "*in execution of any powers delegated by statute*" not included after the words "*by* or under the authority of the Governor in Council"? It must be to allow for these unknown and perhaps unconstitutional prerogative rights which the Governor in Council claims to have from time to time, based only, possibly, on the history of past parliamentary practice or error as they are expounded from time to time in *Hansard.*

If the draftsmen of Bill S-9 are wrong and I am right, how foolish to squabble over the mere addition to section 2(1)(e)(ii) of Bill S-9 of the words "delegated by statute or under a Prerogative Right" or similar words.

If the draftsmen of Bill S-9 are right and I am wrong, what difference would the addition of the words "delegated by statute or under a Prerogative Right" make, as the draftsmen, must maintain this is what they intended it to mean (or was it?), even if it is not too clear.

5. If Bill S-9 is passed without the simple amendment as set

out in 4 above, it might be necessary to go outside the Interpretation Act and look at section 2(a) of the Regulations Act[4] which reads:

> 2(a) Regulation means a rule, order, regulation, by-law or proclamation (1) made in the exercise of a legislative power *conferred by or under an Act of Parliament* by the Governor in Council, the Treasury Board, a Minister of the Crown . . . .

It is to be noted that it is a rule of law that a definition in any specific Act like the Regulations Act takes precedence over the definition of the general Interpretation Act for the purposes only of the special Act.

The question then arises—which Act applies? The General Interpretation Act (Bill S-9) or the Regulations Act, which latter is not being amended?

Surely there is some conflict here, especially as Bill S-9 in section 2(1)(e) states that a regulation includes an order or regulation, rule, rule of court, form, tariff of costs or fees, and so on, *whereas* the Regulations Act in section 2(a)(iii) *specifically excludes* a rule, order or regulation governing the practice or procedure in any proceedings before a judicial tribunal.

6. However much there may appear to be conflict and confusion between the Regulations Act and Bill S-9 as set out in 5 above—the provisions of Bill S-9 would appear to govern, as subsection (2) of section 3 of the Bill states "the provisions of this Act apply to the interpretation of this Act". Thus the Regulations Act can have no effect on what is said to the contrary in Bill S-9. *If this is so, what happens to the conflicting statute law in the Regulations Act?* Which Act would the courts use?

7. The new provisions of the first three sections of Bill S-9 seem unnecessary without some further explanation of the necessity of these changes being given to Parliament or the public—for instance, the complicated redrafting of section 3(1) in Bill S-9.[5]

This section might make it possible to impose retroactive prerogative enactments without authority from Parliament. If this is true, it would be changing the law by the Interpretation Act *to abolish* the rule that no retroactive force can be given to any law or regulation made by order in council unless Parliament has so said and approved of same in an Act of Parliament.

8. The explanatory notes on clause 2(1) of Bill S-9 state the definitions of "Act", "enactment" and "regulation" are new. This explanatory note, which cannot be used in court to interpret the

[4] R.S.C., 1952, c. 235, italics mine.

[5] See *supra*.

Interpretation Act or any other Act, goes on to say: "Their purpose is to apply the whole of the Act to all orders in council and to the various instruments made under the authority of statutes."

This statement seems vague and perhaps misleading. Do the words "all orders in council" mean orders in council made under prerogative rights? And do the qualifying words "made under the authority of statutes" only refer to the various instruments or does it refer also to all orders in council? It does not matter as the explanatory words, as stated, cannot be used in the courts but they could mislead Parliament.

The whole point is why are these words "made under the authority of statutes" used in the explanatory notes and not put into the appropriate place in the actual section 2 of Bill S-9?

9. It might appear that, under many unknown prerogative rights of the Governor in Council, the Governor in Council without specific statutory authority from Parliament can issue, make or establish orders in council, regulations, proclamations, and so on, about which rights Parliament or the people of Canada know nothing. What are all these prerogative rights? Parliament or the People of Canada should know! These prerogative rights should be spelt out! Will any proclamation made by the Governor in Council become an enactment?

It is known that it is the custom for the Governor in Council to authorize some officials to go to international or Commonwealth Conferences and to sign the agreements or treaties entered into on behalf of the Government of Canada.

To date, a treaty or agreement when signed on behalf of the Canadian Government may be morally binding on the Government; but such treaty or agreement so executed under order in council is not law in Canada and cannot *yet* be used to affect any Canadian or any business authorized to be done in Canada until an Act of Parliament is passed approving it, or some part thereof, or the intent of such unknown treaty or agreement is otherwise passed by an Act of Parliament. At any rate, such treaty or agreement cannot be used in the courts of Canada until Parliament has by statute adopted its terms or intent or some parts thereof. Even in past years Parliament has never even seen some of these treaties or agreements; nevertheless, without such knowledge, Parliament has passed enabling legislation or the Government has gradually brought forward legislation which, at least in part, implements these unknown treaties or agreements signed under the prerogative right of the Governor in Council.

The point suggested or objected to is that under the terms of Bill S-9, a treaty or agreement signed under the authority of an order in council made under the prerogative right of the Governor in Council, is a regulation. A regulation in turn is defined as an enactment and enactment itself is defined as an Act of Parliament or a regulation. In other words, such a so-defined regulation might become an enactment on the same footing as an Act of Parliament.

This interpretation may sound rather far-fetched to some, but if there is any doubt about this analysis, why not just repeat what the "*Explanatory Notes*" say and add the words "made under the authority of statutes" to the end of section 2(1)(e)(ii)—and *remove all doubt*, so that the sub-clause will now read:

> 2.(1)(e)(ii)—by or under the authority of the Governor in Council *made under the authority of statutes*; . . .

10. As previously stated, when the courts come to interpret any statute, including the Interpretation Act itself, they cannot even now be told or read what was said to Parliament to justify the words or expressions used to attain *the objects* which were apparently intended by Parliament.

The Courts must also follow the further instructions or law laid down by Parliament in the new proposed Clause 11 of Bill S-9 which reads:

> Every *enactment* shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best insures the attainment of its objects.

Remember! under the suggested new definitions "enactment" now means Regulation as well as Acts of Parliament.

How can the courts determine the objects intended by Parliament in any clause of any *regulation* if the courts are not told what Parliament was told when passing the Act under which the regulation should have been made. Furthermore, Parliament is not even given the opportunity to approve of enactments which are regulations. Sometimes regulations are made by the Governor in Council for objects never intended when an Act of Parliament was passed. This has happened! *But added to this*, we now find under Bill S-9 the Governor in Council, under some unknown prerogative rights, is to be authorized by Parliament to issue enactments, proclamations, and so on, under which regulations can in turn be made—none of which need to be approved by Parliament in the future and the whole might be made *retrocative by section 3 of Bill S-9*.

11. It is noted that the words "*the doing of anything that Parliament deems to be for the Public Good . . .*" are to be removed from

the present section 15 of the Interpretation Act.[6] While still operating under the present Interpretation Act, does Parliament now think the new amendments to the Interpretation Act (as set out in Bill S-9) are for "the public good"? If so, at the very least, the courts and the people (and businesses) of Canada should have available to them the statements made to Parliament, including explanatory notes on any Bill. This is the only way that the proposed section 11 of Bill S-9 could possibly be adhered to by anyone, so that every enactment shall be given such fair, large and liberal construction and interpretation as best insures *the attainment of its objects.*

Surely in this day and age, the old legal fiction or legal hurdle that the courts are not allowed to read, hear or consider what Parliament was told, should be altered or "done away with". The courts should have *the same evidence* that was given to the highest court in the land—namely Parliament—in order to attain the objects intended by Parliament, as they are instructed to do in section 11.

12. What does section 19 of the Bill mean? Where is the law or Act of Parliament as to what must be tabled? Will a treaty now become enforceable before the courts of Canada if only tabled under some instructions given in a prerogative order in council? Why is this parliamentary procedure item included in the Interpretation Act?

Section 19 of Bill S-9 seems to have nothing to do with the interpretation of statutes. What is it interpreting? It is not a definition. It is some sort of declaratory administrative law which somehow crept unnoticed into the Interpretation Act in 1952[7] and it is suggested that it might have something to do with making a treaty, signed under a prerogative order in council, binding on Canadians by simply tabling the same and having a resolution quickly passed by Parliament approving it. This "resolution" then becomes an enactment under the definition of a regulation in section 2(1)(e) of Bill S-9 and the terms of the treaty are binding on Canadians without an Act of Parliament. Even if this is denied by the Minister or some official, such denial has no effect on the interpretation of any wording before the courts. It is to be remembered the new word "enactment" *means—the action of enacting a law, an ordinance, a statute.*

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[6] *Supra*, footnote 1. [7] R.S.C., 1952, c. 327.

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