COMMENTS
COMMENTAIRES

TORTS—STATUTES—TORT LIABILITY FOR BREACH OF AUTOMOBILE LIGHTING LEGISLATION.—Throughout Canada complex and detailed legislation regulates the flow of automobile traffic, the licensing of vehicles, and drivers, the type of equipment requiredand other such matters. As one might expect, nearly three million summary convictions are recorded each year for violations of these statutes and almost one million of them arise out of moving offences.[1] Fortunately, all of these violations do not result in collision, nor do all of the collisions produce law suits; nevertheless, a substantial number of automobile accident actions are concerned with situations where there has been a breach of some criminal or quasi-criminal legislation. In these circumstances tort courts are faced with difficult doctrinal problems in their treatment of the fact of a criminal violation.[2]

The judiciary encountered no apparent difficulty in holding that evidence of a prior criminal *conviction* for the infraction of a statute was inadmissible in a later civil case;[3] however, the courts did not go so far as to prohibit the introduction of all evidence of a *breach* of one of these statutes. Both the circumstances under

[1] The Canada Year Book, 1963-64, p. 396, indicates that in 1961, there were 2,779,000 summary convictions, 1,822,405 of which were parking violations.

[2] See Alexander, Legislation and the Standard of Care in Negligence (1964), 42 Can. Bar Rev. 243; Thayer, Public Wrong and Private Action (1914), 27 Harv. L. Rev. 317; Morris, The Role of Criminal Statutes in Negligence Actions (1949), 49 Col. L. Rev. 21; Lowndes, Civil Liability Created by Criminal Legislation (1932), 16 Minn. L. Rev. 361; Gregory, Breach of Criminal Licensing Statutes in Civil Litigation (1951), 36 Cornell L. Q. 622; Williams, The Effect of Penal Legislation in The Law of Tort (1960), 23 Mod. L. Rev. 233; Fricke, The Juridical Nature of The Action Upon the Statute (1960), 76 L. Q. Rev. 240; James, Statutory Standards and Negligence in Accident Cases (1951), 11 La. L. Rev. 95; Foust, The Use of Criminal Law as a Standard of Civil Responsibility in Indiana (1959), 35 Ind. L. J. 45.

[3] *Hollington* v. *Hewthorne & Co. Ltd*, [1943] K.B. 587, 2 All E.R. 35 (C.A.), (Careless driving conviction inadmissible in negligence case). See comment by C. A. Wright (1943), 21 Can. Bar Rev. 653; *Jalaka* v. *Thompson*, [1959] O.W.N. 324 (Master S.C.O.), (Assault case). But *contra* where defendant pleaded guilty, *Ferris* v. *Monaghan* (1956), 4 D.L.R. (2d) 539 (N.B.C.A.).

which this evidence will be admitted and the procedural effect that it will be accorded have been left unresolved. Canadian judges seem to have held that they would rely on criminal legislation if necessary, but that they would not necessarily do so. In other words, manifesting their characteristic ambivalence, our courts will sometimes consider evidence of a breach of criminal legislation and sometimes they will not.[4]

In deciding what, if any, effect to give criminal statutes, Canadian courts universally proclaim that they are only heeding the intention of the enacting legislature,[5] despite the fact that numerous authors[6] and some judges[7] have exposed the fallacy of this hypocritical quest. Nevertheless, because of the inexplicable reluctance of Canadian judges to discuss policy issues candidly, the true reasons for utilizing penal legislation are normally withheld from our view.

Despite this cover-up, under careful scrutiny one may dimly perceive that the civil courts in these cases are, in reality, advancing the policies enshrined in the criminal law;[8] through the imposition of tort liability, they are encouraging stricter compliance with penal legislation and affording better protection to society.

On a few rare occasions judicial statements have disclosed this, as when Justice Idington declared that to permit a breach of statute to go unrecompensed makes a "hollow mockery" of the legislation[9] and when Justice Rand protested[10] that if an infringement did "not call down accountability, the regulation might almost as well be abolished". It may be that improved enforcement of automobile legislation may be encouraged by dangling the carrot of a tort judgment before would-be informers.[11] The profit motive may operate here as it does elsewhere in society to spur activity that might otherwise not have been undertaken. Justice Adamson envisioned a kind of partnership between penal sanctions and tort

[4] See Alexander, *loc. cit.*, footnote 2.

[5] See, for example, *Phillips* v. *Britania Hygienic Laundry Co. Ltd.* [1923] 2 K.B. 832 C.A. (Atkin L.J.).

[6] Malone, Contrasting Images of Torts—The Judicial Personality of Justice Traynor (1961), 13 Stanf. L. Rev. 779; and see authors cited in footnote 2; A. Linden, Tort Liability for Criminal Nonfeasance (1966), 44 Can. Bar Rev. 25.

[7] Justice Traynor in *Clinkscales* v. *Carver* (1943), 22 Cal. 2d 72, 136 P. 2d 77; Justice Dixon in *O'Connor* v. *Bray* (1937), 56 C.L.R. 464, at p. 478.

[8] Fleming, Law of Torts (3rd ed. 1965), p. 126 *et seq.*; Prosser, Handbook on the Law of Torts (3rd ed., 1964), p. 193; See also Taschereau J., dissenting, in *Fuller* v. *Nickel*, [1949] S.C.R. 601, at p. 612.

[9] *Fralick* v. *Grand Trunk Railway Company* (1910), 43 S.C.R. 494, at p. 510.

[10] *Brooks* v. *Ward*, [1956] S.C.R. 683, at p. 687 (Justice Rand dissented in part in the decision). See also *Bruce* v. *McIntyre*, [1955] S.C.R. 251, at p. 254.

[11] Fricke, *loc. cit.*, footnote 2.

liability in the enforcement of automobile regulations when he stated that:[12] "Unless judges and juries in both criminal and civil cases lay more stress on the duty of the motorists and the danger to themselves and others by the breach of those regulations, and strictly enforce their observance in the interests of public safety, serious accidents and loss of life will continue." Thus, tort courts are, to some extent at least, reasoning by analogy to penal legislation and are applying the "indirect pressure of civil liability . . . to compel conformance to the legislative rule".[13]

Another policy rationale favouring the use of criminal statutes in tort cases is that it simplifies the administration[14] of tort law by particularizing the "featureless generality" of jury verdicts.[15] In their fearsome task of crystallizing the vague reasonable care standard, the judiciary welcomes the aid of detailed statutory commands and relies upon them to determine what is reasonable in the circumstances.[16] Indeed, some have suggested that this was the main reason for this course of conduct[17] and others have admonished courts to rely upon legislation only in this way,[18] but the courts have refused to be thus confined, indicating that other policy factors have entered. Not only should a legislative standard be more precise, but it should incorporate superior expertise[19] since legislatures have at their disposal more extensive resources than do judges and juries. A statutory determination should be better informed than a spur-of-the-moment jury verdict.

Moreover, reliance upon legislative provisions assists the judiciary in controlling the jury,[20] a goal that appears to be gaining favour these days.[21] By instructing the jury to find for the plaintiff if there has been a breach of statute, the judge is able to guide the jury more effectively than if his charge merely tells the jury to decide if there has been unreasonable conduct. Even though the judiciary may be abdicating some of its own authority in this process, the legislative branch of government, the democratic one,

[12] *Voth* v. *Friesen* (1955), 15 W.W.R. (N.S.) 625, at p. 628 (Man. C.A.).

[13] Landis, Statutes and the Sources of Law (1965), 2 Harv. J. Leg. 7, at p. 14, reprinted from Harvard Legal Essays (1934).

[14] Foust, *loc. cit.*, footnote 2.

[15] Holmes, The Common Law (1881), p. 111.

[16] Thayer, *loc. cit.*, footnote 2.

[17] Foust, *loc. cit.*, *ibid.*

[18] Thayer, Gregory and Williams, *loc. cit.*, *ibid.* See also Fleming, *op. cit.*, footnote 8, p. 130.

[19] Fleming, *op. cit.*, *ibid.*, p. 135; Morris, *loc. cit.*, footnote 2, at p. 48.

[20] Fleming, *ibid.*, p. 135.

[21] The use of the jury has been almost eclipsed recently in England, see Denning M. R. in *Ward* v. *James*, [1965] 1 All E.R. 563 (C.A.), Full Court Special Hearing; See also *Sims* v. *William Howard*, [1964] 2 W.L.R. 794 (C.A.), noted in (1965), 78 Harv. L. Rev. 676.

expands its influence accordingly, which is desirable.[22] Some theorists have contended that this device may be used to thwart the improper refusal of juries to invoke the defence of contributory negligence to deprive a negligent plaintiff of tort recovery in accordance with the law.[23] In Canada, however, this result would not follow since comparative negligence legislation permits a reduction, rather than a deprivation, of damages where a plaintiff contributes to his own injury.[24] In point of fact, the incidence of recovery is probably enlarged in this way since most Canadian courts do not permit a set-off in these cases.[25]

Lastly, the use of penal legislation moves tort law closer to strict liability[26] by supplying an additional arrow for the plaintiff's bow. Not only can he plead common law negligence, but he may contend that a breach of statute, which may be negligent or not, caused his injury. This will normally not weaken the plaintiff's case since, if he fails to prove the violation, he can always revert to an ordinary negligence theory. In addition, the adoption of penal standards in negligence cases may encourage prompter settlement of claims. Uncertainty surrounding law or fact impedes negotiation and generates litigation;[26A] the diminution of this uncertainty with more precise standards facilitates the settlement process, which normally redounds to the claimants' favour.

Not all the policy arguments point toward reliance upon penal legislation in civil cases; some militate against their use. It is contended that courts ought not to enter where legislators have failed to tread.[27] If the legislature did not impose civil liability expressly, as they could and have done,[28] it is improper for a court to do so. It may be that some criminal regulations are hurriedly passed, ill-considered, badly-outdated, extremely harsh, or politically motivated.[29] This argument is particularly apt when one considers the dozens of inferior legislative bodies disgorging regulations, orders-in-council, ordinances, by-laws, rulings and the like by the thousands. The purity of the common law ought to be protected from

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[22] Malone, *loc. cit.*, footnote 6, at p. 783.
[23] Harper & James, The Law of Torts (1956), p. 998.
[24] The Negligence Act, R.S.O., 1960, c. 261, s. 4.
[25] See *Wells* v. *Russell*, [1962] O.W.N. 521 (C.A.); *Earl* v. *Morris*, [1950] N.Z.L.R. 33; *cf. Wilkins* v. *Weyer*, [1946] 3 W.W.R. 418 (Sask. C.A.).
[26] Fleming, *op. cit.*, footnote 8, p. 308.
[26A] A. Linden, The Processing of Automobile Claims (1967), 34 Ins. Couns. J. 50, at p. 53.
[27] Thayer, *loc. cit.*, footnote 2, at p. 290.
[28] See, for example, s. 105(1) of the Highway Traffic Act, R.S.O., 1960, c. 172, as am.
[29] Morris, *loc. cit.*, footnote 2, at p. 23.

pollution by these frequently uncommon enactments. This argument, however, assumes that once a court relies upon a penal provision it will be compelled to follow every relevant criminal statute in every tort case. This just is not so. The court is always free to choose when it will accept a statutory standard and when it will refuse to do so.[30] Another policy reason fettering judicial acceptance of legislative provisions is the desire to restrain the undue spread of tort liability.[31] Implicit in this attitude is the respect for the idea of no liability without fault. Unless a defendant is to blame for an accident, he should not have to respond in damages, whether or not his conduct violated a statute. These are the contrary policy arguments.

All of these policy objectives must be balanced by the courts in deciding whether they will rely on a statute. Yet, once they do opt for the legislation, the problem does not evaporate, there still remains for determination the procedural effect to be accorded the fact of the breach, which may be the most difficult task of all. Judicial discussion of this issue has also been marked by indecision and lack of candour. Sometimes it is said that there is an action for breach of the statute,[32] or the violation is negligence *per se*,[33] or *prima facie* evidence of negligence,[34] or just some evidence of negligence[35] or it may even raise a presumption of negligence.[36] There has been no consistency in the treatment of these statutes in Canada; one day the infraction of a certain statute may be treated as negligence *per se* and another day it may be considered only as *prima facie* evidence of negligence.[37] Nor has there been any explanation of the reasons for this disparate treatment. The English courts tend to take an "all-or-nothing-at-all" approach to statutes; either they declare that the legislature intended to confer a cause of action for a breach of statute[38] or they hold that, since only a public duty was created, there was no intention to impose civil

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[30] Malone, *loc. cit.*, footnote 6, at p. 785.

[31] Fleming, *op. cit.*, footnote 8, p. 135, and p. 308; See also *Maharsky* v. *C.P.R.* (1904), 15 Man. R. 53, at p. 80 (C.A.); *Maitland* v. *Raisbeck*, [1944] 1 K.B. 689, 2 All E.R. 272 (C.A.), where the court expressed a reluctance to make the driver an insurer of defects in a motor vehicle.

[32] As in *Ritchie et al* v. *Ptaff*, [1954] O.W.N. 865 (C.A.).

[33] See *Lochgelly Iron & Coal Co. Ltd.*, v. *M'Mullan*, [1934] A.C. 1.

[34] *MacInnis* v. *Bolduc* (1960), 45 M.P.R. 21, 24 D.L.R. 661 (N.S. S. C.).

[35] See Prosser, *op. cit.*, footnote 8, p. 202.

[36] *Satterlee* v. *Orange Glenn School District* (1947), 29 Cal. 2d 581, 177 P. 2d 279.

[37] Compare *McCannell* v. *McLean*, [1937] 2 D.L.R. 639 (S.C.C.), "*per se* evidence of negligence" and *Keays* v. *Parks* (1950), 27 M.P.R. 296, at p. 303.

[38] *Lochgelly Iron & Coal Co. Ltd.* v. *McMullan*, *supra*, footnote 33.

responsibility.[39] In the former case there is no room for excused violations, while in the latter, evidence of excuse becomes superfluous.

The American courts have developed a rich array of varying weights that can be given to statutes.[40] The most common treatment employed by American courts is that evidence of a violation amounts to negligence *per se*, although some courts hold that it gives rise to a presumption of negligence, *prima facie* evidence of negligence, or even some evidence of negligence. In most cases they permit violations to be excused in proper circumstances.[41]

Canadian courts appear to oscillate between the English and American positions without even recognizing this fact. Part of the problem is that Canadian judges do not admit that it is the court, not the legislature, that decides when a penal statute will be used in a civil case. Consequently, they do not realize that some applicable statutes may be relied upon and others rejected for proper reasons. Furthermore, once a court invokes a statute, it may give it great weight or only slight weight for proper reasons. And evidence of excuse may be admitted or not for proper reasons. This failure to use discrimination and candour has produced an almost impenetrable fog in the Canadian cases.

Because of the confusion that abounds in the cases, the recent decision of the Supreme Court of Canada in *Sterling Trusts Corporation* v. *Postma and Little*[42] merits consideration. The plaintiff Brown was severely injured and his wife killed when their vehicle, which was proceeding reasonably on its own side of the highway, was struck head-on by that of Postma, one of the defendants. Postma alleged that he had been forced to pull his vehicle over to his left in order to avoid a collision with the vehicle of the other defendants, the Littles, which was proceeding in the same direction as he was. Postma claimed that the Littles' vehicle, *inter alia*, had no rear lamps lit in contravention of the Ontario Highway Traffic Act. The trial judge held both defendants liable, Postma for two-thirds of the damages and the Littles for one-third. The Littles appealed successfully to the Court of Appeal of Ontario but the judgment against Postma remained undisturbed. The Brown's appeal against the Littles to the Supreme Court of Canada was allowed in a three-two decision and the case was sent back for a new trial to determine whether the Littles' rear lights were illum-

[39] *Phillips* v. *Britania Hygienic Laundry Co. Ltd.*, *supra*, footnote 5.
[40] See Prosser, *op. cit.*, footnote 8, p. 202 *et seq.*
[41] *Ibid.*, at p. 198 *et seq.*
[42] [1965] S.C.R. 324, 48 D.L.R. (2d) 425 (S.C.C.).

inated, and if not, whether this was a cause of the accident and for a re-assessment of the damages.

Justice Cartwright, who was among the majority and with whom Justice Hall agreed, declared that once it was proved that the tail-light was unlit and that this was an "effective cause" of the accident the defendants were "*prima facie* liable"[43] for the damages suffered. He reasoned that the purpose of the legislation was "the protection of other users of the highway, particularly the drivers of overtaking vehicles. Its primary purpose is to prevent the occurence of such a disaster as that out of which this case arises".[44] His Lordship avoided the theoretical clash over whether this was a species of negligence action or whether it was a separate cause of action on a statute.[45]

Justice Cartwright also felt that it was unnecessary to decide whether the duty was an absolute one and under what circumstances, if any, a defendant could absolve himself of liability when he has violated a statute. He did, however, give notice that, in his view, it would be insufficient for the defendant to show that he did not intend nor know of the breach because, if this would suffice to exculpate him, "the protection which it is the purpose of the statute to afford would in most cases prove illusory."[46]

Justice Cartwright then purported to resolve the apparent conflict in two cases decided by the Ontario Court of Appeal in the same year. In *Falsetto* v. *Brown*[47] the Court of Appeal refused to rely on evidence of a statutory violation while in *Irvine* v. *Metropolitan Transport Co., Ltd*[48] it did invoke the legislative breach in imposing liability. Justice Cartwright said that *Irvine* "is to be preferred" but he did not go so far as to reverse the *Falsetto* case, preferring to distinguish it on the basis of causation.[49] The strange thing is, however, that *Irvine* did not hold that a statutory violation amounted to *prima facie* negligence, but rather held that the statute created a cause of action.[50]

Justice Spence, who was also among the majority, echoed the word formula used by Justice Cartwright when he stated[51] that "if the tail-light were unlit and such unlit condition was an effective

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[43] *Ibid.*, at p. 330 (S.C.R.).
[44] *Ibid.*, at p. 329 (S.C.R.).
[45] *Ibid.*, at p. 329 (S.C.R.), he discussed the *Upson* case.
[46] *Ibid.*, at p. 331 (S.C.R.).
[47] [1933] O.R. 645 (C.A.).
[48] [1933] O.R. 823 (C.A.).
[49] He accepted the treatment of the *Falsetto* case made by Masten J.A. in *Irvine* where he said that in *Falsetto* the breach did not *cause* the accident.
[50] See Masten J.A. in *Irvine, supra*, footnote 48. There was also a holding of common law negligence in the case.
[51] See *Sterling Trusts Corporation, supra*, footnote 42, at p. 348 (S.C.R.).

cause of the collision, there is *prima facie* liability upon the defendants . . .". However, there was less accord over excused violations; Justice Spence declared[52] that he was "not prepared to say that that liability is an absolute one and that the said defendants would be unable to discharge it by showing that such condition occurred without negligence for which they are in law responsible . . .".

Justice Ritchie and Justice Judson, dissenting, felt that since the plaintiff failed to discharge the onus of proof resting upon him with regard to the evidence of improper lighting, his action must fail for lack of proof.[53] Although they said that it was unnecessary to decide the other points, if it were necessary, they would accept the analysis of Justice Cartwright.[54]

The Supreme Court of Canada has supplied the nation with a formula to use in these cases, but it has not succeeded in solving the problem for all time. Although *Falsetto* may not be dead, it is certainly in its last coma. In future, breach of vehicular lighting legislation will undoubtedly be used in negligence cases to offer *prima facie* evidence of negligence across Canada, but the meaning of this phrase is shadowy. It is clear that it is not an absolute duty; what remains unclear is the nature of the excuses the court will accept to relieve the violator from liability and upon whom the onus of proof will rest. Justice Cartwright put very little flesh on the bones when he suggested that mere evidence of lack of intent or knowledge would not exculpate the defendant, and Justice Spence did not help much by withholding comment on whether evidence of no negligence would spare the defendant. Implicit in both their reasons, however, was the notion that it was the violator of the legislation that had the burden of convincing the court that he had a valid excuse. The only policy discussion in the case related to affording better protection for society by more diligent enforcement of highway legislation; the other relevant policy issues were ignored by the court, yet they need airing. Lastly, there was no hint of whether the Supreme Court would follow a consistent line with all other statutes, or any other legislation, or whether this decision would be limited to lighting regulations.

One of the major difficulties with these cases may very well be that the courts seem to feel compelled to treat breaches of all legislation in a consistent fashion. This need not be the case. It might be preferable on some occasions to ignore a breach of statute, on

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[52] *Ibid.*, at p. 348 (S.C.R.).
[53] *Ibid.*, at p. 341 (S.C.R.).
[54] *Ibid.*, at p. 341 (S.C.R.).

other occasions to impose liability strictly and on still other occasions to permit certain excuses to absolve the defendant. However, it is not the varying intentions of the legislatures that dictate how the statute is to be treated; rather it is the courts' assessment of the importance of the policies embodied in these statutes that produces these different results. Nowhere in the Supreme Court decision, however, is this fact recognized.

An attempt will now be made to analyze the Canadian cases that involved the breach of lighting regulations to see if any pattern emerges. An attempt will be made to portray the present posture of the law, how it arrived there, and to prophesy the road it will travel in the future.

Our task would be easier if there were express terms in legislation dealing with civil liability, but unfortunately these occasions are extremely rare. One earlier version of the Ontario Highway Traffic Act was interpreted in such a way that any breach thereof imposed civil liability upon the violator.[55] Since the statute read that an owner "shall be responsible for any breach of this act", the Supreme Court of Canada in *Hall* v. *Guelph Toronto Express*[56] felt justified in so holding. The legislation was amended soon thereafter to state that the owner would "incur the penalties" provided, which event was used by the Ontario Court of Appeal to aid it in distinguishing the *Hall* decision,[57] although some other provinces continued to apply it.[58] In the vast majority of penal statutes there appear no express provisions on civil liability. When tort lawyers search the enactments for clues, they rarely discover any. In the light of this sphinx-like response, one might have thought that the courts would ignore these statutes in civil cases, since one might fairly say that the legislators evinced no intention that their product be used by tort courts.[59] Nevertheless, judges have relied on penal legislation in the past and will continue to do so in the future in certain limited circumstances.

First, in order for a tort court to rely upon a criminal statute in imposing civil liability, there must be conduct that violates the

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[55] *Hall* v. *Toronto Guelph Express*, [1929] 1 D.L.R. 375, dealing with s. 41(1) of the 1923 statute.

[56] *Ibid.*

[57] *Falsetto* v. *Brown*, *supra*, footnote 47, relying on 19 Geo. V, c. 69, s. 9, assented to March 28th, 1929.

[58] *Connell* v. *Olson*, [1933] 1 W.W.R. 654 (Man. C.A.); *Western Canada Greyhound* v. *Trans.-Canada Auto Transport* (1952), 6 W.W.R. (N.S.) 695 (Alta S.C.).

[59] See Lowndes and Thayer, *loc. cit.*, footnote 2, and generally see MacCallum, Legislative Intent (1966), 75 Yale L.J. 754.

provision in question.[60] Where there is no violation, the statute will not normally[61] be used in affixing civil liability, but liability may still be imposed for negligence at common law.[62] Section 33 of the Ontario Highway Traffic Act[63] stipulates that "at any time from one-half hour after sunset to one-half hour before sunrise, and any other time when, due to insufficient light or unfavourable atmospheric conditions . . . every motor vehicle shall carry three lighted lamps in a conspicuous position, one on each side of the front of the vehicle which shall display a white or amber light only, and one on the rear of the vehicle which shall display a red light only . . . and any lamp so used shall be clearly visible at a distance of at least 500 feet from the front or rear, as the case may be". The front lamps must produce "a driving light sufficient to render clearly discernible . . . any person or vehicle on the highway within a distance of 350 feet".[64] Certain regulations are set out with regard to clearance lamps on wide vehicles[65] and side marker lamps for long vehicles.[66] Small fines of five dollars and up are stipulated for any infraction.[67] This sort of legislation is mirrored across Canada and the United States.[68]

The person who is alleging that there has been a breach of a lighting requirement bears the onus of proving this fact[69] on the balance of probabilities since there is a presumption that people obey the law.[70] If the evidence discloses that the lights were constructed in accordance with the statute,[71] were actually lit[72] and were visible from the required distance,[73] the tort court will dismiss the claim, unless, of course, there is some other evidence of

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[60] *McKee* v. *Malenfant*, [1954] S.C.R. 651 (Vehicle not "parked" on highway as required by statute); *Mamczasz* v. *Bruens* (1964), 43 D.L.R. (2d) 707 (S.C.C.), (Act applied only to moving vehicles and here vehicle stationery); *McLeod* v. *Dockendorf* (1955), 36 M.P.R. 284 (P.E.I.), (Lights were in fact lit).

[61] On rare occasions legislation is relied upon as evidence of negligence although there has been no breach because of technical grounds, see *Littley & Brooks* v. *C.N.R.*, [1930] S.C.R. 416, 4 D.L.R. 1.

[62] *Kilgollan* v. *William Cooke & Co. Ltd.*, [1956] 2 All E.R. 294 (C.A.).

[63] *Supra*, footnote 28, as amended by S.O., 1965, c. 46, requiring two rear lights on new vehicles instead of only one.

[64] *Ibid.*, s. 33(3). [65] *Ibid.*, s. 33(6).

[66] *Ibid.*, s. 33(10). [67] *Ibid.*, s. 33(8) and (11).

[68] See, for example, the Motor-vehicle Act, R.S.B.C., 1960, c. 253 and regulations pursuant thereto (4.01-4.22) and California Vehicle Code (1959), § 24400 *et seq.*, § 24600 *et seq.*

[69] *Morrison* v. *Dunlap*, [1959] O.W.N. 164, 18 D.L.R. (2d) 393; *Kuhnle* v. *Ottawa Electric Railway*, [1946] 3 D.L.R. 681.

[70] *Kuhnle* v. *Ottawa Electric Railway*, *ibid.*, at p. 688.

[71] *Bolton* v. *Charkie* (1953), 8 W.W.R. (N.S.) 412 (Dist. Ct.).

[72] *McLeod* v. *Dockendorf*, *supra*, footnote 60; *Dawson* v. *Oberton* (1952), 6 W.W.R. (N.S.) 465 (Alta C.A.).

[73] *Gillies* v. *Lye* (1926), 58 O.L.R. 560.

negligence. Where the statute was directed at *moving* vehicles, a *stationary* vehicle was not in violation thereof[74] and, similarly, legislation aimed at vehicles parked on a highway was not breached when someone *stopped* momentarily to pick up something.[75] On one occasion there was held to be no legislative infraction because the statute did not govern the highway in question.[76] Moreover, no tort court would hold culpable any one who failed to have his headlights burning on a clear, sunny afternoon, or prior to sunset or after sunrise, unless, of course, the weather was foul. Although the courts have construed these statutes rather broadly,[77] there are limits beyond which they cannot fairly go. In one case a court did deny a motorcyclist recovery for not having on his headlight even though the statute did not apply to motorcycles, but it apparently believed that this may have been a *casus omissus*.[78]

Second, the conduct violating the lighting regulation must be the *cause* of the accident being complained of.[79] If the proscribed conduct did not contribute to the accident or if the accident would have transpired even if the statute had been obeyed, the court will not utilize the legislative standard. The onus of proving the causal connection between the offender's conduct and the injury lies upon the plaintiff as well.[80] The cases have not remained without conflict over the type of proof of causation necessary. Most judges believe that the mere proof of an infraction will not suffice; something more than that is required.[81] Evidence is needed that "but for" the conduct of the defendant this accident would not have occurred.[82] Other judges[83] are more prepared to invoke "common experience" and to assume that, if there had been no violation, the light would in all probability have been seen and the accident avoided.[84]

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[74] *Mamczasz* v. *Bruens*, *supra*, footnote 60.
[75] *McKee* v. *Malenfort*, *supra*, footnote 60.
[76] *Callihoo* v. *Bradbury*, [1939] 3 W.W.R. 344 (Alta C.A.).
[77] *Clark* v. *Hetherton*, [1930] 1 W.W.R. 165 (Sask. C.A.).
[78] *Maxwell* v. *Callbeck*, [1939] S.C.R. 440, at p. 444.
[79] *Currie* v. *Nilson* (1954), 13 W.W.R. (N.S.) 497.
[80] *Fuller* v. *Nickel*, *supra*, footnote 8, per Estey J., at p. 606; *Underwood* v. *Rayner Construction* (1953), 34 M.P.R. 229 (N.B.C.A.); *Peloski* v. *Park*, [1950] 2 W.W.R. 1179 (Sask. C.A.), (defendant under onus of disproof failed to show lack of light was cause).
[81] See Estey J. in *Fuller* v. *Nickel*, *ibid.*; Richards C.J. in *Underwood* v. *Rayner Construction*, *ibid.*; Laidlaw J.A. in *Grubbe* v. *Grubbe*, [1953] O.W.N. 626.
[82] This is the most common test of causal relationship, Fleming, *op. cit.*, footnote 8, p. 177.
[83] Roach J.A. in *Ritchie* v. *Ptaff*, *supra*, footnote 32; See also *Henley* v. *Cameron* (1948), 118 L.J.R. 989 (C.A.).
[84] See Taschereau, dissenting, in *Fuller* v. *Nickel*, *supra*, footnote 8.

Causation doctrine has been relied upon in a few cases to relieve a violator of legislation from civil responsibility. Where the person alleging that another person breached a statute has failed to keep a proper lookout himself, he was held to be the cause of the accident and not the offender.[85] So too, where someone stopped "for the purpose of relieving nature"[86] and left his vehicle with a brighter light burning than the required reflector, his breach was not the cause of the collision.[87] Moreover, where the accident occurred at a well-lighted intersection[88] or street[89] or where the offender's vehicle was actually seen[90] or should have been seen,[91] no civil liability flowed. Some of the older cases, decided prior to the passage of comparative negligence legislation, held that some accidents were caused solely by the persons complaining of a breach and frequently rested on ultimate negligence and last clear chance theories.[92] The more recent cases have wisely tended to apportion liability in these situations where both absence of lights and someone else's negligence contribute to collisions.[93] Nevertheless, anyone planning to rely on a violation of a lighting statute should lead evidence not only of a breach but of a causal connection between that breach and the accident and should be prepared to refute evidence that he alone caused the accident.

Third, the person relying on the statutory infraction must be among the class that the legislature sought to protect and must have been injured in the sort of accident the statute was designed to prevent.[94] Thus if a pedestrian walked into, or a low-flying aircraft flew into, the rear of an unlit automobile on a highway, the court might well deny liability to these claimants since they would not be among the group of persons that the legislation was supposed to benefit. Similarly, it is doubtful that someone injured in a head-on collision with a vehicle that had no tail-lights would recover since the section was aimed at reducing rear-end collisions

[85] *Valin* v. *Empey*, [1962] 1 W.W.R. 381 (Alta S.C.).

[86] *Schwartz et al* v. *Mytruk et al.*, [1949] 1 W.W.R. 342, aff'd. 2 W.W.R. 208 (Alta C.A.), per Shepherd J., at p. 343.

[87] *Ibid.*

[88] *Collins* v. *General Service Transport* (1927), 38 B.C.R. 512, 2 D.L.R. 353.

[89] *Peacock* v. *Stephens*, [1927] 3 W.W.R. 570 (Sask. C.A.).

[90] *Morrison* v. *Ferguson* (1930), 1 M.P.R. 81 (N.S.C.A.).

[91] *Holgate* v. *Canadian Tumbler* (1931), 40 O.W.N. 565; *Antoine* v. *Larocque*, [1954] O.W.N. 641 (H.C.).

[92] See, for example, *Peacock* v. *Stephens*, *supra*, footnote 89, and *Collins* v. *General Service Transport*, *supra*, footnote 88.

[93] See for example *Underwood* v. *Rayner Construction*, *supra*, footnote 80.

[94] See generally, Fleming, *op. cit.*, footnote 8, p. 133; Prosser, *op. cit.*, footnote 8, p. 193 *et seq.*

not head-on ones. In short, the normal limitation of proximateness applies here as it does elsewhere.

Whenever a claimant is able to prove that the defendant was in breach of a tail-light statute which proximately caused him injury, he is virtually assured of some tort recovery. This does not mean, however, that the court will always hold the defendant absolutely liable for a violation; true, in some cases statutory liability or negligence *per se* language is employed, but in others the courts speak of *prima facie* liability or they merely assume that the breach of statute is negligence without explaining or particularizing. There are apparently no tail-light cases where a court has held that proof of an infraction was merely evidence of negligence for the judge or jury to consider. In a large number of cases the person in breach of statute was held only partially to blame and a few violations were excused.

These variations in wording are by no means inconsequential; they reflect differences of some substance in the use made of legislative infractions, although occasionally they are produced by carelessness of judicial expression. As Fleming has said of *res ipsa loquitur*,[95] a statutory violation may whisper negligence or it may shout it aloud. In other words, the fact of a breach may be given more or less weight depending on the circumstances and the statute. Although the differences in procedural effect given to this evidence is sometimes scoffed at,[96] trial lawyers recognize the value of having the burden of proof on the other side and take advantage of this in their settlement negotiations which, after all, is the ultimate destination of the vast majority of the automobile cases that are commenced.[97] Another advantage of having different effects given to different statutory infractions is that the court will thereby secure more maneuverability. A judge will be free to decide himself that negligence has been proved, he may put the entire question to the jury or he may seek the jury's assistance only on the question of excused violation.

There are four alternative procedural results possible when a legislative infraction is relied on in a civil case.[98] The first, and least

[95] *Op. cit., ibid.*, p. 288; See also Prosser, *op. cit., ibid.*, p. 234; Alexander, *loc. cit.*, footnote 2, at p. 272 and *MacInnis* v. *Bolduc*, there cited, *supra*, footnote 34.

[96] Prosser, *op. cit., ibid.*, p. 202 ". . . precisely the same result . . ." appears to be reached in presumption States as in negligence *per se* States.

[97] See A. Linden, Osgoode Hall Study on Compensation for Victims of Automobile Accidents (1965). See also A. Linden, Peaceful Coexistence and Automobile Accident Compensation (1966), 9 Can. Bar J. 5, at p. 9.

[98] See Foust, *loc. cit.*, footnote 2, at p. 60, for an excellent discussion of this problem.

effective one, is that the fact may be treated as some evidence of negligence that the jury may, if it so wishes, assess in deciding the negligence question. At the least, this approach gets the claimant to the jury and avoids a non-suit. The second way of handling this evidence is to hold that it entitles the plaintiff to judgment, if the defendant offers no evidence to explain his breach or if he fails to raise a reasonable doubt. If the defendant explains his conduct so as to create a reasonable doubt, he is entitled to the verdict.[99] The third method that may be utilized is that the evidence of breach entitles the plaintiff to a judgment unless the defendant convinces the court that he was not negligent. This result shifts the onus of proof to the defendant and he must go farther than merely raise a reasonable doubt; he must tip the scales in his favour before he may succeed.[100] The last way of using a breach of a statute is to hold that it is conclusive of negligence and to reject all evidence to the contrary, which is the traditional negligence *per se* approach.[101] The picture is, unfortunately, even more complex than this, because the evidence of excused violation may or may not be admitted for jury consideration in each of the above situations. One might conclude that the judge must preside over the trial like an orchestra conductor conducts a symphony concert. He may call upon one technique or another, a flute or a trumpet, depending on the type of legislation and the circumstances of the breach. Seldom, however, have our courts been successful in producing music; instead discordant sounds have rent the air and filled the law reports. Let us now examine the weight that Canadian courts have given to statutory infractions in the lighting cases to see if any trend can be discerned.

At one time evidence of a violation of the tail-light section was said to impose "unrestricted and absolute liability on the owner".[102] When the legislation upon which this decision was amended, the Ontario courts faltered,[103] but the seed found fertile ground in the West. In Manitoba it was proclaimed[104] that "the statutory duty was

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[99] This is called a "presumption" or a "rebuttable presumption" by some evidence scholars. See Morgan, Some Observations Concerning Presumptions (1931), 44 Harv. L. Rev. 906; Thayer, A Preliminary Treatise on Evidence at Common Law (1898), p. 336.

[100] Compare with s. 106 of the Highway Traffic Act, *supra*, footnote 28. See also *Winnipeg Electric* v. *Geel*, [1932] A.C. 690, per Lord Wright.

[101] Foust, *loc. cit.*, footnote 2, at p. 59 *et seq.*

[102] *Hall* v. *Toronto Guelph Express*, *supra*, footnote 55, at p. 389, per Anglin C.J.C.; see also *Fralick* v. *Grand Trunk Railway*, *supra*, footnote 9.

[103] *Falsetto* v. *Brown*, *supra*, footnote 47.

[104] *Connell* v. *Olson*, *supra*, footnote 58.

absolute" and an Alberta court declared[105] that there was "a very definite duty to ensure their vehicles shall be visible to other drivers on the highway". The Ontario courts soon recovered and stated[106] that breach of the lighting section was "*per se* evidence of negligence" and that a violation of a "statutory duty"[107] created a cause of action.[108] Often courts impose liability in statutory violation cases without articulating the persuasive value given to this fact[109] or stating that it is unnecessary to do so.[110] Frequently the judge merely states that the breach of the statute amounted to negligence without disclosing whether the breach alone was conclusive or whether he was relying upon the breach as well as other evidence in deciding the negligence issue.[111] There was little policy discussion until Justice Rand[112] explained that "the scandal of the ravages of our holidays . . . is more than sufficient justification for the insistence on the drastic measures to which our highway authorities have been aroused". In one case[113] the court declared that "the act was passed for the purpose of preventing exactly what happened in this case", and in another,[114] where vehicles were customarily being parked on the side of snow-covered highways, a judge remonstrated that the "highways were never intended to be used for garages". It is relatively clear that the civil courts were influenced in these cases by the compelling policy of accident prevention to accord great weight to the infractions of the rear-light section, the effect of which was a tendency to use the fourth method of statutory treatment, the negligence *per se* approach.

There is another group of cases where courts have stated that violation of a tail-light statute is *prima facie* evidence of negligence[115]

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[105] *Western Canadian Greyhound* v. *Trans-Canada Auto Transport, ibid.*, at p. 697, per Egbert J.

[106] *McCannell* v. *McLean, supra*, footnote 37, at p. 641.

[107] *Ritchie* v. *Ptaff, supra*, footnote 32.

[108] *Irvine* v. *Metropolitan Transport Co., supra*, footnote 48, at p. 694.

[109] *Jackson* v. *Joel*, [1948] 1 W.W.R. 156; *Meth* v. *Melinsky*, [1941] 3 W.W.R. 779 (Sask. Dist. Ct.); *Smorlie* v. *Harvey et al.*, [1939] 2 W.W.R. 344 (Alta S.C.); *The King* v. *Maracle*, [1949] 1 D.L.R. 673 (S.C.C.).

[110] *Schultze* v. *Endel*, [1940] 2 W.W.R. 497 (Sask. C.A.).

[111] *Fellows* v. *Majeau*, [1945] 2 W.W.R. 113 (Alta S.C.); *Rubin* v. *Steeves* (1951) 28 M.P.R. 421 (N.B.C.A.); *The King* v. *Demers*, [1935] 3 D.L.R. 561 (S.C.C.); *Billings* v. *Mooers*, [1937] 4 D.L.R. 518 (N.B.C.A.); *Jordan* v. *Fitzgerald*, [1949] O.W.N. 730 (H.C.).

[112] *Bruce* v. *McIntyre, supra*, footnote 10, at p. 254.

[113] *Atwood* v. *Lubotina* (1928), 40 B.C.R. 446, at p. 447, per Macdonald C.J.A.

[114] *Drewry* v. *Towns*, [1951] 2 W.W.R. (N.S.) 217, at p. 221, per Kelly J.

[115] *Keays* v. *Parks, supra*, footnote 37; *Ward* v. *Regina*, [1954] Ex. C.R. 185, reversed on other grounds [1956] S.C.R. 683; *Dugas* v. *LeClaire* (1962), 32 D.L.R. 459 (N.B.C.A.).

or *prima facie* a tort.[116] In this series of cases, now brought to prominence by the *Sterling Trusts Corporation* decision, a finding of negligence is not conclusive and evidence of justification or absence of negligence will be admitted, although it remains unclear whether, in order to succeed, the defendant must balance the scales or tip them in his favour. These latter choices are the second and third methods of handling an infraction. The debate in the years to come is destined to focus on the relative merits and demerits of these techniques.

There do not appear to be any cases where breach of a tail-light provision was relied upon only as some evidence of negligence, indicating that Canadian courts have accorded this legislation substantial respect. On occasion, however, the issue of negligence appears to have been put to the jury for decision.[117] In these cases there is presently a distinct trend toward splitting liability between the violator and the other person[118] who may not be looking,[119] driving too fast[120] or in breach of some statute as well.[121]

A similar pattern of handling violations is discernible in the cases where the claimant established the breach of a headlight provision. Whatever treatment is given to the infraction procedurally, the violator rarely escapes civil liability, although frequently responsibility is divided between him and the other person.[122] The cases involving breach of headlight sections are richly varied. Since headlights permit a driver both to see and to be seen, the accidents generated will include those where others collided head-on with an offending vehicle, where the driver was unable to see adequately into the distance and where dazzling lights blinded one of the parties to a collision.

Here, too, in most of the cases the violation of a statute is given great weight. Typical of the strict view is the case of *Wilkins* v. *Weyer*[123] where the court held that a person who violated the statute by having only one headlight burning was negligent *per se*. In *Nes-*

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[116] *Strelioff* v. *Chernoff*, [1950] 1 W.W.R. 643 (Sask. C.A.), at p. 647.

[117] *Kuhnle* v. *Ottawa Electric Railway*, *supra*, footnote 69; *Fralick* v. *Grand Trunk Railway*, *supra*, footnote 9; *McFadden* v. *McGillivray*, [1940] S.C.R. 331, 2 D.L.R. 351.

[118] *Dugas* v. *Le Clair*, *supra*, footnote 115.

[119] *Ibid.*; See also *Carlson* v. *Chochinov*, [1947] 1 W.W.R. 775; *The King* v. *Maracle*, *supra*, footnote 109; *Jackson* v. *Joel*, *supra*, footnote 109.

[120] *Jordan* v. *Fitzgerald*, *supra*, footnote 111.

[121] *Ritchie* v. *Ptaff*, *supra*, footnote 32.

[122] For example, *Voth* v. *Friesen*, *supra*, footnote 12; *Wilkins* v. *Weyer*, *supra*, footnote 25; *Casselman* v. *Sawyer*, [1954] O.W.N. 50 (C.A.); Where a plaintiff bicyclist is the violator the court may blink at it, see *Davis* v. *Hall et al*, [1956] 1 W.W.R. 419.

[123] *Ibid.*

bitt v. *Carney*,[124] Justice Martin declared that "It is negligence *per se* to operate an automobile without complying with the statutory requirements as to lights . . ." since to do so was a "menace".[125] In *Voth* v. *Friesen*[126] a defendant, who continued to drive while being unable to see two hundred feet in front of him because of blinding lights, was held liable for breach of statutory duty. Justice Adamson revealed the attitude of the court when he stated: "The many deaths and the great damage caused by motor traffic can only be minimized by motorists recognizing the necessity of strictly discharging their duty in driving motor cars. This they will not do unless the courts insist on strict compliance with the duty which is on every motorist to take care and to comply with the regulations".[127]

A small cluster of cases have held that driving with "bum" headlights,[128] with low beam instead of high,[129] without any headlights on at all[130] was negligent without particularizing the procedural effect granted the violation.[131] There do not appear to be any cases where the breach of a headlight statute amounted merely to *prima facie* evidence of negligence or some evidence of negligence,[132] indicating once more that courts pay heed to the policy of accident prevention enshrined in these statutes. Headlight infractions seem to be treated even more stringently than do tail-light ones, perhaps because the driver is more likely to have knowledge of a defective headlight than a tail-light. It may also be that, because head-on collisions are potentially more serious, the court is imposing a heavier obligation upon the driver as is customary in situations of grave risk of harm. Whether this will persist after *Sterling Trusts Corporation* is as yet unsettled.

It now appears as though certain excuses will be available to anyone who violates a lighting statute in most situations. Even in the cases that held breach of statute conclusive of negligence, it was recognized that it was possible to excuse a violation. For example, in *Hall*[133] the court recognized that if the breach were

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[124] [1930] 3 W.W.R. 504.
[125] *Ibid.*, at p. 509.
[126] *Supra*, footnote 12.
[127] *Ibid.*, at p. 628.
[128] *Norris* v. *Fiveland et al*, [1949] 2 W.W.R. 1104 (Alta C.A.).
[129] *Casselman* v. *Sawyer*, *supra*, footnote 122.
[130] *Fellows* v. *Majeau*, *supra*, footnote 111.
[131] *R.* v. *Lightheart*, [1952] Ex. C.R. 12.
[132] In *Bennett* v. *Gardewine*, [1948] 2 W.W.R. 474 (Man. K.B.) Justice Adamson only made a slip of the tongue, it is submitted, when he stated that a breach is "evidence of negligence" since this result would be inconsistent with the rest of his reasons and his later reasons in *Voth* v. *Friesen*, *supra*, footnote 12.
[133] *Hall* v. *Toronto Guelph Express*, *supra*, footnote 55.

brought about by an Act of God it might be excused. This should not surprise us for even in *Rylands* v. *Fletcher*[134] cases, various defences like act of third party, *vis major*, consent, legislative authority and others were available. The courts have, however, limited the scope of these excuses providing relief only in rare cases. It may become even more difficult in the future for an offender to satisfy a court that he has a justifiable excuse for the violation and with some statutes this opportunity may be precluded altogether. For example, it would be impossible to excuse the presence of badly worn tires on a vehicle.[135] In one case an offender who had been injured[136] and one whose vehicle had become disabled[137] were not excused from complying with the dictates of the lighting legislation. Moreover, this decided reluctance of courts to permit excuses has led to the view that the offender is the one who must adduce the evidence of excuse,[138] although it is still uncertain what strength that evidence must have.

One obviously permissible excuse is where the violator of a lighting statute has substituted equally effective or superior lighting equipment. Here the statutory purpose is not subverted by the breach but reinforced. The authority[139] to the contrary should be limited to the situation where the replacement is less effective than the legislative equipment. Therefore, where a white, but more powerful rear light was used instead of a red one as required,[140] where clearance lights with equivalent brightness to the absent tail-lights were on,[141] and where a bright light was burning at the back of a vehicle instead of the reflectors prescribed,[142] violations were excused.

The excuse of ignorance of the violation is not as easily disposed of. It is clear that there need be no *mens rea* or wilful breach[143]

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[134] See Fleming, *op. cit.*, footnote 8, p. 299 *et seq.*

[135] Foust, *loc. cit.*, footnote 2.

[136] *Jackson* v. *Joel*, *supra*, footnote 109.

[137] *Holychuck* v. *McCallum*, [1949] 2 W.W.R. 720, aff'd, [1950] 1 W.W.R. 672, (Alta), (Driver failed to put out a flare when left to seek help).

[138] The cases on this appear to conflict, *cf. Irvine* v. *Metropolitan Transport Co. Ltd.*, *supra*, footnote 48, and *Sterling Trusts Corporation*, *supra*, footnote 42.

[139] *Fralick* v. *Grand Trunk Railway*, *supra*, footnote 9, where the court stated that the offender who substitutes "takes the risk of all injuries which observance of the statute would probably have prevented", per Anglin J.

[140] *McCallum* v. *Tetroe et al* (1958), 25 W.W.R. 49 (Man. C.A.); *Hancharuk* v. *Smilsky*, [1942] 1 W.W.R. 317, per Donovan J.

[141] *Tinling* v. *Bauch* (1952), 59 Man. R. 310, per Kelley J.

[142] *Schwartz et al.* v. *Mytruk et al.*, *supra*, footnote 86 (not cause).

[143] *R.* v. *Costello*, [1932] O.R. 213 (C.A.), (dealing with the mental requirement for criminal negligence).

nor is it necessary to prove an intentional violation[144] to secure the benefit of the infraction in a tort case. But the more common question of mere lack of knowledge poses more difficulty, since courts understandably have manifested a suspicion toward such a defence. Proof that the violator was unaware of a breach has been rejected as a valid excuse,[145] and the decisions to the contrary[146] are probably no longer trustworthy.[147] It may be, however, that if the defendant convinced the court that he reasonably believed that the light was burning[148] or that it had just gone out prior to the accident[149] and he was doing everything in his power to repair it,[150] he may be exonerated from civil liability. A fine distinction may be drawn here between the positive proof of belief, on the one hand, and the negative evidence of unawareness on the other hand. Moreover, sudden lamp failures resemble somewhat the Act of God notion that might be acceptable as an excuse.[151] The court wisely requires more of the defendant that a shrug of the shoulders and a statement that he did not know the light was out. Further details of the circumstances in which this defence and others will be permitted await clarification.

In conclusion, it cannot be denied that the *Sterling Trusts Corporation*[152] decision is a landmark case in the march toward a more sensible approach to criminal legislation in tort litigation. In eclipsing the *Falsetto* v. *Brown*[153] decision, the Supreme Court of Canada has committed itself to relying on penal statutes to some extent in civil cases. It has openly lent its weight to the advancement of the policy of accident prevention embodied in highway traffic legislation. It has not so openly broadened the incidence of tort recovery and simplified to some degree the administration of tort trials. There has been no departure from the normal requirements of proof of breach, causation and proximate cause as prerequisites of adopting statutory standards. With regard to the

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[144] *Sterling Trusts Corporation* v. *Postma and Little*, *supra*, footnote 42, per Cartwright J.

[145] *Connell* v. *Olson*, *supra*, footnote 58, at p. 656, per Richards J.A.; *Nesbitt* v. *Carney*, *supra*, footnote 124, at p. 509.

[146] *Falsetto* v. *Brown*, *supra*, footnote 47; *McLeod* v. *Lee*, *supra*, footnote 60; *Currie* v. *Nilson*, *supra*, footnote 79 (Judicial notice taken that could drive without headlight without knowing and three month old truck involved).

[147] Since the decision in *Sterling Trusts Corporation* v. *Postma and Little*, *supra*, footnote 42.

[148] *Clark* v. *Brims*, [1947] 1 All E.R. 242 (K.B.D.).

[149] *Maitland* v. *Raisbeck*, *supra*, footnote 31.

[150] *Brown* v. *Bulger*, [1938] 4 D.L.R. 708 (Man. C.A.).

[151] See *Hall* v. *Toronto Guelph Express*, *supra*, footnote 55.

[152] *Supra*, footnote 42.

[153] *Supra*, footnote 47.

procedural effect to be given to a violation, the court did not commit the error of adopting too rigid an approach but rather preferred flexibility. The word formula enunciated, *prima facie* evidence of negligence, is both familiar and workable.

Nevertheless the *Sterling Trusts Corporation* decision left many questions unanswered. The Supreme Court did not explain what it meant by *prima facie* evidence of negligence nor what procedural effect it would have. It did not clearly define which excuses would be tolerated nor who had the onus of proof with regard to them. Neither did the court fully discuss all of the policy issues inherent in their choice and the priorities accorded them. Nor did the Supreme Court indicate how far their decision would extend, whether to tail-light cases alone, to all lighting cases, to all equipment cases or to all violations of statutes. All of these questions were left for the future. The *Sterling Trusts Corporation* decision is, therefore, extremely significant for what it has decided; however, it may be even more significant because of the gaps that remain unfilled.

ALLEN M. LINDEN*

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CONFLICT OF LAWS—VALIDITY OF FOREIGN DIVORCE DECREE BASED ON JURISDICTIONAL GROUND NOT RECOGNIZED IN ENGLISH LAW AT TIME WHEN OBTAINED—SUBSEQUENT CHANGE IN ENGLISH LAW—RETROSPECTIVE OPERATION OF *Travers* v. *Holley*[1]—PUBLIC POLICY.—At the end of the nineteenth century, English courts became fully committed by judicial decision to the view that the only domicile of a married couple is that of the husband. Further, a marriage could only be dissolved in England if the husband was domiciled there at the time at which the proceedings were commenced.[2] In selecting the domicile of the husband as the sole basis of jurisdiction, English judges were actuated by the belief that all other civilized countries had adopted the same criterion and that, since a husband can only have one domicile at a time and his wife shares it, there could be only one court in the civilized world competent to dissolve a marriage at any given time.

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[1] [1953] P. 246, [1953] 2 All E.R. 794 (C.A.).

[2] *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517, 11 T.L.R. 481 (P.C.). The 1857 Matrimonial Causes Act, 20 & 21 Vict., c. 85, which bestowed upon an English court the power to dissolve marriages made no express provision as to what marriages it could dissolve.

English courts adopted the same criterion for recognizing the jurisdiction of foreign courts to dissolve marriages and would only recognize foreign decrees of divorce which were pronounced by the courts of the husband's domicile at the commencement of the proceedings. Domicile became the exclusive common law basis for domestic jurisdiction and for recognition of foreign decrees. English courts thought that the possibility of limping marriages would thus be avoided. Actually, the rule was merely an application of the more general rule of English conflict of laws that the legal capacity of a natural person is regulated solely by the law of his domicile, so long as this does not offend against English rules of public policy.

It soon became apparent that domicile was not a universal criterion. In many countries, the nationality of the spouses, their common residence or that of the petitioner alone or the mere submission of both or even one party to the court, is a sufficient basis for divorce jurisdiction. However, so long as the jurisdiction of English courts to dissolve marriages was limited by intractable precedent to those of which the husband was domiciled in England at the date of the commencement of the proceedings, they refused to recognize a foreign decree pronounced by the courts of a country in which the husband was not domiciled at the time the proceedings were begun. Gradually though, the courts began to doubt the wisdom of the old common law rules of the unity of domicile of the husband and wife and of the exclusive jurisdiction of the *forum domicilii*, particularly when it became obvious that these rules, in combination, were causing great hardship to the deserted wife who could only have recourse to the courts of the country of her husband's domicile to obtain dissolution of her marriage. Clearly, something had to be done to mitigate the rigour of these rules. Thus, during the twentieth century, the English Parliament and then the courts began to give relief to both English and foreign wives. On two occasions the English Parliament extended the grounds on which English courts might assume jurisdiction to dissolve a marriage.

The Matrimonial Causes Act was enacted in 1937 and in section 13 provided that:[3]

> Where a wife has been deserted by her husband or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled

[3] 1 Edw. 8 & 1 Geo. 6, c. 57.

> in England and Wales, the court shall have jurisdiction for the purpose of any proceedings under Part VIII of the principal Act notwithstanding that the husband has changed his domicile since the desertion or deportation.

Since January 1st, 1938, when a husband, who is domiciled in England, deserts his wife and establishes a new domicile in another country, she is no longer bound to follow him to his new country in order to obtain a divorce. She can still sue him in England.

In 1949, the Law Reform (Miscellaneous Provisions) Act[4] in section 1 added a new jurisdictional ground:

> The High Court in England shall have jurisdiction in proceedings by a wife for divorce, notwithstanding that the husband is not domiciled in England, if—(a) the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and (b) the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

Since December 16th, 1949, when a wife has been ordinarily resident in England for three years, although her husband is domiciled abroad, she can sue him for divorce in the English courts.

These two Acts make it now impossible to maintain that under English rules of conflict of laws a person's legal capacity, so far as it results from the existence or non-existence of the married status, is regulated solely by the law of his or her domicile, since English courts may in certain circumstances dissolve the marriage of persons not domiciled in England.

Since these statutes do not provide for the recognition of foreign divorce decrees, the question arose whether, without specific statutory provision, this extension of domestic jurisdiction, worked a corresponding extension of the common law rules of recognition.[5] Without hesitation, the English courts answered in the affirmative and soon began to give relief to wives who obtained foreign divorces.

Already, in 1906, *Armitage* v. *the Attorney General*[6] had, in an indirect way, extended the basis for recognizing the jurisdiction of foreign courts. The English court recognized a divorce decree pronounced in South Dakota, on proof that the decree would be

[4] 12, 13 & 14 Geo. 6, c. 100. The Act was repealed by the Matrimonial Causes Act, 1950, 14 & 15 Geo. 6, c. 25, but the rule of s. 1 was repeated in s. 18 (1) (b). This section is now repealed and re-enacted by s. 40 of the Matrimonial Causes Act, 1965, 13 & 14 Eliz. 2, c. 72.

[5] The Matrimonial Causes (War Marriages) Act 1944, dealt with recognition of foreign decrees, 7 & 8 Geo. 6, c. 43.

[6] [1906] P. 135, 75 L.J.P. 42, 22 T.L.R. 306.

recognized in New York where the parties were domiciled in the eyes of the court. In other words, where a foreign decree is recognized as valid by the courts of the country of the husband's domicile at the time the decree was pronounced, the English courts will treat it as effective to alter his married status.

The first serious attempt to extend the common law basis for recognition took place in 1953 in the now famous case of *Travers* v. *Holley*[7] decided by the English Court of Appeal. It was held that English courts should recognize in foreign courts a like jurisdiction to that which they claim for themselves. If English courts have, by statute, jurisdiction to grant divorces to wives whose husbands are not domiciled in England, a corresponding jurisdiction should, as a matter of common law, be accorded to foreign courts, to grant divorces to wives whose husbands were not domiciled in the foreign countries where the divorces were sought. As Hodson L.J. said:[8] "Where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which *mutatis mutandis* they claim for themselves." The nexus, falling short of domicile, between the petitioning wife and the foreign forum which was relevent in *Travers* v. *Holley*, was that the wife should have been deserted at a time when her husband was domiciled in this foreign country. As a result of this decision, if a wife domiciled in a foreign country is there deserted by her husband who then changes his domicile and she obtains a divorce in the courts of his former domicile, this divorce will be recognized in England. The decision was a bold and beneficial piece of judicial legislation intended to reduce the incidence of "limping marriages".

In *Travers* v. *Holley*, the jurisdiction claimed by the English court (in a domestic context) was that conferred by the deserted wife provision of the Act of 1937.[9] In 1958, in *Robinson-Scott* v. *Robinson-Scott*,[10] reciprocity was established by reference to sec-

[7] *Supra*, footnote 1. In that case it will be recalled that a decree pronounced under the deserted wife statute of New South Wales was held entitled to recognition in England on the ground that English law since 1937 provided for a substantially similar basis of jurisdiction. *Travers* v. *Holley* was not followed in *Fenton* v. *Fenton*, [1957] V.L.R. 17. The Full Court of Victoria treated the existing judge-made rule as to recognition of foreign decrees of dissolution of marriages as too firmly established to be susceptible of alteration by judicial decision. This case was abrogated by s. 4 of the Marriage (Amendment) Act 1957 (Victoria), No. 6186. See now s. 95 (2) of the Commonwealth Matrimonial Causes Act, 1959, No. 104, of 1959.

[8] *Ibid.*, at p. 257 (P.).

[9] *Supra*, footnote 3.

[10] [1958] P. 71, [1957] 3 W.L.R. 842, [1957] 3 All E.R. 473. See R. H. Graveson, (1958), 7 Int. and Comp. L. Q. 166.

tion 18 (1) (b) of the Matrimonial Causes Act, 1950, which deals with the residence of the wife.[11] The court held that a divorce obtained by a wife who had been resident in Switzerland for over three years would be recognized in England, even though her husband was not domiciled in that foreign country at the time of the commencement of the proceedings. The principle of *Travers* v. *Holley* was refined by Karminski J. The Swiss court had exercised jurisdiction on the basis that the wife had, in the circumstances, acquired a separate domicile from that of the husband. But the basis upon which the Swiss court proceeded was not considered relevant. What mattered was whether, on analogous facts, the English courts could have taken jurisdiction: "It is not necessary that the foreign statutory grounds of jurisdiction be substantially similar to the English ones. It is sufficient that facts exist which would enable the English courts to assume jurisdiction".[12] However, the foreign divorce decree must not have been granted by the courts of the country where the wife had only transitory residence.[13] Recognition of the effectiveness of a foreign decree granted by the courts of the domicile does not depend upon the grounds upon which the foreign court had acted. This proposition should have equal application to the recognition of a foreign decree under the *Travers* v. *Holley* doctrine. Thus, in *Januszkiewicz* v. *Januszkiewicz*, Nitikman J. of the Manitoba Court of Queen's Bench said:[14] "Having found in the case before me that the Polish court had jurisdiction to entertain the suit for divorce, there remains merely the question: Is it necessary that the grounds for divorce be such as are required in our jurisdiction? The answer to that must be in the negative. Once it is recognized the foreign court has jurisdiction to deal with the matter, it follows that a divorce granted by that court, on grounds proper to it, is valid, and must be so found by our courts."

To sum up, in England today, the courts will recognize the validity of a foreign decree of divorce rendered either by the court of the husband's domicile or the court of the wife's three-year residence, or that of the country where her husband was domiciled when he deserted her. English courts will also uphold a foreign

[11] *Supra*, footnote 4.

[12] *Supra*, footnote 10, per Karminski J., at p. 88 (P.).

[13] *Mountbatten* v. *Mountbatten*, [1959] P. 43.

[14] (1965), 55 D.L.R. (2d) 727, at p. 735. The Polish court had exercised jurisdiction to declare the marriage dissolved in circumstances which the Canadian courts themselves recognize as a sufficient basis for taking jurisdiction. See Divorce Jurisdiction Act, R.S.C., 1952, c. 84, s. 2. This section is analogous to s. 13 of the 1937 Matrimonial Causes Act (U.K.) which was relevant in *Travers* v. *Holley*, *supra*, footnote 3.

divorce decree if its validity is admitted by the law of the husband's domicile.

What still remained unclear until recently, was whether the doctrine of *Travers* v. *Holley* could be made retrospective to divorces granted before the passage of the statutes extending the grounds of domestic jurisdiction of English courts. Should a foreign decree be recognized if it were pronounced at a date prior to the conferment of comparable non-domiciliary jurisdiction in the English courts?

This problem had not escaped the attention of some scholars. In 1961, Dean Z. Cowen and Professor Mendes da Costa had this to say:[15]

> In *Travers* v. *Holley*, Hodson L.J. pointed to the fact that at the material time at which the New South Wales proceedings were instituted, the comparable English legislation was in force; but in *Arnold* v. *Arnold* recognition was given to the foreign decree notwithstanding the fact that foreign proceedings were instituted and a decree pronounced at a time when three years' residence was not yet a ground of jurisdiction in English law. As a practical matter, this is a good result, as it will tend to avoid limping marriages, and it is submitted that as a matter of common law, the decisive date should be the time at which the foreign

[15] Matrimonial Causes Jurisdiction (1961), p. 86. See also: G. D. Kennedy, "Reciprocity" in the Recognition of Foreign Judgments: The Implication of *Travers* v. *Holley* (1954), 32 Can. Bar Rev. 359, at p. 367 who suggests that the principle of reciprocity is retroactive, there being no rule of public policy which prevents it being so. The date of remarriage is the decisive date. If that date follows the date of the change in the municipal law, the English court can disregard the fact, that at the time when it was pronounced the foreign decree was invalid in English law. J. K. Grodecki, in Conflicts of Laws in Time (1959), 35 Br. Y. B. Int. L. 58, at p. 62, believes that the material time at which the statutory similarity must exist is the time of the institution of the English proceedings. *Contra:* Dicey, Conflict of Laws (7th ed., 1958), p. 322, par (5) where it is stated: "The material time at which the similarity must exist is the time when the foreign divorce proceedings are instituted." The words of Hodson L.J. in *Travers* v. *Holley*, *supra*, footnote 1, at p. 256 (P.), are referred to as the basis of this statement: "Since 1937 this exception has been largely extended first by the Matrimonial Causes (War Marriages) Act, 1944 (a temporary war measure), and later by the Matrimonial Causes Act, 1950, s. 18. It is unnecessary to consider the effect of these later statutory provisions since, *at the material time*, when the New South Wales proceedings were instituted, the Act of 1937 was in force and s. 13 of this Act corresponds in substance with the provision under which the New South Wales court claimed jurisdiction between the parties to this appeal." (Italics mine).

Professor J. H. C. Morris, in an article entitled The Time Factor in the Conflict of Laws (1966), 15 Int. and Comp. L.Q. 422, at p. 425 says: "The *foreign divorce* which was recognised in *Travers* v. *Holley* on the analogy of the English statute of 1937 had been obtained in 1943. The question therefore arises, would the decision have been the same if the divorce had been obtained before 1937? Since the decision would have been inconceivable before the statutory change made in that year, it is submitted that on principle no divorce granted before 1937 or 1949, as the case may be, should be recognised in England under the doctrine of *Travers* v. *Holley*."

proceedings come into question, so that if at that time there is a comparable basis of jurisdiction in the forum, the foreign decree should be recognized.

Actually, in both *Travers* v. *Holley* and *Arnold* v. *Arnold*,[16] the court did not consider the retrospective operation of the statutes involved. This problem was the major issue in *Indyka* v. *Indyka*[17] just decided by the English Court of Appeal. Lord Denning expressed the opinion that: "If a wife was resident in a foreign country for three years and validly obtained a divorce there, that is, in the courts of her three-year residence, we should recognize it as valid here for all relevant purposes, no matter, whether the divorce was granted before or after December, 1949."[18]

In this case, the wife who had always resided in Czechoslovakia but whose Czech-born husband had acquired a domicile of choice in England in 1946, was granted a decree of divorce by a court in Czechoslovakia in January 1949, which became final in February 1949. In 1959, the husband went through a ceremony of marriage with his second wife. Six years later, she petitioned for a divorce on the ground of her husband's cruelty. By an amended answer, the husband claimed that the marriage was void for bigamy in that the Czech decree purporting to dissolve his previous marriage was not valid in England, as he was domiciled in England at the time when it was made. Accordingly, he was still married to his first wife. In a reserved judgment, Latey J., on the question of the validity of the English marriage, held that the Czech decree pronounced in 1949 was not valid in English law, with the result that there was no marriage to dissolve and, he made a declaration of nullity. Latey J. based his decision on the view that the Act of 1949—by which, as noted, the English courts first assumed jurisdiction to grant divorces to wives domiciled abroad but resident in England and the consequential change of recognition of foreign decrees—altered the law in December 1949, prospectively and not retrospectively. He accepted the rationale of *Travers* v. *Holley*[19] and *Robinson-Scott* v. *Robinson-Scott*[20] but was prepared to apply

[16] [1957] P. 237. In that case a Finnish decree of divorce was recognized notwithstanding that it was granted in 1940, that is nine years before the coming into effect of the English Act of 1949. But the ground upon which jurisdiction was based is not clear: See J. H. C. Morris, The Australian Matrimonial Causes Act, 1959 (1962), 11 Int. and Comp. L. Q. 641. See also V. L. Korah, Recognition of Foreign Divorce Decrees (1957), 20 Mod. L. Rev. 278, at p. 280.

[17] [1966] 3 W.L.R. 603 (C.A.), rev'ing [1966] 2 W.L.R. 892 (P.).

[18] *Ibid.*, at p. 609.

[19] *Supra*, footnote 1. Note that in the present case the husband did not desert the first wife in Czechoslovakia, the latter having refused to live with him in England.

[20] *Supra*, footnote 9.

it only if the first wife had obtained a divorce in Czechoslovakia after December 1949. Since the 1949 statute was enacted eleven months after the foreign decree was granted, such decree could not be recognized in England.

On appeal by the second wife, the decision of Latey J. was reversed by a majority of the Court of Appeal. Lord Denning was of the opinion that: "If the courts of England were not to recognize this Czech divorce, it would be a disgrace to the law that should prevail between nations."[21] Applying *Travers* v. *Holley*[22] and *Robinson-Scott* v. *Robinson-Scott*,[23] two decisions which have proved most beneficial to foreign wives, his Lordship properly points out that the doctrine of these cases is judge-made law, "and the judges can make it retrospective to divorces before 1949 if it is just and proper to do so".[24] And in his opinion, it is the policy of the English law that it should be so.

The majority of the Court of Appeal believed that Latey J. was wrong to think that the doctrine of *Travers* v. *Holley* was based on an implied enactment by Parliament in December 1949. The doctrine is not based on any implication in the English statute. This statute only deals with the jurisdiction of English courts to grant a divorce; it does not say a word about the recognition of foreign divorces. The English rules of recognition of foreign divorce decrees are common law rules and nothing else. For this reason also, the application of the doctrine does not depend on a showing of substantially similar form in the foreign domestic ground of jurisdiction.

Diplock L.J. bases his decision supporting the validity of the Czech divorce on the view that it is, ". . . a well established principle of public policy applied by English courts that, so far as it lies within their power to ensure it, the status of a person as married or single should be the same in every country which he visits, that is that there should not be 'limping marriages' ".[25] Existing rules as to recognition of foreign decrees must be constantly re-examined, ". . . in the light of changed social conditions and of developments in the public policy towards the dissolution of marriages which the statutory alterations in their own jurisdiction disclosed".[26]

Diplock L.J. believes that the underlying *ratio decidendi* of *Travers* v. *Holley* is that:[27]

[21] *Supra*, footnote 17, at p. 607.
[22] *Supra*, footnote 1.
[23] *Supra*, footnote 10.
[24] *Supra*, footnote 17, at p. 609.
[25] *Ibid.*, at p. 610.
[26] *Ibid.*, at p. 612.
[27] *Ibid.*, at p. 613.

> If it be right that the public policy which underlay the original judge-made rules both as to the jurisdiction of the English courts to dissolve marriages and as to the recognition of the effectiveness of foreign decrees is to avoid the creation of marriages which limped in England or abroad, this policy would lead the English courts to recognise as effective in England every decree of dissolution of marriage pronounced by a foreign court which they were not inhibited from so recognising by the competing rule that the English courts do *not* recognise as effective to alter the legal rights in this country of any person any judgment of a foreign court given in circumstances in which *mutatis mutandis* the English courts themselves would not have jurisdiction to adjudicate by reason of the subject-matter of the litigation or the parties thereto. It follows, therefore, that to the extent that that inhibition is removed by the extension of the jurisdiction of the English courts themselves to decree dissolution of marriages, the public policy requires the English courts to recognise the effectiveness of decrees of dissolution of marriage pronounced by foreign courts in exercising their jurisdiction in the new circumstances which *mutatis mutandis* would entitle an English court to exercise its extended jurisdiction to dissolve a marriage.

Furthermore, one of the most important consequences flowing from this decision is brought to light by his Lordship when he points out that:[28]

> . . . the rule as to the recognition of foreign decrees of dissolution of marriage can no longer be regarded as merely part of a more general rule of English private international law that a natural person's legal capacity in this country is regulated by the law of his domicile. It is a separate rule in its own right about recognition of judgments of foreign courts. The decision in *Travers* v. *Holley*, [1953] P. 246, creates an exception to the more general rule that the law of his domicile alone governs legal capacity by recognising the right of some courts which are not courts of a natural person's domicile by a decree of dissolution of marriage to effect changes in his legal capacity in England in so far as this is dependent upon the existence or non-existence of his married status but not otherwise. But the *ratio decidendi* of *Travers* v. *Holley*, as I have expanded it, does not, in the absence of such a decree, permit an English court to treat any law other than the law of a natural person's domicile as regulating in any respect his legal capacity, including his married status, in this country. This was what was decided by Davies J. in *Mountbatten* v. *Mountbatten*, [1959] P. 43.

On the question whether the court should recognize the effectiveness of the Czech decree rendered on a jurisdictional basis similar to that which, a few months later, was bestowed upon the English courts, Diplock L.J. considers, as the relevant date, the husband's second marriage in 1959, for if it were ineffective, then he lacked the capacity to marry again. He acknowledges the cogency and logic of the reasoning which led Latey J. to the con-

[28] *Ibid.*, at p. 614.

clusion that, ". . . the law is that when the English municipal law is altered to widen the divorce jurisdiction of the English courts, comity and reciprocity require the appropriately widened recognition of decrees pronounced abroad after and not before the change in the municipal law: the two changes coincide in point of time and are both prospective",[29] but rejects it as, in his opinion:

> We are dealing with a rule of public policy whose object is to prevent creating "limping marriages".[30]
>
> The Act of 1949 removed an inhibition upon the application of that policy to the recognition of decrees of dissolution of marriage pronounced by foreign courts in the circumstances in which the Czech decree was made. Ever since that inhibition has been removed, it has, in my opinion been open to this court to say:
>
> "We now recognise that residence of a wife petitioner within the jurisdiction of a court of a foreign state for three years immediately preceding her petition for a divorce is a sufficient nexus between the spouse and that foreign state on which to found the jurisdiction of its court effectively to dissolve their marriage."
>
> And I see no reason why if we now recognise that nexus as sufficient, we are not entitled to recognise the validity of such a decree of a foreign court whenever made where that nexus between the spouses and the foreign state in fact existed at the time that it was made. To restrict recognition to decrees made by a foreign court after the Act of 1949 was passed would be to defeat to that extent the public policy of avoiding "limping marriages" which is the purpose and justification of the changes which the courts since *Travers* v. *Holley*, [1943] P. 246, have been making in the common law as to the recognition of the effectiveness of foreign judgments of dissolution of marriage.[31]

Turning to the proper function of the courts, Diplock L.J. points out that the common law is not changeless. "It is the function of the courts to mould the common law and to adapt it to the changing society for which it provides the rules of each man's duty to his neighbour. . . . And within the limits that we are at liberty to do so, let us adapt the common law in a way that makes common sense to the common man."[32] On that basis, he did not hesitate to reject the narrower basis of recognition of foreign decrees of dissolution which Latey J. adopted in the court below. To recognize the effectiveness of the Czech decree accords, "better with the public policy of avoiding 'limping marriages' and with what the common man would think was common sense".[33]

This policy-oriented approach to the solution of conflict of laws problems did not satisfy Russell L.J. who, in a dissenting opinion, also took a narrower basis of recognition. His legalistic

[29] [1966] 2 W.L.R. 892, at p. 901.
[30] *Supra*, footnote 17, at p. 615.
[31] *Ibid.* [32] *Ibid.* [33] *Ibid.*

approach as to whether the Act of 1949 could retroactively validate the Czech divorce seems correct up to a certain point only. He quite properly states that: "The validity (or effect) in English law of the English post-1949 marriage must have depended upon the matrimonial status in English law of the husband at the time when it was contracted. That in turn must have depended upon the validity (or effect) in English law of the pre-1949 Czech divorce. When that decree was made it cannot be doubted that in English law it was invalid and ineffective, and effected in English law no change in the matrimonial status of the husband. At that time it is beyond dispute that English law required her to bring proceedings in this country if she wanted a divorce." Thus, according to Russell L.J., the Act of 1949 could not validate in English law, on the day on which it came into operation, all invalid foreign divorce decrees in cases where the appropriate conditions existed, automatically altering on that day the matrimonial status in English law of the parties. Why not? It would seem that as long as, on the *date of remarriage*, the Czech divorce could have been recognized as valid on the basis of *Travers* v. *Holley*, the husband was capable of contracting marriage.

Actually, the 1937 and 1949 statutes dealt with future divorces *in England* only, therefore one cannot argue that they should only have prospective operation also with respect to *foreign* divorces. As the majority of the Court of Appeal points out, the issue is simply a question of recognition by the English court of a foreign decree, and there is no reason why the court should not be able to make the doctrine of *Travers* v. *Holley*[34] retrospective. In cases, where the circumstances of the foreign decree are such that, if it were made at the time of *the remarriage* or *at the date of the English proceedings*, it could have been validly made in English law, it will be recognized as valid in England. As Mr. Grodecki points out, the fact that a judicial rule is modelled on the analogy of a statute, does not mean that it should share with that statute its non-retroactive character:[35]

> There would seem no warrant for such a finding, with its logical corollary, that in order to obtain recognition in this country, the foreign decree must have been made since 1953 [date of *Travers* v. *Holley*]. If in fact the Acts [of 1937 and 1949] had been concerned with recognition a conflict would have arisen between the judicial rule and the new statutory rule and, subject to special transitional provisions in the Acts, the Finnish decree in *Arnold* [1957] P. 377 could not have been recog-

[34] *Supra*, footnote 1.
[35] *Loc. cit.*, *supra*, footnote 15, at p. 62.

nised. This result would be so inconvenient as to force the conclusion that in such an event the Acts would have indubitably been made, in some measure at any rate, retrospective.

It is true that the solution adopted by the majority could lead to some difficulties and should not be followed when it would defeat vested rights. For instance, where there is a pre-1949 foreign decree followed by a pre-1949 English marriage, it might be wrong to hold the marriage valid in post-1949 proceedings. Or, as Russell L.J. points out:[36]

> Suppose a relevant pre-1949 decree of divorce, and a pre-1949 death of the husband intestate with estate in England, not having attempted remarriage, the wife would in English law have rights to his estate accruing on his death as being his widow. Would the coming into operation of the Act of 1949 deprive her of those rights? And, if so, would such deprivations be limited to undistributed assets?
>
> It is perhaps, however, asserted as a proposition of English law, that if the event upon which English law operates (*e.g.* remarriage, or death intestate) and which is related for its validity or effect to a pre-1949 foreign decree, is itself post-1949, the foreign decree is valid in English law; but if the event is pre-1949 the foreign decree is invalid in English law. But this limited way of putting the case still does not appeal to me. As I see it, it comes back in the end to the proposition that the Act of 1949 operated in English law to alter the then existing matrimonial status; and that proposition that the Act of 1949 operated in English law to alter the then existing matrimonial status; and that proposition I cannot accept.

However, if the relevant date is that of the remarriage, and at that time the foreign divorce could have been recognized as valid in England, these problems do not arise and one need not be concerned with vested rights. If, on the other hand, one considers as relevant the date of the English proceedings and the remarriage took place before the domestic legislation was enacted, Russell L.J.'s remarks have much force.

Russell L.J. rejects the argument based on the public policy of avoiding "limping marriages" on the ground that it has been singularly ignored by the legislature except in a few special cases. Yet he is forced to admit that the attitude of the English courts to foreign divorce decrees has been conditioned by domestic legislation. Since legislation is prospective, why does he ask, should the judiciary adopt a retrospective attitude? The public policy of avoiding "limping marriages", "must be preserved within the framework of English legislation and law as it stands at the time when the foreign decree, which is one leg of the limp, was made.

[36] *Supra*, footnote 17, at pp. 616-617. See also the example given by Latey J., *supra*, footnote 29, at p. 901.

The judiciary is not unfettered by domestic legislation in pursuing such public policy, otherwise all limping marriages would be avoided by recognition of all foreign divorce decrees".[37]

Finally his Lordship argues that from a "common man's" point of view whose supposed reactions might not always "be a dependable guide through the necessarily complicated path of a legal system"[38] the facts of the case call for a dismissal of the appeal.

This decision is of great value, first of all because the majority of the Court of Appeal took great pains to explain the *ratio decidendi* of *Travers* v. *Holley*[39] and to analyse the consequences which follow from it. Secondly, by deciding that recognition of foreign divorce decrees should not be restricted to those made by foreign courts after the Act of 1949 was passed, the Court of Appeal breaks new ground and puts the finishing touches on *Travers* v. *Holley* with respect to conflict of laws in time.

In this case, the conflict of laws in time, involves a change in the conflict rule of the forum.[40] We must ask ourselves whether *Travers* v. *Holley*, a judicial decree which reverses an earlier judicial rule, should have a retrospective effect. The majority of the Court of Appeal found no difficulty in holding that a new English common law rule of conflict of laws may be made to apply to a legal situation which came into existence before the adoption of the new rule. This approach is consistent with the view that judge-made law is retrospective, whereas statute law is usually prospective. Nevertheless, as Dr. Morris observes,[41] sharing Russell L.J.'s doubts: "But what is the position when a rule of judge-made law is modelled on the analogy of a prospective statute. Is the new rule fully retrospective, or only to the date when the statute came into force?" As Mr. Grodecki points out,[42] "the position should not be different, retroactivity is implicit in judge-made rules".

The change in the conflict rule of the recognising court was only *indirectly* based on the modification of the *domestic* law by Parliament, therefore the question of the retroactive application

[37] *Ibid.*, at p. 617. [38] *Ibid.* [39] *Supra*, footnote 1.

[40] See authors cited, *supra*, footnote 15; In Canada, J.-G. Castel, Conflict of Laws in Space and in Time (1961), 39 Can. Bar Rev. 604. A change in the conflict rule of the forum does not differ from a change in any other rule of law and its effect must be ascertained in accordance with English rules of statutory interpretation and judicial precedent. In general there is a strong but rebuttable presumption that a statute is not intended to have retrospective effect. See J. H. C. Morris, *loc. cit.*, footnote 15, at p. 423.

[41] *Loc. cit.*, footnote 15, at p. 424; Russell L.J., *supra*, footnote 17, at p. 617.

[42] *Loc. cit.*, *supra*, footnote 15.

of a statutory rule could not arise. Again it must be emphasized that the court was faced with the problem of determining the respective scope of operation in time of successive *common law* rules of conflict of laws and the majority decided to give retrospective effect to the principle of *Travers* v. *Holley*. This approach accords with established principles. The Court of Appeal was free to decide this question completely unfettered by any legislative provision or rule of statutory interpretation. There is no reason why a common law rule should not be made retrospective, as long as vested rights are not infringed.

Indyka v. *Indyka*[43] is also of interest to students of jurisprudence as the majority of the court emphasized that its decision was motivated by public policy. A policy-oriented approach to the solution of conflict of laws problems is not new, although judges often hesitate to acknowledge it openly. The courts are always prepared to modify the common law to adapt it to a changing society. This attitude clearly indicates that today, the declaratory theory of precedent is no longer a basic principle of the common law. However, it does not mean that when a precedent is overruled by a higher court, the effect should not be retrospective. A legalistic approach must yield to strong public policy reasons.

Actually, even from a legalistic point of view, it seems that the result could be upheld. The problem was whether, on March 20th, 1959, when the husband went through the second ceremony of marriage in England, he was capable of doing so. Such capacity did exist because, at that time, by virtue of the 1949 Act and the rationale of *Travers* v. *Holley*, his divorce, *if it had been questioned then*, would have been recognized as valid in England, the country of his domicile. Thus, contrary to what Latey J. held,[44] it is possible to recognize the decree as effective not because English courts would not have recognized it *at the time when it was made* but because they would have recognized it as effective at the time of *the second marriage*.

It would seem that in matrimonial cases, the decisive date should be when the second marriage takes place and not necessarily, as some scholars have proposed[45] and the majority of the Court of Appeal has decided,[46] when the foreign proceedings come

[43] *Supra*, footnote 17. For a criticism see F. A. Mann, (1967), 30 Mod. L. Rev. 94. The case is also noted in (1967), 83 L.Q. Rev. 6.

[44] *Supra*, footnote 29, at p. 901. [45] See *op. cit.*, footnote 15.

[46] *Supra*, footnote 17, per Lord Denning at p. 609: ". . . no matter whether the divorce was granted before or after December, 1949"; per Diplock J., at p. 615: "I see no reason why . . . we are not entitled to recognise the validity of such a decree of a foreign court whenever made. . . ."

into question before the English courts. In the present case, to consider as decisive the date of the second marriage, would be consistent with the view that a person's capacity is governed by the law of his domicile.[47]

In summary, *Indyka* v. *Indyka*[48] constitutes an important landmark in the development of conflict of laws in space and time in the field of recognition of foreign divorces in England as it solves another difficult problem arising from *Travers* v. *Holley*.[49]

J.-G. CASTEL*

* * *

CONSTITUTIONAL LAW—EXCESS OF AUTHORITY BY PUBLIC OR QUASI-PUBLIC BODY—PUBLIC INTEREST AFFECTED—STATUS OF INDIVIDUAL TO BRING ACTION FOR DECLARATION THAT CANADIAN BROADCASTING CORPORATION ACTED *Ultra Vires*—NECESSITY FOR SPECIAL DAMAGE.—The poverty of Canadian public law has once again been illustrated by the Ontario Court of Appeal decision in *Cowan* v. *Canadian Broadcasting Corporation*.[1]

The parties were a member of Parliament and a federal Crown corporation, and the issues included the status of the French lang-

See also P. R. H. Webb, Note (1958), 7 Int. and Comp. L.Q. 374, at pp. 383-384 and *Garwood* v. *Garwood* (1964), 108 S.J. 359 which involved the same problem as in *Indyka* v. *Indyka*. In a short note on the case, it is reported that Faulks J. recognized a decree granted in 1942 in the United States of America, on the basis of residence, as validly dissolving the marriage in English law.

[47] See for instance *Sheldon* v. *Douglas* (*No. 1*) (1962), 4 F.L.R. 104, at p. 108, [1963] S.R.N.S.W. 442, where Nield J. for the Supreme Court of New South Wales held that: "It does not seem to me, however, that any later date can be looked to than the date of the marriage in 1947 [between the petitioner and the respondent] because the marriage then was either void or valid and I cannot see that legislation not directly concerned therewith could validate what was invalid as far as the marriage was concerned." At that time, the jurisdictional basis of the Californian decree of divorce granted in 1942 and sought to be recognized in New South Wales in 1962 was not the same in substance as the New South Wales exception from the strict rule that jurisdiction depended on domicile. Hence, the decree would not be recognized as valid in New South Wales as a decree which was valid under the common law rule that courts will recognize a jurisdiction which they themselves claim. The idea of substituting a period of residence for domicile in the case of a woman did not come until 1955 in the Commonwealth of Australia. Therefore, to consider the question whether permanent residence in California for more than twelve months should be regarded as substantially equivalent to three years residence in Australia was beside the point."

[48] *Supra*, footnote 17. [49] *Supra*, footnote 1.

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[1] [1966] 2 O.R. 309, 56 D.L.R. (2d) 578 (C.A.). Leave to appeal to the Supreme Court of Canada was refused on June 13th, 1966.

uage outside Quebec. Against this colourful background the judgment seems drab indeed.

Until October, 1964, the Canadian Broadcasting Corporation had operated radio station C.J.B.C. in Toronto as an English language station. At that time the station was changed into a French language station by the corporation. The plaintiff Mr. Cowan, member of Parliament for York-Humber, commenced this action for various declarations that the acts of the Canadian Broadcasting Corporation were illegal and for an injunction restraining the corporation from operating a French language station anywhere in Ontario. The grounds asserted for this relief may be summarized as follows: (1) the corporation had not been authorized by Parliament to establish a French language station in Ontario, nor had Parliament or any other appropriate authority authorized the funds for implementing and continuing this new policy; or, (2) if these acts were authorized by federal legislation, such legislation was *ultra vires*. Thus the essence of the claim was that either the Canadian Broadcasting Corporation, or Parliament, or each had exceeded its powers.

After commencement of the action the defendant corporation moved to have the statement of claim struck out on the grounds that it disclosed no cause of action, that the plaintiff had no status to bring the action, that the action was frivolous, vexatious, and an abuse of the process of the court. The trial judge struck out the statement of claim, apparently on the grounds that the plaintiff had no standing to maintain such an action. From this decision the appeal was brought to the Court of Appeal. Here the appeal was dismissed, the court relying on long recognized rules of standing-to-sue as developed in England.

The conventional jurisprudence on the right to commence actions may be simply stated. (1) If the plaintiff is merely suing to enforce a right peculiar to himself, for example in an action for trespass, there is no problem of standing. (2) If his complaint is of interference with a public right—such as public nuisance to a highway—he may still bring his action if he can show that he has been especially injured, for example by being struck by a tree overhanging the road. Consistently with this it has been accepted since *Dyson* v. *Attorney General*[2] that a private citizen can ask for a declaration that a public authority is acting beyond its powers if he is one of the persons whose private rights would be violated by its acts. It is irrelevant that thousands of others might also be inter-

[2] [1911] 1 K.B. 410.

fered with in the same manner. (3) A municipal taxpayer may sue for a declaration and an injunction to prevent *ultra vires* expenditures by his municipality. He must sue by way of a class action on behalf of all ratepayers, and need not show any injury peculiar to himself.[3] The class action can be brought only with respect to an interest common to the whole class, such as the interest in having a declaration of invalidity. The taxpayer-plaintiff cannot recover damages for taxes illegally imposed on himself in such a proceeding, for example. (4) Company shareholders are even more fortunate in the matter of standing. A shareholder may sue his company to restrain an *ultra vires* act, apparently even where no wrongful expenditure of company funds is involved. He need not bring a class action but can sue for a declaration or injunction solely in his own name.[4] (5) For purely "public" actions, where the rights of the public alone are at stake and no plaintiff can show an interference with his own private rights, the Attorney General must be the plaintiff. He can either bring the action by himself, *ex officio*, or can consent to his name being added in a relator action commenced by a private citizen.[5] Attorney General's actions are used most commonly to restrain a public nuisance or to prevent a public authority from exceeding its powers.

The Ontario Court of Appeal in dismissing the *Cowan* appeal tried to keep well within these established rules. The unanimous judgment of the three-man court (Schroeder, McGillivray, and Evans JJ.A.) written by Schroeder J.A., held that Mr. Cowan could not bring the action because he could show no special damage to himself. The essence of the opinion seems to be that:[6]

> . . . in an action where it is alleged that a public or *quasi*-public body has exceeded or abused its authority in such a manner as to affect the public, whether a nuisance be involved or not, the right of the individual to bring the action will accrue as it accrues in cases of nuisance on proof that he is more particularly affected than other people.

Counsel for the plaintiff-appellant concluded his appeal with an application to amend the statement of claim in order to show that

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[3] *MacIlreith* v. *Hart* (1908), 39 S.C.R. 657; *Affleck* v. *City of Nelson* (1957), 23 W.W.R. (n.s.) 386, 10 D.L.R. (2d) 442 (B.C.S.C.).

[4] *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580; *Burland* v. *Earle*, [1902] A.C. 83 (P.C., 1901); *Dominion Cotton Mills Co.* v. *Amyot*, [1912] A.C. 546 (P.C.); *Theatre Amusement Co.* v. *Stone* (1914), 50 S.C.R. 32, 16 D.L.R. 855.

[5] See *e.g. Robertson* v. *Montreal* (1915), 52 S.C.R. 30, 26 D.L.R. 228; *Jenkins* v. *Winnipeg*, [1941] 1 W.W.R. 37, [1941] 1 D.L.R. 477 (Man. K.B.). See also Zamir, The Declaratory Judgment (1962), pp. 254-270; Edwards, The Law Officers of the Crown (1964), pp. 286-295.

[6] *Supra*, footnote 1, at pp. 311 (O.R.), 580 (D.L.R.).

Mr. Cowan was member of Parliament for York-Humber and that he brought the action,[7]

> . . . on behalf of himself and all other English speaking tax-payers of Metropolitan Toronto who habitually listened to broadcasting station C.J.B.C. in the English language and who have been deprived of this advantage by virtue of the defendant causing the said station to broadcast in the French language.

The Court of Appeal held that such an amendment could not strengthen the plaintiff's position because his interest would still be the same as all those he represented, and none of these had any right to bring such an action. In short, the court appears to have said that no private right of the plaintiff was being interfered with and therefore he had no status to seek the declaration or injunction.

The court also referred in passing to *MacIlreith* v. *Hart*,[8] the leading Canadian authority on the right of action of a municipal taxpayer, and to *Smith* v. *A.G. for Ontario*[9] in which the Supreme Court of Canada had disapproved of extending the *MacIlreith* decision to non-municipal cases. Schroeder J.A. took the view that only public interests were involved in Mr. Cowan's claim, and that an action to vindicate such interests should be commenced by the Attorney General.

Several difficulties arise out of the *Cowan* judgment. First, the Court of Appeal may have stated the law too narrowly in their dictum, quoted above, that a plaintiff must be able to show that he is more affected "than other people". In *Dyson* v. *Attorney General*[10] the plaintiff successfully complained of a defective tax notice sent out by the Commissioners of Inland Revenue. About eight million similar notices had been sent out. He was not barred from obtaining a declaration that the commissioners had acted *ultra vires* simply because millions of others were affected in the same way. Similarly, one would not be barred from suing for actual injury from a public nuisance such as a tree overhanging a roadway, just because fifty others might also have been injured by it. Surely, the crucial test for *locus standi* is as to whether the plaintiff alleges interference with some interest or right of his which the law is prepared to protect.

Secondly, the court glosses over the fundamental question of whether the plaintiff's complaint really might involve a denial of rights. In essence the plaintiff seems to have been saying that he had a right not to be forced in Ontario to listen to French pro-

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[7] *Ibid.*, at pp. 315 (O.R.), 584 (D.L.R.).
[8] *Supra*, footnote 3.
[9] [1924] S.C.R. 331, [1924] 3 D.L.R. 189.
[10] *Supra*, footnote 2.

gramming over a publicly-supported station. He claimed that this right had either been interfered with by the Canadian Broadcasting Corporation without parliamentary authority, or else Parliament had invalidly authorized the interference. Unfortunately, the basis alleged for this right is not set forth in the report. Novel and questionable as a claim to such a right may be, it does raise problems as to the nature of the language guarantee in section 133 of the British North America Act[11] and the meaning of the Broadcasting Act.[12] While the Court of Appeal purported to dismiss the case on the ground of lack of standing, they were in effect also deciding the substantive question. If the plaintiff had the rights which were the substance of the claim, then he had standing. The finding that he had no standing was predicated on the assumption that he had no right to hear English rather than French over C.J.B.C. The court should have made clear that it was also deciding the substantive issue and should have given its reasons.

Thirdly, the court might have noted that constitutional issues were involved and ignored the more restrictive private-law rules of standing. A precedent for this existed in *Smith* v. *A.G. for Ontario*,[13] a case relied on by Schroeder J.A., in his judgment. In that case the plaintiff had sought a declaration that Part IV of the Canada Temperance Act[14] had not been validly brought into force in Ontario. He had tried unsuccessfully to import liquor into that province from Montreal. Had he succeeded, he would have contravened the provisions of Part IV. A Montreal liquor dealer declined his order because of Part IV's prohibition on interprovincial movement. The Supreme Court of Canada held that he had no standing to obtain a declaration because he was not subject to prosecution, no liquor actually having been imported. Nevertheless, three of the four judges then proceeded to deal with the substantive issue and held Part IV to be in force in Ontario. Thus they appeared to exercise a discretionary power to decide the matter even if the plaintiff did not have standing *stricto sensu.* According to Duff J., they were "loath to give a judgment against the appellant solely based upon a fairly disputable point of procedure . . .".

This generous attitude is very appropriate in constitutional cases. Canadian courts have always prided themselves on their right to determine the constitutional validity of executive actions and legislative enactments. They should not unduly restrict themselves in the exercise of this right by barriers of their own making

[11] 1867, 30 & 31 Vict., c. 3.
[12] S.C., 1958, c. 22.
[13] *Supra*, footnote 9.
[14] 1919, 10 Geo. V, c. 8.

or by an excess of devotion to the traditional common law rules. These rules developed long ago in a unitary State and are not necessarily suitable for a modern federal State. Canadian courts should be willing to exercise a discretion in favour of deciding constitutional issues even if the plaintiff cannot show interference with his personal legal rights, at least where the remedy sought is a declaration. There may also be good reasons for courts to exercise their discretion against deciding the constitutional issues in such cases, of course, if for example the claim is patently frivolous or the issue is so hypothetical that no adequate facts exist on which a meaningful decision can be based.[15] But no such reasons were given for the judicial self-restraint exhibited in the *Cowan* case.

It is unnecessary to apply the conventional rules of standing as if they represented the ultimate in rationality. In fact they are quite illogical, particularly as they apply in constitutional cases. We allow a taxpayer to complain to the courts of illegal expenditures of his municipal government, but not of his provincial or federal governments. Yet if a federal taxpayer otherwise gets into court, he can induce the court to decide the legality of government spending.[16] We allow a shareholder to sue for a declaration that his company is acting illegally, but we probably would not allow a voter to challenge the validity of a federal law making Urdu the official language. Moreover, where a party does have standing he can raise any relevant constitutional issue, even though he seeks to enforce constitutional rules which were never designed for his protection. For example, a defendant charged under a provincial statute can defend himself on the ground that the statute conflicts with a valid federal law. Thus the substantive power of the courts is not rationally related to the interest of the plaintiff.

Nor is it sufficient to say, as the Ontario Court of Appeal did in the *Cowan* case, that public interests may be protected by the Attorney General bringing an action. This may be adequate in England, but is it sound in Canada where the constitutional validity of legislation is in question? Which Attorney General should bring the action? Is the provincial Attorney General at liberty to commence actions at will to challenge the validity of federal laws? Can the Attorney General of Canada commence actions in provincial courts to challenge the provincial laws or acts? Apart from

[15] The latter reason would have justified the decision in *Saumur and Jehovah's Witnesses* v. *A.G. for Que.*, [1964] S.C.R. 252, 45 D.L.R. (2d) 627, where it was uncertain whether the legislative amendment would apply to the activities of the plaintiffs.

[16] See *e.g. Angers* v. *M.N.R.*, [1957] Ex. C.R. 83; *Porter* v. *The Queen*, [1965] 1 Ex. C.R. 200.

special statutory rights such as exist in Ontario[17] and some other provinces, it is submitted they cannot. Even where such provisions apply, it is submitted they should not. Surely in a federal State the powers of the Attorney General, as the representative of the Crown in its role as *parens patriae*, are divided between the federal and provincial law officers in a manner commensurate with the division of legislative power. This would be consistent with the accepted rules with respect to the division of prerogative powers. Consequently, it would be the provincial Attorney General who would have to bring the action to attack the validity of provincial laws or acts, and the federal Attorney General who would have to fill the same role in the federal sphere. It is hardly reasonable to expect (as the court implicitly suggested in the *Cowan* case) that the Attorney General of Canada will undertake actions to attack the validity of Parliament's legislation. He is, after all, a minister responsible to Parliament and his first duty should be to advise Parliament that its law is *ultra vires*. If Parliament declines to act on his advice, should he then seek to make his point by commencing an action for a declaration of invalidity? Here again the traditional rules of standing create novel problems when applied to a federal State.

It is time, therefore, for our courts to reassess the validity of private-law tests for *locus standi* as they affect litigation involving important issues of public law. The courts must retain a discretion to decline certain actions but the choice to hear or not to hear should be available to them. Whatever the result should have been in the *Cowan* case, the court precluded itself from making that choice.

BARRY L. STRAYER*

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INTERNATIONAL LAW—TREATY-MAKING POWER—CONSTITUTIONAL LAW—POSITION OF THE GOVERNMENT OF QUEBEC.—At the time when the first modern federations, the United States and Switzerland, were established, treaties dealt with subjects that were mainly of concern to the central governments, such as alliances, commerce and tariffs. Multilateral treaties were infrequent and "law-making treaties" extremely rare.[1]

[17] R.S.O., 1960, c. 197, s. 20.

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[1] E. Nys, Le droit international (1912), vol. I, pp. 165, 184; A. Nussbaum, A Concise History of the Law of Nations (1954), p. 198.

Since the appearance of the first multilateral treaties in the second half of the twentieth century, and particularly since international organisations have given birth to great conventions that are sometimes referred to already as "international legislation", the question of treaty-making power has assumed a new importance and often gives rise to unexpected difficulties within many federations. The treaty has in fact become a very flexible instrument. There is nothing which cannot be made the subject of international law, once States have chosen the treaty as a means of regulating their mutual relationship, of codifying their norms of behaviour or of achieving uniformity in the standards of social, economic or cultural activity. Whether the subject be working hours in industry, social security, responsibility of the aerial carrier, health, education or culture, driving licenses or human rights, treaties today touch all fields.

In federal-type States, however, several of these subjects fall, wholly or in part, under the legislative jurisdiction of the member States. One can easily see that the exclusive jurisdiction of the cantons, regions or provinces would steadily lose any real meaning if the central agencies of the federation could, at their will, bring these matters into their own field of competence through the expedient of an agreement with a foreign country or a multilateral convention. Can one accept this situation and still talk of autonomy? On the other hand, can one accept the fact that a great number of subjects, of the utmost importance for the future of the international society, cannot become the object of any multilateral regulation for the simple reason that they are the responsibility of provincial or cantonal governments that are jealous of their prerogatives? Is it admissible to "disarm" the federal State in view of the trend towards regional and international integration by denying it one of the most effective means of reducing local particularity?

These questions have, more than once, plunged the constituant bodies and tribunals of federations into a state of perplexity. There is nothing surprising in this, since a fundamental option of an essentially political nature is involved here, which determines to a large extent the kind of federalism practised within the State.

In Canada today, the question is raised in all its scope. We have, for several years, experienced the doctrinal perplexities and the jurisprudential confusion which already characterized several other federations. Recently, the Quebec Government officially took position in favour of the right of the Canadian provinces to

exercise a *jus tractatuum* which would extend to all matters falling within their field of legislative competence.[2]

I

In order to grasp the present situation in Canada with respect to international agreements, one must go back to the period when the provinces-to-be were separate colonies within the British Empire. At that time, the Crown controlled all the foreign relations of its dependent territories and the government in London enjoyed almost unlimited power, particularly in the matter of treaties. On the advice of his Britannic ministers, the King concluded agreements that were applicable either to the entire Empire or to a particular colony. Each governor then had the mission of implementing the treaties in the colony under his jurisdiction, unless such a treaty entailed amending the legislation applicable to the colonies, in which case the Imperial Parliament or the colonial legislature was required to intervene in order to implement the agreement internally.[3]

It was quite normal that a similar rule should be inserted in the imperial law which set up the Canadian Union in 1867. Article 132 of the British North America Act conferred upon the central Parliament of the new federation "all powers necessary or proper" to fulfill obligations towards foreign countries incurred by the Empire in the name of Canada or one of her provinces.[4]

In other words, whenever there was a treaty to be implemented, the federal Parliament, acting alone, could legislate on all matters, even on those which the constitution placed exclusively under provincial jurisdiction. This was the only rule concerning treaties which appeared in the written constitution of Canada. Obviously, no treaty-making power as such was transferred thereby to the central administration of the federation, but the very wide legislative power thus conferred upon Parliament was soon to serve as an argument on behalf of the federal executive in its efforts to obtain the exclusive right to conclude treaties. The article 132-

[2] See the speech pronounced before the Consular Corps of Montreal by Mr. Gérin-Lajoie, Vice-president of the Council of Ministers and Minister of Education of Quebec, on April 12th, 1965, and published in Le Devoir, on April 14th and 15th, 1965, p. 5.

[3] A. B. Keith, Constitutional History of the First British Empire (1930), pp. 220, 247, 253.

[4] "The Parliament and Government of Canada shall have all powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as part of the British Empire towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries". British North America Act, 1867, 30 & 31 Vict., c. 3.

system in effect tended towards centralization, since the division of powers within the federation faded out somewhat in the face of imperial treaties.[5] At the time, however, provincial autonomy was not particularly endangered, since most international treaties dealt with matters falling under the jurisdiction of the federal or imperial authorities.

The situation became quite different when Canada obtained the right to conclude treaties without passing through London. His Majesty did indeed continue, during several years, to conclude agreements on behalf of Canada, since this power, under British law, is a royal prerogative.[6] However, the federal government had in effect gradually substituted itself for the British cabinet in advising the King on whether or not to conclude a particular international agreement. Actually, the royal prerogative in this field had long been of a purely nominal nature, so that the central executive body of Canada found itself sole master of the treaty-making power.

II

With the disappearance of the imperial ties and Canada's accession to full international personality, the question was raised whether article 132, which mentioned only "Empire treaties" was applicable to agreements concluded by the Canadian government. Could the central government, through its new right to make treaties, assume the right to legislate in fields reserved to the provinces under the British North America Act?

Even though the control exercised by the British Cabinet had been removed, the appeal jurisdiction of the Judicial Committee of the Privy Council was maintained until 1949. It was to this tribunal, the highest in the Empire, that were submitted, on several occasions, the matters we have just outlined. Up to 1937, the policy of the Committee was rather hesitant, but no federal law implementing a treaty was invalidated.

In 1937, however, the Judicial Committee, in the famous *Labour Conventions* case, decided to protect the provinces against federal encroachment. The Ottawa Parliament had just adopted laws implementing three International Labour Organization conventions on the eight-hour day, minimum wages and weekly rest, which had been ratified by the Canadian executive in 1935.[7] The

[5] *In re Nakane and Okasake* (1908), 13 B.C.R. 370 (C.A.).

[6] J.-Y. Grenon, De la conclusion des traités et de leur mise en oeuvre au Canada (1962), 40 Can. Bar Rev. 151, at p. 153.

[7] Convention on Working Hours (Industry), 1919; Convention on Minimum Wages, 1928; Convention on Weekly Rest (Industry), 1921.

Province of Ontario had attacked the validity of this legislation. The Judicial Committee decided that the central power, although competent in the matter of concluding treaties, could not adopt legislation implementing those treaties whose subject fell under provincial legislative jurisdiction. Lord Atkin established the inapplicability of article 132 to the conventions and gave his opinion on the distinction between the conclusion and the implementation of treaties ("formation" and "performance").

> There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. . . .
>
> . . . the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligation, they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of State now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.[8]

The conclusion of a treaty adds nothing to the legislative powers of the federal Parliament; the sharing of powers remains the same, whatever the extent of Canada's international activity. On the point of letting go the last reins, the Privy Council no doubt realised that provincial autonomy faced a precarious existence if the article 132 rule were extended; Lord Atkin clearly suggested this in the lines just quoted.[9] Behind a judicial façade, the judgment contains a political decision of the greatest importance, considered in Quebec to be one of the cornerstones of Canadian constitutional law.

This being said, the Privy Council decision is not without serious drawbacks. There exists in Canada a vast field which cannot in practice be made the object of an international treaty, as the provinces greatly hesitate to place themselves in the hands of the central government. Thus, confronted with the efforts of the International Labour Organization and of the General Assembly of the United Nations to have their members ratify conventions which would commit them to apply international norms in their internal

[8] *Attorney General for Canada* v. *Attorney General for Ontario*, [1937] A.C. 326, at pp. 352-354 *passim*.

[9] See also the following passage, *ibid.*, at p. 351: "If the position of Lower Canada, now Quebec, alone were considered, the existence of her separate jurisprudence as to both property and civil rights might be said to depend upon loyal adherence to her constitutional right to the exclusive competence of her own Legislature in these matters". Along the same lines, see A. B. Keith, The Privy Council Decisions, A Comment from Great Britain (1937), 15 Can. Bar Rev. 428, at p. 432.

legislation, Canada, together with other federal States, has found herself in a deadlock. On the one hand, the central government has the power to conclude treaties, but cannot enact or implement them whenever the subject of the agreement falls within provincial jurisdiction. On the other hand, the provinces, although competent to legislate in matters of labour, health, education, natural resources, and so on, have let themselves be out-distanced by the central executive with respect to concluding treaties to the point where it is difficult for them today to negotiate with foreign countries.

We will attempt to outline a possible course of action in the light of solutions found in other federations and of the tendencies which have arisen in Canada in the past few years.

III

If we turn to the positive law of various federations (of which there are twenty or so at the present time), we will see that the diversity in the constitutional systems is such that an initial review can only leave us perplexed. It would appear possible however to systematise this vast material by taking as a basis the distinction found in most States, whether unitary or composite, between, on the one hand, the conclusion and ratification of treaties, which generally are the responsibility of the executive, and, on the other hand, the approval of these agreements and the power to take the necessary measures to enforce or implement the treaties and integrate them in the internal legislative system.

This distinction, which, as mentioned above, was invoked by Lord Atkin in the decision concerning the international labour conventions, makes it possible to reduce to three general categories the various solutions offered by federal constitutions: (A) Federal States in which the conclusion of treaties and the power to approve or implement them is the sole responsibility of the central authorities; (B) States in which the central government has the power to conclude treaties, whereas the member States retain the power to approve or implement treaties whose subject falls within their legislative field; finally (C) Federations whose members possess, to some extent, the power to conclude treaties.

The majority of federal States fall within the first category, particularly the more recent ones. India, Malaysia, Burma, Austria, Mexico, Brazil, and Lybia may be so classified, as well as three of the federations which will be dealt with in the third category, that is, the Soviet Union, the United States and Argentina.

In these federal States, the central authorities have been granted a veritable monopoly with respect to foreign relations and agreements deriving therefrom. Although it is rarely mentioned in the constitutional texts, the rule that federal treaties take precedence over the powers of the member States constitutes an essential corollary to this monopoly. Only the Upper Houses (Senate, Federal Council) are in a position to put forward the point of view of the member States within the central administration. The efficiency of this method as a protection for local autonomy is in most cases very problematical. The federations mentioned in this first category, therefore, present to the outside world a very definite unitary image.

Very few federations can be classified in the second category. They are Nigeria and Canada, to which we may add Australia. These federations are characterized by the fact that the member States have a right to refuse to act whenever the central executive requests that they implement a treaty or multilateral convention, whose subject matter falls within their jurisdiction. In the case of Australia, although the High Court has granted very wide powers of implementation to the federal government, the States have in fact kept their freedom, especially in connection with international labour standards. This is a makeshift solution which satisfies neither the central government, whose international activities are impeded, nor the member States, whose desire to defend their own autonomy reduces them to the role of perpetual hinderers. This is why some federal States have adopted a more flexible system, which we will now examine.

IV

In the last category, one can group, for purposes of analysis, all those composite States whose constitution authorizes the members to conclude some treaties or compacts, even if they do not in practice exercise this right. These are the Soviet Union, the United States, Argentina, Switzerland and the German Federal Republic.

The federated republics of the Soviet Union were granted in February 1944, the right "to enter into direct relations with foreign States, to conclude agreements with them and to engage in the exchange of diplomatic and consular representatives".[10] Whatever may have been the real purpose of this constitutional amendment,

[10] Constitution of the U.S.S.R., art. 18a. The text of the decrees of the Supreme Soviet amending the Constitution are published in English in International Conciliation, Documents for the Year 1944 (Carnegie Endowment), p. 246.

it must be admitted, however, that its effect remains largely theoretical. With the exception of the special international status granted to two federated republics, the Soviet Union should rather be classified in the category of federations in which the *jus tractatuum* is the sole responsibility of the central administration.

In the United States, quite recently, Congress took the initiative of encouraging the States to conclude agreements with neighbouring countries, in particular in the fields of forest protection and civil defense. A doctrinal movement has taken form with a view to encouraging the States to make use of the compact clause of the Constitution, which authorizes them to enter into "compacts" with foreign powers, with the consent of Congress.

Thus, in 1949, Congress approved an agreement dealing with the protection against forest fires in the Northeast, which allows certain States to conclude agreements with neighbouring Canadian provinces. In 1951, a new initiative of Congress in the field of civil defence invited the participation of Canada and Mexico "or of their States or provinces" in the signature of agreements with the American States.[11] This initiative was not followed through, however, because Ottawa felt that all co-operation in matters of passive defence should take place within the framework of the policies and agreements established by the central authorities. The evolution taking place in the United States appears to hold promise for the future, although it remains very limited for the present.

In Switzerland, the cantons retain certain powers with respect to treaty-making as defined in article 9 of the Constitution:

> Exceptionally, the cantons retain the right to conclude treaties with foreign States in respect of matters of public economy, frontier relations, and police; nevertheless, such treaties must not contain anything prejudicial to the Confederation or the rights of other cantons.

This text has been the cause of a lengthy controversy concerning the nature and extent of the *jus tractatuum* of the cantons. Constitutional practice has evolved continually towards centralization throughout the last century and the Confederation has concluded agreements in several spheres formerly reserved for the cantons; in particular, in the field of double taxation.

On the other hand, the practice of the cantons shows that they have concluded a great number of treaties, several of which exceed the relatively tight limits which article 9 imposes upon the cantonal *jus tractatuum*. While all the cantons have not availed themselves of these powers (Valais, Bern, Freiburg, and Glaris, for instance,

[11] Interstate Civil Defense Compact (1951), 64 Stat. 1251, art. X.

have not signed any agreements since 1918), one finds in other cantons agreements concerning double taxation,[12] the protection of literary and artistic property,[13] the construction of railways,[14] the distribution of electric power[15] and the administration of justice, in particular with respect to reciprocity in the enforcing of judgments.[16] However, since the Confederation claims the power to negotiate treaties in all fields, it would appear that a sort of concurrent jurisdiction, with federal priority, has evolved with respect to the relations of the cantons with foreign States. Actually, the Federal Council is trying to monopolize the relations of the cantons with the outside world, except in certain matters of secondary importance. This does not prevent cantonal autonomy from being very real, but it rests, in final analysis, on political and economic factors.

In Germany, the member States possess the *jus tractatuum* to the extent of their power to legislate. The *Länder* of Baden-Württemberg, Rhineland-Palatinate and Bavaria have concluded agreements directly with foreign countries on various subjects. The Rhineland-Palatinate government for instance concluded two agreements with Luxembourg, concerning the construction of hydro-electric dams on boundary waters,[17] whereas Baden-Württ-

[12] *E.g.*, Arrangement between the Canton of Basel-City and Prussia with a view to avoiding double taxation (1910-11), in G. F. Martens and H. Triepel, Nouveau recueil général des traités, 3rd ser. (1907-1942), vol. VII, p. 845; Declaration of reciprocity between the Canton of Soleure and the German Imperial Government concerning duties on donations (1911), 65 Recueil officiel des lois du Canton de Soleure 218; Mutual agreement between the Principality of Liechtenstein and the Canton of the Grisons concerning succession duties (1957), Amtliche Gesetzsammlung, Band 1958, s. 13; Treaty between the Confederation, acting in the name of the Canton of Vaud, and England concerning succession duties (1872), Amtliche Sammlung der Bundesgesetze and Verordnungen der Schweizerischen Eidgenossenschaft, vol. 10, p. 1011 (agreement abrogated in 1958).

[13] Treaty between the Confederation, acting in the name of the Canton of Geneva, and France concerning the protection of literary and artistic property (1858), Amtliche Sammlung der Bundesgesetze und Verordnungen der Schweizerischen Eidgenossenschaft, vol. 6, p. 86.

[14] *E.g.*, Agreement concerning the Schaffhausen railway station (1863), between Baden and the Canton of Schaffhausen; Arrangement between the Canton of Basel-City and Baden concerning the Baden station on the territory of the canton (1870), Bereinigte Sammlung der Bundesgesetze und Verordnungen 1848-1947 (1953), vol. 13, p. 273.

[15] Agreement between Baden and the Canton of Schaffhausen concerning the installation of a station near Trasadingen (1947).

[16] *E.g.*, Declaration of reciprocity between the Canton of St.-Gall and the Principality of Liechtenstein concerning the administration of justice (1916), St.-Gallische Verwaltungspraxis (1917), no. 360; Declaration of reciprocity between the Canton of Zurich and Austria concerning the enforcement of civil judgments (1907), 28 Recueil des lois du Canton de Zurich, p. 82.

[17] State Treaty concerning the construction of a hydro-electric dam on the Sauer near Rasport-Ralingen, of April 25th, 1950, Gesetz- und Ver-

temberg has entered into several agreements with Switzerland or Austria concerning fishing in the reserve basins of the Rhine or the protection of boundary waters against pollution.[18] The Free State of Bavaria, for its part, has signed numerous agreements with Austria, most of them in the form of administrative agreements,[19] and also participated in the 1960 agreement with Switzerland, Austria and the *Land* Baden-Württemberg concerning the protection of the waters of Lake Constance.[20]

If we attempt now to draw an overall picture of the allocation of treaty-making power within federations, our analysis of positive law shows that there is no uniform rule in this matter. In the first group are to be found federations which have settled the question in favour of the central government, certainly the easiest solution, but which tend to reduce the powers of the member States proportionately to the increase in the international activities of the central authority. Then come the federations in which the members have a "right of veto" that allows them to refuse to approve or implement agreements concerning matters under their jurisdiction; this situation contains all the disadvantages, since it tends, in practice, to oppose the federal State and the member States and to hinder the development of international legislation. Finally, we have classified in a third category those federal States whose members have the power, under the constitution, to conclude international agreements themselves. This solution, which is rather complex and varies considerably from one federation to another,

ordnungsblatt der Landesregierung Rheinland-Pfalz (1950), no. 35, p. 239; State Treaty concerning the construction of hydro-electric dams on the Our, of July 10th, 1958, Gesetz- und Verordnungsblatt für das Land Rheinland-Pfalz (1959), no. 4, p. 13.

[18] Agreement concerning fishing in the reserve basin of the Rhine near the Rheinau dam, of November 1st, 1957, Gesetzblatt für Baden-Württemberg (1959), p. 39; Übereinkommen uber den Schutz des Bodensees gegen Verunreinigung (1960), Gesetzblatt für Baden-Württemberg (1962), No. 1. See also the Regulation on bird-shooting on the territory of the Untersee and the Rhine (agreement with Switzerland and the Canton of Thurgau of May 23rd—June 5th, 1954, Gesetzblatt für Baden-Württemberg (1954), p. 99.

[19] *E.g.*, Agreement between the Free State of Bavaria and the Republic of Austria concerning the enforcement of the Convention on salt mines of 1929, of March 25th, 1957, Bayer. Gesetz- und Verordnungsblatt (1958), p. 167 (came into effect on July 8th, 1958, following an exchange of notes). For treaties concluded before 1939, see the Constitution of the Free State of Bavaria (1947), arts 181 and 182; Treaty between the Governments of Austria and Bavaria concerning the Osterreichisch-Bayerische Karftwerke AG, of October 16th, 1960 (not published); Agreement between the Government of the Free State of Bavaria and the Federal Government of Austria on the use of the waters of the Saalach, of July 20th, 1959, Bayer. Gesetz- und Verordnungsblatt (1959), p. 209. See T. Maunz and G. Dürig, Grundgesetz Kommentar, 5. Lieferung (1961), no. 71.

[20] *Supra*, footnote 18.

appears to be, however, the only one which is really appropriate to a federation composed of resolutely autonomous States.

V

At the beginning of 1965, the Quebec Government decided to raise the question of the allocation of treaty-making power in the Canadian federation. The accelerated evolution which Quebec has experienced since World War II, the developments that have taken place in cultural, social and economic fields, and finally the greater emphasis on the tendency towards increased self-government at the very moment when international law is progressively embracing the fields heretofore reserved to provincial jurisdiction, all these factors have pushed the former colony to turn towards the outside world and to establish ties with foreign States, in particular with French-speaking countries.

On February 27th, 1965, was signed in Paris an "Agreement between Quebec and France on the Programme of Exchanges and Co-operation in the Field of Education", the negotiations for which had lasted several months.[21] This document is the first *official* agreement concluded between a provincial government and a foreign State, and, for this reason, gave rise to lively debates both in the House of Commons and in the press. The federal government took this opportunity to recall that, in its view, Canada possessed a single international personality within the community of States and that only the central executive had the power to conclude treaties with foreign countries. To further stress this point, the Ministry of External Affairs exchanged letters with the French Embassy on the same day that the Paris-Quebec agreement was signed, in which it is said that the Canadian Government gives its consent to the agreement. If Quebec's act had constituted a precedent in favour of a certain international capacity for the province, Ottawa was immediately opposing it from the point of view of principle.

The Quebec Government therefore raised the issue again, several weeks later, in the person of Mr. P. Gérin-Lajoie, Vice-president of the Council and Minister of Education. Before the

[21] The agreement was signed on behalf of the French government by Messrs. C. Fouchet, Minister of National Education, and J. Basdevant, Director General of Cultural and Technical Affairs of the Ministry of Foreign Affairs. On the Quebec side, full powers had been granted by ministerial decree to Messrs. P. Gérin-Lajoie, Vice-president of the Council and Minister of Education, and Claude Morin, Under-Secretary for Federal-Provincial Affairs.

Consular Corps of Montreal, the Minister developed the theme of Quebec's international personality, in the following terms:

> At the time when the Quebec Government is becoming fully aware of its responsibility in the accomplishment of the particular destiny of the Quebec society, it has no desire to abandon to the federal government the powers to enforce conventions whose subjects fall under provincial competence. It fully realises, furthermore, that there is something absurd in the present constitutional situation.
>
> Why should a State which enforces an agreement be incapable of negotiating it and signing it itself? Is not an agreement entered into with the main purpose of being enforced, and should it not be up to those who have the responsibility of implementing it to draw up its terms? . . .
>
> There was a time when the fact that Ottawa exercised international powers exclusively was in no way detrimental to the interests of the federated States, since the field of international relations was quite clearly delimited.
>
> But nowadays it is no longer so. International relations concern all aspects of the life of society. That is why, in a federation like Canada, it is necessary that the member States who so desire participate actively and personally in the drawing up of international conventions which are of direct interest to them.[22]

The reply of the federal government was given to the press on April 23rd and commented upon in Parliament at Ottawa several days later. The Secretary of State for External Affairs was willing to extend a helping hand to Quebec or any other province in the matter of treaties, providing that these were compatible with the general policy of the central government and that, furthermore, the federal treaty-making power be invoked when the agreements were formally concluded.[23]

Several months later, on November 17th, 1965, Ottawa concluded with Paris a treaty or cultural agreement, the purpose of which was to promote exchanges and contacts between France and all of Canada.[24] To the extent that it concerns higher education, its application could give rise to numerous constitutional difficulties; the parties, therefore, specified that they committed themselves to the extent of their respective competence. The agreement contains no reference to Quebec's claims with respect to treaties. There was annexed to the document, however, an exchange of

[22] See *supra*, footnote 2 (Author's translation). The Minister expressed the same views in an address to a delegation of university professors from Belgium, France and Switzerland, at the Quebec Parliament, on April 22nd, 1965.

[23] Press Release No. 25, April 23rd, 1965, Le Devoir, Montreal, April 24th, 1965, p. 1.; (1965), 110 House of Commons Debates 395 (April 26th, 1965).

[24] See (1965), 17 External Affairs 513.

letters in which it was stated that cultural exchanges could be the object of agreements entered into with the provinces of Canada. In effect, this letter contains the principal feature of the agreement, since France probably preferred that no mention be made of a constitutional problem in the main body of the treaty. However, the Government of Quebec was in no way inclined to avail itself of this provision, since federal competence in cultural matters is strongly questioned in the province.

The exchange of letters with Paris stipulated that the provinces might sign agreements, either by referring to the Ottawa-Paris agreement, or by obtaining the agreement of the federal government. Thus the agreement on cultural co-operation, signed at Quebec several days later, on November 24th, 1965, by the French Ambassador and the Quebec Minister for Cultural Affairs, makes no mention of the Ottawa-Paris agreement.[25] Ottawa's assent appears to have been obtained, however.

VI

These empirical arrangements, designed to save appearances *a posteriori*, raised a number of problems. They must no doubt be considered as another episode in the constitutional crisis which has been going on for some time in this country. Just what sort of agreement must be obtained from the central government? Will Ottawa be able to exercise control over the very content of the agreement, although it may be within exclusive provincial competence? To this, the Quebec Government has replied, through M. Gérin-Lajoie "that it is no longer admissible . . . that the federal government should exercise a sort of supervision and policy control over the international relations of Quebec".[26]

This attitude does not exclude the control of the constitutionality of the agreements entered into by Quebec. It goes without saying that a similar control should also take place with respect to treaties signed by Ottawa. As long as Quebec remains a member of a federal or confederal State, the question of constitutionality may be raised whenever agreements are concluded by either level of government. Important as it is to remove any policy control over Quebec treaties, it is just as important to accept a control of their legality. Of course, this review should not be carried out by the federal government, but rather by the courts.

The new Quebec requires greater decentralisation as a condi-

[25] See *ibid.*, at p. 520.
[26] See *supra*, footnote 2 (Author's translation).

tion of membership in the Canadian federation. Since it is possible, however, that the English-speaking provinces will tend towards greater centralisation, the most reasonable solution would be to specify in the special status for Quebec a strictly judicial control over treaties. The other provinces would then be free to adopt the method which suits them best and, if need be, reinstate the system inspired by article 132 of the British North America Act, or to borrow a solution from the first category of federations we have described (India, Brazil, Austria).

The preceding considerations lead us to believe that the problem of the *jus tractatuum* cannot be separated from the overall constitutional question. Up to now, agreements concluded by Quebec have concerned only double taxation, technical co-operation and exchanges of researchers, professors and students. It is sufficient, however, to envisage the multiplication of such agreements in all fields that fall under provincial jurisdiction, natural resources for instance, to have an idea of the friction which could arise, under the present Constitution, between Ottawa and Quebec. This dimension of the problem indeed shows that Quebec will eventually come to question the overall Canadian federal system and that, sooner or later, it will be necessary to face the heavy task of redefining the constitutional equilibrium of the country.

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