# COMMENTS
# COMMENTAIRES

DROIT ADMINISTRATIF—IMMIGRATION—PARTIALITÉ[1] EN FAVEUR D'UN SERVICE—BREF DE CERTIORARI.—Le ministère fédéral de la Citoyenneté et de l'Immigration admet au Canada, en juin 1963, un individu originaire de Trinidad, nommé Gooliah, dans le but de lui permettre de poursuivre, à titre d'étudiant, un cours d'électronique à l'Institut de technologie du Manitoba. N'ayant pas réussi, au cours de la première année, à obtenir la moyenne requise par l'Institut, Gooliah, plutôt que de reprendre son année, s'inscrit, sur le conseil de son tuteur, à un cours préparatoire à l'apprentissage.

Ce changement dans le statut de Gooliah ne vient à la connaissance du ministère de l'Immigration qu'en janvier 1965, lorsque ce dernier, ayant terminé avec succès ce cours préparatoire, loge une demande au ministère aux fins d'être enregistré comme apprenti.

Le ministre de l'Immigration nomme alors, en vertu des pouvoirs que lui confère l'article 11 de la Loi sur l'immigration,[2] un fonctionnaire de son ministère à Winnipeg, Mr. Alfred F. Brooks comme enquêteur spécial aux fins d'examiner si, en abandonnant un cours purement académique pour entreprendre un entraînement pratique, Gooliah a opéré dans son statut un changement tel qu'il se trouve maintenant dans une catégorie autre que celle dans laquelle il a été admis au Canada à titre de non-immigrant.

Au terme de l'enquête, une ordonnance d'expulsion est émise contre Gooliah. Ce dernier demande alors à la Cour du Banc de la Reine du Manitoba d'émettre un bref de *certiorari* pour annuler cette ordonnance, alléguant que l'enquêteur spécial procède selon une opinion préconçue, fait preuve de préjugés et de partialité et, partant, viole l'un des principes fondamentaux du droit et de la justice, soit le droit pour une personne de jouir d'une

[1] Il est possible de traduire l'expression anglaise "bias" par le terme français "partialité", à condition d'admettre que cette dernière puisse être involontaire ou inconsciente.

[2] S.R.C., 1952, c. 325.

audition impartiale et désintéressée. Le juge en chef Tritschler[3] juge ces motifs fondés et émet un bref de *certiorari* annulant l'ordonnance d'expulsion. Le ministère public[4] porte ce jugement devant la Cour d'appel du Manitoba.

La Cour d'appel du Manitoba, par un jugement majoritaire,[5] maintient la décision rendue en première instance par le juge Tritschler. Après avoir posé le principe général que, dans un litige entre deux parties, l'agent de l'une des parties ne peut jouer le double rôle d'accusateur et de juge, le juge Freedman reconnaît que, dans l'espèce qui lui est soumise, c'est justement ce que la Loi sur l'immigration[6] permet:[7]

> Ordinarily, in a dispute between two parties, an officer of one of them may not properly assume the role of judge. But in the present case the statute permits that very thing.

Reprenant, toutefois, les termes mêmes du juge de première instance, le juge Freedman prend soin de souligner que, si la Loi sur l'immigration habilite l'enquêteur spécial à être de la partie, c'est à titre d'arbitre et non pas comme membre de l'équipe adverse.[8]

Il s'agit donc, fondamentalement, de déterminer, si de par sa situation stratégique en tant que fonctionnaire du ministère de l'Immigration à Winnipeg, Mr. Brooks s'est formé une opinion sur l'affaire—favorable au ministère et défavorable à Mr. Gooliah —et s'il s'est laissé guider par cette opinion lors de la conduite de son enquête ayant ainsi fait preuve de partialité et de préjugés. Voici d'ailleurs comment s'exprime le juge Freedman:

> In examining the conduct of the Special Inquiry Officer, it will be necessary to determine whether he functioned as a judicial or quasi judicial officer (which he was) or as a partisan (which in law he was not entitled to be[9]. . . .)
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> The rightness or wrongness of his conclusions was not the issue for determination in the Court below nor is it the issue here. What is of concern is whether in dealing with these or other questions the officer acted judicially and impartially or whether he conducted himself in a spirit of bias or partisanship.[10]

Le juge Monnin, dissident, fait toutefois remarquer, de concert d'ailleurs sur ce point avec le juge Freedman, qu'il est nécessaire,

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[3] Jugement non rapporté. [4] Habituellement appelé "la Couronne".
[5] *Re Gooliah and Minister of Citizenship and Immigration* (1967), 63 D.L.R. (2d) 224. Jugement rendu par MM. les juges Freedman et Guy, avec la dissidence du juge Monnin.
[6] *Supra*, note 2, art. 11(1). [7] *Supra*, note 5, à la p. 228.
[8] *Ibid.*, à la p. 230. [9] *Ibid.*
[10] *Ibid.*, à la p. 231.

pour que la Cour intervienne, que la partialité et les préjugés soient ceux de l'enquêteur spécial lui-même et non pas ceux de quelques autres membres du ministère de l'Immigration:[11]

> The real issue is whether an allegation of bias, ill-will or prejudgment can be attached to Brooks acting in his capacity as a Special Inquiry Officer, and to him alone. Whatever may have transpired with other department officials prior to the inquiry has no bearing at all. It is the conduct of Brooks alone that must be looked at.

Il faut donc distinguer, entre la conduite de l'enquêteur spécial et celle des autres membres du ministère car, comme le souligne le juge Freedman:[12]

> Their bias would not destroy the Special Inquiry Officer's jurisdiction. That is to say it would not destroy it unless the bias infected him personally and improperly influenced his handling of the inquiry.

Enfin, le juge Freedman se dit d'avis que Gooliah avait le droit de connaître les directives, règlements ou documents sur lesquels le ministère de l'Immigration s'est fondé pour prétendre qu'il avait cessé d'appartenir à la catégorie spécifique dans laquelle il avait été admis au Canada:[13]

> It became very pertinent, in view of the Department's reliance upon a confidential manual of instructions, to ascertain whether Gooliah had been informed of the manner in which those instructions bore upon his case or whether, on the other hand, he had been condemned to deportation without knowledge of their relevant contents.

Ces quelques principes étant posés, les juges Freedman, Guy et Monnin procèdent ensuite à l'examen des faits en cause. Les juges Freedman et Guy, pour leur part, dans un jugement majoritaire, en viennent à la conclusion que l'enquêteur spécial du ministère de l'Immigration a agi de façon partiale et préjugée et a, lors de son enquête, violé les règles fondamentales de la justice naturelle:

> The performance of the Special Inquiry Officer on this matter was not that of one engaged in an objective search for truth. Rather it appeared to be an attempt to find justification or support for a point of view to which, in advance of the relevant testimony, he was already firmly committed. Such conduct falls below the standard to which a person engaged in a judicial or quasi judicial task is expected to conform[14]. . . .
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> Looking at the record of the inquiry in its entirety, I am constrained to say, as did Tritschler, C.J.Q.B., that it discloses a hostile attitude on the part of the Special Inquiry Officer towards the applicant[15]. . . .

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[11] *Ibid.*, à la p. 250. [12] *Ibid.*, à la p. 230. [13] *Ibid.*, à la p. 235.
[14] *Ibid.*, à la p. 234. [15] *Ibid.*, à la p. 235.

> I regret that I have found it necessary to be critical of the conduct of the Special Inquiry Officer. He is an experienced and, I have no doubt, an able and conscientious officer of the Immigration Branch. Perhaps in this case, he convinced himself that Gooliah had become disentitled to remain in Canada and ought therefore to be deported. That attitude may have controlled his approach to the inquiry and caused him, in a spirit of excessive zeal, to deal with the issues in such a way as to ensure the attainment of the objective he was seeking. Unfortunately, however, the result was something less than justice for Mr. Gooliah. It exposed him to an inquiry which fell below the standard of objective impartiality and adherence to natural justice which the law demands and to which he was entitled[16]. . . .
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> It is quite apparent that Mr. Brooks' function as an officer of the Department of Immigration in Winnipeg did indeed colour his approach to the inquiry to the extent that it showed some measure of prejudgment or prejudice.[17]

Le juge Monnin, pour sa part, tout en reconnaissant que l'enquêteur spécial n'a pas suivi la procédure ni adopté le phraséologie des cours de justice, ne peut admettre qu'il ait violé véritablement et dans leur essence même les principes de la justice naturelle:[18]

> Gooliah and his counsel knew what they had to face; they were given ample opportunity to meet the situation. I am unable to find that the Special Inquiry Officer was biased, acted capriciously or demonstrated ill-will towards Gooliah or had prejudged the issue.

Il enregistre donc sa dissidence au jugement majoritaire de la Cour d'appel qui rejette l'appel du ministère public et maintient le jugement rendu en première instance annulant l'ordonnance d'expulsion.

Au plan du droit administratif, cette décision, on le conçoit aisément, est intéressante à plus d'un point de vue.

D'abord, il faut remarquer que la question de fond qui y est débattue, soit celle de la partialité d'un fonctionnaire en faveur du service gouvernemental dont il fait partie, a rarement fait l'objet de litiges devant les tribunaux canadiens et, jamais d'une façon aussi élaborée.

En principe, on reconnaît au Canada qu'il est illogique et futile de vouloir imposer à un ministre ou à un fonctionnaire qui essaie d'accomplir ses fonctions en accord avec les politiques gouvernementales ou avec celles de son service, les normes précises d'impartialité qui sont normalement requises des tribunaux ou officiers judiciaires.[19] Il s'avère donc extrêmement difficile de faire annuler

[16] *Ibid.*, à la p. 236.
[17] *Ibid.*, à la p. 238, M. le juge Guy.
[18] *Ibid.*, à la p. 254.
[19] René Dussault, Judicial Review of Administrative Action in Quebec: Criteria and Scope (1967), 45 Rev. du Bar. Can. 35, à la p. 96.

les actes posés ou les décisions rendues par un ministre ou un fonctionnaire pour le simple motif qu'il a fait preuve de partialité en faveur du service qu'il dirige ou auquel il appartient. Il faut généralement prouver que le ministre ou le fonctionnaire a agi de mauvaise foi ou pour des motifs non pertinents.[20]

Néanmoins, cette récente décision de la Cour d'appel du Manitoba démontre que les cours canadiennes n'hésitent pas, lorsqu'un fonctionnaire exerce, à l'occasion de ses fonctions administratives, certains pouvoirs de nature judiciaire ou quasi judiciaire, à lui imposer le devoir d'agir de façon tout-à-fait impartiale. En cela, cette décision vient corroborer une opinion récemment émise par le juge Bissonnette de la Cour d'appel du Québec dans l'affaire *Guay* v. *Lafleur*.[21] Dans cette affaire, le juge Bissonnette, parlant du défendeur qui était fonctionnaire du ministère du Revenu national et seul membre d'une commission formée en vertu de la Loi sur les enquêtes[22] aux fins d'enquêter sur les affaires financières du demandeur, avait déclaré ce qui suit:[23]

> On n'est évidemment pas en présence d'une commission impartiale. Si probe et sympathique soit-il, le défendeur joue le rôle d'accusateur, d'avocat et de juge, plus que cela, celui d'un véritable inquisiteur. Il veut pour des fins ultérieures étayer sa preuve. Or, qui dit inquisition dit perquisition rigoureuse mêlée d'arbitraire. Fonctionnaire dévoué au service dont il fait partie, il est forcément, même malgré lui, préjugé.

Il est frappant, dans ces deux arrêts, de constater à la source même du litige la présence d'un dénominateur commun: la législation. En effet, dans l'un comme dans l'autre, on retrouve un texte

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[20] *Roncarelli* v. *Duplessis*, [1959] R.C.S. 121, infirmant, [1956] B.R. 447, et confirmant, [1952] 1 D.L.R. 680.

[21] [1963] B.R. 623, infirmé par, [1965] R.C.S. 12. Il faut remarquer cependant que l'une des principales questions débattues dans cet arrêt était celle de savoir si les fonction exercées par l'enquêteur, nommé en vertu de la Loi de l'impôt, étaient d'une nature judiciaire ou administrative, alors que cette question ne s'est même pas posée dans l'arrêt *Gooliah*; la nature judiciaire des fonctions exercées par l'enquêteur, nommé en vertu de la Loi sur l'immigration, ne faisant aucun doute. En effet, en matière d'immigration, la loi habilite l'enquêteur spécial à rendre lui-même, au terme de son enquête, une décision susceptible d'affecter les individus; soit une ordonnance d'expulsion. En matière d'impôt, par contre, la loi n'habilite l'enquêteur qu'à faire rapport de ses conclusions au ministre qui prend lui-même la décision. Voir René Dussault, Relationship Between the Nature of the Acts of the Administration and Judicial Review: Quebec and Canada (1967), 10 Adm. Pub. Can. 298, à la p. 312.

[22] S.R.C., 1952, c. 148, art. 126(4), (8).

[23] *Supra*, note 21, à la p. 636. Il convient ici de souligner que le juge Bissonnette fut le seul à utiliser cet argument dans le jugement majoritaire rendu par la Cour d'appel du Québec en 1963 et que cet argument n'a d'ailleurs pas été repris par le juge Hall dans sa dissidence au jugement de la Cour suprême du Canada en 1965 renversant le jugement de la Cour d'appel du Québec.

législatif habilitant de façon expresse le ministre à nommer un fonctionnaire de son ministère comme enquêteur spécial. Il s'agit, d'une part, de l'article 11(1) de la Loi sur l'immigration,[24]

> Les fonctionnaires supérieurs de l'immigration sont des enquêteurs spéciaux, et le ministre peut nommer les autres fonctionnaires à l'immigration qu'il juge nécessaires pour agir en qualité d'enquêteurs spéciaux.

et, d'autre part, de l'article 126(4), (8) de la Loi de l'impôt sur le revenu:[25]

> Le ministre peut, pour toute fin ayant trait à l'application ou à l'exécution de la présente loi, autoriser une personne, qu'elle soit ou non un fonctionnaire du ministère du Revenu national, à faire toute enquête qu'elle juge nécessaire sur une question relevant de l'application ou de l'exécution de ladite loi. . . .
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> Aux fins de toute enquête permise en vertu du paragraphe (4), la personne autorisée à faire l'enquête dispose de tous les pouvoirs et de toute l'autorité conférés à un commissaire par les articles 4 et 5 de la Loi sur les enquêtes[26] ou qui peuvent être conférés à un commissaire sous le régime de ladite loi.

Il est certes permis de s'interroger sur la pertinence de telles dispositions. On sait, d'une façon générale, que les membres des organismes administratifs, fonctionnaires ou autres agents publics doivent éviter de se placer dans des situations qui peuvent rendre vraisemblable l'existence chez-eux d'un préjugé à l'égard d'une personne susceptible d'être affectée par leur décisions. Il est, en effet, un vieux principe de *common law* qui veut la justice, non seulement soit faite, mais également, apparaisse, hors de tout doute, avoir été faite.[27]

Pourtant, c'est exactement ce à quoi les articles 11(1) de la Loi sur l'immigration et 126(4), (8) de la Loi de l'impôt sur le revenu habilitent les fonctionnaires des ministères concernés, lorsqu'ils sont nommés enquêteurs spéciaux. Il y a certes donc lieu de se demander si le législateur fédéral ne devrait pas reviser ces dispositions et requérir plutôt que ces enquêtes soient confiées à des personnes qualifiées qui ne sont pas des fonctionnaires.

A cet égard, les termes employés par le juge Guy dans le jugement précité sont on ne peut plus explicites:[28]

> The Immigration Act, R.S.C. 1952, c. 325, specifically authorizes and permits a member of the Department to act as a Special Inquiry Officer. In my personal view, this section of the enactment is unfair to any such

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[24] *Supra*, note 2. [25] S.R.C., 1952, c. 148. [26] S.R.C., 1952, c. 154.

[27] Comme, l'a, en effet, souligné Lord Hewart dans *R.* v. *Sussex Justices, ex p. McCarty*, [1924] 1 K.B. 256, à la p. 259: "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."

[28] *Supra*, note 5, à la p. 238.

persons so appointed, let alone the person who is the subject of the inquiry. An officer of the Department who is appointed as a Special Inquiry Officer is immediately made potentially vulnerable to an attack of this nature respecting his impartiality. It must be remembered that either Brooks or one of his confreres in the Department of Immigration (in this case McLeod) was required to sign the "check-out" letter to Gooliah. Brooks cannot be expected to be entirely free of some tentative prejudgment.

This, of course, is attacking the legislation itself which specifically permits the employment of a staff member as a Special Inquiry Officer. While I am not in any position to change the legislation so as to prohibit this, I can say that this employment of a Department officer as a Special Inquiry Officer deliberately invites criticism as to his objective judicial attitude, no matter how diligent that officer may be in his efforts to play a proper, impersonal, disinterested role.

Pursuant to recommendations made by the American Bar Association and the "Hoover Commission" which conducted an extensive investigation into the operations of the Government of the United States of America, the Immigration Service there adopted the practice of appointing qualified lawyers as Special Inquiry Officers. I believe the American experience in this regard was most satisfactory, and it was followed in Canada for a short time around 1960 and 1961.

Même si on partage entièrement l'avis du juge Guy sur la question, on peut toutefois s'étonner de trouver une telle critique de la législation existante sous la plume d'un juge d'une cour d'appel. Le régime constitutionnel canadien subordonne, en effet, sauf pour ce qui est du partage des compétences législatives, le juge au législateur. C'est donc dire que le rôle du juge ne consiste pas à faire la loi, mais à l'appliquer.[29] Le juge ne peut donc pas critiquer la loi, encore moins la changer.[30] Pour utiliser les termes mêmes du juge Bissonnette:[31]

[29] Comme l'a souligné le juge Strong dans *Sivern* v. *The Queen* (1878), 2 R.C.S. 70, à la p. 103: "It does not belong to courts of justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it." Ce n'est pas autrement, d'ailleurs, que s'est prononcé sur la question le juge Schroeder dans *Re Noble and Wolf*, [1948] 4 D.L.R. 123, à la p. 139: "Whatever view I may entertain, based upon my conception of justice, morality or convenience, I must always have present to my mind the proper conception of the judicial function, namely to expound and interpret the law and not to create the law based on my individual notion or opinion of what the law ought to be."

[30] Dans *Cedar Towers Corporation* v. *Cité de Montréal*, [1960] C.S. 552, à la p. 555, le juge Brossard s'est exprimé comme suit: "Les juges cependant ne peuvent ignorer la loi; ils doivent la respecter; ils ne peuvent substituer leur opinion sur la sagesse de la loi à celle du législateur; toute critique de la sagesse de la loi doit s'adresser à la Législature et non pas aux tribunaux. *Dura lex, sed lex*!"

[31] Considérations sur la Cour d'appel (1962), 22 R. du B. 573, à la p. 578. Voir aussi *Giroux* v. *Maheux*, [1947] B.R. 163, à la p. 168, par le juge Pratte: "La décision judiciaire ne crée pas de droit. La loi crée les droits et le tribunal les constate."

> Le juge doit se soumettre à la règle de droit. Il ne peut y déroger. L'ordre social et la justice même lui imposent cet impérieux devoir. A tous égards, il en est le serviteur, pour ne par dire l'esclave.

C'est d'ailleurs ce que reconnaît formellement le juge Monnin, dissident, dans l'affaire *Gooliah*, lorsque examinant à son tour les dispositions de la Loi sur l'immigration, il déclare:[32]

> A court is not free to question the legislation enacted by Parliament and, whether one approves of it or not, the Court's duty is to examine whether the law as enacted has been properly exercised; ascertain itself that there has been no abuse; make certain there is no lack or excess of jurisdiction; and assure itself that ill-will was not demonstrated to anyone in the application of the laws and regulations made thereunder.

Le contraste entre cette attitude et celle adoptée par le juge Guy[33] est, on en conviendra, des plus saisissant. Rares, en effet, sont les cas où on retrouve dans un même arrêt une approche aussi différente sur une question aussi fondamentale.

Il convient également de souligner la contradiction qui existe entre l'opinion du juge Freedman et celle du juge Monnin, dissident, sur la question du droit d'accès d'une personne aux directives, règlements ou documents confidentiels sur lesquels se fonde l'Administration pour prendre une décision à son égard. D'une part, en effet, nous l'avons déjà souligné, le juge Freedman pose comme principe que la personne, dont l'Administration examine le dossier, a le droit d'être informée du contenu, pertinent à sa cause, des directives, règlements ou documents confidentiels sur lesquels l'Administration fonde sa décision.[34] D'autre part, parlant de ces mêmes documents, le juge Monnin déclare:[35]

> I see no difficulty with the departmental instructions as it must be accepted that a Minister or a senior departmental officer can circulate to his personnel guide lines and instructions on admissions to Canada and their use. They should remain of a confidential nature within the confines of the department.

Voilà certes une question sur laquelle les tribunaux canadiens devront se pencher à nouveau aux fins d'apporter des éclaircissements. On réalise donc, en définitive, que cette décision de la Cour d'appel du Manitoba dans l'affaire *Gooliah* quoique faisant, à plusieurs points de vue, progresser le droit administratif canadien, soulève néanmoins certains problèmes dont la solution reste encore à trouver.

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[32] *Supra*, note 5, à la p. 247.

[33] *Ibid.*, à la p. 238. [34] *Ibid.*, à la p. 235. [35] *Ibid.*, à la p. 252.

SECURITIES—CHATTELS—LAND—CONDITIONAL SALES ACT—REGISTRY ACT—PRIORITIES.—The bane of a law teacher's life is the difficulty of constructing hypotheticals which will bring conflicting principles of law into sharp relief. Every now and again real life concocts a situation which achieves this aim much more satisfactorily than any fictitious example. Such a fact pattern was provided by the recent case of *Montreal Trust Co.* v. *Goldaire Rentals Ltd. et. al*,[1] where the Ontario High Court had to interpret the doctrine of priorities from within the legislative framework provided by The Registry[2] and The Conditional Sales Acts.[3] The problem was raised by the following sequence of events:

(i) Goldaire Rentals Ltd. (the defendant) wished to erect an office building in London, Ontario. Accordingly the defendant first entered into a contract with Otis Elevator Company Limited whereby the latter undertook to supply an elevator for the building. Otis was to retain property in its elevator until all purchase and erection monies had been paid by instalments. This contract was not registered.

(ii) To finance the undertaking, Goldaire obtained a mortgage from Montreal Trust Co. which was registered promptly. Money was lent then and there and further advances were to be made periodically. Some such advances were made. Then,

(iii) Otis began to install the elevator. Otis had earlier specified the size of the elevator shaft so that one of its standard models could be inserted easily. This type of construction also permitted removal of the elevator with a minimum of damage to the building. The contract was still not registered.

(iv) After this installation had begun, the mortgagee made further advances, until finally the full amount promised had been lent. Only then did Otis register its conditional sale contract.

(v) Goldaire defaulted, causing the mortgagee to foreclose. A default judgment was followed by a sale of the premises, and the question before the court was the deceptively simple one of deciding on the order of priority of distribution of the various monies owed to the mortgagee and the conditional seller.

As a prologue, something needs to be said about the state of the law prior to legislative regulation. Let us accept the opinion of the court that the elevator in the instant case became a fixture when installed.[4] At common law a fixture was part of the realty

[1] (1967), 59 D.L.R. (2d) 338.
[2] R.S.O., 1960, c. 348. [3] R.S.O., 1960, c. 61.
[4] The greatest part of the court's judgment is taken up by the reasons in favour of pronouncing the elevator a fixture. If this conclusion would not

from the moment it could be so characterized, and therefore owned by the proprietor of the real estate. This was so, even though the affixer had never intended such a result. Naturally special rules evolved to protect a tenant's possessions against undeserved claims by a reversioner, and thus it is that such fixtures which can be identified as "tenant's fixtures" may always be removed. A more difficult situation exists however where another party is involved in the tug of war. This happens where there is a mortgagee—mortgagor relationship, and the mortgagor buys a chattel which he affixes to the realty and the seller of this chattel, by contract, remains the owner of it until it has been fully paid for. Here, the rule that a fixture is irremovable clearly works a hardship on the conditional seller, and hence it was not surprising that courts should modify the "irremovable" rule.

Thus it was held in *Gough* v. *Wood & Co.*[5] that until the mortgagee (who is the fee simple owner) exercises his right to possession, the mortgagor may affix and remove things at will. But if the thing is still affixed when the mortgagee takes possession, then being part of the realty, it falls into the mortgagee's possession with all the rest of the land, and neither the mortgagor nor the conditional seller will have a claim. The courts in adopting this approach[6] were merely following the reasoning they had already utilized in the analogous landlord-tenant relationship. It is plain that the protection given to the mortgagor, was like a tenant's, implied from his physical possession of the realty. It became common place, therefore, for mortgagees to circumvent this judicial protection, by simply inserting into the mortgage agreement a clause which prevented the mortgagor from removing any fixture, whenever acquired, from the mortgaged premises. In other words, the implied authority was revoked. This left a conditional seller a poor second in any dispute with the mortgagee over entitlement to the affixed chattel. This was considered a most unfortunate, but inevitable result of the common law doctrines: ". . . it must be left to legislation, or to the decision of a higher tribunal, to protect honest traders from dangers which they can neither foresee nor guard against".[7] In Ontario, the legislature

have been reached. then Otis would not have been protected by The Conditional Sales Act, *ibid.*, s. 10.

[5] [1894] 1 Q.B. 713.

[6] For illustrative cases see *Ellis* v. *Glover & Hobson Ltd.*, [1908] 1 K.B. 388; *Hobson* v. *Garringe*, [1897] 1 Ch. 182; *Reynolds* v. *Ashley & Son*, [1904] A.C. 466.

[7] Per Fletcher Moulton L.J. in *Ellis* v. *Glover & Hobson Ltd.*, *ibid.*, at p. 398.

responded to this problem by the enactment of certain provisions of The Conditional Sales Act.

Section 10(1) of that Act provides that a conditional seller will always remain the paramount owner of goods sold by him and affixed to the land, but that the owner of the real estate has an option to purchase such goods. On its face, this resolves the conflict between a prior mortgagee and seller in the latter's favour. But the court had for too long been indoctrinated by the principle of "once a fixture, always land" for it to be so easily defeated. Thus in *Hoppe* v. *Manners*[8] it was held that a mortgage created subsequently to the affixation was entitled to priority over the seller because his claim over the land (which at common law includes fixtures) was registered prior to the seller's claim to the land—that is, the claim to his affixed "thing". This holding could only apply where the subsequent mortgagee had no notice of the conditional sale. Hence the legislature responded on behalf of the seller by enacting section 14(3) which provides that a subsequent encumbrancer of land will be deemed to have actual notice of a prior conditional sale if it is registered under The Conditional Sales Act.

This legislative history is very instructive. It demonstrates, that, to encourage conditional sales contracts the legislators have afforded sellers the utmost protection. Further, it is clear that the safeguards so provided are based on sound policy. Prior to the above enactment a mortgagee who foreclosed and sold property which included fixtures "owned" by a conditional seller, obtained a windfall at the expense of such a seller. After all, when the mortgagee took his risk, he loaned money upon the security as it stood, and not on the hope that the value would be increased by hapless third parties. It follows from this that where a mortgagee who is *bona fide*, that is without notice of a prior conditional sale, lends money, he does so on the security which includes the affixed "thing". In such a case the mortgagee should have a better claim than the seller to the fixture. And indeed, section 14(4) gives this protection in some measure by providing that if prior to affixation a mortgage existed, then further *bona fide* loans under that mortgage will have priority over the conditional sale contract until its registration.

This puts us in a position to solve the problem presented by the facts of *Montreal Trust* v. *Goldaire*. The conditional seller's claim comes before the mortgagee's by virtue of section 10, except for that part of the money lent after affixation of the elevator

[8] (1931), 66 O.L.R. 587.

but before registration by the conditional seller of his contract. Thus distribution of Goldaire's assets should have had to be made in the following order:

a) the mortgagee's advances from the date of affixation until the final advance (no notice until then);

b) the conditional seller's claim for the outstanding monies on its supply and work contract;

c) the mortgagee's advances from the date of registration of the mortgage until affixation of the elevator.

The court adopted this interpretation. It is here submitted that though such a decision flows from a natural reading of The Conditional Sales Act, it reveals defects and inconsistencies in the legislative schemes regulating our priority doctrines.

One of the objections raised by the mortgagee in *Goldaire* was that the first monies it had lent were to be paid out last. This result offends logic. It is perhaps true that the first monies paid should be repaid only out of the proceeds of a sale of the very security on which they were loaned. By the same token, the advances made after the improvement should only be secured to the extent of the value of the improvement plus the value of the property after deducting any prior existing charges. Here the court did not make the mortgagee's advances after affixation subject to any prior encumbrances at all. This approach could lead to a strange result as may be shown by an illustration. Assume that there is a registered first mortgage; then a second, under which some advances are made, and future advances are promised. A conditional seller affixes, but before he registers his contract, the second mortgagee makes further advances. The *Goldaire* approach should result in the *second* mortgagee's last advances taking priority over the first mortgagee's claim. If nothing else is clear, it is manifest that this interpretation of The Conditional Sales Act has thrown the ordinary priority rules into confusion. Further, a problem arising out of legislative rules on priority is also created. Briefly stated it is this: when a mortgagee registers a mortgage under which he is to make further advances, he is entitled to priority over any other later mortgagees although his later advances are made subsequent to the registration of a mortgage. This makes sense for if the first mortgage is agreed to be (and registered as being) for a sum certain, then it is either a mortgage for that amount or not, and the legal interest that the mortgagee acquires should not be disturbed by later equitable interests. But section 79 of The Registry Act qualifies this doctrine by stating

that the first mortgagee will only be protected to the extent of his loan, and should he make advances after he actually knows of other mortgages, such advances will rank below the later mortgagee's interest.[9] It is now conceivable that the second mortgagee in the hypothetical could end the priority of a mortgagee who has a better and prior legal interest, without giving *actual notice*. It could be argued that this would not be an undesirable result, as the first mortgagee would only be forced to rank behind the second mortgagee with respect to security on which he never lent money. But of course there will be many instances in which the second mortgagee's advances after affixation could well exceed the value of the affixed thing. If priority be granted to the second mortgagee he would displace the prior mortgagee from his proper position of paramountcy.[10]

This conflict between The Conditional Sales Act and The Registry Act as a result of the *Goldaire* decision is compounded by another aspect of the case. Let us assume this sequence of events:

(i) a first mortgage which is registered and under which money is lent immediately;

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[9] S. 79 enacted the decision reached in *Pierce* v. *Canada Permanent Loan and Savings* (1894), 25 O.R. 671. A problem not referred to by the courts after this enactment still persists: if the first mortgagee's interest could be disturbed by actual notice of a later interest, why did he not have to enter into a new mortgage upon actual notice of the later charge? See Osborne, On Mortgages (1951), p. 287 *et seq.*

[10] An apparent solution is provided by Falconbridge, Law of Mortgages (3rd ed., 1942), at p. 146 where he discusses a similar problem arising out of *McMillan* v. *Munro* (1898), 25 O.A.R. 288 and *Thomson* v. *Harrison* (1927), 60 O.L.R. 484. By analogy to the learned author's argument there, it could be suggested that although The Conditional Sales Act gives the second mortgagee priority over the conditional seller, as The Registry Act gave the first mortgagee priority over the second, this latter priority is to be preserved by giving the first mortgagee the privilege of being subrogated to the second mortgagee's rights arising out of The Conditional Sales Act. This is appealing, for in *Goldaire* it would mean that the first mortgagee would step into his own shoes, but it is not an acceptable answer. Dr. Falconbridge was resolving a conflict that arose from the provisions of one Act. If we adopted this approach to salvage the requirements of The Registry Act, we would do violence to the tenets of The Conditional Sales Act. Surely if the prior encumbrancer may be subrograted to a later one's advances after affixation, then that later encumbrancer will not be protected by s. 14(4) *i.e.* his loan, *bona fide*, on the security after improvement, is not protected. Yet both s. 10 and s. 14 set out to afford this safeguard. A worthwhile alternative might be to have the first mortgagee subrogated to advances of the second mortgagee made after affixation to the extent that these exceed the value of the affixed chattel. Such an interpretation would be satisfactory in principle but requires a very liberal reading of s. 14(4) of The Conditional Sales Act. It is dubious whether a court would range so wide afield.

(ii) affixation of a chattel sold to the mortgagor under a conditional sale contract, which is not yet registered;

(iii) further advances under the first mortgage;

(iv) a second mortgage which is registered and under which money is immediately lent;

(v) registration by the conditional seller of his contract. In distributing monies between these various creditors, it is clear that the monies lent by the first mortgagee after affixation will have to be paid out before the first monies lent by that mortgagee. The second mortgagee who also made advances after affixation, and before registration of the conditional sale contract, will not receive such generous treatment, as section 14(4) only supports the claim of a mortgagee whose interest was registered prior to affixation of the subject-matter of the conditional sale.[11] Yet it is clear that if the policy basis for the decision in *Goldaire* is a sound one, the second mortgagee here should get priority over the seller, for his advances like the first mortgagee's last ones in the principal case, were made after the value of the property had been increased by the fixture. This apparent loophole in section 14(4) is seemingly covered by section 2(1) of The Conditional Sales Act. It reads:

> Where possession of goods is delivered to a purchaser of them under a contract which provides that the ownership is to remain in the seller until payment of the consideration money or part of it, *as against a purchaser or mortgagee claiming from or under the purchaser, without notice, in good faith and for valuable consideration, such provision is invalid* and the purchaser shall be deemed to be the owner of the goods, unless:
>
> (a) the contract is evidenced by a writing, signed by the purchaser or his agent, stating the terms and conditions of the sale and describing the goods sold; and
>
> (b) within ten days after the execution of the contract a true copy of it is registered in the office of the clerk of the country or district court of the country or district in which the purchaser resided at the time of sale and the renewal statement, if any, is registered as provided in section 5.[12]

In *Goldaire* itself the mortgagee had registered after the creation of the conditional sale contract and without notice of it. He therefore argued, that as the conditional seller had let nine months lapse, rather than ten days, between formation of contract and its

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[11] S. 14(4) reads: "Where the goods have become affixed to the land or are fixtures and there is *already* registered against the land a mortgage or charge . . ." the future advance will obtain priority. Emphasis added.

[12] Emphasis added.

registration, he (the mortgagee) was a subsequent encumbrancer for the purposes of section 2(1) and should be entitled to first claim on the affixed chattel. The court dismissed this argument by adopting a[13] literal interpretation of the section. It was held that a purchaser or mortgagee did not become subsequent, unless the goods had been delivered in possession to the purchaser of them, and the contract had not been registered within ten days of such delivery date. Now, it will be noted that section 2(1) (b) speaks of registration within ten days of execution. Henceforth this must be read as meaning as within ten days of the implementation of the contract rather than its formation. The effect of this rigidly linguistic approach to section 2(1) in this case is that the policy basis for the very decision in *Goldaire* is being undermined, in that a *bona fide* later advance on the improved security was not protected. This was amplified by the fact that the court thought that the words "when possession of goods is delivered" did not refer to the date that components were dumped prior to installation, and might be elastic enough to mean either the date of acceptance of the "thing" by the purchaser, or the date of completion of installation. It is therefore very difficult indeed to become a "subsequent" encumbrance for the purposes of benefiting under section 2(1).[14]

As if all this were not enough, the legislators themselves have thrown the legislative regulation of priorities into chaos. It has already been seen that a first mortgagee who makes further advances under his registered mortgage, retains priority over later registered mortgages unless he has actual notice of such subsequent encumbrances. In other words the legislature thought that it would be unfair and cumbersome to make an already registered mortgagee check the register for later entries. Yet under The Conditional Sales Act, the same mortgagee is obliged to check for later registered conditional sale contracts. Surely such a re-

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[13] *Supra*, footnote 1, at pp. 355-356.

[14] Although the point was not raised in *Montreal Trust* v. *Goldaire*, it was plausible to argue that the conditional seller is protected against all subsequent encumbrances (except those protected by s. 14(4)), if the subject of the contract is manufactured goods on which the seller's name and address are indicated: s. 2(5). Even if Otis might not have had this argument available to it, it is clear that most manufacturers can ensure that they will be given such protection. Yet it points to another anomaly. The subsequent encumbrancer would presumably be defeated because he could have *seen* the nature of the improvement with his own eyes. But by ss. 14(3) and (4), the encumbrancer must have actual notice which is not vouchsafed by physical presence, but by registration.

quirement is just as cumbersome as the need to look out for subsequent mortgages?

Granting the theoretical nature of the hypotheticals chosen, they illustrate that neither the courts nor the legislators, have evolved a coherent, rational system of priorities. Such a development is of course highly desirable. How can it be achieved?

In making some suggestions, it is submitted that at least four criteria must be satisfied:

(a) between successive purchasers and lenders, the chronological order of the creation of their interests should determine the priorities;

(b) a subsequent purchaser or encumbrancer for value without notice should not be prejudiced but registration should suffice as notice;

(c) a prior registrant should not get a windfall at the expense of one who increases the value of the security;

(d) the various legislative schemes should be in harmony.

It is not too difficult to provide a solution which would encompass these basic requirements by putting a burden on the conditional seller. Such a person could be completely protected by asking him to check the various registers prior to entering into his contract. If he does so, and registers, any later encumbrancer of any kind could be deemed to have actual notice of the contract and will take subject to it. If a mortgage has already been registered the seller can protect himself against further advances by such a mortgagee, by giving him notice of his contract of sale.[15] This would bring The Conditional Sales Act provisions into line with The Registry Act requirements, where a later encumbrancer must give notice other than registration to a prior registered interest, but not to a later one.

If this be thought to be too onerous on the conditional seller, an alternate scheme could be employed. This would again require a conditional seller to register the contract upon creation, but not to give notice to a prior encumbrancer. A mortgagee who is already registered would again only be protected up to the value of the security prior to affixation. For any monies lent after that, he will be subsequent in priority to the registered interest of the

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[15] This scheme would dovetail with the provisions of The Mechanics' Lien Act, R.S.O., 1960, c. 233, ss. 7(3), 7(4), and 13(1). This in itself would be useful for the Otis elevator in this instance was held to be a fixture, it could just as easily have been held to be building materials. Surely neither the mortgagee's nor the supplier's remedies should depend on where such a fine line of distinction might be drawn?

conditional seller. Thus to protect himself he will have to search the register before making further loans. This would be more awkward to implement, for to harmonize the statutes, it would be necessary to amend section 79 of The Registry Act, and make a prior registered mortgagee search the register before making further advances. Nonetheless either solution would bring some order into a very muddled area.[16]

H. J. GLASBEEK*

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CONFLICT OF LAWS—RECOGNITION OF FOREIGN DIVORCE DECREES—A "PROPER FORUM"—A FORUM WITH WHICH THE PETITIONER HAS A SUBSTANTIAL AND REAL CONNEXION.— In *Indyka* v. *Indyka*,[1] the English Court of Appeal was confronted with the issue of whether or not to recognize a Czechoslovakian divorce decree which had been granted on the petition of the wife after the husband had acquired an English domicile. As the wife had always been resident in Czechoslovakia, there would have been no difficulty in recognizing the decree on the doctrine of *Travers* v. *Holley*,[2] if the decree had been granted after December, 1949 when the Law Reform (Miscellaneous Provisions) Act, 1949[3]

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[16] This comment was written at a time when the Personal Property Security Act, R.S.O., 1967, c. 73 was still not available. It now appears that the draftsman has overcome some of the problems raised by *Goldaire*, by enacting something like the first suggested recommendation for reform. That is, by virtue of s. 36(3) of the new Act it seems that a conditional seller, to protect himself against further advances under a prior registered instrument must give actual notice to such earlier interest. It was suggested in the text that this might well be too onerous on the conditional seller. The burden that was envisaged would stem from the fact that it would be very difficult for a seller to know whether he was selling a potential fixture or not. Further, the seller could be put to some commercially crippling inconvenience. It is true that s. 53(2) permits a sale of a fixture to be registered under the Registry Act. This serves as actual notice to later mortgagees, but again involves the seller in making a decision as to the nature of the chattel he is selling. Thus as the new Act will not be effectively implemented until 1972, it is hoped that the second suggestion made in the text be considered as a way out of these vexing problems.

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[1] [1966] 3 All E.R. 583, [1966] 3 W.L.R. 603 (C.A.). See J.-G. Castel, Comment (1967), 45 Can. Bar Rev. 140 in regard to the retrospective operation of *Travers* v. *Holley*.

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

[3] 12, 13 & 14 Geo. 6, c. 100, s. 1. The Act was repealed by the Matrimonial Causes Act, 1950, 14 & 15 Geo. 6, c. 25 but s. 18 (1)(b) re-enacted the former s. 1. This section has now been repealed and re-enacted as s. 40(1)(b) of the Matrimonial Causes Act, 1965, c. 72.

became effective. This Act enabled the High Court to assume jurisdiction in a proceeding by a wife for divorce or nullity on the basis of her residence in England for three years immediately preceding the suit, in cases in which the husband was domiciled abroad. The majority of the Court of Appeal held that, as the law relating to the recognition of foreign divorces is judge-made law, there was no reason why the doctrine of *Travers* v. *Holley* should not apply to foreign divorce decrees granted to wives prior to December, 1949, in jurisdictions in which the wife had been resident for three years. Diplock L.J. stated: "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* have been making in the common law as to recognition of the effectiveness of foreign judgments of dissolution of marriage."[4]

*The House of Lords and Travers* v. *Holley.*

The husband appealed to the House of Lords.[5] The case is significant in that it is the first time the House of Lords has been called upon to consider whether or not a foreign divorce not granted by the law of the domicile should be recognized. The House of Lords unanimously held that the Czech decree should be recognized. However, the doctrine of *Travers* v. *Holley,* at least in the strict form in which it has been propounded, received approval by only a three to two decision. Lord Reid and Lord Wilberforce disapproved of the rigidity of the doctrine of *Travers* v. *Holley*. Lord Reid, to illustrate his disapproval of the doctrine of *Travers* v. *Holley*, presented the following example:

> An Englishman accompanied by his wife takes a three year's appointment in one of the hundred odd countries of the United Nations where divorce is granted on some flimsy pretext or perhaps merely on request, but they have no intention of making their home there. If the wife, after residing there for three years, gets such a divorce, are the English courts really to be bound to recognise its validity? I can see no answer to that if we accept the *Travers* v. *Holley* doctrine as it is at present being applied; and the result would be the same if an English wife went to such a country, for the purpose of getting a divorce, resided there for three years, perhaps obtaining employment there, and then returned here with her decree. So I propose to consider whether there is not some more satisfactory basis for supporting the decision in *Travers* v. *Holley* and the cases which have followed on it.[6]

[4] *Supra,* footnote 1, at pp. 590-591 (All E.R.), 51 (W.L.R.).
[5] *Indyka* v. *Indyka,* [1967] 2 All E.R. 689, [1967] 3 W.L.R. 510 (H.L.E.).
[6] *Ibid.,* at pp. 697 (All E.R.), 519-520 (W.L.R.).

Lord Wilberforce was also opposed to determining whether a foreign non-domiciliary divorce decree should be recognized by asking whether the same facts, if they had occurred in England, would have permitted an English court to assume jurisdiction. Lord Wilberforce said:[7]

> Finally, as to *Travers* v. *Holley and Holley*. I do not find it necessary to discuss either the case itself, or those which have followed it, in detail, since I am in general agreement with what my noble and learned friend, Lord Reid, has said about it. The decision itself is clearly unexceptionable and it has provided a working rule which, though not without some process of refinement, has proved, if not its logic, at least its utility in the courts. It is only when it is invoked to lay down a cast iron rule that the courts' power and duty to recognise foreign decrees of divorce follows by implication from amendments to the domestic law as to divorce jurisdiction that I begin to find difficulties. For I am unwilling to accept either that the law as to recognition of foreign divorce (still less other) jurisdiction must be a mirror image of our own law or that the pace of recognition must be geared to the haphazard movement of our legislative process. There is no reason why this should be so, for the courts' decisions as regards recognition are shaped by considerations of policy which may differ from those which influence Parliament in changing the domestic law. Moreover, as a matter of history, it is the law as to recognition which has led and that as to domestic jurisdiction which has followed, and Parliament, by refraining from legislating as to recognition (as with minor exceptions it has done) must be taken to have approved this divergence. So I would not regard the *Travers* v. *Holley and Holley* rule as amounting to more than a general working principle that changes in domestic jurisdiction should be taken into account by the courts in decisions as to what foreign decrees they will recognise.

Lord Morris of Borth-Y-Gest, Lord Pearce and Lord Pearson specifically approved of the doctrine of *Travers* v. *Holley*. Lord Morris said: "Now that we assume jurisdiction if a wife has been ordinarily resident in England for three years, I can see no reason why we should not recognise a decree made in some other country where the wife was resident for three years."[8] Lord Pearce said:[9]

> To narrow the ground of recognition accorded by *Travers* v. *Holley and Holley* might cause grave difficulties in respect of those who may have remarried on the strength of it; but even more important it would create unnecessary hardship and difficulty in the future. Counsel for the husband, while attacking the decision, admitted frankly that common sense and practical benefit were all in its favour. It has worked well and it has removed much hardship. In my opinion it would be wrong to overrule or narrow it; one should rather broaden it, and

[7] *Ibid.*, at pp. 727 (All E.R.), 559 (W.L.R.).
[8] *Ibid.*, at pp. 708 (All E.R.), 534 (W.L.R.).
[9] *Ibid.*, at pp. 714-715 (All E.R.), 542 (W.L.R.).

regard our own jurisdiction as only an approximate test of recognition with a right in our courts to go further, when this is justified by special circumstances in the petitioner's connection with the country granting the decree.

Lord Pearson said:[10]

I think that as a minimum the principle of *Travers* v. *Holley and Holley* must be applied in this case . . . . The principle applies if the facts are such as would, *mutatis mutandis*, confer jurisdiction on the English courts, even though the court in the other country may have claimed jurisdiction on some other basis.

*Nationality as a Factor in the Recognition of Foreign Divorce Decrees.*

*Indyka* v. *Indyka* is important because the majority of the House of Lords has placed its *imprimatur* on *Travers* v. *Holley* and the retrospective operation given to it by the Court of Appeal. However, the House of Lords' decision is likely to have a greater impact on the development of the conflict of laws because of the additional basis upon which the Law Lords chose to recognize the Czech divorce decree. All but Lord Reid considered that nationality was a connecting factor which in this case warranted the recognition of the Czech decree. Lord Morris said:[11]

I would support recognition of the Czech decree on the basis adopted by the majority in the Court of Appeal. I would also support it on a wider basis. The evidence was that the Czech court accepted jurisdiction on the ground that both the parties were and always had been Czechoslovakian citizens. The first wife at the time when she presented her petition in Czechoslovakia undoubtedly had a real and substantial connection with that country. I see no reason why the decree of the Czech court should not in those circumstances be recognised.

Lord Pearce said: "There are further reasons which, in my opinion, compel the recognition of the decree. Both parties to the marriage were nationals of Czechoslovakia (and incidentally domiciled there as well until 1946), the matrimonial home was there, the petitioning wife resided there all her life, and their courts took jurisdiction on the ground of nationality."[12] Lord Pearce believed that English courts should recognize foreign divorce decrees on the basis sug-

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[10] *Ibid.*, at pp. 729 (All E.R.), 561-562 (W.L.R.).

[11] *Ibid.*, at pp. 708 (All E.R.), 534 (W.L.R.). Dr. Gilbert Kennedy suggested that the "reciprocity" of *Travers* v. *Holley* might be extended to the recognition of divorce decrees granted on the basis of nationality in "Reciprocity" in the Recognition of Foreign Judgments (1954), 32 Can. Bar Rev. 359, at pp. 366-367.

[12] *Ibid.*, at pp. 717-718 (All E.R.), 546 (W.L.R.).

gested by the Royal Commission on Marriage and Divorce presented in March, 1956. The *Report* reads:[13]

> We recommend, therefore, that recognition should be given in England and Scotland to the validity of a divorce (i) which has been obtained, whether judicially or otherwise, by a spouse in accordance with the law of the country of which both husband and wife were nationals, or of which either the husband or the wife was a national at the time of the proceedings, or (ii) which would grant recognition by the law of that country.

Lord Pearce also noted that, "even at the time of *Le Mesurier* nationality could not properly be ignored, and in my opinion decrees of the court of nationality, should be recognised".[14] Lord Wilberforce also thought that nationality was a factor which should be considered in determining whether a foreign divorce decree will be recognized. He said:[15]

> Recognition might, in appropriate circumstances, be given to the factor of nationality, whether of both parties, or conceivably of one party to the marriage . . . the relevance of nationality as a connecting factor in certain cases may, in principle, be accepted. In individual situations, however, many factors are involved: nationality (and the complexities of "British nationality"), sometimes double nationality, or statelessness, and, especially as regards non-unitary states, these may be combined in different ways with residence or with domicil. The present case is one in which, in combination with other factors, the nationality factor (of both spouses) appears to me to be relevant to the question of recognition. In other cases the nationality of one spouse may be similarly relevant on the question of recognition. In other cases the nationality of one spouse may be similarly relevant at least in relation to the quality of residence, where jurisdiction is based on residence. Beyond this, at the present I am unable to define the situations in which nationality may be taken into account.

Lord Pearson said:[16]

> It seems to me that, subject to appropriate limitations, a divorce granted in another country on the basis of nationality or on the basis of domicil (whether according to English case law or according to a less exacting definition) should be recognized as valid in England. Also, if the law of the other country concerned enables a wife living apart from her husband to retain or acquire a separate qualification of nationality or domicil for the purpose of suing for divorce and the jurisdiction has been exercised on the basis of that qualification that would not normally at any rate be a reason for refusing recognition.

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[13] Royal Commission on Marriage and Divorce, Report, 1951-55, Cmd. 9678, p. 226.

[14] *Supra*, footnote 5, at pp. 717 (All E.R.), 545 (W.L.R.).

[15] *Ibid.*, at pp. 726 (All E.R.), 557-558 (W.L.R.).

[16] *Ibid.*, at pp. 731 (All E.R.), 563 (W.L.R.).

Lord Reid considered that the Czech decree should be recognized on the basis that it was granted by a court of the matrimonial home and of the continued residence of the wife. Lord Reid refrained from expressing an opinion as to whether recognition should be accorded on the basis that the decree was granted by a court of the nationality of the parties. Lord Reid did, however, indicate that he was mindful that, in the future, it might be necessary to attach significance to nationality in the recognition of foreign divorce decrees. He stated that: " In many countries jurisdiction depends on nationality, indeed one might almost say that in half the world domicil in one form or another prevails and in the other half nationality. If they are to live in peaceful co-existence it may be necessary to take note of this . . . ."[17]

The House of Lords has sounded the death knell to the tyranny of the concept of domicile in regard to the recognition of foreign divorce decrees. The absolutism of domicile has been abrogated. The House of Lords has recognized that the exclusiveness accorded to domicile in *Le Mesurier* v. *Le Mesurier*[18] was out of harmony with the private international law of many nations at that time. Lord Watson, in *Le Mesurier* v. *Le Mesurier*, stated that: "Their Lordships have in these circumstances, and upon these considerations come to the conclusion that, according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage."[19] This case, which was on appeal from the Supreme Court of Ceylon, was concerned only with the divorce jurisdiction of the District Court of Matara with respect to persons resident in the district but domiciled in England. The case however, is regarded as an authority establishing that divorce jurisdiction of the English court is founded solely on domicile. This was accepted by the House of Lords in *Salvesen* or *Von Lorang* v. *Administrator of Austrian Property*.[20] In that case, Viscount Haldane said: "It is now estab-

[17] *Ibid.*, at pp. 703 (All E.R.), 527 (W.L.R.).
[18] [1895] A.C. 517, 64 L.J P.C. 97 (P.C.).
[19] *Ibid.*, at pp. 540 (A.C.), 107 (L.J.P.C.).
[20] [1927] A.C. 641, 96 L.J.P.C. 105 (H.L.Sc.). *Indyka* v. *Indyka* might be regarded as a case in which the House of Lords has exercised its recently stated power not to be absolutely bound by its own former decision. On July 26th, 1966, Lord Gardiner, the Lord Chancellor, speaking for himself and the Lords of Appeal in Ordinary said: "Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. . . . Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding,

lished, since the decisions in *Le Mesurier* v. *Le Mesurier; Lord Advocate* v. *Jaffrey;* and *Attorney-General* for *Alberta* v. *Cook,* that for a decree of dissolution of a marriage the Court of the domicil is the true Court of jurisdiction. That jurisdiction ought on priniciple to be regarded as exclusive."[21] Unfortunately, the *Le Mesurier* case also came to be regarded as an authority for the proposition that only a divorce decree granted by the court of the domicile is entitled to recognition.

The Privy Council in *Le Mesurier* v. *Le Mesurier* arrived at the conclusion that domicile was the exclusive test by considering English and Scottish practice and three writers on private international law, Huber, Rodenburg and Bar. It is not surprising that Huber and Rodenburg failed to mention nationality since they lived in the seventeenth century and it was not until the nineteenth century that nationality became the determinant of a man's personal law in France and from there spread to most of Europe. Lord Watson also referred to Bar and said:[22]

> The same rule is laid down by Bar, the latest Continental writer on the theory and practice of international private law. He says (sect. 173, Gillespie's Translation, p. 382), "that in actions of divorce—unless there is some express enactment to the contrary—the judge of the domicil or nationality is the only competent judge". And he adds: "A decree of divorce, therefore, pronounced by any other judge than a judge of the domicil or nationality, is to be regarded in all other countries as inoperative."

Lord Watson, however, chose to ignore the significance that Bar attached to nationality and enunciated the principle that domicile should be the exclusive test as though this were consistent with the practice in all civilized countries. It is clear that, in 1895, this was not the case. In 1909, Zeballos, an Argentine jurist, calculated that about 460 million persons were subject to the nationality principle and about 500 million persons were subject to the domicile principle.[23] The situation, in 1895, was probably substantially similar. Lord Reid in referring to the decision in *Le Mesurier* v. *Le Mesurier* said:[24]

> From the wording of the judgment it seems to me that in laying down this test their lordships must have thought that they were keeping in line with the practice in other civilized countries; but in fact they were

to depart from a previous decision when it appears right to do so." [1966] 3 All E.R. 77. For a comment on this new approach to precedent see Bale, The Quiet Revolution (1966), 15 Chitty's L.J. 329.

[21] *Ibid.,* at pp. 654 (A.C.), 110 (L.J.P.C.).

[22] *Supra,* footnote 18, at pp. 538 (A.C.), 106 (L.J.P.C.).

[23] Wolff, Private International Law (2nd ed., 1950), p. 105.

[24] *Supra,* footnote 5, at pp. 700 (All E.R.), 523-524 (W.L.R.).

> not. . . . But I would find it surprising if their lordships really thought that they were keeping in line with other countries. It is just possible that they were actuated by the hope, common in Victorian times, that if England showed the way others would see the light and follow: if so, any such hope has been grievously disappointed.

The House of Lords has clearly indicated that the courts should no longer delude themselves with the comforting thought that domicile is the determinant of the personal law of persons in all countries and that jurisdiction to grant a divorce decree is based primarily on domicile. The courts can no longer be content to recognize only those foreign divorce decrees granted or recognized by the law of the domicile or granted where the facts would enable the court of the forum, in which recognition of the foreign divorce decree is in issue, to assume jurisdiction itself. The House of Lords has accepted the conclusion of the Royal Commission on Marriage and Divorce that the basis upon which foreign divorce decrees have been recognized in the past is inadequate. The Report of the Royal Commission stated:[25]

> It must be accepted that the courts in a number of countries assume jurisdiction to grant a divorce if the husband is a national of that country, whatever his domicil may be. To refuse recognition to a divorce obtained in such circumstances is to increase the number of "limping marriages" and to cause hardship to the persons affected. To recognise such decrees is to promote a better understanding in the international sphere and possibly to secure wider recognition of English and Scottish decrees of divorce granted on the basis of domicil.

Lord Pearson indicated that the symmetry between divorce jurisdiction and the recognition of foreign divorce decrees was no longer adequate. The symmetry developed from the *Le Mesurier* case and was re-established by *Travers* v. *Holley* after divorce jurisdiction had been altered to relieve the hardship on the wife caused by the unity of the domicile of married persons. Lord Pearson said:[26]

> There is the plain fact that divorce jurisdiction is exercised on different bases in different countries. It cannot be said that the English basis—of domicil according to English case law plus two enactments in favour of wives—is the only reasonable basis. Domicil according to a less exacting definition would be a not unreasonable basis and would have some advantages. The basis of nationality would in a great many cases give the same result as any basis of domicil, and it has the advantage of simplicity, and it seems to have been in use in many countries for many years. Nationality, however, is not available as a basis for use by federal and other nations which contain states, provinces or

[25] *Supra*, footnote 13, at p. 226.
[26] *Supra*, footnote 5, at pp. 730 (All E.R.), 563 (W.L.R.).

countries having the same nationality but separate divorce jurisdictions. Such nations will naturally use domicil as their basis, or they might use some residential qualification falling short of domicil. Therefore, unless the nations now using nationality as their basis are willing to change it (which is not indicated), there must be in the international sphere at least two different bases of jurisdiction being used. The duality is in that sense inevitable, and in any case it exists, and it should not be ignored.

The decision of the House of Lords represents a great stride forward in the spirit of internationalism in English private international law. Professor Kahn-Freund has noted that English courts have been internationally minded in the recognition of foreign judgments.[27] *Indyka* v. *Indyka* now joins with *Armitage* v. *A.G.*[28] and *Travers* v. *Holley* in bearing witness to this position in regard to foreign judgments concerning status. The questions which now confronts the courts is the scope of this more liberal approach to the recognition of foreign divorce decrees.

Lord Pearce was the most specific about the significance of nationality for the purpose of recognition of a foreign divorce decree. He considered that when jurisdiction is taken on the basis of nationality, the decree of the court of the nationality should be recognized. He then quoted from the *Report* of the Royal Commission on Marriage and Divorce and stated that English courts should recognize nationality to the extent suggested by the Royal Commission. The Royal Commission said that a divorce obtained in accordance with the law of the nationality of either or both parties should be recognized. However, the Commission did not stipulate that jurisdiction should have been assumed on the basis of nationality. Lord Pearce stated that the Commission's rule would have produced a different and more satisfactory result in *Levett* v. *Levett*.[29] In that case, the German court assumed jurisdiction on the basis of the ordinary residence of the wife-petitioner who had married an Englishman who was domiciled in England. The husband was granted a divorce decree by the German court on his cross-petition on the ground of the wife's adultery. This decree was not recognized in England in that Parliament had only provided an exception from the domiciliary principle in favour of the wife and not in favour of the husband. Therefore, on the basis of *Travers* v. *Holley*, the decree could not be recognized. If the de-

[27] Kahn-Freund, The Growth of Internationalism in English Private International Law, Lionel Cohen Lectures at The Hebrew University of Jerusalem (1960).

[28] [1906] P. 135, 75 L.J.P. 42 (P.D.A.).

[29] [1957] P. 156, [1957] 1 All E.R. 720 (C.A.).

cree in *Levett* v. *Levett* is now to be recognized on the basis of the new rule regarding recognition of foreign divorce decrees, it apparently does not matter whether the court of the nationality of either of the parties assumes jurisdiction on a basis other than nationality. It would also appear that in cases where the parties have different nationalities, the foreign divorce decree should be recognized even if it is granted on the petition or cross-petition of the person who is not a national of that jurisdiction provided that the other party is a national.

*A "Proper Forum" for Divorce—A Forum with which the parties have a Substantial and Real Connexion.*

The decisions of the other Law Lords, however, do not justify according as much significance to nationality as indicated by Lord Pearce. The other Law Lords appear to have evolved a new rule for the recognition of foreign divorce decrees. This new rule seems to be that a foreign divorce decree should be recognized, in the words of Lord Wilberforce "whenever a real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction".[30] Lord Wilberforce went on to say that, "I use these expressions so as to enable the courts, who must decide each case, to consider both the length and quality of the residence and to take into account such other factors as nationality which may reinforce the connection".[31] Lord Pearson also said that "nationality might perhaps in some circumstances be regarded as insufficient to found jurisdiction, if there was no longer any real and substantial connection between the petitioner and the country of his or her nationality".[32] Lord Morris said: "The first wife at the time when she presented her petition in Czechoslovakia undoubtedly had a real and substantial connection with that country. I see no reason why the decree of the Czech court should not in those circumstances be recognised."[33]

An important inquiry is whether this new rule for the recognition of foreign divorce decrees is a supplementary rule or whether it is a new general rule. It is probably legitimate to contend that it is a new general rule. A foreign divorce decree will be recognized if there is a substantial and real connexion between the parties to the marriage and the jurisdiction granting the divorce decree. This rule comprehends the old general rule that divorce decrees will

[30] *Supra*, footnote 5, at pp. 727 (All E.R.), 558 (W.L.R.).
[31] *Ibid.*
[32] *Ibid.*, at pp. 731 (All E.R.), 564 (W.L.R.).
[33] *Ibid.*, at pp. 708 (All E.R.), 534 (W.L.R.).

be recognized if granted by the law of the domicile. Our definition of domicile implies that there is a substantial and real connexion between the parties and the jurisdiction in which they are domiciled.[34] In addition, the new rule can be said to include the principle of *Travers* v. *Holley* which was approved, three to two, by the House of Lords. It is reasonable to contend that when Parliament, for instance, empowers a court to assume jurisdiction on the basis of the residence for three years of the wife-petitioner, it has determined that this constitutes a substantial and real connexion. Therefore, when a foreign court grants a divorce decree in circumstances in which the English court could have assumed jurisdiction, it follows that there is a substantial and real connexion between the petitioner and the jurisdiction granting the divorce decree, which warrants the recognition of the decree.

The problems which will face the English courts is to give specific content to the term sustantial and real connexion between the parties to the marriage and the jurisdiction granting the divorce decree over and above the basis upon which the English court will itself assume jurisdiction. Determining whether the jurisdiction granting the divorce decree is a "proper forum" will not be as difficult a task as determining the "proper law" of the contract and now in New York and some states of the United States determining the "proper law" of the tort.[35] The "proper law" of the contract or of the tort being a choice of law rule relating to more than formal validity must indicate only one system of law. However, there may be more than one "proper forum", a forum with which the parties to the marriage have substantial and real connexion. The problem will be defining the minimum relationship between the parties and the jurisdiction granting the divorce, which will qualify as a substantial and real connexion and, thereby, warrant recognition of the divorce decree. In *Indyka* v. *Indyka,* there was no room for doubt that there was a substantial and real connexion between the parties and Czechoslovakia. At the time the wife petitioned for divorce, the spouses were both Czech nationals, the wife was resident in Czechoslovakia and the marriage had been

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[34] It must be admitted the tenacity of the domicile of origin in *Winans* v. *A.G.*, [1904] A.C. 287, 73 L.J.K.B. (H.L.E.) and *Ramsay* v. *Liverpool Royal Infirmary*, [1930] A.C. 588, 99 L.J.P.C. 134 (H.L.Sc.), has tended to make the concept of domicile rather artificial.

[35] The difficulty of determining the "proper law" of the tort is discussed by Baer, in Two Approaches to Guest Statutes in the Conflict of Laws: Mechanical Jurisprudence Versus Groping for Contacts (1967), 16 Buffalo L. Rev. 537, at pp. 548-554.

celebrated there. The first and only matrimonial home had been in Czechoslovakia.

The English courts have already commenced the process of giving more specific content to the term substantial and real connexion. In *Angelo* v. *Angelo*,[36] the issue was whether a German divorce should be recognized. The marriage had been celebrated in England between a man who was a British subject domiciled in England and a woman who was a German national domiciled in Germany. They lived for a short period of time in England and then in France. In December 1962, while they were living at Nancy, where the husband was employed, the wife, returned to Germany with their one child. The wife refused to return to her husband and on April 9th, 1963, she obtained a divorce from the German court at Ravensburg. Ormrod J. noted that, "the law as to recognition of foreign decrees underwent an abrupt change a week ago when the House of Lords gave their decision in *Indyka* v. *Indyka*". He attempted to determine the *ratio decidendi* of *Indyka* v. *Indyka*. He stated that:[37]

> Each of their lordships expresses much the same broad view of what should be the new recognition rule, although stating it in quite different terms. Counsel submits that the real *ratio decidendi* of that case probably is to be found in Lord Morris of Borth-Y-Gest's speech, in which he speaks of it being necessary for the party obtaining the decree to have a "real and substantial connection" with the country pronouncing the decree.

Ormrod J. appears to accept counsel's formulation of the *ratio decidendi*. He decided to recognize the German divorce decree and stated that, "In this case, the wife is a German national and she is clearly habitually resident within the jurisdiction of the German court granting the decree. In those circumstances, she seems to me clearly to fall within the test proposed by all of their lordships in *Indyka's* case . . .".[38]

In *Peters* v. *Peters*,[39] the parties, when they married in Belgrade in 1946, were both of Yugslav nationality and domicile. They left Yugoslavia and came to England in 1947. In 1949, they were both naturalized and the husband acquired a domicile of choice in England at about the same time. The parties ceased to live together and towards the end of 1962, the husband, who was anxious to marry another woman, requested his wife to obtain a divorce in Yugoslavia. On December 31st, 1962, the circuit court of Belgrade,

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[36] [1967] 3 All E.R. 314 (P.D.A.).
[37] *Ibid.*, at p. 315.
[38] *Ibid.*, at pp. 317-318.
[39] [1967] 3 All E.R. 318, [1967] 3 W.L.R. 1235 (P.D.A.).

which assumed jurisdiction on the basis that the marriage was celebrated in Yugoslavia, granted a divorce decree. Mrs. Peters went to Yugoslavia only a few days prior to December 31st, 1962, when the decree was pronounced, and returned to England a few days later. Mr. Peters, who was a travel agent and sometimes spent time in Yugoslavia, was alleged to have fulfilled a six month residential qualification. However, the judge was not satisfied with the evidence and concluded that the case had to be decided without considering the residence of the husband. Mr. Peters subsequently went through a form of marriage in Austria which was later dissolved on the petition of the woman. In 1967, the first Mrs. Peters petitioned for a declaration that her marriage had been dissolved by the Yugoslav court or, in the alternative, for a divorce. Wrangham J. said:[40]

> I have been referred to the recent decision of the House of Lords in *Indyka* v. *Indyka*, and to the decision of Ormrod, J., following that case. From the point of view of the petitioner seeking to assert the validity of a foreign decree, it seems to me that the high water mark of those decisions is the proposition that an English Court will recognize the validity of a foreign decree wherever there is a real and substantial connection between the petitioner and the court exercising jurisdiction. I do not pause to enquire whether the decision in *Indyka* v. *Indyka* went quite as far as that, because I am satisfied that the mere fact that a marriage is celebrated in a particular jurisdiction is not enough to create a real and substantial connection between a petitioning spouse and that jurisdiction. . . . Nor do I think that it would be enough to show that the parties entering into the marriage in the foreign jurisdiction had been at the time of the marriage nationals of that jurisdiction or domiciled within it. If either of them, continued to be a national of that jurisdiction, or if there continued to be any question of domicil in that jurisdiction, of course the matter would be wholly different; but in this case it is plain that both spouses had abandoned Yugoslav nationality and Yugoslav domicil before ever the Yugoslav court came to adjudicate on them.

It is possible to say that the place where the marriage is celebrated does not in itself constitute a substantial and real connexion which will warrant an English court recognizing a foreign divorce decree.[41] It is also possible to say that the nationality together with habitual residence of the petitioner does constitute a substantial and real connexion. A question which remains open is whether

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[40] *Ibid.*, at pp. 320 (All E.R.), 1238 (W.L.R.).

[41] A case which was not cited to the court in which a foreign divorce decree was recognized because it was granted by the place where the marriage was celebrated was *Ingham* v. *Sachs* (1887), 56 L.T. 920. The divorce decree was recognized in spite of the fact that it would not be recognized by the law of the domicile. *Ingham* v. *Sachs* must be considered as wrongly decided.

nationality of the petitioner, by itself is sufficient, as advocated by Lord Pearce. It also remains to be decided whether this applies to a petitioner who has more than one nationality. Another question to which no answer has yet been given is whether habitual residence without nationality is itself sufficient to qualify as a substantial and real connexion. It will also be necessary to determine how habitual the residence must be before it becomes an habitual residence. Does this new rule apply only with regard to a divorce decree obtained by the wife? If the wife is the petitioner is the new test to be applied by asking the question, "Where would she be domiciled, assuming that she had the capacity to acquire a separate domicile?" In other words is this new test in large measure to compensate for the defect in English law which denies to a woman living separately from her husband, the capacity to acquire a separate domicile? Lord Wilberforce in *Indyka* v. *Indyka*[42] seems to adhere to this position, but he was the only Law Lord to do so.

It will probably take some time before the courts have defined what constitutes the minimum relationship between the parties and the jurisdiction granting the divorce decree which will qualify as a substantial and real connexion. The need for a more liberal rule for the recognition of foreign divorce decrees is undeniable. However, in evolving this new more liberal rule, the courts must be cautious lest they sacrifice the interest of the State or community in maintaining the grounds for divorce which have been considered appropriate for domiciliaries of that State. If both parties are resident in the State and intend to remain there, the State's policy in regard to the grounds upon which a marriage can be dissolved would be unduly frustrated, if a foreign divorce decree were recognized on the sole basis of nationality. It would also give an undue preference to persons who have not acquired the nationality of the State in which they are domiciled. However, if one of the parties ceases to be resident in the State, with no intention of returning, and that party obtains a divorce decree from the jurisdiction of his or her nationality and new residence or perhaps merely his or her new residence, it would be an exercise in futility to refuse to recognize the divorce decree. To insist that there is still a marriage is merely a sham.

*The Possible Extension of Armitage* v. *A.G.*

If there is a new general rule which states that a foreign divorce decree will be recognized provided there is a substantial and real

[42] *Supra*, footnote 5, at pp. 726-727 (All E.R.), 558, (W.L.R.).

connexion between the parties to the marriage and the jurisdiction granting the divorce decree, *Armitage* v. *A.G.* would appear to fall outside the rule. However, perhaps the new general rule should read that a foreign divorce decree will be recognized, if there is a substantial and real connexion between the parties to the marriage and the jurisdiction granting the divorce decree, or, if it will be recognized by a jurisdiction with which the parties have a substantial and real connexion. This formulation would comprehend *Armitage* v. *A.G.* but it would also include *Mountbatten* v. *Mountbatten.*[43] In the latter case, a wife, who had been resident in New York for three years, obtained a divorce in the State of Chihuahua in Mexico on the ground of incompatibility of temperament. The wife was actually present within the jurisdiction of the Mexican court for approximately twenty-four hours and the husband, who was domiciled in England, was represented by a Mexican attorney in the proceedings. The husband admitted the contents of the wife's petition and expressly submitted to the jurisdiction. The divorce decree was recognized by the law of the wife's residence, New York. The husband petitioned in England for a declaration that the Mexican decree validly dissolved the marriage. It was submitted on behalf of the husband, that since a divorce decree was then recognized if it was granted by the law of the domicile, or, if it was granted to the wife in circumstances in which the forum would itself have jurisdiction, there should be a two pronged test for other foreign decrees. This two pronged test for other foreign divorce decrees is that a decree should be recognized, if it is recognized either by the law of the domicile, or, by the law of the place in which the wife is concurrently entitled to proceed. Davies J. rejected the second prong of this proposed test for other foreign divorce decrees. Professor Kahn-Freund has stated that: "One can understand the revulsion Davies J. must have felt when requested to import into England the product of the Mexican divorce industry. Nevertheless one can have serious doubts whether

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[43] [1959] P. 43, [1959] 1 All E.R. 99 (P.D.A.). Another case in which the *Armitage* case was not extended is *Yeger and Duder* v. *Registrar General of Vital Statistics* (1958), 26 W.W.R. 651 (Alta. S.C.). However the *Armitage* case may have been extended in a temporal dimension in *Schwebel* v. *Ungar*, [1947] 1 O.R. 430, 42 D.L.R. (2d) 622 (C.A.) which was affirmed on appeal by the Supreme Court of Canada, [1965] S.C.R. 148, 48 D.L.R. (2d) 644. Professor Hartley has suggested that *Schwebel* v. *Ungar* establishes the proposition that, "a divorce will be recognized by our law if it is recognized by the law of a country in which the parties (or, probably, the husband alone) become domiciled at any subsequent time". (1965), 4 Western Ont. L. Rev. 99, at p. 111. See also Lysyk, Comment (1965), 43 Can. Bar Rev. 363.

his refusal to combine the effect of the *Armitage* case with that of *Travers* v. *Holley* was justified, and one can ask oneself what he really achieved by treating in England as still married this couple who were regarded as divorced in the United States."[44]

It is submitted that now that the House of Lords has held that domicile should not be considered the sole test for the recognition of foreign divorce decrees and that the doctrine of *Travers* v. *Holley* should be broadened and not narrowed, it seems reasonable that *Armitage* v. *A.G.* should not be restricted to the recognition of decrees which will be recognized by the law of the domicile. The *Armitage* case should be extended so as to permit the recognition of a foreign decree which will be recognized by a jurisdiction with which either of the parties have a substantial and real connexion. The difficulty which this proposition encounters is that Lord Pearce, in regard to the *Mountbatten* case, said that: "Davies, J., rightly refused to apply the principle of *Armitage* to the wife's court of residence, since, though we acknowledge its right to grant her a divorce, in appropriate cases there seems no adequate reason to regard it as the arbiter on her personal law in other respects."[45] Lord Pearce was the only member of the court to comment on *Mountbatten* v. *Mountbatten*. He was also the only one to hold that the courts should recognize nationality to the extent suggested by the Royal Commission.

The Royal Commission recommended that recognition should be given to a divorce obtained in accordance with the law of which both or either parties are nationals or which would be granted recognition by the law of the nationality. As Mrs. Mountbatten was a citizen of the United States and of the state of New York and as New York would recognize the divorce decree, the English court should also recognize the decree on the basis of the rule advocated by Lord Pearce. Thus, the *obiter* dictum of Lord Pearce in which he approved of the non-recognition of the Mexican divorce decree in the *Mountbatten* case can perhaps be discounted in that the rule which he alone enunciated would require a recognition of the divorce in that case. Recognition of the divorce in the *Mountbatten* case on the basis, that it would be recognized by a jurisdiction with which the petitioner had a substantial and real connexion, would also be consistent with what Lord Pearce regards as one of the duties of the courts, the avoidance of "limping marriages" or as he prefers to call them "unilateral marriages". In

[44] *Supra*, footnote 27, at p. 34.
[45] *Supra*, footnote 5, at pp. 717 (All E.R.), 545 (W.L.R.).

speaking of the occurrence of "unilateral marriages", Lord Pearce said, "It is not possible wholly to avoid it, but it is the duty of the courts to do their best to reduce it."[46] Extending the *Armitage* case to comprehend divorce decrees which would be recognized by a jurisdiction with which one or both of the parties have a substantial and real connexion, would amount to a reasonable exercise of the duty of the courts to reduce "unilateral marriages".

*The Applicability of Indyka* v. *Indyka to other Branches of the Conflict of Laws.*

*Indyka* v. *Indyka* will probably be extended to other branches of the conflict of laws in the area concerned with status just as *Armitage* v. *A.G.*[47] and *Travers* v. *Holley*[48] have been so extended. The test for recognition, of whether there is a substantial and real connexion between the petitioner and the court granting the decree, is directly relevant to a foreign nullity decree. A foreign nullity decree is not now recognized if the petitioner alone is resident in the foreign jurisdiction and the petitioner or respondent is not domiciled there or the marriage was not celebrated there in the case of a void marriage. Such a nullity decree should now be recognized if there is a substantial and real connexion between the petitioner and the jurisdiction granting the nullity decree. If the petitioner is habitually resident in the foreign jurisdiction and is a national of that jurisdiction, the decree should be recognized. In the recognition of foreign nullity decrees, *Indyka* v. *Indyka* will thus in some instances render it unnecessary to determine whether the marriage is void or voidable. In instances where the male-respondent is neither resident nor domiciled in the jurisdiction, it has been and will still be necessary to determine whether the marriage is void or voidable in order to determine whether our own

[46] *Ibid.*, at pp. 718 (All E.R.), 546 (W.L.R.).

[47] *Armitage* v. *A.G.* has been extended to the recognition of foreign nullity decrees in *Abate* v. *Abate*, [1961] P. 29, [1961] 1 All E.R. 569 (P.D.A.).

[48] *Travers* v. *Holley* has been extended to the recognition of foreign nullity decrees in *Re Capon*, [1965] 2 O.R. 83, 49 D.L.R. (2d) 675 (C.A.), in *Merker* v. *Merker*, [1963] P. 283, [1962] 3 All E.R. 928 (P.D.A.) and in *Lepre* v. *Lepre*, [1965] P. 52, [1963] 2 All E.R. 49 (P.D.A.). In *Lepre* v. *Lepre*, the Maltese nullity decree was not recognized but this was only because resort was made to the public policy reservation. For a discussion about *Re Capon* see J.-G. Castel, Comment (1965), 43 Can. Bar Rev. 647. *Travers* v. *Holley* has also been extended to the recognition of foreign adoption orders in *Re Valentine's Settlement*, [1965] 2 All E.R. 226, [1965] 2 W.L.R. 1015 (C.A.), by Lord Denning, M.R. but not by Danckwerts L.J., the other judge who constituted the majority.

court has jurisdiction to hear the petition on the basis that the female petitioner is domiciled as well as resident in the jurisdiction. *Travers* v. *Holley* has required the same inquiry to be made in determining whether a foreign nullity decree should be recognized in cases in which it has been granted to a female petitioner and the respondent is not resident or domiciled in the foreign jurisdiction. If there is a substantial and real connexion between the petitioner and the jurisdiction granting the annulment, this will no longer be necessary, in that *Indyka* v. *Indyka* should permit recognition of the foreign nullity decree, whether or not the marriage is void or voidable.

Another area in which *Indyka* v. *Indyka* may have some impact is in regard to the recognition of foreign adoption orders. In *Re Valentine's Settlement*,[49] the problem which faced the court was whether children adopted in the Union of South Africa by Mr. and Mrs. Valentine, who were resident and domiciled in Southern Rhodesia, were entitled to share in an English trust with the child born to the Valentines. The trust was established in 1946 by the mother of Mr. Valentine for the children of Mr. Valentine on his death. A preliminary issue was whether the South Africa adoption order should be recognized in England. Lord Denning M. R. said:[50]

> Our courts should recognise a jurisdiction which mutatis mutandis they claim for themselves; see *Travers* v. *Holley and Holley*. We claim jurisdiction to make an adoption order when the adopting parents are domiciled in this country and the child is resident here. So also out of the comity of nations, we should recognise an adoption order made by another country when the adopting parents are domiciled there and the child is resident there.

As the adopting parents were not domiciled in South Africa but in Southern Rhodesia, when the two adoption orders were granted by the South African court, the majority of the Court of Appeal refused to recognize the adoption orders. If *Indyka* v. *Indyka* is extended to the matter of recognition of a foreign adoption order, as was *Travers* v. *Holley*, the adoption order may be recognized if there is a substantial and real connexion between the parties affected by the adoption order and the jurisdiction granting that order. The adoption orders in *Re Valentine's Settlement* might now be recognized in that there was nothing to suggest that the natural parents were not resident and domiciled in South Africa as was the child. The status of the natural parents and the adopted child is being changed just as much as that of the adopting parents. There-

[49] *Ibid.*
[50] *Ibid.*, at pp. 230 (All E.R.), 1021 (W.L.R.).

fore, in *Re Valentine's Settlement*, it would be difficult to contend that there was not a substantial and real connexion between the parties affected by the adoption order and the jurisdiction granting the adoption order, South Africa. *Indyka* v. *Indyka* seems to represent a reasonable reconciliation between the conflicting principles which the dissenting judge, Salmon L. J., mentioned in his judgment in *Re Valentine's Settlement*. He said:[51]

> There is nothing in the evidence to suggest that the natural parent of either of them was domiciled or ordinarily resident anywhere other than in South Africa. Whilst, it is, of course, a principle of English law that it will not recognise the right of a foreign court to impose a change of status on anyone not domiciled within its jurisdiction, it is equally a principle of English law generally to recognise the right of a foreign court to make an order changing the status of any one over whom it has jurisdiction. What happens, as here, when the two principles conflict? When the adopted child and the child's natural parents are domiciled within the jurisdiction of the foreign court and the adoptive father is not domiciled within its jurisdiction? There is no escape from the necessity of choosing between the two principles, for no compromise is possible. We could not regard the orders of the South African court as effective to sever the ties between the children and their natural parents and make them the children of Alastair and yet ineffective to make Alastair their father.

In States where no provision is made for inter-State adoptions, adoptions where the child and the adopting parents are resident or domiciled in different States, the doctrine of *Travers* v. *Holley* is totally inadequate in that it results in the non-recognition of all inter-State adoptions. *Indyka* v. *Indyka* holds considerable promise in regard to the evolution of a new recognition rule for foreign adoption orders, particularly foreign inter-State adoptions.

*Indyka* v. *Indyka in Canada.*

The decision of the House of Lords in *Indyka* v. *Indyka* is important in Canada in that *Travers* v. *Holley* is not yet firmly and deeply rooted in our jurisprudence. *Travers* v. *Holley* has been agreed with and applied in *B. and B.* v. *Deputy Registrar General of Vital Statistics*,[52] *Allarie* v. *Director of Vital Statistics*[53] and *Januszkiewicz* v. *Januszkiewicz*.[54] It was mentioned with apparent approval in *Buehler* v. *Buehler*.[55] However, in *La Pierre* v.

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[51] *Ibid.*, at pp. 236-237 (All E.R.), 1029-1030 (W.L.R.).
[52] (1960), 24 D.L.R. (2d) 238, 31 W.W.R. 40 (Alta S.C.).
[53] (1964), 41 D.L.R. (2d) 553, (1963), 44 W.W.R. 568 (Alta S.C.).
[54] (1966), 55 D.L.R. (2d) 727, 55 W.W.R. 73 (Man. Q.B.).
[55] (1956), 4 D.L.R. (2d) 326, 18 W.W.R. 97 (Sask. Q.B.).

*Walter*,[56] Riley J. disapproved of *Travers* v. *Holley* and said he preferred the reasoning in *Fenton* v. *Fenton*,[57] a decision of the Victorian Full Court and *Warden* v. *Warden*,[58] a decision of the Court of Session of Scotland. This was, however, an *obiter* dictum in that the doctrine of *Travers* v. *Holley* was inapplicable to the facts of the case. *Travers* v. *Holley* was also considered in *Re Needham* v. *Needham*.[59] Mr. J. Moorehouse noted that in *La Pierre* v. *Walter* the reasoning in *Fenton* v. *Fenton* was preferred to that in *Travers* v. *Holley*. Again, however, the doctrine of *Travers* v. *Holley* was inapplicable. These were all trial court decisions. The first and to date only Canadian appellate court to consider the doctrine of *Travers* v. *Holley* is the Ontario Court of Appeal. The case did not deal with the recognition of a foreign divorce but with a foreign nullity decree. Schroeder J. A., in *Re Capon* said:[60]

> I have formed the view that the Courts of Ontario would be entitled to assume jurisdiction on the ground that the petitioner alone is domiciled in this Province whether the marriage was celebrated here or not. To deny the equivalent right to a foreign Court would be inconsistent and contrary to well-recognized principles. In *Travers* v. *Holley*, [1953] P. 246, the Court of Appeal gave effect to the rule that what entitles an English Court to assume jurisdiction is equally effective in the case of a foreign court.

As the majority of the House of Lords approved the doctrine of *Travers* v. *Holley*, this doctrine is much more likely to be applied by Canadian courts.[61] This is particularly significant at the present time in that the scope for the application of the doctrine of *Travers* v. *Holley* is apparently about to be widened. The Parliamentary Committee on Divorce has recommended that the married woman should have the capacity to acquire a separate domicile for the purpose of determining the jurisdiction of a court in regard to a petition for a divorce or annulment.[62] If this recom-

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[56] (1960), 24 D.L.R. (2d) 483, 31 W.W.R. 26 (Alta S.C.).
[57] [1957] V.R. 17. [58] 1951 S.C. 508, 1951 S.L.T. 406.
[59] [1964] 1 O.R. 645, 43 D.L.R. (2d) 405 (H.C.).
[60] *Supra*, footnote 48, at pp. 96 (O.R.), 688 (D.L.R.).
[61] Decisions of the House of Lords are of great persuasive value in Canada. There is only one House of Lords decision which the Supreme Court of Canada has ever refused to follow and that is *British Transport Commission* v. *Gourley*, [1956] A.C. 185, [1955] 3 All E.R. 796. The Supreme Court of Canada refused to follow this case in *The Queen* v. *Jennings and Cronsberry*, [1966] S.C.R. 532, 57 D.L.R. (2d) 644. For a brief note on this case see Bale, Correspondence (1966), 44 Can. Bar Rev. 724.
[62] Report of The Special Joint Committee of The Senate and House of Commons on Divorce (1967), pp. 30-31 and section 9 of the proposed Bill on p. 162.

mendation is enacted with regard to divorce jurisdiction, the doctrine of *Travers* v. *Holley* will result in fewer "limping marriages" through the recognition of more divorce decrees in Canada.

Since *Travers* v. *Holley* causes the rules for the recognition of foreign divorce decrees to be a mirror image of the rules for jurisdiction, the rules for the recognition of foreign divorce decrees are automatically liberalized when the jurisdictional rules are liberalized. For instance, an English divorce decree was not recognized in Canada in cases in which the English court had assumed jurisdiction on the basis of the wife's residence in England for three years under section 40(1) (b) of the Matrimonial Causes Act 1965.[63] Canadian courts would only recognize English divorce decrees in cases in which the husband was domiciled in England or in cases in which the English court had assumed jurisdiction on the basis that the wife had been deserted by her husband and the husband had been domiciled in England immediately prior to the desertion provided that the wife had been living separately and apart from her husband for a period of not less than two years prior to presenting the petiton.[64] After the wife is given the capacity to acquire a separate domicile for the purpose of determining divorce jurisdiction, Canadian courts, on the doctrine of *Travers* v. *Holley*, should recognize an English divorce decree, where the English court has assumed jurisdiction on the basis of the wife's residence in England for three years, provided that the wife is not only resident in England but has the intention of continuing to reside there. If the wife is resident in England with the intention of continuing to reside there, a Canadian court, after the wife is given the capacity to acquire a separate domicile for the purposes of divorce jurisdiction, would in like circumstances have jurisdiction. Therefore, on the basis of *Travers* v. *Holley*, an English divorce decree granted in those circumstances should be recognized.

*Indyka* v. *Indyka*, however, goes further than *Travers* v. *Holley* and permits the recognition of divorce decrees when there is a substantial and real connexion between the parties and the jurisdiction granting the divorce decree. In *Angelo* v. *Angelo*[65] for instance, Ormrod J. recognized a German decree because of the wife's German residence and nationality in a situation in which

[63] *Supra*, footnote 3.

[64] In that situation the English court assuming jurisdiction under s. 40 (1)(a) of the Matrimonial Causes Act 1965, *ibid.*, would be assuming jurisdiction in a circumstance in which a Canadian court having divorce jurisdiction would assume jurisdiction under s. 2 of the Divorce Jurisdiction Act, R.S.C., 1952, c. 84.

[65] *Supra*, footnote 36.

the English court could not have assumed jurisdiction itself. Rules for the recognition of foreign divorce decrees are no longer inflexibly tied to our jurisdictional rules. The great danger in legislating in regard to the recognition of foreign divorce decrees, at the present time, is that future development of the conflict of laws rules may be jeopardized unless the legislation clearly states that the legislation is not intended to be exhaustive.

Section 6 (2) of Bill C-187, An Act respecting Divorce, which received its first reading in the Canadian House of Commons on December 4th, 1967, provided for the recognition of foreign divorce decrees. As originally introduced, it read:

> For all purposes of determining the marital status in Canada of any person, recognition shall be given to a decree of divorce granted after the coming into force of this Act under a law of any country or subdivision of any country other than Canada by a tribunal or other competent authority that had jurisdiction under that law to grant the decree, on the basis of the domicile of the husband or wife in that country or subdivision, or on the basis of the domicile of the wife therein determined as if she were unmarried and, if she was a minor, as if she had attained her majority.

Section 6 (2) of Bill C-187, as originally introduced, failed to indicate that it was not an exclusive rule in regard to the recognition of divorce decrees granted after the coming into force of the Act. This might have prejudiced the possible adoption by our courts of a more reasonable rule in regard to recognition of divorce decrees which was enunciated in *Indyka* v. *Indyka*. Section 6 (2), as originally introduced, placed in doubt the principle of *Armitage* v. *A.G.* The principle of this case is that a foreign divorce decree will be recognized even though not granted by the law of the domicile provided the decree will be recognized by the law of the domicile. For instance, if German nationals domiciled in Italy obtained a divorce decree in Germany, the Italian court, although it does not itself grant divorce decrees, will recognize the divorce decree since the decree was granted by the law of the nationality, the personal law of the parties. This decree should be recognized in Canada on the principle of *Armitage* v. *A.G.* However, if section 6 (2) had been enacted as originally introduced and it had been interpreted as an exhaustive rule in regard to the recognition of foreign divorce decrees, such a decree would not have been recognized in Canada.[66] Fortunately, the Minister of Justice on

[66] The Legitimacy Act 1926, 16 & 17 Geo. 5, c. 60 set out a new conflict rule in regard to recognition of legitimation by the subsequent marriage of the natural parents. The Act did not indicate whether the new

December 19th, 1967, introduced an amendment in the committee of the whole which added after the word person in section 6 (2) the following words, "and without limiting or restricting any existing rule of law applicable to the recognition of decrees of divorce granted otherwise than under this Act".[67] This provision clearly preserves the *Armitage* v. *A.G.* principle and permits our courts to adopt *Indyka* v. *Indyka*.

A problem may arise out of the ambiguity in section 6 (2). Is it necessary in order that the foreign decree should be recognized that the foreign court assumed jurisdiction on the basis that the husband or wife was domiciled in the foreign State or is it sufficient that the foreign court has granted a divorce in a factual circumstance which would entitle a Canadian court to assume jurisdiction under section 5 of Bill C-187? For instance, would a Canadian court recognize an English divorce decree in a situation in which the English court assumed jurisdiction on the basis of the wife's residence in England for three years under section 40 of the Martrimonial Causes Act, 1965. If section 6 (2) requires a Canadian court to look merely to the basis upon which the English court assumed jurisdiction, the divorce would not be recognized. If on the other hand, section 6 (2) is interpreted as meaning that a Canadian court is to recognize a divorce if it is granted in circumstances in which our court would assume jurisdiction, the English decree will be recognized provided that the wife-petitioner is not only resident in England but has the intention of continuing to reside there. Undoubtedly, section 6 (2) was intended to be a statutory enactment of the doctrine of *Travers* v. *Holley* as explained in *Robinson-Scott* v. *Robinson-Scott*,[68] so that if the factual circumstance would have permitted a Canadian court to assume jurisdiction on the basis of domicile of the husband or wife according to our own definition of domicile, the foreign decree should be recognized.[69] Nevertheless, there is ambiguity. Another defect in regard to section 6 (2) is that it states that "recognition

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rule was exhaustive or whether it was supplementary to the common law conflict of laws rule. However, in *Re Hurll*, [1952] Ch. 722, [1952] 2 All E.R. 322 (Ch.) Harman J. held that the new statutory conflict rule did not entirely replace the common law conflict rule but was supplementary to it. Section 6 (2) of Bill C-187 might also have been construed in this way.

[67] (1967), 112 H. of C. Deb. 5606.

[68] [1958] P. 71, [1957] 3 All E.R. 473 (P.D.A.).

[69] The Minister of Justice in explaining section 6(2) indicated that he believed that it was a statutory enactment of *Travers* v. *Holley* as explained *Robinson-Scott* v. *Robinson-Scott*. See *supra*, footnote 67, p. 5609.

shall be given". This would appear to eliminate the public policy reservation which is attached to conflict of laws rules.[70]

*Conclusion*

The doctrine of *Travers* v. *Holley* which holds that our courts should recognize a foreign decree in circumstances in which our courts would themselves assume jurisdiction was a significant forward step in the spirit of internationalism. It had the effect of equating our rules for the recognition of foreign divorce decrees with our own jurisdictional rules. This resulted in a liberalization of our rules for the recognition of foreign judgments in that prior to *Travers* v. *Holley* only those divorce decrees, granted by the law of the domicile of the husband, or, those non-domiciliary divorce decrees which would be recognized by the law of the domicile of the husband, received recognition. In *Indyka* v. *Indyka*, the House of Lords has now said that we should face the fact that in many States jurisdiction is assumed on the basis of nationality and or residence. The House of Lords has indicated that where there is a substantial and real connexion between the petitioner and the jurisdiction granting the divorce decree, we should not be so parochial as to say, "We will not recognize the decree because our court in a like circumstance could not assume jurisdiction". The courts will have to give concrete definition to this new concept of a "proper forum", a forum with which the petitioner has a substantial and real connexion. *Indyka* v. *Indyka* represents an exciting new movement forward in the spirit of internationalism. It is perhaps a little early to assess whether it is a small step or giant stride forward.

GORDON BALE*

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[70] A failure of natural justice in the course of proceedings has been held to strike at the competence of the foreign court and to justify non-recognition of the decree. Where the petitioner fraudulently deceived the court about the residence of the respondent so that the respondent received no notice of the proceeding, the divorce decree has been refused recognition. See *Macalpine* v. *Macalpine*, [1958] P. 35, [1957] 3 All E.R. 134 (P.D.A.) and *Middleton* v. *Middleton*, [1966] 1 All E.R. 168, [1966] 2 W.L.R. 512 (P.D.A.). This principle has long been applied in Canada. *Maday* v *Maday* (1910-11), 16 W.L.R. 701, (1911), 4 S.L.R. 18 (Trial); *Delaporte* v. *Delaporte*, [1927] 4 D.L.R. 933, 61 O.L.R. 302 (H.C.); *Bavin* v. *Bavin*, [1939] 3 D.L.R. 328, [1939] O.R. 385 (C.A.); *Rothwell* v. *Rothwell*, [1942] 4 D.L.R. 767, [1942] 3 W.W.R. 442 (Man. K.B.).

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CONFLICT OF LAWS—DAMAGES FOR TORT.—Few people will quarrel with the decision of Milmo J. in *Boys* v. *Chaplin*,[1] but among those who take a special interest in the conflict of laws there will be many who will regret the reasoning on which the learned judge based his decision. The facts of the case were that the plaintiff who was serving with the Royal Air Force in Malta was seriously injured there in a motor accident owing to the negligence of the defendant who was serving in Malta with the Royal Navy. Both parties were resident in England. The only question which the judge had to decide was whether the damages to which the plaintiff was unquestionably entitled were to be assessed in accordance with the law of Malta or in accordance with the law of England. According to Maltese law he would have been entitled only to what in England are called "special damages", that is to the recovery of the actual expenses incurred, and he would not have been entitled to any damages for the permanent impairment of his health. In fact it was agreed that the damages according to Maltese law would have amounted to £53, whereas the judge found that according to English law the additional damages amounted to £2,250.

The decision was to the effect that English law applied and the judge gave judgment for £2,303, that is for the amount recoverable in accordance with English law.

The judgment was based on the decision of the Court of Appeal in *Machado* v. *Fontes*.[2] In this case, as will be remembered, an action had been brought in England by reason of an alleged libel published in Brazil, and the defendant sought leave to amend his defence by adding the plea that according to the law of Brazil the publication of the alleged libel would not be a ground for legal proceedings aiming at the recovery of damages, but only for criminal proceedings. Alternatively, he intended to plead that according to the law of Brazil the plaintiff could not recover general damages for any injury to his credit, character or feelings. The Court of Appeal refused to grant leave to amend the defence, on the ground that both pleas which the defendant intended to raise were irrelevant. It was, in other words, held in this case by the Court of Appeal that the so-called Second Rule in *Phillips* v. *Eyre*[3] merely required that the act complained of should not be "innocent" in accordance with the *lex loci delicti*, but that once it was not innocent, the *lex fori* would apply to the right to damages. It is well

[1] [1967] 3 W.L.R. 266.
[2] [1897] 2 Q.B. 231.
[3] (1870) L.R. 6 Q.B. 1.

known that this case has met with wide-spread criticism in the literature on the subject,[4] on the ground that it enables a plaintiff, by invoking the jurisdiction of the English court, to recover damages in accordance with a system of law (English law) which may be completely unconnected with the facts of the case (as, for all we know, it may have been in *Machado* v. *Fontes* itself). In other words: the argument against *Machado* v. *Fontes* is based on the fundamental purpose of all rules of the conflict of laws which is that as far as possible no-one should be able to gain and nobody should stand to lose by the possibility of invoking the jurisdiction of the courts of a particular country. In this sense the decision of the Court of Appeal in *Machado* v. *Fontes* is, as it were, a sin against the Holy Ghost of private international law.

Moreover,[5] the Scottish courts have expressly refused to follow *Machado* v. *Fontes*, and the Australian courts have been severely critical of the case.[6] There had, prior to the decision of the case under review, been no reported English case in which *Machado* v. *Fontes* had been followed, although it is quite possible that, as the learned judge said,[7] it was in practice applied and acted upon during the seventy years since the case was decided.

The defendant who relied on the application of Maltese law, tried to persuade the judge to hold that the decision in *Machado* v. *Fontes* was incompatible with *Phillips* v. *Eyre*, and also incompatible with *The Mary Moxham*,[8] but the learned judge rejected this argument and held that *Machado* v. *Fontes* was compatible with both these precedents. He did not, however, go into an analysis of the concept "justifiable" which is, of course, the central concept of the so-called Second Rule in *Phillips* v. *Eyre* as formulated in that case by Willes J. It is difficult to see, with all respect to the learned judge, how the fact that a particular act does not give rise to the liability of a particular person (this was the case in *The Mary Moxham*) can be brought within the concept of justifiability, whereas the application of the criminal rather than the civil law

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[4] *E.g.* Cheshire, Private International Law (7th ed., 1965), p. 247 *et seq.*; Falconbridge, Conflict of Laws (2nd ed., 1954), ch. 14; Hancock, Torts in the Conflict of Laws (1942), p. 15 *et. seq.*; Castel, Private International Law (1960), p. 224; See for further references, Dicey and Morris, Conflict of Laws (8th ed., 1967), p. 925, note 38.

[5] *Naftalin* v. *L.M.S.*, 1933 S.C. 259; *M'Elroy* v. *M'Allister*, 1949 S.C. 110; *MacKinnon* v. *Iberia Shipping Co.*, 1955 S.C. 20. For details see Dicey and Morris, *op. cit.*, ibid., p. 925.

[6] See esp. *Varawa* v. *Howard Smith Co. Ltd. (No. 2)* [1910] V.L.R. 509, at p. 535; *Koop* v. *Bebb* (1951), 48 C.L.R. 629, at p. 643. For further references see Dicey and Morris, *op. cit.*, *ibid.*, p. 924.

[7] *Supra*, footnote 1, at p. 270.

[8] (1876) 1 P.D. 107 (C.A.).

to an act does not come within that concept. It seems to be perfectly clear from *The Mary Moxham* that "justifiable" cannot mean "innocent", because the act complained of in *The Mary Moxham* was, according to the Spanish *lex loci delicti*, anything but innocent, it just so happened that the defendant was not liable for the particular tort. Why it should be relevant whether the defendant or somebody else is liable but irrelevant whether anybody is liable at all, is difficult to see, and (despite what the learned judge said in the present case) it is submitted that on this point the two decisions in *The Mary Moxham* and *Machado* v. *Fontes* are irreconcilable.

So *Machado* v. *Fontes* has now been applied in a reported English case, but it has been applied in a situation very different from that in which *Machado* v. *Fontes* itself had been decided. In *Machado* v. *Fontes* the first and primary plea of the defendant was that he was not liable at all according to the *lex loci delicti*, but no case had so far been decided in England in which the principle of *Machado* v. *Fontes* was applied so as to deny that the amount of damages recoverable under the *lex loci delicti* was the maximum of what could be recovered in an English court. It is true that this conclusion was drawn in one Canadian case more than half a century ago. The decision in this case, *Story* v. *Stratford Mill Building Co.*[9] has been rightly called "far fetched and unfortunate",[10] but its principle appears to be accepted law in Canada[11] whereas it has been vigorously rejected in Australia.[12] This precisely, however, is the way *Machado* v. *Fontes* was applied in the present case. It must be said, in support of the learned judge's view, that the alternative plea in *Machado* v. *Fontes* which had not so far been considered in the literature on the subject, gives a foundation for the conclusion which he drew from *Machado* v. *Fontes*. This alternative plea which the Court of Appeal rejected in *Machado* v. *Fontes* was, it will be remembered, to the effect that in legal proceedings against the defendant in Brazil the plaintiff could not have recovered general damages for any injury to his credit, character or feelings. It may be said that in refusing to give leave to amend the defence not only in accordance with the first, but also in accordance with the second plea, the Court of Appeal in *Machado* v. *Fontes* seems to have taken the view

[9] (1913), 18 D.L.R. 309, at p. 320.
[10] Hancock, *op. cit.*, footnote 4, p. 122.
[11] See *Young* v. *Industrial Chemicals Ltd.*, [1939] 4 D.L.R. 392, at p. 401.
[12] *Li Lian Tan* v. *Durham*, [1966] S.A.S.R. 143, at p. 148.

that any maximum of damages imposed by the *lex loci deliciti* should be irrelevant in an English court. This, it must be admitted, supports the above mentioned Canadian case.

It does not, however, detract from the general criticism of the decision in *Machado* v. *Fontes* itself. It can only be regretted that the learned judge did not think that the Scottish cases to which he was referred were sufficient persuasive authority to permit departure from the principle of precedent, it is also regrettable that apparently his attention had not been drawn to the powerful Australian criticism of the decision of the Court of Appeal on which he based his judgment.

However, when all is said and done, one feels a great deal of sympathy with the view which the judge took. Had this been a case of a collision of two vehicles in Malta due to the negligence of a Maltese or a Scotsman or a Frenchman and leading to injuries of a resident Englishman or had it been an accident in which a Maltese or a Scotsman or a Frenchman had been injured owing to the negligence of a resident Englishman, it is submitted that very little could have been said for the decision of the judge. As it is, who can object to one Englishman recovering against another Englishman damages in accordance with English law for an accident in an overseas country to which they had both been posted, as members of the armed forces? This, however, is an argument which has nothing to do with *Machado* v. *Fontes* at all. It is a general argument in favour of the application of what has been called the "proper law of the tort"[13] or the law of "social environment"[14] in which the tort is committed. It may be said that if one member of the armed forces resident in England commits a tort against another member of the armed forces resident in England, it should not matter whether the tort was committed in England or in Malta or in some foreign country. It is greatly to be regretted that the judge did not make an attempt to base his decision on this view of the conflict of laws with regard to torts which is now so powerfully supported by recent American cases, and notably by the decision of the New York Court of Appeals in *Babcock* v. *Jackson*.[15]

The Canadian courts have generally followed *Machado* v. *Fontes*, and in particular the Supreme Court of Canada in *McLean* v. *Pettigrew*[16] applied *Machado* v. *Fontes* to a situation in which

[13] Morris, The Proper Law of a Tort (1951), 64 Harv. L. Rev. 881.
[14] Dicey and Morris, *op. cit.*, footnote 4, p. 914.
[15] (1963), 12 N.Y. 2d 473, 191 N.E. 2d 279.
[16] [1945] 2 D.L.R. 65 (S.C.C.).

one person resident in Quebec commited against another person resident in Quebec a tort in the province of Ontario. This situation is comparable to the situation in the present case, and like the learned judge, the Supreme Court of Canada based its decision on *Machado* v. *Fontes*. It is, however, for consideration whether this decision in *McLean* v. *Pettigrew*, like the decision in the present case, should not have been based on the principles which the New York Court of Appeals so eloquently expressed in *Babcock* v. *Jackson*. The situation in *Boys* v. *Chaplin* should have given rise to the application of these principles now gaining ground in the United States. If, instead of relying on an isolated and debatable decision of the Court of Appeal of well over half a century ago, the judge had based his decision on those principles which are now being developed to adjust the conflict of laws in torts to the conditions of our time, his reasoning as well as his actual decision would have satisfied one's sense of justice.[17]

O. KAHN-FREUND*

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CANADIAN BILL OF RIGHTS—IRRECONCILABLE CONFLICT WITH ANOTHER FEDERAL ENACTMENT—"EQUALITY BEFORE THE LAW" AND THE LIQUOR PROVISIONS OF THE INDIAN ACT.—It is not every day that the Supreme Court of Canada is invited to review a drunk conviction or, for that matter, any other conviction for which the sentence imposed was a ten dollar fine. In *Regina* v. *Drybones*,[1] on appeal from the Northwest Territories Court of Appeal, it will have an opportunity to do so—and incidentally to deliver what

[17] After the comment had gone to Press, the Court of Appeal affirmed the decision by a two to one majority. Of the three members of the court two held that *Machado* v. *Fontes* was wrongly decided and should be overruled, whilst the third judge expressed doubts concerning its correctness. Denning M.R., based his decision on the principle of the proper law of the tort, Lord Upjohn took the view that the question of "heads of damages" was part of the question of "remedy" and as such governed by the *lex fori*, and Diplock L.J., in a dissenting judgment, held that the question was entirely governed by the *lex loci delicti*, and leave to appeal to the House of Lords was granted.

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[1] (1967), 64 D.L.R. (2d) 260, 61 W.W.R. 370 (N.W.T.C.A.); aff'ing (1967), 60 W.W.R. 321 per Morrow J., rev'ing conviction by a Magistrate. At the time of writing, an appeal to the Supreme Court of Canada was pending.

is very likely to be the most important decision on the Canadian Bill of Rights[2] since its enactment.

The issues are clear cut and the facts not in dispute. Joseph Drybones pleaded guilty before a Magistrate in Yellowknife to a charge of being unlawfully intoxicated off a reserve contrary to section 94 (b) of the Indian Act.[3] Section 94 provides:

> An Indian who
>
> (a) has intoxicants in his possession
>
> (b) is intoxicated, or
>
> (c) makes or manufactures intoxicants
>
> off a reserve, is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.

On the appeal by way of trial *de novo*, the accused having obtained leave to change his plea, Morrow J. concluded that the essential elements of an offence under section 94(b) had been established. He found that Drybones was an Indian within the meaning of the Indian Act, that he was intoxicated on the occasion referred to in the charge, and that, with reference to the words "off a reserve" in section 94, the fact that there were no reserves in the Northwest Territories was irrelevant.[4] Morrow J. allowed the appeal, however, holding that this section of the Indian Act offended, and was rendered inoperative by, the guarantee in the Canadian Bill of Rights of equality before the law without discrimination by reason of race or colour.[5] The Crown's appeal to the Northwest Territories Court of Appeal was dismissed in a unanimous decision. It was held, first, that where there is a direct conflict between a provision of the Bill of Rights and another federal enactment, the former overrides the latter and renders it inoperative. Second, the court held that the right to equality before the law recognized and declared by the Bill of Rights related not merely to procedural matters, but provided a standard against which provisions of substantive law must be measured. Both propositions are of fundamental significance to the future of the Canadian Bill of Rights.

The material provisions of the Canadian Bill of Rights are section 1(b) and the introductory clause of section 2, which read as follows:

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[2] S.C., 1960, c. 44. [3] R.S.C., 1952, c. 149.

[4] As to the last element, *cf. R.* v. *Modeste* (1960), 31 W.W.R. 84, at p. 88. The reasoning of Morrow J. on this point was approved on the appeal; see *supra*, footnote 1, at pp. 264 (D.L.R.), 374 (W.W.R.).

[5] *Supra*, footnote 2, s. 1(b). The material provisions are set out in the following paragraph.

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, . . .
>
> (b) the right of the individual to equality before the law and the protection of the law;
>
> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, . . .

With reference to the element of "discrimination by reason of race" in the opening words of section 1, and denial of "equality before the law" within the meaning of paragraph (b) of that section, the argument for the accused was based on the fact that the intoxication provisions of the Northwest Territories Liquor Ordinance,[6] under which he would have been charged if a non-Indian, are less stringent than those contained in the Indian Act. The differences relate both to the definition of the offence and to the punishment prescribed. Under the Liquor Ordinance, the offence is constituted by being intoxicated "in a public place".[7] Section 94 (b) of the Indian Act prohibits intoxication "off a reserve". Since, however, there are no reserves in the Territories, the result is that an Indian commits an offence by reason of being intoxicated *anywhere*, including his own home. Again, section 94 of the Indian Act makes provision for stiffer penalties, in terms of minimum fine and maximum imprisonment, than those stipulated for under the Liquor Ordinance.[8]

Despite the substantial number of decisions on the Bill of Rights since its enactment, there is little in the way of authority on the question of the effect of a direct conflict between one of its provisions and another federal statute. In *Regina* v. *Gonzales*,[9] where the Bill of Rights had been set up against section 94(a) of the Indian Act, Davey J. A. expressed the opinion that section 1 of the Bill of Rights simply supplied a "canon or rule of interpretation" for construing the challenged enactment.[10] Where the legislation attacked was unambiguous and incapable of being reconciled with the first section of the Bill of Rights, he stated, then the former

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[6] R.O.N.W.T., 1956, c. 60. [7] *Ibid.*, s. 19(1)(a).

[8] The material section of the Liquor Ordinance, *ibid.*, s. 38(1), prescribes no minimum fine and sets the maximum period of imprisonment at thirty days. S. 94 of the Indian Act, *supra*, footnote 3, provides for a minimum fine of ten dollars, and imprisonment for up to three months.

[9] (1962), 32 D.L.R. (2d) 290, 37 W.W.R. 257 (B.C.C.A.).

[10] *Ibid.*, at pp. 292 (D.L.R.), 260 (W.W.R.).

enactment must prevail, and the Bill of Rights would be without effect. The remarks of Davey J.A., did not, however, form part of the *ratio* in the *Gonzales* decision, the reasons of the other two members of the court going off on other grounds without reference to the point.[11] The reasoning of Davey J.A., furthermore, was referred to and expressly disagreed with by Cartwright J. in his dissenting judgment in *Robertson and Rosetanni* v. *The Queen*.[12] Mr. Justice Cartwright's conclusion that the Bill of Rights would render a conflicting enactment inoperative stands as the only view so far expressed on the matter in the Supreme Court of Canada. In the case under review Johnson J. A., delivering the reasons of the Northwest Territories Court of Appeal, simply referred to the two opposed views and adopted the conclusion reached by Cartwright J. in the higher court. In terms of its value as a precedent, it may be noted that this finding of Johnson J. A., representing part of the *ratio* in an appellate court judgment, qualifies the *Drybones* case as the leading authority on point to date.

Johnson J.A. was content to cite the remarks of Cartwright J. without otherwise elaborating on his reasons for rejecting the canon-of-construction theory propounded by Davey J. A. in the *Gonzales* case. As courts and commentators have pointed out, sections 1 and 2 of the Canadian Bill of Rights undoubtedly leave something to be desired as an exercise in draughtsmanship. The operative words are to be found in the introductory clause of section 2, and a review of the suggested interpretations of that clause, as read with section 1, cannot be attempted here.[13] In the opinion of the present writer, however, a very strong inference as to the intention of Parliament may be drawn from that part of the clause which relates that every law of Canada is to be construed and applied so as to avoid certain consequences "*unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights*". It is difficult to conceive of circumstances in which Parliament would ever feel impelled to employ such an express declaration if, as Davey J. A. suggested, the Bill of Rights has no greater role than to assist in construing ambiguous statutory language. Let it be assumed that when a particular measure is before Parliament it becomes apparent that a provision in the proposed enactment is capable of being

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[11] The reasons of Tysoe J.A., with whom Bird J.A. concurred, are considered below.

[12] [1963] S.C.R. 651, at p. 662 (1963), 41 D.L.R. (2d) 485, at p. 489.

[13] For such a review, see Tarnopolsky, The Canadian Bill of Rights (1966), pp. 90-98.

interpreted in two ways, one of which is inimical to a right or freedom recognized and declared in the Bill of Rights. Would not Parliament move to resolve the ambiguity by amending the provision in order to make its intention manifest, rather than resort to the express declaration contemplated by section 2 of the Bill of Rights? Apart from the obvious political implications of the latter course of action, having recourse to such a declaration for the sake of preserving an ambiguous provision elsewhere in the enactment would hardly seem worthwhile, for it would not reach the time-honoured principle of interpretation which requires that a statute be construed, as far as the language permits, so as to preserve the traditional liberties of the subject. It is suggested, in short, that the canon-of-construction theory advanced by Davey J. A. in the *Gonzales* case denies due force to that part of section 2 which contemplates use of a declaration, and it is perhaps significant that the learned judge made no reference to that part of the section in his analysis. It is submitted that the section is more readily taken to mean that if an enactment is in direct conflict with a Bill of Rights guarantee, and the former fails to declare that it "shall operate" notwithstanding the Bill of Rights, then that enactment shall not "operate" unless and until Parliament chooses to supply such a declaration. This is the effect given to the section by Johnson J. A. in the case under review although, as noted above, he did not essay an independent analysis of the material provisions of the Bill of Rights in this connection.

The other broad issue raised in the *Drybones* case goes to the meaning and scope of "equality before the law and the protection of the law" within the meaning of section 1(b) of the Bill of Rights. In holding that section 94 of the Indian Act was in conflict with the requirements of this provision of the Bill of Rights, Johnson J.A. was obliged to reject the contrary finding of the British Columbia Court of Appeal in the *Gonzales* case.[14] There Tysoe J. A. (with whom Bird J. A. concurred) stated that section 1(b) of the Bill of Rights implied no more than the right of any person to stand on an equal footing with every other person "*to whom a particular law relates or extends*", and he cited, by way of example, the right "to be subject . . . to the same processes of law and the same presumptions, evidential and otherwise . . . and to

[14] *Supra*, footnote 9. The conviction in *Gonzales* was for possession of intoxicants contrary to s. 94(a) of the Indian Act, *supra*, footnote 3. In *Drybones* the conviction was under paragraph (b) of that section, but no suggestion was made that anything turned on this difference. Both provisions penalize conduct which is legally innocent on the part of a non-Indian.

the same penalties and punishments and to have the same rights to claim and defend as every other such person".[15] It is evident that Tysoe J. A. considered section 1(b) to be concerned with procedural protections only. His examples, in fact, are ones that might equally well have suggested themselves in connection with the "due process" clause in section 1(a) of the Bill of Rights. Referring to this aspect of Tysoe J. A.'s reasoning, Johnson J. A. in the instant case observed that:[16]

> This interpretation would restrict equality before the law to equality before the Courts. If this paragraph means no more than this, it would hardly have seemed necessary to include it for this right has always been jealously guarded by the Courts.

Johnson J. A. pointed out that if the requirements of section 1(b) were satisfied provided only that the members of the race singled out for discriminatory treatment were dealt with in the same way, it would mean that (even in the absence of a section 2 declaration) the Canadian Bill of Rights could not be used to challenge the kind of race legislation that continues to come before the Supreme Court of the United States.[17] This result, he concluded, would fall far short of the high purpose expressed in the Canadian Bill of Rights and its preamble.

In his *Gonzales* reasons Tysoe J. A. made reference to two considerations inclining him toward a narrow construction of section 1(b) of the Bill of Rights. The first arises out of his interpretation of the "discrimination" clause in the section. Tysoe J. A. expressed the view that the words "without discrimination by reason of race, national origin, colour, religion or sex" were not qualifying words,[18] and it followed that section 1(b) must be read as applying to legislative classifications of all kinds. He was impressed by the practical necessity of having laws which took account of differences in age, ability, characteristics, and so on, and this militated against applying the test of equality to substantive law. In the *Drybones* decision Johnson J.A. took a different view of the "discrimination" clause, holding that it was only discrimination on the five grounds specifically enumerated in that clause that was affected by the

[15] *Ibid.*, at pp. 296 (D.L.R.), 264 (W.W.R.). The italics are those of Tysoe J.A.

[16] *Supra*, footnote 1, at pp. 263 (D.L.R.), 373 (W.W.R.).

[17] For a recent example, see *Loving* v. *Virginia* (1967), 388 U.S. 1. This was the first case ever to reach the Supreme Court challenging the validity of a statute prohibiting and punishing interracial marriages. As of June, 1967, when this decision striking down the Virginia statute was delivered, such statutes were in force in sixteen states; fifteen other States had repealed their antimiscegenation laws within the last fifteen years.

[18] *Supra*, footnote 9, at pp. 294 (D.L.R.), 262 (W.W.R.).

requirements of the Bill of Rights.[19] The latter interpretation, of course, obviates the necessity of considering classifications based on such grounds as incapacity due to infancy or insanity. It is, perhaps, worth noting in this connection that unlike section 1(b), its counterpart in the American Bill of Rights—namely, the clause in the Fourteenth Amendment to the Constitution respecting "equal protection of the laws"—offers no guidance at all as to which bases of classification are permitted and which are not. This deficiency appears not to have seriously impaired the use of the Equal Protection clause for the purpose of challenging discriminatory enactments. With respect to state statutes drawn according to race, the Supreme Court has developed and applied what amounts to a rebuttable presumption of invalidity, holding that such enactments bear a "very heavy burden of justification".[20]

The other difficulty that Tysoe J. A. discerned in according a substantive effect to section 1(b) had to do not with the basis of discrimination, but with the *kind* of provisions that would be caught by the ban on "discrimination" within the meaning of that section. If the contention were accepted that section 1(b) rendered inoperative the liquor sections of the Indian Act, it would logically follow, he suggested, that those sections of the Indian Act conferring special rights and privileges on Indians would be equally vulnerable, with the result that "practically the whole of the Indian Act would be invalidated by the Canadian Bill of Rights".[21] The apparent dilemma would seem to arise from construing "discrimination" to mean simply "treating differently than", as opposed to the more usual sense of "treating less favourably than". In the *Drybones* decision no attempt was made to develop the latter interpretation, but there is a suggestion that the penal character of section 94 of the Indian Act was treated as a material factor. Noting that governmental policy has been to treat Indians differently, in many respects, from non-Indians, Johnson J. A. remarked that, "One would have hoped that that could have been done *without subjecting Indians to penalties and punishments different to those imposed on other races*".[22] If protective legislation could not be framed otherwise, he concluded, Parliament would

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[19] *Supra*, footnote 1, at pp. 263-264 (D.L.R.), 373 (W.W.R.).

[20] See, for example, *Loving* v. *Virginia, supra*, footnote 17, at p. 9. For a review of the authorities on the Equal Protection clause as applied to statutes drawn on racial lines, see also *McLaughlin* v. *State of Florida* (1964), 379 U.S. 184, where the court struck down a statute prohibiting cohabitation between negro and white.

[21] *Supra*, footnote 9, at pp. 297-298 (D.L.R.), 266 (W.W.R.).

[22] *Supra*, footnote 1, at pp. 264 (D.L.R.), 373 (W.W.R.). Italics mine.

be obliged to make use of the express declaration contemplated by section 2 of the Canadian Bill of Rights.

In connection with the significance apparently placed by Johnson J. A. on the penal nature of section 94 of the Indian Act, it is of interest to note that the United States Supreme Court has also directed its attention to this factor in considering enactments drawn on racial lines. In separate concurring opinions in two recent decisions, the position has been taken that the Equal Protection clause invalidates, *per se*, any law "which makes the criminality of an act depend upon the race of the actor".[23] The opinions of the court stopped short of this position, leaving the door open to the possibility of some overriding statutory purpose. The court has, however, stated that racial classifications are "especially suspect" in criminal enactments.[24]

Looking past the role played by presumptions or inferences drawn from the basis of classification (race), or the kind of enactment (criminal), the basic question for the United States courts in applying the Equal Protection clause has been to decide whether a classification rests upon some difference having a reasonable and just relation to the act in respect of which the classification is proposed. Unless some such legitimate legislative purpose can be discerned, the enactment will be characterized as one which entails "arbitrary" discrimination, and it will accordingly be struck down.[25] The issues were not discussed in these terms in the *Gonzales* or *Drybones* cases,[26] although in both allusion was made to the protective character of at least some of the provisions of the Indian Act. In neither case was it considered whether the liquor sections themselves could properly be characterized as "protective", and it may be that such a line of inquiry would have raised substantially the same issues as an analysis in terms of a legitimate legislative purpose.

It cannot be disputed that Indians have had, and continue to have, a disproportionately high involvement with liquor infractions.[27] This fact in itself, however, provides no warrant for relying on the liquor sections of the Indian Act in preference to the pro-

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[23] *Loving* v. *Virginia*, *supra*, footnote 17, at p. 13, per Stewart J., and *McLaughlin* v. *State of Florida*, *supra*, footnote 20, at p. 198, per Stewart and Black JJ.

[24] *Loving* v. *Virginia*, *ibid.*, at p. 11.

[25] See authorities referred to *supra*, footnote 20.

[26] Interestingly, however, the argument addressed to the British Columbia Court of Appeal by counsel for the Crown in the *Gonzales* case appears to have followed these lines. See the references to that argument in the reasons of Tysoe J.A., *supra*, footnote 9, at pp. 294 (D.L.R.), 262 (W.W.R.).

[27] See Canadian Corrections Association, Indians and the Law (Ottawa, 1967), ch. 4, and studies therein cited.

vincial (or territorial) liquor legislation that applies to the non-Indian.[28] In a survey recently prepared for the Minister of Indian Affairs and Northern Development it is stated that:[29]

> Most police officers, magistrates, Indian Affairs Branch officials, Indian leaders and inmates, felt strongly that the liquor provisions of the Indian Act should be deleted and that for purposes of liquor control, Indian people should be dealt with the same as other residents under the terms of the provincial and territorial liquor legislation. It was apparent from observation and statistics that many Indian people are being convicted under sections of the Indian Act for behaviour that is not an offence under provincial legislation.

The Minister has since indicated that forthcoming amendments to The Indian Act are likely to excise all liquor provisions from this Act.[30]

*Regina* v. *Drybones* is a test case *par excellence*. Presumably Joseph Drybones' reputation and fortune will not be irreparably damaged should the Supreme Court conclude that his conviction for intoxication must be restored. In all probability the liquor provisions of the Indian Act will soon be relegated to the role of historical curiosities by repeal, whether or not the court holds them to have been rendered inoperative by the Bill of Rights. All that hangs in the balance is, to a very considerable extent, the future effectiveness of the Canadian Bill of Rights itself.

K. LYSYK*

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[28] As to the legal difficulties in the way of applying territorial or provincial legislation to Indians while the liquor provisions of the Indian Act, *supra*, footnote 3, remain in effect, see *Regina* v. *Peters* (1966), 57 W.W.R. 727. This case, and related authorities, are discussed in my article, The Unique Constitutional Position of the Canadian Indian (1967), 45 Can. Bar Rev. 513, at pp. 545-549.

[29] *Supra*, footnote 27, at p. 29.

[30] Address by the Hon. A. Laing, delivered to the Ryerson Men's Club, Vancouver, October 16th, 1967. He stated: "In the new Indian Act which will come before Parliament in a few months time, there will probably be no reference to liquor at all. It is time to treat the Indian as a person responsible for his own behavior in personal matters."

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