CASE AND COMMENT

REFERENCE OF CLAIM BY DEPARTMENTAL HEAD — ATTEMPT TO WITHDRAW REFERENCE BY ORDER-IN-COUNCIL—OUSTING JURISDICTION —FREEDOM OF JUDICIARY FROM EXECUTIVE CONTROL.—In the case of the *Dominion Building Corporation Limited* v. *The King*[1] Mr. Justice Maclean, President of the Exchequer Court of Canada, was called upon to decide a nice point of law and one which recalls the strenuous period in our constitutional history when the independence of the Bench from Executive control was settled in England. This point was whether a Reference to the Court under the provisions of section 38 of the Exchequer Court Act, by the Head of the Department in connection with the administration of which the referred claim arises, can be revoked by Order-in-Council and all proceedings under the Reference thereby stayed. The Order-in-Council had been passed after the Reference had been officially transmitted to the Court, and placed on record, but before the claimant had filed his Statement of Claim. After the period of filing a Statement of Defence by the Crown had expired the claimant moved for judgment by default, and upon this motion counsel for the Crown raised the point stated. The Court decided that it was beyond the power of the Crown, as represented by the Dominion Government, to revoke the Reference after it had been filed in the Court, because to permit that to be done would be to concede that the Executive could of its own motion, and by something done outside of the Court, oust it of jurisdiction that attached under the authority of a statute—the Exchequer Court Act. The learned Judge overruled the point taken by the Solicitor-General, who appeared as counsel for the Crown against the motion for judgment by default, but intimated that the matter in question might be raised on a substantive application to the Court to withdraw the Reference. Subsequently the application so indicated by the Judge as open to the Crown was made, but was dismissed as not showing sufficient grounds in law or fact to warrant the Court in ordering that the Reference should not be proceeded with.

We quote below from the learned Judge's reasons for holding that the Crown could not of its own motion revoke a Reference when made under the statute and filed in the Court:—"I am of the opinion that

[1] At present unreported.

there was no authority for the withdrawal of the Reference by Order-in-Council; that the Reference is still effective, and that the Statement of Claim is properly before the Court. Sec. 38 of the Exchequer Court Act recognizes a Petition of Right and a Reference as equivalent means of enabling a subject to prosecute a claim against the Crown; but if a Reference is made, then proceedings by way of Petition of Right are barred. I am not aware of any statute or other authority which enables the Crown of its own motion to withdraw a Reference, any more than it could withdraw a Fiat, and that cannot be done except under the terms of the statute amending the Petition of Right Act, to which I have alread referred. The tendency in legislation has been to increase and broaden the avenues by which the subject may seek his remedies against the Crown, and to extend the discretionary powers of the Executive in granting facilities to the subject for pursuing his claim against the Crown. It would seem rather extraordinary in view of the trend of development in this direction, that Parliament should ever have contemplated the bestowal of an arbitrary power of withdrawing a Reference by the Executive once it is made."

The statute last mentioned by the learned Judge is an Act passed in 1923 (13-14 Geo. V. c. 25), to enable the Crown to withdraw a Fiat authorizing a Petition of Right to be filed, when the granting of the Fiat was induced by a misrepresentation, concealment, or non-disclosure, on the part of the petitioner, of any material fact which should have been truly stated for the information of the Minister of Justice in considering the petition.

C. M.

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TAXING ACT—FUEL OIL—NATURE OF TAX—"PURCHASER."—The case of *The Attorney-General for British Columbia* v. *The Canadian Pacific Railway Company*, as determined at first instance in the Supreme Court of British Columbia, will be found noted at page 585 of Volume 4 of the CANADIAN BAR REVIEW. The Supreme Court of Canada has since given judgment upon the appeal then pending, confirming the Provincial Courts in holding the "Fuel-oil Tax Act" of British Columbia *ultra vires* on the ground that it is indirect taxation.

The tax was imposed upon the first purchaser after importation into or manufacture within the Province.

The somewhat interesting contention of the Railway Company was, that notwithstanding it bought fuel-oil not for sale but for

consumption in its own operations and did so consume it, and there was consequently, so far as concerns the oil purchased by it, no "passing on" of the tax, the taxation was nevertheless indirect. The contention of the Railway Company has been upheld.

The submission of the Company was in effect that taxation imposed upon the sale of a marketable commodity has, as a matter of tax classification in the past, been classified as indirect taxation—as income taxes have been classified as direct taxation—and that actual results in particular cases are not regarded.

The Supreme Court, in upholding the contention of the Railway Company, substantially says: Apart from special circumstances, the presumable incidence and the general tendency of a tax imposed upon the first purchaser in the Province of a commodity susceptible of general use is that it will be passed on to the consumer, who may or may not be the first purchaser—in other words, *primâ facie*, such a tax is indirect. Conceivably special circumstances disclosed in evidence might lead to a different result. As to the evidence to this end in the case at Bar the Court says: "The evidence in our opinion falls short of disclosing such special circumstances as might suffice to take this tax out of the category of taxes imposed on marketable commodities such as customs and excise duties, which, according to their general incidence, it may be expected will ultimately be borne by persons other than those required by the taxing statute to pay them and are, therefore, indirect."

The Railway Company further contended that the tax was an excise tax and on that ground unconstitutional. The Supreme Court did not, however, deal with the point.

M.

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WILL — "MISCARRIAGE OF JUSTICE" DEFINED — CONCURRENT FINDINGS — RULES OBSERVED ON APPEAL TO PRIVY COUNCIL.—The case of *Robins* v. *National Trust Co.* involving the validity of the will of the late Edward C. Walker, decided by the Judicial Committee on the 7th February, 1927, presents some interesting features, by-products, so to speak, of the questions involved therein.

1. *Miscarriage of Justice.*—This expression occurs in the appeal sections of the Criminal Code and is therefore of considerable importance. For under the Code an appeal from a Judge (sitting without a Jury) or a Magistrate can only be allowed for three reasons, one of which is thus described. The others do not concern us here, but it is under this heading that appeals are being allowed

as if the phrase meant a judgment that did not proceed upon what the Court of Appeal deems to be a proper inference from the facts or a correct view of the facts themselves. In his judgment in the *Robins* case Lord Dunedin says:

"There was a faint attempt made in the present case to argue that what the appellant considered a quite inadequate appreciation and an unjustifiable belittling of a certain witness whom he regarded as all important would amount to a miscarriage of justice. The expression means no such thing. It means such departure from the rules which permeate all judicial procedure as to make that which happened not in a proper use of the word judicial procedure at all."

2. *Concurrent findings of two Courts on a pure question of fact.* The rule of the Privy Council is not to interfere with such findings and it is thus stated:

"The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Board has laid down for itself. As such it has gradually developed."

"Their Lordships wish it to be clearly understood that the rule of conduct is a rule of conduct for the Empire, and will be applied to all the various judicatures whose final tribunal is this Board."

This rule is stated to be qualified in two particulars. These are:

a. "If it can be shown that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case it is no finding at all."

b. "The rule is a rule as to concurrent findings, and not a rule as to concurrent reasons."

"The rule [as to concurrent findings] is none the less applicable because the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence."

3. *Onus of proving testamentary capacity lies on those who propound the will.*

This is dealt with thus:

"In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity.

Moreover, if a will is only proved in common and not in solemn form, the same rule applies even though the action is to attack a probate which has been granted long ago."

4. *Effect of decisions in Dominion Courts of Appeal which differ from those in a Court of Appeal in England.*

Lord Dunedin says:

"Now when an Appellate Court in a Colony which is regulated by English law differs from an Appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court which is bound by English law is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board."

F. E. H.

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JUVENILE COURTS—PROCLAMATION—HABEAS CORPUS—JURISDICTION—EVIDENCE.—A decision of some interest has just been rendered by the Supreme Court of Nova Scotia.[1] A boy named Wilfred St. Peters was dealt with by the Juvenile Court in a manner that did not commend itself to his mother, and in an effort to get him out of the custody of the Court an application was made for a writ of habeas corpus, based on the sole ground that it had not been proved at the trial that a proclamation putting the Juvenile Delinquents Act into force in Halifax had issued or been published in the Canada Gazette. The necessary procedure had, in fact, been followed and the Act was in force, but the point urged was that there had been no formal proof of this. Reliance was placed on *Regina* v. *Bennett*,[2] *Regina* v. *Walsh*,[3] and *Regina* v. *Elliott*,[4] in which it was held that on a trial for an offence under the Canada Temperance Act the proclamation putting the Act in force must be proved. It was, further, contended that section 1128 of the Code had no application, since the Juvenile Court Judge was not either a stipendary magistrate or a justice, as defined in the Code, sec. 2, par. 18.

The application came on for hearing before His Lordship Mr. Justice Carroll, who considered the matter of sufficient importance to refer it to the full Court. The Court has now given judgment

[1] *In re Wilfred L. St. Peters,* not yet reported.
[2] 1 O.R. 445.
[3] 2 O.R. 206.
[4] 12 O.R. 524.

refusing the application. Their Lordships were unanimous in holding that the Juvenile Court Judge could take judicial notice of the authority under which his Court was established.

W. L. S.

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MORTGAGE — GUARANTY—BREACH BY MORTGAGOR—PAYMENT BY CERTAIN SURETIES—CONTRIBUTION.—Thirteen persons, parties of the third part to a mortgage given by a company, covenanted therein to guarantee unconditionally the performance by the mortgagor of its undertaking to pay the principal, interest, taxes and certain life insurance premiums. The mortgagor made default in the payment of certain sums due under its covenant. Four of the guarantors paid to the mortgagee, under their guarantee, $2,560. These four sureties then brought an action, claiming contribution in respect to the amount paid by them, against the remaining nine guarantors. Mr. Justice Orde, in *Tucker* v. *Bennett et al.*,[1] held that they could not recover.

It was admitted that the principal, interest, taxes and insurance premiums constituted one debt. It was calculated, that if the principal were due at the date of the opinion of Mr. Justice Orde, a one-thirteenth share of the amount guaranteed would be $1,427. No one of the four plaintiffs had paid or had been called upon to pay as much as $1,427.

The right of one of two or more sureties, who has paid more than the share which as between himself and his co-sureties he ought to pay, to recover the excess from them does not depend upon the existence of a contract.[2]

The rationale for one surety, who has paid more than his share of the suretyship obligation, having a right to contribution from his co-sureties, is to be found in the fact that the surety by such payment has relieved them of a common burden. Hence they ought to reimburse him for their proportionate part of his loss.

It can be well contended that the four plaintiffs in paying $2,560 under the guarantee, relieved *pro tanto* the remaining nine of the common burden and that an ensuing right to contribution arose in their favour in respect of these payments. On the other hand, if the plaintiffs were given a new cause of action every time they paid any part of the debt of the mortgagor, there might result a multiplicity of actions. Or if the remaining nine, having contributed in

[1] (1927), 31 O.W.N. 402.
[2] *Deering* v. *Winchelsea*, (1800), 2 B. & P. 270.

respect to the payment by the four plaintiffs of $2,560, subsequently, on default of the mortgagor, paid a part of the guaranteed debt to the mortgagee, they in turn would have a cause of action for contribution against the four, and so on whenever the mortgagor makes default.

To avoid the practical difficulty of a multiplicity of actions in respect of this one guarantee, the learned judge decided in favour of the defendants and held that the four plaintiffs could not enforce contribution until they had paid or had been called upon to pay, respectively, an amount in excess of a one-thirteenth part of the whole guarantee debt.[3] For until such time, *non constat* that the plaintiffs, when the whole debt is paid, would have a right of contribution against the defendants, the defendants may pay the balance of the guaranteed amount and it would be they who in the final result would have the right to contribution. Another illustration of the statement: "Law is logic tempered with expediency."

S. S.

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THE INTEREST OF THE CHILD—CAN A GOOD FATHER BE DEPRIVED OF HIS DAUGHTER?—The majority of the Manitoba Court of Appeal say he can; and say that this extraordinary result issues from the statutory law of Manitoba.

Not often do we find opposing propositions of law stated with the force and trenchency that make the judgments in *In re Skaleski*[1] such vivid reading. That case concerns the rights of a virtuous, kindly, Christian householder to the custody of his foster-daughter, aged six.

The child had been adopted soon after birth. Her true parents had been Greek Catholics who attended the Roman Catholic Church, and Jenny was baptized a Roman Catholic. Her poor mother was dying of cancer, and gave over the baby to Mr. and Mrs. Popham for full adoption, being convinced, apparently, that the Pophams were devout Roman Catholics, and that the baby would be nourished in that faith.

And so it was. But Mrs. Popham died in 1926. Then the trouble began. Popham himself was a regular church-goer—a firm believer in some form of Christianity, but somewhat vagrant; not submissive to any one particular branch, and certainly not to the Roman branch. Yet Popham emphatically called himself a "Chris-

[3] *Davies* v. *Humphreys*, (1840), 6 M. & W. 153; *Ex parte Snowdon*, (1881), 17 Ch. D. 44; *Stirling* v. *Burdett*, [1911] 2 Ch. 418, accord.

[1] *Popham* v. *Bertrand et al.* (1927), 1 W.W.R. 355; [1927] 1 D.L.R. 781.

tian," and certainly he did support Christian churches. That was not the kind of spiritual guardian to whom his dying wife wished to leave little Jenny. She sought something more traditional, and nominated Father Bertrand and her own Roman Catholic brother as guardians; and when she lay dying, Father Bertrand did a neighbour's duty by taking the three Popham children into his home. So far so good. But the moment Mrs. Popham died, Father Bertrand, qua guardian, spirited Jenny away to another city, placed her in the household of a well-off and faithful churchman, and defied the foster-father.

The foster-father claimed Habeas Corpus against Father Bertrand, saying: "I have brought up Jenny from her cradle; I love her, and she loves me and her two foster-brothers; I am a sober man, industrious and respected, and have a fair position in life; I keep a Christian home, and a comfortable one. Restore me my child. Its own mother is dead; its own father disappeared years ago; I am now its father and mother."

To which Father Bertrand replies: "The Manitoba Children's Protection Act says that no R. C. child shall be placed in a Protestant home. Jenny is R. C. baptized and bred; you are virtually a Protestant; you can't claim the child."

This too was the judgment of Perdue, C.J.M., Dennistoun and Prendergast, JJ.A., all supporting Galt, J., who had refused Habeas Corpus. Fullerton and Trueman, JJ.A., dissented keenly, contending that whatever might later happen to the child under a Court order, and whatever religion the Court might decide on for Jenny, the primary law must first be vindicated, and the child restored to her bereaved father.

Said Mr. Justice Trueman:—"I deny with complete conviction that a person who has unlawfully removed a child from its parent's control can support his action by pointing out that the home to which the child has been taken offers the child a better position in life or a greater degree of comfort or opulence than the home of its parent. What first had to be made right is the vindication of the parent's right not to be deprived of his child except by the Court's order made for cause; cases of misconduct by the parent occasioning harm to the child before the Court can intervene excepted."

And Mr. Justice Fullerton, even more caustically:—"To justify the respondent's position, this Court must hold it to be the law of this province that a wife whose religious views differ from those of her husband can by will, hand over the custody and education of the

children of the marriage to a stranger. If this were the law which it certainly is not, it would be a most inhuman and iniquitous law. In the present case there is not a word against the character of the applicant or his ability to support the child. . . . I can see no grounds whatever on which the order appealed from can be supported, and I can see every reason both in law, in fact, in common fair play and ordinary humanity, why it should be set aside."

A far-reaching and rather disturbing case. Most people will be relieved if the Supreme Court of Canada is allowed to pronounce on the matter. G. C. T.

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HOTEL—NEGLIGENCE—LICENSEE ON PREMISES.—There are some interesting features in the case of *Knight* v. *G. T. P. Development Co.*[1] It does not disclose any new legal doctrine, but there is in it an application of some elements of the law of Negligence in somewhat novel circumstances.

Two matters are dealt with by the decision in this case. First, that persons invited to a hotel for a special purpose are only on the premises by licence when that purpose has been accomplished. Secondly, that the hotel proprietors are not responsible for injury to a licensee occurring on a part of the premises to which he has no right to resort.

The special purpose in this case was a banquet supplied by the management of the hotel. One of the guests, after the banquet was over, found his way, presumably in looking for a lavatory, into quarters used only by the hotel servants, and fell down the shaft of an elevator, receiving injuries which caused his death.

One who is invited by the owner to enter on private land for any purpose certainly remains there pursuant to the invitation until he leaves, though the purpose may have been accomplished long before unless some overt act of the owner changes his status to that of trespasser. The case of a temporary guest in a hotel does not seem to be analogous. He must leave, or remain as a licensee, so soon as the reason for his invitation to be there has ceased to exist.

Two questions arise out of this decision. The case deals only with a licensee, but if a guest of the hotel had been injured in the same way, would the result have been different? I do not think so. Then, the learned Judge who wrote the opinion of the Court apparently intimates that the defendants might have been responsible if it

[1] [1926] S.C.R. 674; [1926] 4 D.L.R. 87.

had been proved that the accident was caused by their negligence. In view of the authorities, I am inclined to doubt this. The defendants were under no obligation to exercise care in respect to a trespasser. C. H. M.

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SCHOOL LAW—CATHOLIC SEPARATE SCHOOLS IN ONTARIO—26 VIC. (CAN.) C. 5—SHARE IN GENERAL FUND.—The judgment of Mr. Justice Rose in the Ontario Separate School case *Tiny Separate-School Trustees* v. *The King*,[1] which dismissed a petition of right on behalf of all Roman Catholic separate school boards, rural and urban, in the province, and was the subject of an extended comment in the October number of the REVIEW, (vol. 4, p. 592) has been affirmed, on the appeal of the suppliants, by the unanimous judgment of the First Appellate Division, composed of Sir William Mulock, C.J.O., Magee, Hodgins and Ferguson, JJ.A., and Grant, J. The several interesting questions of law involved in this important case, as indicated in the previous comment, are fully dealt with by the Chief Justice, Mr. Justice Hodgins, and Mr. Justice Grant, in separate judgments; and with the result that the conclusions of Mr. Justice Rose at the hearing, and the reasoning upon which they are founded, are approved and adopted. Magee, J.A., and Ferguson, J.A., merely express their concurrence in the conclusions of the trial Judge.

The claims of separate school supporters in Ontario, whose separate denominational schools have been confined since 1867 to public schools, that they are entitled, under the school law of the late Province of Canada, applicable to Upper Canada, at Confederation, and sec. 93 of the British North America Act, to establish and conduct their own separate high schools and collegiate institutes, and to provide education in the province up to the work of the universities in their denominational schools, with freedom from taxation for all such education in the provincial system, and a right to an arithmetical share, on a basis of average attendance, in all legislative grants of every description for public schools and secondary schools in the province are accordingly denied.

Leave to appeal to the Supreme Court of Canada has been granted by the Appellate Division. BARRISTER.

[1] 59 O.L.R. 96.