COMMENTS
COMMENTAIRES

THE CANADIAN BILL OF RIGHTS—"EQUALITY BEFORE THE LAW"—A.-G. CAN. V. LAVELL.—

The Decision.

The decision of the Supreme Court of Canada in *A.-G. Can. v. Lavell*[1] is a weak response to a question which generated great public interest because of its implications for Indians, for women and for the continued vitality of the Canadian Bill of Rights' guarantee of "equality before the law". The case concerned section 12(1)(b) of the Indian Act.[2] This section provides that an Indian woman who marries "a person who is not an Indian" is not entitled to be "registered as an Indian". The Registrar, an official in the Department of Indian Affairs and Northern Development, has the power to delete from "the Indian Register" the name of any Indian woman who has married a non-Indian man.[3] By contrast, when an Indian man marries a non-Indian woman, the man does not lose his Indian status; instead, his wife acquires Indian status.[4] Thus the Indian Act treats Indian women and Indian men quite differently in the same circumstances of marriage to a non-Indian.

The *Lavell* case was an appeal from two judgments. The first concerned Mrs. Lavell, who was a "status Indian" (an Indian within the meaning of the Indian Act) until she married a non-Indian. Her name was deleted from the Indian Register by the Registrar. She had not been living on a reserve for nine years prior to her marriage, and she did not claim to have been deprived of any property rights by the Registrar's decision. She appealed from the decision to a County Court judge under section 9(3) of the Indian Act; he upheld the decision of the Registrar.[5] She then appealed to the Federal Court of Appeal, which reversed

[1] (1973), 38 D.L.R. (3d) 481.
[2] R.S.C., 1970, c. I-6.
[3] *Ibid.*, s. 7.
[4] *Ibid.*, s. 11(1)(f).
[5] (1971), 22 D.L.R. (3d) 182.

the County Court judge on the ground that section 12(1)(b) was inoperative by reason of conflict with the right to "equality before the law" in section 1(b) of the Canadian Bill of Rights.[6]

The second case concerned Mrs. Bedard, who was also a status Indian until she married a non-Indian in 1964. She separated from her husband in 1970, and returned to the reserve to live in a house which had been left to her under her mother's will. When she returned to the reserve the band council required her to dispose of the property and gave her permission to remain on the reserve only until she had disposed of the property. She disposed of the property to her brother, but he allowed her to continue to live in the house. The band council then resolved that the regional supervisor should be requested to serve a notice to quit the reserve on Mrs. Bedard. She responded by commencing an action for an injunction restraining the band council from expelling her from the reserve and claiming some other relief as well. Osler J. in the Supreme Court of Ontario granted the injunction; he followed the decision of the Federal Court of Appeal in the *Lavell* case and held section 12(b) to be inoperative as in conflict with the Bill of Rights.[7]

On appeal from both decisions, the Supreme Court of Canada, by the narrow majority of five to four, reversed the decisions of the Federal Court of Appeal and of Osler J., and held that section 12(1)(b) was not in conflict with the right to "equality before the law" in the Bill of Rights; it was therefore an operative provision, and Mrs. Lavell and Mrs. Bedard had legally lost their status as Indians. The principal majority opinion was written by Ritchie J. It will be recalled that it was Ritchie J. who wrote the principal majority opinion in *R.* v. *Drybones*,[8] the first and so far still the only case in which the Supreme Court of Canada has held a statute to be inoperative for conflict with the Bill of Rights. Ritchie J. in *Lavell* is careful to reaffirm his earlier decision that the Bill of Rights does have the effect of rendering inoperative statutes which conflict with its precepts.[9] But he concludes in *Lavell* that section 12(1)(b) is not in conflict with the Bill of Rights and that the *Drybones* doctrine is therefore inapplicable. He offers essentially two arguments in support of this result, which I have called "the British North America Act argument" and "the Dicey argument". Each of these arguments is considered later in this comment. Ritchie J.'s opinion was concurred in by Fauteux C.J., Martland and Judson JJ. The fifth vote was provided by Pigeon J. who had

[6] (1971), 22 D.L.R. (3d) 188.
[7] *Bedard* v. *Isaac*, [1972] 2 O.R. 391; 25 D.L.R. (3d) 551.
[8] [1970] S.C.R. 282; 9 D.L.R. (3d) 473.
[9] *Supra*, footnote 1, at p. 494.

dissented in *Drybones*. He wrote a short opinion agreeing in the result with Ritchie J., but dissociating himself from Ritchie J.'s reasoning. Pigeon J. made no attempt to determine whether or not section 12(1)(b) was in conflict with the Bill of Rights (although he implied that he thought it was). He avoided the issue by persisting in the view he had expressed in dissent in *Drybones* that the Bill of Rights does not in any event override inconsistent legislation. Section 12(1)(b) was therefore operative, whether or not it conflicted with the Bill of Rights.

The principal dissenting opinion was written by Laskin J. as he then was. He argued that there was no distinction between *Drybones* and *Lavell* and that section 12(1)(b) was in conflict with the equality guarantee in the Bill of Rights and was inoperative. Laskin J.'s opinion was concurred in by Hall and Spence JJ. Abbott J. wrote a separate dissenting opinion in which he agreed with Laskin J. and added some comments of his own, including the striking statements that the Bill of Rights "has substantially affected the doctrine of the supremacy of Parliament", and that such a result is "undesirable".[10] Abbott J., like Pigeon J., had been one of the three dissenters in *Drybones* (the third one being Cartwright C.J.) who held that the Bill of Rights could not override inconsistent statutes. It is perhaps surprising that he apparently did not feel free to join Pigeon J. in persisting in this dissenting view, since in no decision after *Drybones* had the Bill of Rights actually been given the effect of rendering a statute inoperative. As a digression it may be noticed that Abbott J.'s opinions in three important civil liberties cases are very difficult to reconcile with each other. It will be recalled that it was Abbott J. in *Switzman* v. *Elbling*,[11] the famous padlock case, who stated, *obiter*, that there was a bill of rights implied in the British North America Act, whereby neither Parliament nor the legislatures could abrogate the freedoms of expression and debate which were essential to the working of a parliamentary democracy. This opinion appeared to reflect a strong view of the desirability of limiting legislative supremacy by a bill of rights, because there is no such bill of rights explicit in the British North America Act, and no other judge of the Supreme Court of Canada has been prepared to assert clearly that one should be implied. Then in *Drybones*[12] when Abbott J. was given the opportunity to join the majority in holding that the explicit Canadian Bill of Rights was a "true" bill of rights with overriding effect on inconsistent statutes he rejected the opportunity and held that the Bill of Rights was merely a canon of

[10] *Ibid.*, at p. 484.
[11] [1957] S.C.R. 285, at p. 328.
[12] *Supra*, footnote 8, at pp. 299 (S.C.R.), 477 (D.L.R.).

construction. Now in *Lavell* Abbott J. asserts that the Bill of Rights "has substantially affected the doctrine of the supremacy of Parliament" (this is inconsistent with his *Drybones* opinion), and that such a result is "undesirable" (this is inconsistent with his *Switzman* v. *Elbling* opinion).

The British North America Act Argument.

Ritchie J.'s first reason for upholding section 12(1)(b) is summarized in his own words:[13]

> . . . that the *Bill of Rights* is not effective to render inoperative legislation, such as s. 12(1)(b) of the *Indian Act*, passed by the Parliament of Canada in discharge of its constitutional function under s. 91(24) of the *B.N.A. Act*, to specify how and by whom Crown lands reserved for Indians are to be used.

Early in his judgment he emphasized that section 91(24) of the British North America Act assigned to the federal Parliament the subject of "Indians, and Lands reserved for [the] Indians".[14] This authority "could not have been effectively exercised without enacting laws establishing the qualifications required to entitle persons to status as Indians and to the use and benefit of Crown 'lands reserved for Indians'".[15] The Bill of Rights "has [not] rendered Parliament powerless to exercise the authority entrusted to it under the Constitution";[16] and "it is not effective to amend or in any way alter the terms of the B.N.A. Act".[17]

This argument, which I have called the British North America Act argument, may perhaps be best understood by looking at another case, *Canard* v. *A.-G. Can.*,[18] a decision of the Manitoba Court of Appeal written by Dickson J.A. (who has of course since been elevated to the Supreme Court of Canada). In *Canard* the court was concerned with section 43 of the Indian Act, a provision which gives to the Minister of Indian Affairs and Northern Development jurisdiction to appoint the executors and administrators of the estates of deceased Indians. For non-Indians that jurisdiction exists in the Surrogate Court (or other probate court) of the province in which the deceased is domiciled (or in which he leaves land) at the time of death. Dickson J.A., in an opinion which was agreed to by the other members of the court (Guy and Hall JJ.A.), held that section 43 was in conflict with the Bill of Rights because it denied "equality before the law" to the Indians; it was "a legal roadblock in the way of one particular racial group, placing that

[13] *Supra*, footnote 1, at pp. 499-500.
[14] *Ibid.*, at p. 489.
[15] *Ibid.*, at p. 490.
[16] *Ibid.*
[17] *Ibid.*, at p. 489.
[18] (1972), 30 D.L.R. (3d) 9. Leave to appeal to the Supreme Court of Canada was granted on October 16th, 1972.

racial group in a position of inequality before the law;[19] it was therefore inoperative. The learned judge also cast doubt on the other succession rules in the Indian Act.[20]

This decision has always seemed to me to be wrong. Let us assume that there is a disadvantage to Indians in having their estates administered by the Minister of Indian Affairs instead of by the Surrogate Court. Section 91(24) of the British North America Act assigns legislative power over "Indians, and Lands reserved for the Indians" to the federal Parliament. It thereby envisages that legislation upon matters which would otherwise be within provincial competence, for instance, succession on death, can be enacted by the federal Parliament so long as it is in relation to "Indians, and Lands reserved for the Indians". Obviously, the rules of the Indian Act concerning succession on death will apply only to Indians, for if they applied to any wider class of persons they would be unconstitutional. And, equally obviously, those rules will differ from the rules applicable to non-Indians, because the rules for Indians can only be enacted federally, while the rules for non-Indians can only be enacted provincially. To say that the rules of the Indian Act deny "equality before the law" because they are harsher than the provincial rules is to ignore the federal character of Canada. It is like saying that an Ontario law denies equality before the law because it is harsher than the comparable Quebec law. The essential feature of federalism is that it will accommodate differences of this kind.

The Bill of Rights could be interpreted as abolishing all special rules for Indians, or at least those which place Indians in a position which is disadvantageous in comparison with non-Indians.[21] This point of view does *not* involve the proposition "that the Bill has rendered Parliament powerless to exercise the authority entrusted to it under the constitution", or the proposition that the Bill is effective to "amend" or "alter" the terms of the British North America Act. These suggestions by Ritchie J. (quoted earlier in this comment) are clearly erroneous. A voluntary withdrawal by Parliament from a field entrusted to it under the constitution does not render Parliament "powerless" to re-enter that field; nor does it "amend" or "alter" the British North America Act. That Act does not impose a duty to enact special laws for the Indians; it does not compel Parliament or the legislatures to exercise any of their legislative powers to the full, or even at all. It is not necessary to set up Ritchie J.'s straw men in order to reject the

[19] *Ibid.*, at p. 23.
[20] *Ibid.*, at p. 22.
[21] This was in fact the decision of Osler J. in *Isaac* v. *Davey*, [1973] 3 O.R. 677; 38 D.L.R. (3d) 23. A dictum of Laskin J.'s in *Lavell, supra*, footnote 1, at pp. 511-512, suggests that he also holds this point of view.

argument that the Bill of Rights prohibits special laws for Indians. What seems to me to be wrong with the argument is that it is not plausible. There is no need to construe the vague phrase "equality before the law" as requiring such a radical result as the abolition of laws enacted by the federal Parliament which employ a racial classification when the use of that classification is essential to the validity of the laws under the British North America Act. It is much more plausible to construe the guarantee of equality as not intended to disturb the federal principle: inequalities between the laws of different legislative bodies within the federation should be deemed not to be inconsistent with equality before the law.[22]

If we accept that the guarantee of equality before the law should be qualified by the federal principle of diversity between legislative jurisdictions, then we have to conclude that *Drybones* was wrongly decided. The only reason why section 94(b) (now section 95(b)) of the Indian Act was held inoperative was because it imposed a "harsher" liquor law on Indians than the law applicable to non-Indians. The difficulty with this reasoning was clearly stated by Pigeon J. in his dissenting judgment in *Drybones*. The "very object" of section 91(24) of the British North America Act, he said, "in so far as it relates to Indians, as opposed to Lands reserved for the Indians, is to enable the Parliament of Canada to make legislation applicable only to Indians as such and therefore not applicable to Canadian citizens generally".[23]

[22] Katz, The Indian Act and Equality Before the Law (1973), 6 Ottawa L. Rev. 277 agrees with this proposition, but he argues that the Indian Act may nevertheless be in violation of "equality before the law". He would compare its provisions, not with provincial laws, but with the absence of similar federal laws for non-Indians; and where Parliament has no power to enact similar federal laws for non-Indians then he would compare the Indian Act provisions with the laws of the federal territories, even though the facts may arise far away from either of the territories. These arguments, while ingenious, seem to me to be unrealistic. The absence of federal laws in a field where the Parliament has power to enact laws may be explained by the existence of satisfactory provincial laws (which Katz will not use for purposes of comparison), or at least by a provincial occupation of the field which it is not politically feasible for the federal Parliament to disturb. The territorial laws are not a realistic basis for comparison either, because they are enacted for each territory not by the federal Parliament but by the local, mainly elected, Territorial Council (see next footnote); and although the power of each Council is merely delegated from the Parliament, there are obvious political constraints against direct federal parliamentary intervention in the local government of each territory.

[23] *Supra*, footnote 8, at pp. 303 (S.C.R.), 489 (D.L.R.). The only possible escape from this argument lies in the fact that *Drybones* arose in the Northwest Territories over which the federal Parliament has full legislative authority under an 1871 amendment to the B.N.A. Act. In fact, however, the federal Parliament has delegated to a Territorial Council legislative powers equivalent to those of a provincial Legislature: Northwest Territories Act, R.S.C., 1970, c. N-22, s. 13; the Yukon Territory Act, R.S.C., 1970, c. Y-2, s. 16, is similar. The result is that the territorial ordinances

Ritchie J. in his majority judgment in *Drybones* did not attempt to answer this criticism. Now in *Lavell* we learn what his answer is: *Drybones,* we are told, was concerned with "conduct by Indians *off* a reserve"; *Lavell,* on the other hand, is concerned with "the internal regulation of the lives of Indians *on* Reserves of their right to the use and benefits of Crown lands thereon".[24] The emphasis of "off" and "on" in these quotations is Ritchie J.'s own, and throughout his reasons for judgment he emphasizes that the *Lavell* case is concerned with the property and civil rights of Indians "on reserves".[25]

Ritchie J.'s characterization of the issue in *Lavell* seems to me to be both wrong and irrelevant. The reason why it is wrong is that the issue in the case was whether or not Mrs. Lavell and Mrs. Bedard had been lawfully deprived of their status as Indians. Indian status certainly does carry with it the right to reside on, and acquire property in, a reserve, but it carries non-reserve consequences as well. Sections 42 to 52 make detailed provisions with respect to the property of Indians—all property whether situate on a reserve or not, and all Indians whether residing on a reserve or not. Thus, as we noticed in the *Canard* case, probate jurisdiction over the estates of deceased Indians is exercised by the Minister of Indian Affairs and Northern Development.[26] The Minister has power to "declare the will of an Indian to be void in whole or in part" if he is satisfied of any one of a number of matters, including such extraordinary grounds as that the terms of the will are"vague, uncertain or capricious" or are "against the public interest".[27] If an Indian dies intestate, the scheme of distribution of his estate is laid down in the Indian Act;[28] that scheme differs very substantially from the Ontario scheme, for example. There are provisions for the administration of the property of mentally incompetent Indians and infant Indians;[29] these provisions, like the other property and succession rules, apply to Indians and their property off as well as on reserves. Then, moving away from the private property rules, we find that the Act authorizes payments of money to Indians and the provision of services to Indians, and that these provisions are not always confined to Indians living on reserves.[30] Then there is section 95, the section held to be inoperative in

may be expected to differ from federal statutes in exactly the same way as provincial laws. In *Canard* this particular complication is not present, for the case arose not in a federal territory but in the province of Manitoba; but see Katz, *op. cit.*, footnote 22, *ibid.*

[24] *Supra,* footnote 1, at p. 499.
[25] See *ibid.*, at pp. 490, 492, 495, 498.
[26] Indian Act, *supra,* footnote 2, ss 42-44.
[27] *Ibid.*, s. 46.
[28] *Ibid.*, ss 48-50.
[29] *Ibid.*, ss 51, 52.
[30] *Ibid.*, ss. 61-73.

Drybones (then section 94), making drunkenness (as well as possession or manufacture of intoxicants) off a reserve an offence for Indians. The provisions concerning education[31] require Indian children to attend "such school as the Minister may designate", and they provide for the appointment and empowering of truant officers; these obligations are not confined to Indian children living on reserves, and the designated school need not be on a reserve. It is worth noting that the parent or guardian of a truant Indian child commits an offence under section 119 of the Act, so that Ritchie J. seems to be wrong when he says that "a careful reading of the Act discloses that section 95 (formerly 94) is the only provision therein made which creates an offence for any behaviour of an Indian *off* a reserve".[32] It is surely plain that the issue for Mrs. Lavell and Mrs. Bedard was not exclusively concerned with their rights on reserves; the deprivation of Indian status was much wider than that.

Even if the *Lavell* case could be characterized in the narrow fashion attempted by Ritchie J. this would still not make the case materially different from *Drybones*. Section 91(24) of the British North America Act empowers the federal Parliament to legislate for "Indians, and lands reserved for the Indians". There are two heads of power here: "Indians" and "Lands reserved for the Indians". The distinction may be seen in the drunkenness provisions of the Indian Act. Thus section 95, making drunkenness an offence *off* a reserve, has to employ a racial classification and apply to "an Indian"; section 97, making drunkenness an offence *on* a reserve, need not employ a racial classification and it applies to "a person". If a distinction is to be drawn, the British North America Act argument applies with more force to those provisions of the Indian Act which apply off reserves. Such provisions are constitutional only if they are laws in relation to "Indians"; here the British North America Act seems to insist upon a racial classification, as the draftsman of section 95 clearly concluded. Provisions which apply on reserves are constitutional if they are in relation to "Lands reserved for the Indians"; it is possible to make some provisions for lands reserved for the Indians without using a racial classification, as the language of section 97 demonstrates.[33] An argument might be constructed (which would not in my view be very strong) for the proposition that provisions employing a racial classification which apply off reserves do not offend the

[31] *Ibid.*, ss 114-123.

[32] *Supra*, footnote 1, at p. 498.

[33] In *R.* v. *Whiteman*, [1971] 2 W.W.R. 316, McClelland D.C.J. (Sask.) refused to hold s. 97 (then s. 96) inoperative on the ground that, unlike s. 95 (then s. 94) which had been held inoperative in *Drybones*, s. 97 did not employ a racial classification.

Bill of Rights, but provisions employing a racial classification which apply on reserves do offend the Bill of Rights. Ritchie J.'s proposition is the exact reverse of this. It cannot be supported, and it cannot therefore provide a basis for distinguishing *Drybones* from *Lavell*.

I have taken the view that an analysis of "the British North America Act argument" is justified because it will obviously be of great significance in testing other parts of the Indian Act. The fact that it is relied upon by Ritchie J. stimulated the discussion. But in my view the argument is totally irrelevant to the issue in *Lavell*, and was not even worthy of mention in the case. The British North America Act argument is that where the Act uses a particular classification in order to confer legislative jurisdiction on the federal Parliament then the use by the federal Parliament of that classification should not be deemed in violation of the "equality before the law" guarantee in the Bill of Rights. Thus a law in relation to "aliens"[34] should not be deemed in violation of equality before the law because it treats aliens more harshly than British subjects or citizens. A law in relation to "savings banks"[35] should not be deemed in violation of equality before the law because it treats savings banks more harshly than insurance companies. But as soon as Parliament employs a classification which is different from that contained in the British North America Act's grant of power, then the law does have to meet the test of equality. Thus a law which treats black aliens differently from white aliens would undoubtedly be in violation of the equality guarantee; a law which prohibits savings banks from accepting deposits from Roman Catholics would also be in violation. In these examples it is no answer to say that Parliament is exercising its authority over aliens and savings banks; it is the classification by colour and religion which is offensive and those classifications are not built into the British North America Act. Indeed, Parliament is always legislating in exercise of some power conferred by the British North America Act; if that fact alone exempted its products from the Bill of Rights, then the Bill of Rights could never be effective.

This rather obvious fallacy is the principal (though not the only) vice in Ritchie J.'s use of the British North America Act argument to sustain section 12(b) of the Indian Act in *Lavell*. He says that the provision is not offensive to "equality" because its rule was "imposed in discharge of Parliament's constitutional function under section 91(24)".[36] But Mrs. Lavell and Mrs. Bedard did not claim to be discriminated against by reason of the fact that

[34] B.N.A. Act, s. 91(25).
[35] *Ibid.*, s. 91(16).
[36] *Supra*, footnote 1, at p. 490.

they were Indians; if that had been their complaint then Ritchie J. could have replied that that kind of discrimination is inherent in the grant of legislative power over Indians in section 91 (24) of the British North America Act. What Mrs. Lavell and Mrs. Bedard complained of was discrimination by reason of the fact that they were *women*. If the British North America Act had granted power over "Indian women" the same reply would have been available to his Lordship. But the British North America Act in fact confers power over "Indians"; it is obvious that Indians is a term which is regardless of sex and that therefore sexual discrimination is not inherent in that grant of power. It is therefore a massive red herring to justify section 12(b) of the Indian Act on the ground that it was enacted in exercise of authority conferred by section 91(24). A provision of the Indian Act which *can* be justified on that ground is section 95, dealing with drunkenness by an "Indian"; but in *Drybones,* as we have noticed, Ritchie J. himself wrote the majority judgment of the Supreme Court of Canada holding section 95 (then section 94) to be inoperative as in conflict with the equality guarantee. Another provision is section 43, dealing with the estates of deceased "Indians"; but in *Canard,* as we have noticed, Dickson J.A., now one of Ritchie J.'s colleagues on the Supreme Court, wrote the unanimous judgment of the Manitoba Court of Appeal holding section 43 to be inoperative as in conflict with the equality guarantee.

My conclusion is that the British North America Act argument is sound, but inconsistent with the decision in *Drybones* and irrelevant to the issue in *Lavell.* Ritchie J.'s first reason for his decision in *Lavell* is therefore unsatisfactory.

The Dicey Argument.

Let us now turn to Ritchie J.'s second reason for upholding section 12(1)(b). It is summarized in his own words:[37]

> . . . that equality before the law under the Bill of Rights means equality of treatment in the enforcement and application of the laws of Canada before the law enforcement authorities and the ordinary courts of the land, and no such inequality is necessarily entailed in the construction and application of s. 12(1)(b).

This definition of equality before the law is taken from Dicey's famous definition of the "rule of law". In *The Law of the Constitution,* written in 1885, Dicey described "the rule of law" as one of the two leading characteristics of the English constitution, the other being the sovereignty of Parliament. He offered three definitions of the rule of law; the second of these was "the universal

[37] *Ibid.,* at p. 500. The quoted passage is actually his third reason, but the second reason is an *obiter* dictum.

subjection of all classes to one law administered by the ordinary courts".[38] According to Ritchie J., it is Dicey's second meaning of the rule of law which is embodied in the Bill of Rights guarantee of equality before the law:[39]

> . . . "equality before the law" as recognized by Dicey as a segment of the rule of law, carries the meaning of equal subjection of all classes to the ordinary law of the land *as administered by the ordinary courts*, and in my opinion the phrase "equality before the law" as employed in section 1(b) of the *Bill of Rights* is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land.

Ritchie J. goes on to assert that section 12(1)(b) of the Indian Act does not involve any such inequality in the administration or application of the law. The sum total of the reasoning on this point is contained in a passage which attempts to distinguish *Drybones* from the present case:[40]

> The fundamental distinction between the present case and that of *Drybones*, however, appears to me to be that the impugned section in the latter case could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary courts of the land to a racial group, whereas no such inequality of treatment between Indian men and women flows as a necessary result of the application of s. 12(1)(b) of the *Indian Act*.

The first point to be made about the Dicey argument is that Dicey would turn in his grave if he knew that his language was being used as a gloss on a bill of rights. Ritchie J. does not refer to Dicey's *third* meaning of the rule of law, but his third meaning is that civil liberties "are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts"; whereas under many foreign constitutions civil liberties are protected by a bill of rights in the constitution.[41] It must also be remembered that Dicey in the same book described and extolled the doctrine of the sovereignty of Parliament, under which Parliament "can make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament".[42] It was Dicey's view that the great strength of the English constitution lay in the *absence* of any bill of rights or other constitutional restraint on legislative power. His second meaning of the rule of law (the one relied on by Ritchie J.) was intended to show how civil liberties were protected in England without a bill of rights. They were protected because anyone in-

[38] (10th ed., by E. C. S. Wade, 1965), p. 193.
[39] *Supra*, footnote 1, at p. 495.
[40] *Ibid.*, at p. 499.
[41] *Op. cit.*, footnote 38, pp. 195-196.
[42] *Ibid.*, p. 40.

jured by a high official could sue that official for redress under the ordinary law in the ordinary courts. The point of equality before the law was that "with us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen".[43] And he contrasted this happy situation with countries where "nobles, priests and others could defy the law",[44] or even the France of his own time, which subjected official acts to a special system of law, namely, "official law administered by official bodies".[45] There is no need to repeat the many criticisms which have been made of Dicey's concept of the rule of law.[46] It is enough for our purpose to say that his concept of the rule of law cannot be enshrined in a bill of rights which overrides statutes, because a salient characteristic of the concept is that it is *not* enshrined in a bill of rights, or at least that it does nor in any degree disturb the sovereignty of Parliament. According to Ritchie J. it was the Diceyan definition which led to section 95 of the Indian Act being held inoperative in *Drybones*.[47] Such a result would have been anathema to Dicey. In Dicey's scheme, a provision of an Act of Parliament had to be applied without question by the courts; Drybones' civil liberties would be adequately protected by the fact that he was tried in the ordinary courts; equality before the law would be irrelevant to the *Drybones* facts, but would involve the proposition that an Indian holding an official position (for instance, a cabinet minister or the chief of a band) would be subject to the same drunkenness law as Drybones.

One must conclude that Ritchie J. is wrong in believing that his definition of equality before the law is taken from Dicey. However, that does not prove that there is anything wrong with it. Let us therefore examine it on its own merits. The definition is "equality of treatment in the enforcement and application of the laws of Canada before the law enforcement authorities and the ordinary courts of the land".[48] The example of its application, we are told, is *Drybones,* where "the impugned section could not be enforced without denying equality [in the sense defined]; on the other hand, we are told, the impugned section in *Lavell* does not lead to any such inequality".[49]

A possible meaning of equality in the "enforcement and ap-

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[43] *Ibid.*, p. 193.
[44] *Ibid.*, p. 194.
[45] *Ibid.*, p. 195.
[46] The best-known of many criticisms is perhaps Jennings, The Law and the Constitution (5th ed., 1959), chapters 1, 2, 6 and Appendix II.
[47] See quotation accompanying footnote 40, *supra.*
[48] See quotation accompanying footnote 37, *supra.*
[49] See quotation accompanying footnote 40, *supra.*

plication" of the law is that any given law should be administered or applied impartially to those persons to whom the law applies. In this sense the guarantee of equality would govern the conduct of the officials or courts charged with the enforcement of the law and would exclude bias, discrimination, or bad faith on their part. In this sense the concept *would* be agreeable to Dicey, for it would never result in the upsetting of the law itself. In the context of section 12(1)(b) of the Indian Act, this definition of equality would be satisfied if Mrs. Lavell and Mrs. Bedard were treated in the same way as other Indian *women* who marry non-Indians. In the context of section 95 of the Indian Act, equality in this sense would be satisfied if Drybones were treated in the same way as other *Indians* found similarly intoxicated in like circumstances; so long as the law was applied or enforced fairly, the Bill of Rights would be satisfied. This is exactly what was decided prior to *Drybones* by a majority of the British Columbia Court of Appeal in *R.* v. *Gonzales.*[50] In *Drybones* Ritchie J. emphatically rejected this holding. He pointed out (perfectly correctly) "that the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members 'to equality before the law', so long as all the other members are being discriminated against in the same way".[51] And of course the actual decision in *Drybones* was inconsistent with this "administrative" definition of equality, because the Supreme Court of Canada held that Drybones had been denied equality before the law, although there was no suggestion that enforcing officers or courts had treated Drybones differently from other persons to whom the impugned law applied, that is, other Indians; and the Supreme Court distinctly held that the law itself, and not merely enforcement practice, was inoperative. So much for the definition of equality as requiring only equality of enforcement or administration.

It is clear that Ritchie J. in *Lavell* is not repenting of his decision in *Drybones.* He expressly states in *Lavell,* in a passage I quoted earlier, that the impugned law in *Drybones* "could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary courts of the land to a racial group".[52] In what sense is this true? If a white man had been found with Drybones in the lobby of the Old Stope Hotel at Yellowknife in a similar state of intoxication, then the white man could not have been charged under the Indian Act; he would have to have been charged under the Liquor Ordinance of

[50] (1962), 32 D.L.R. (2d) 290.
[51] *Supra,* footnote 8, at pp. 297 (S.C.R.), 484 (D.L.R.).
[52] See quotation accompanying footnote 40, *supra.*

the Northwest Territories.[53] Under the Liquor Ordinance there is no minimum penalty, and the maximum penalty is thirty days imprisonment; under the Indian Act there is a minimum penalty of a $10.00 fine and a maximum penalty of three months imprisonment. In fact Drybones was sentenced to the minimum fine of $10.00. The fine seems modest, and our hypothetical white man could have been given exactly the same (or a heavier) penalty. But it is also possible that the white man could be sentenced to a lesser fine than $10.00 whereas the Indian could be penalized no less than $10.00.[54] The most that can be said in favour of Drybones' claim that he had been denied equality is that a white man in like circumstances *could* have been sentenced to a lesser penalty than Drybones. It must therefore be this possibility of a lesser penalty for a white man which is what Ritchie J. regards as a denial of "equality of treatment in the administration and enforcement of the law".

Now let us look at the *Lavell* facts. Suppose that an Indian *man* married a non-Indian at the same time as Mrs. Lavell (or Mrs. Bedard) did so. The consequence for the man is that he retains his Indian status, he remains free to reside on his reserve and to own property in the reserve, and he remains subject to the other benefits and burdens of Indian status. The consequence for the woman is that she loses her Indian status, she loses her right to reside on her reserve or to own property in the reserve, and she is denied the other benefits and burdens of Indian status. Obviously these differences are reflected in the "administration and enforcement of the law". The law was administered or enforced against Mrs. Lavell by the Registrar striking her name off the Indian Register; had she been a man, the Registrar would not and could not have struck the name off. The law was administered or enforced against Mrs. Bedard by the band council forcing her to sell her house and commencing to expel her from the reserve; had she been a man, the band council would not and could not have forced the sale of the house or the expulsion from the reserve. And, if it is thought to be important, these inequalities of treatment are ultimately enforced in the ordinary courts, as the course of proceedings in these two cases shows: Mrs. Lavell appealed

[53] R.O.N.W.T., 1956, c. 60, s. 19.

[54] Another difference between the Liquor Ordinance and the Indian Act is that the Liquor Ordinance makes drunkenness an offence only "in a public place", while the Indian Act makes it an offence anywhere "off a reserve". Ritchie J. in *Drybones, supra,* footnote 8, at pp. 290 (S.C.R.), 478-479 (D.L.R.), treats this difference as important, but a glance at the Liquor Ordinance (*ibid.*, s. 2(1)(e)) reveals that the lobby of an hotel (where Drybones committed his offence) would be a "public place" within the meaning of the Liquor Ordinance, so that Drybones could not rely on that particular inequality.

the Registrar's decision into the ordinary (federal) court system; Mrs. Bedard sought an injunction from the ordinary (provincial) superior court. If Mrs. Lavell and Mrs. Bedard had chosen not to take any legal initiative, but had refused to accept their loss of status, their loss of status would ultimately have been enforced by the courts, probably in legal proceedings to remove them from the reserves, but at the very latest on their deaths, when the question would arise (as it did in the *Canard* case mentioned earlier) whether the Surrogate Court or the Minister of Indian Affairs had jurisdiction to administer their estates.

The inequality in treatment of Indian men and women which is required by the Indian Act's status provisions is not materially different from that authorized by the drunkenness provisions. Indeed, what differences do exist make *Lavell* a clearer case than *Drybones*. On the facts of *Lavell* the status provisions compel enforcement officers and courts to treat women differently from men; the officials have no discretion, but are obliged to treat Mrs. Lavell (or Mrs. Bedard) differently from a man. On the facts of *Drybones* the drunkenness provisions allow, but do not compel, the enforcement officers and courts to treat Indians differently from non-Indians; the provisions give a sufficiently wide discretion to enable the officials to treat Drybones in the same way as a non-Indian. Another difference between the two cases is that the consequences of discrimination in *Drybones* were criminal whereas the consequences in *Lavell* were civil. But no one believes that criminal consequences are necessarily more severe than civil consequences, and the Bill of Rights is not confined to criminal consequences. In fact the civil consequences of a denial of status are very much more severe than the added penalties for drunkenness. In *Drybones* the possible discrimination between Indians and non-Indians could be measured in dollars and cents or days in prison. These are not trivial matters, certainly, but they do not compare in severity with the impact of the denial of Indian status on a woman who is proud to be an Indian and who wishes to live with her own people. A final difference is that the discrimination in *Drybones* was based on race, whereas the discrimination in *Lavell* was based on sex. But section 1 of the Bill of Rights specifically forbids "discrimination by reason of" either "race" or "sex". If there is a difference between "race" and "sex" as a basis for discrimination it is the qualification implicit in section 91(24) of the British North America Act granting legislative power over "Indians"; as we have seen, this suggests that the "Indian" classification which was in issue in *Drybones* is admissible; it does not give any ground for argument that a classification by sex is admissible.

The conclusion is that the Diceyan definition of equality before the law, or any other definition which depends upon such abstractions as inequality in administration or enforcement of the law, cannot explain the different results in *Drybones* and *Lavell*.

Reasonableness of Classification.

The crucial question which the court never reached in its reasons for judgment in *Lavell* (or in *Drybones* for that matter) is whether there is any rational and acceptable policy justification for the discriminatory provision under review in that case. In other words, is there any reason to be found in Indian history or current needs which would justify the defining of Indian status in a way which discriminates against women? And if such a reason can be found, it is sufficiently strong to outweigh the more general community value of the equality of the sexes?

The reason why these questions have to be addressed is that nearly all laws impose burdens or confer benefits on special groups in the community, and deny the burdens or benefits to other groups. The guarantee of "equality before the law" cannot therefore condemn all legislative classifications; it must condemn only those which lack acceptable justification in policy. Even such classifications as "race", "national origin" or "sex" (which are enumerated in section 1 of the Bill of Rights)[55] are not necessarily objectionable. For example, we may want laws which provide special assistance for disadvantaged groups such as native peoples (race) and women (sex); we may want to confine certain rights and privileges, such as the vote, to Canadian citizens or British subjects (national origin); we may want to impose disabilities on aliens or foreign-owned corporations (national origin); and there

[55] The guarantee of "equality before the law" should not however be *confined* to laws which classify on the basis of the enumerated classifications ("race, national origin, colour, religion or sex") for the reasons given in Sinclair, The Queen v. Drybones (1970), 8 Osgoode Hall L.J. 599, at p. 615. This appears to me to be what Laskin J. said in *Curr* v. *The Queen*, [1972] S.C.R. 889, at pp. 896-897; 26 D.L.R. (3d) 603, at p. 611. In *Lavell*, however, Laskin J., without specifically denying this proposition, relied on his dictum in *Curr* as supporting the quite distinct proposition that *all* legislative classifications of "race, national origin, colour, religion or sex" are offensive to the Bill of Rights, and that there is no need to enquire into their justification: *supra*, footnote 1, at p. 510. The same passage from *Curr* is quoted and given yet another interpretation (I think) by Ritchie J. in *Lavell* in a difficult passage in his reasons for judgment, at p. 492.

It is worth repeating here too that, in my opinion, where the B.N.A. Act has allocated legislative power by using a classification such as "Indians" or "Aliens", then the use by the federal Parliament of that classification is likely to be a prerequisite of validity, and should not be treated as offensive to the Bill of Rights. In other words the use of a particular classification in the grant of power in the B.N.A. Act is by itself a sufficient justification for the use of that classification in a statute enacted under the grant of power. This is explored earlier in this Comment in the text headed "The B.N.A. Act Argument".

may even be physical differences which justify discriminatory treatment, as in the law of rape, an offence which under the Criminal Code can only be committed by a man; no doubt, other examples of "acceptable" discrimination can be found in the statute books or can be imagined. The need to examine the policy justification of a law which is alleged to violate the guarantee of equality emerges clearly from the jurisprudence which has developed around the "equal protection clause" of the Fourteenth Amendment of the United States Constitution.[56] The mere fact that a law "discriminates" against a particular group does not make that law a denial of equal protection; rather it forces a judicial enquiry into whether the law's classification is a reasonable means of securing a legitimate legislative purpose.[57]

There is nothing peculiarly American about the doctrine of reasonable classification. It springs from the inherently "unequal" nature of legal rules, whether American or Canadian (or Egyptian for that matter). Unless the Canadian courts abandon the decision in *Drybones* and relinquish the power there assumed to strike down laws for violation of equality, they must develop some criteria of inequality like the American doctrine of reasonable classification.[58] And yet in *Lavell* both Ritchie and Laskin JJ., in language which is admittedly not unequivocal, appeared to deny the relevance of the American doctrine.[59] It is easy to see why they find such a doctrine unpalatable. It forces the court to leave the safe area of conventional legal materials, and embark on an enquiry into the rationality and acceptability of policy. The court does not have the means to acquire the broad range of facts and policy considerations which are necessary to make a wise judgment as to legislative policy. Nor are the judges equipped by their legal backgrounds to evaluate "those social, political and economic considerations which are the raw material of the law maker".[60] Nor are they likely to welcome the public controversy which surrounds the making of community policy, or the public interest which is taken in the backgrounds and political attitudes of policy-

[56] The best-known article among the enormous literature is probably Tussman and tenBroek, Equal Protection of the Laws (1949), 37 Cal. L. Rev. 341; a more recent, excellent analysis may be found in Note, Legislative Purpose, Rationality and Equal Protection (1972), 82 Yale L.J. 123.

[57] Formulations vary, and some tend to obscure the policy choices which are involved: See Note, Legislative Purpose, Rationality and Equal Protection, *ibid.*

[58] *Accord*: Tarnopolsky, The Canadian Bill of Rights (1966), p. 217; Sinclair, *op. cit.*, footnote 55, at pp. 614-618; Smith, Regina v. Drybones and Equality before the Law (1971), 49 Can. Bar Rev. 163; Cavalluzzo, Judicial Review and the Bill of Rights (1971), 9 Osgoode Hall L.J. 511, at pp. 544-551; R. N. McLaughlin, Comment (1973), 51 Can. Bar Rev. 517, at p. 520.

[59] *Supra*, footnote 1, at p. 494, per Ritchie J., at p. 510, per Laskin J.

[60] Sinclair, *op. cit.*, footnote 8, at p. 608.

makers.[61] After the *Lavell* decision at least one women's group publicly attacked the court as prejudiced against women.[62] This hardly fits into the Canadian tradition of civilized legal criticism, but it is part and parcel of normal political polemic. The Minister of Justice, Otto Lang, responded with dismay that the *Lavell* decision "does not indicate a bias against women, but centres on a technical legal question".[63] No doubt the response is correct as to the court's lack of prejudice against women. But the bit about technical legal questions will have to be repeated every time the court rules on a controversial law, and no amount of repetition will make it convincing.

P. W. HOGG*

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SEEING THROUGH THE DOUBLE-DUTCH OF CORPORATE OPPORTUNITY?—The House of Lords in *Boardman* v. *Phipps*[1] make very clear the error in assuming that every profit or conflict between interest and duty necessarily renders a fiduciary accountable.[2] Like the duty of care in the law of negligence, fiduciary duties do not apply in the abstract.[3] There is the need—given that a fiduciary relationship exists—to examine carefully the scope of that relationship.[4] This is merely to recognize that the intensity and therefore the perimeter of a fiduciary relationship will vary

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[61] When Laskin J. was elevated to the position of Chief Justice a letter in the correspondence column of The Globe and Mail, January 11th, 1974, praised the appointment on the ground that "he is aware of the changing role of women in society and convinced that our laws must reflect this change".

[62] The Globe and Mail, September 29th, 1973.

[63] *Ibid.*

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[1] [1967] 2 A.C. 46.

[2] *Ibid.*, at pp. 90-91, per Viscount Dilhorne; at pp. 100, 102-103, per Lord Cohen; at pp. 105, 109-110, per Lord Hodson; at pp. 125-130, per Lord Upjohn. See also the examples given by Wilberforce J., [1964] 1 W.L.R. 993, at pp. 1009-1010, accepted by Lord Denning M.R., [1965] 2 W.L.R. 839, at pp. 860.

[3] See *Smith Ltd.* v. *Smith*, [1952] N.Z.L.R. 470, at p. 471.

[4] As Frankfurter J., put it: "But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?" *S.E.C.* v. *Chenery Corp.* (1943), 318 U.S. 80, at pp. 85-86.

Similar is the analysis of Lord Upjohn in *Boardman* v. *Phipps*, *supra*, footnote 1, at p. 127 which was recently applied by Roskill J., in *Industrial Development Consultants Ltd.* v. *Cooley*, [1972] 2 All E.R. 162, at p. 173.

See generally Sealy, [1962] C.L.J. 69, at pp. 73-74.

according to the type of fiduciary relationship,[5] the terms, express or implied, of that relationship and the extent to which the policy reasons underlying the strict nature of the profit[6] and conflict[7] doctrines are applicable.[8] Emphasis on the scope of duty prevents the determination of the ambit of the beneficiary's interests from being telescoped into a question-begging exercise.[9]

The Privy Council decision in *Oranje* v. *Kuys*[10] should be welcomed as a reaffirmation that the profit and conflict doctrines must not be taken *au pied de la lettre*. Moreover, the decision represents the most detailed examination of those factors which determine the scope of these doctrines that has occurred in the Commonwealth since the High Court of Australia's efforts in

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[5] Trustees, agents, directors, solicitors, partners and so on, may all be fiduciaries, but their functions and roles are different.

[6] The obligation not to profit from a position of trust.

[7] The obligation not to permit a possible conflict to arise between duty and interest.

For the significance of distinguishing the profit and conflict doctrines see McClean (1969), 7 Alta. L. Rev. 218.

[8] The "severity" of the equitable doctrines stems from the fact that a fiduciary, by the very nature of his work, is placed in a situation of temptation and therefore strict rules are necessary, for otherwise the beneficiary's interests may not be looked after with the vigilance expected of a fiduciary: *Keech* v. *Sandford* (1726), Sel. Cas. T. King 61, at p. 62; *Bray* v. *Ford*, [1896] A.C. 44, at p. 51; *Costa Rica Rly. Co.* v. *Forwood*, [1901] 1 Ch. 746, at p. 761. A corrollary of this view is the courts' recognition that, in the majority of cases, they would be faced with an impossible fact-finding task if they were to attempt to examine in depth the supposed motives of the parties in dispute. *Ex parte James* (1803), 6 Ves. Jun. 326, at pp. 345 and 349; *Regal (Hastings) Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378; [1967] 2 A.C. 134n, at p. 154; *cf. Holder* v. *Holder*, [1968] 1 Ch. 353, at p. 398. This is merely to recognize that the special position of fiduciaries provides them with the means to conceal their activities, suppress relevant facts and thereby preclude detection: *Benson* v. *Heathorn* (1842), 1 Y. & C.C.C. 326, at pp. 342-343. Normally, a fiduciary is the sole source through whom information and opportunity are acquired by the beneficiary. Therefore, the need for positive obligations on fiduciaries: *Industrial Development Consultants Ltd.* v. *Cooley*, *supra*, footnote 4, at pp. 173-174 and Prentice (1972), 50 Can. Bar Rev. 623, at p. 632, (the relevant passage is cited, *infra*, footnote 50).

[9] Defendant counsel in *Boardman* v. *Phipps*, *supra*, footnote 1, at p. 63 put it thus: "The basic fallacy . . . is [to] . . . first impose on [the defendants] all the duties and obligations of a general agent and then ask whether, on that assumption, the (defendants) have divested themselves of their fiduciary duty. The first question is whether the (defendants) were agents at all, and, if so, what were the terms on which they were expressly or impliedly appointed." And Lord Upjohn took up this point in his speech, at p. 126.

See also *Tufton* v. *Sperni*, [1952] 2 T.L.R. 516, at p. 530, per Jenkins, L.J.

[10] *New Zealand Netherlands Society "Oranje" Incorporated* v. *Kuys and the Windmill Post Ltd.*, [1973] 1 W.L.R. 1126, [1973] 2 All E.R. 1222, [1973] 2 N.Z.L.R. 163. Lord Wilberforce delivered the judgment of the Board (Lord Wilberforce, Lord Hodson, Lord Pearce, Lord Diplock and Lord Simon of Glaisdale). The judgments of the Supreme Court and Court of Appeal of New Zealand are unreported.

Furs Ltd. v. *Tomkies.*[11] But, as the following analysis suggests, a more comprehensive and unequivocal approach is necessary if the determination of the scope of duty is not to become a mechanistic process—as opposed to one ultimately serving the justifications that are the cornerstone of the equitable doctrines.

The *Oranje* case concerned an incorporated Society and its secretary, Kuys. The Society's principal object was to keep alive Dutch tradition and to maintain the cultural ties between The Netherlands and New Zealand. The pursuit of this aim included publishing a monthly bulletin, whose editorship Kuys held (by virtue of his position as the Society's secretary) from his appointment in 1963 until June 1966 when he went abroad for three months. During Kuys's absence, the financially precarious bulletin floundered still further. During a meeting in January 1967 to amalgamate the Society into a national organization,[12] Kuys's proposal that a newspaper (*The Windmill Post*) replace the bulletin was accepted. Kuys would edit the newspaper, retain all profits and bear any losses for six months, during which time the Society would guarantee its purchase at one shilling a copy by the 2,000 members. Thereafter the terms could be reconsidered. The case centered around who owned the newspaper, Kuys or the Society; both claimed that the January meeting gave them title. Kuys succeeded; the courts rejected the defendant's counterclaim that Kuys had acted inconsistently with his fiduciary duties.[13] The Privy Council emphasized that while the same principles apply to all fiduciaries, these principles have "different applications in different contexts".[14] The scope of a fiduciary's duties "must be moulded according to the nature of the [fiduciary] relationship".[15] The factors determining the scope of that relationship are summed up by Dixon J.,[16] in a dictum which their lordships enthusiastically approved:[17]

> The subject-matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is ascertained, not merely from the express

[11] (1935-36), 54 C.L.R. 583.

[12] The appellant.

[13] "This was in effect relief against passing off, since the appellant was publishing a newspaper with the same title" once the dispute between the parties in June 1967 had begun: *supra,* footnote 10, at pp. 1127H (W.L.R.), 1223j (All E.R.), 164 (N.Z.L.R.).

[14] *Ibid.,* at pp. 1129H (W.L.R.), 1222f (All E.R.), 166 (N.Z.L.R.).

[15] *Ibid.,* at pp. 1130A (W.L.R.), 1225g (All E.R.), 166 (N.Z.L.R.).

[16] *Birchnell* v. *The Equity Trustees, Executors and Agency Ltd.* (1929), 42 C.L.R. 384, at p. 408.

Dixon J., suggested a similar approach in *Peninsular and Oriental Steamship Ltd.* v. *Johnson* (1938), 60 C.L.R. 189, at p. 252; see Parsons (1966), 5 M.U.L. Rev. 395, at p. 406, note 50.

[17] *Supra,* footnote 10, at pp. 1130D, E (W.L.R.), 1226 a-b (All E.R.), 166 (N.Z.L.R.).

> agreement of the parties. . . . but also from the course of dealing actually pursued by the firm. . . .

The association was an incorporated non-profit making society, not a commercial venture.[18] The division between Kuys's personal interests and his responsibilities to the Society was "loosely defined". Although running his own insurance business and having financial interests in the Association's Group Travel Service, in relation to the Society he was a part-time,[19] unpaid, enthusiastic volunteer. The Privy Council concluded from all these factors that:

> A person in his position may be in a fiduciary position *quoad* a part of his activities and not *quoad* other parts; each transaction or group of transactions must be looked at.[20]

In other words, given the nature of the association and of Kuys's work, it was easier to separate the various aspects of his work and isolate those performed within the course of his fiduciary duties and those without. However, their Lordships recognized that regarding *The Windmill Post,* Kuys was a potential fiduciary.[21] To succeed, therefore, Kuys had to establish that a "special arrangement" took him outside the ambit of his fiduciary duties quoad the newspaper.[22] This he was able to do since the New Zealand courts had held that the paper was Kuys's property. The decision of the January meeting, so interpreted, acted as a dispensation which "fully displace[d] any potential fiduciary obligations on Kuys to hold the newspaper in trust for the Society".[23]

Was the January meeting really a rejection by the Society of its property in the paper, thereby dispensing with Kuys's fiduciary obligations to the Society *quoad* the paper, given the total disagreement between the parties on this very matter? The question of ownership is decisive only if the facts are viewed in the contractual context cast at first instance. Speight J., as fact finding judge, dealt with the case solely in terms of determining the ownership of *The Windmill Post.* The learned judge made the issue an exercise in applying the officious by-stander test, with no mention

[18] Is the distinction between commercial concerns and voluntary associations valid in the context of scope of duty? See the discussion *infra,* and footnote 65.

[19] The profit and conflict doctrines are less stringently applied to directors who are not full-time: see Goff and Jones, The Law of Restitution (1966), p. 453; Hanbury's Modern Equity (9th ed., 1969), p. 372. *Cf.* Partnership Act, 1890, c. 39, s. 30.

[20] *Supra,* footnote 10, at pp. 1130C (W.L.R.), 1225j-1226a (All E.R.), 166 (N.Z.L.R.).

[21] *Ibid.,* at pp. 1130F-H (W.L.R.), 1226c-e (All E.R.), 166-167 (N.Z. L.R.).

[22] *Ibid.,* at pp. 1130H-1131C (W.L.R.), 1226e-g (All E.R.), 167 (N.Z. L.R.).

[23] *Ibid.,* at pp. 1131C (W.L.R.), 1226h (All E.R.), 167 (N.Z.L.R.).

of "fiduciary" or "dispensation".[24] In the New Zealand Court of Appeal, however, Turner J. took the view that the agreement was not a contract as such but the granting of a dispensation from a fiduciary obligation which might otherwise apply.[25] The other two judges refer to the principle of loyalty which an employee owes an employer[26] and even Turner J. is concerned only with Kuys's position as an employee (that is as secretary) of the Society.[27] Before the Privy Council, counsel for the Society argued that Kuys was under a fiduciary obligation because of his position as an *executive comittee member*;[28] a duty higher than that which concerned the Court of Appeal.[29] The higher courts did not re-evaluate the facts as found by Speight J., despite their basically different decisions. Thus, the Court of Appeal and Privy Council never escaped from the first instance findings of fact and the direction and scope of the examination their weighting dictated. Therefore, matters deemed irrelevant at first instance, but pertinent when the question is one of status,[30] were never properly considered by the higher courts. This in turn dictated a narrower view of Kuys's fiduciary duties than both law and facts warranted.[31]

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[24] The following is indicative of his judgment: "The fact that they (the Association at the January meeting) did not necessarily understand that they were consenting to a situation does not prevent the Court from determining the sense of promise if it can ascertain what a sensible third party would have understood the arrangements to mean." Record of proceedings, p. 131: 1.37-40.

[25] *Ibid.*, p. 141: 1.10-31.

[26] *Ibid.*, p. 143; 1.53-56, per Haslam J.; p. 147: 1.32-37, per North P.

[27] Thus, the dispensation which Turner J., found simply refers to a fiduciary duty arising from Kuys's position as employee and not as executive officer.

[28] Case for the Appellant, p. 6, 1.16-18; see *supra*, footnote 10, at pp. 1128A (W.L.R.), 1224a (All E.R.), 164 (N.Z.L.R.).

[29] See *Bell* v. *Lever Bros.*, [1932] A.C. 161; Gower, The Principles of Modern Company Law (3rd ed., 1969), p. 518, note 21 and p. 548; also *Re Faure Electric Accumulator Co.* (1880), 40 Ch. D. 141, at p. 151 where Kay, J., emphasized that, *prima facie*, the executive has a wider scope of duty because his powers are broader than those normally accorded to employees. See also *Canadian Aero Services Ltd.* v. *O'Malley*, [1972] 1 O.R. 592, at p. 602 and Scott (1949), 37 Cal. L. Rev. 539, at p. 541.

[30] See Bowstead on Agency (13th ed., 1968), p. 127 and *Lister* v. *Romford Ice Co.*, [1957] A.C. 555, at p. 576, per Viscount Simmonds. See also *infra*.

[31] Contract is not the basis underlying fiduciary relations. Therefore, the existence or otherwise of a contract cannot, of itself, decisively determine the existence and extent of a fiduciary relationship. "There are circumstances in which the relationship arises (at least for certain purposes) against the real wishes of one, if not both, of the parties. In situations of this kind the . . . relationship, at least so far as certain of its effects are concerned, has no contractual, or even consensual, basis." Thus, in *Boardman* v. *Phipps*, *supra*, footnote 1, it was held that, ". . . . an agency relationship existed even though no consent could be found on the part of the 'principal' to the existence of any such relationship". Fridman, The

Kuys, as an executive officer, secretary and editor was the person most informed about the Society's organization, membership, contacts, source of funds and general management. Having settled on initiating an independent Dutch newspaper,[32] he obtained, while visiting Holland in mid-1966, information enabling him to obtain Dutch news more rapidly and cheaply than existing known sources.[33] On his return he acquired the only competing Dutch newspaper,[34] having taken on a partner,[35]—a person unconnected with the Society. In October 1966 he approached representatives of the *New Zealand Herald* and *Irish Reporter*[36] for relevant information. In November 1966 he approached the printers of the bulletin for a quotation for a newspaper, saying that the Society required a paper.[37] For the January meeting to be regarded as conferring the necessary authority for Kuys to avoid his fiduciary obligations *quoad* the newspaper, these facts had to be disclosed.[38] This did not occur.

Indeed, Speight J.'s finding that a straight contractual arrangement permitted Kuys to publish the newspaper as his own property is, with respect, open to question. "Outsiders" such as the printer of the newspaper, the airlines (who advertised in *The Windmill Post* and whom Kuys also dealt with in his position as organizer of the Society's group travel scheme to Holland) and the representatives of the Dutch clubs from the South Island, all believed that the paper belonged to the Society and testified to this effect.[39] This view is understandable as the above-men-

Law of Agency (3rd ed., 1971), p. 11; see Fridman (1968), 84 L.Q. Rev. 224, at pp. 225-231, Bowstead on Agency, *op. cit.*, footnote 30, p. 151 and the cases cited in note seven of that page. See also the references cited *supra*, footnote 30 and the discussion *infra*.

Although the higher courts recognized this fact, they super-imposed the "contract" question onto the "status" question. For example: "I agree that it might have been better if the learned judge had said in express terms that Mr. Kuys had discharged the burden of showing that the fact that he was . . . secretary . . . did not . . . require him to hold that he was trustee . . . . Nevertheless, in result that is what I understand the learned judge *really decided*." Record of proceedings, p. 148: 1.54-59, per North P., approved by the Privy Council: *supra*, footnote 10, at pp. 1131F (W.L.R.), 1227b (All E.R.), 167-168 (N.Z.L.R.). My emphasis.

[32] Record of proceedings, p. 9, para. 3.

[33] *Ibid.*, para. 4: also p. 53. This was a quasi-professional trip. Kuys was undertaking Society's work; his free passage resulted from his official position.

[34] *Ibid.*, p. 9, para. 5.

[35] Until May, 1967, Kuys had denied having such a partner. *Ibid.*, pp. 70 and 100.

[36] *Ibid.*, p. 54.

[37] *Ibid.*, p. 21, para. 5.

[38] Bowstead on Agency, *op. cit.*, footnote 30, arts 19, 54 and 55. The onus of proof rests on the fiduciary: *Dunne* v. *English* (1874), L.R. 18 Eq. 524; *Baker Ltd.* v. *Baker*, [1954] 3 D.L.R. 432, at p. 440, per MacKay J.A.

[39] Record of proceedings, p. 133: 1.18-26.

tioned conduct reflects. Kuys's behaviour after the January meeting did much to reinforce this impression. He canvassed on Oranje Society note-paper those who had advertised in the old bulletin, asking in the name of the Society for their support of the new paper.[40] Kuys wrote to the Postmaster (Wellington) on Society note-paper to invoke the old permit already in existence for the moribund bulletin in order that the paper would enjoy a reduced postal rate.[41] *The Windmill Post,* in its heading, announced that it "incorporated" the Society's former publication, the bulletin. As Turner J. recognized, "this . . . . was clearly untrue if *The Windmill Post* was the property of [Kuys], for any property remaining in the old bulletin must have continued to be in the Society".[42] The paper used the small windmill insignia used by the Society's bulletin throughout its publication.[43] Further, the editorial of the paper's first issue was by the Society's president and spoke of the paper fulfilling the promise made by the Society to its members at an earlier time.[44] If Kuys believed the paper to be his, why was it that he incorporated the paper and registered "Windmill Post" as a trade name[45] only after he was forced to resign his official position and the parties were at loggerheads?

Given the shaky foundations on which the higher courts built their arguments, their finding of a dispensation must also be open to doubt. In contrast to Turner J.'s conclusion, the facts above could equally support the view that the January meeting reaffirmed that Kuys was a fiduciary and made his obligations to the Society even greater *quoad* the paper. In other words, the corollary of his enlarged discretion was his enlarger duty.[46] This view is strengthened by two considerations central to the Society's position. Firstly, the publication of a newspaper was precipitated by unification of the Oranje Societies in New Zealand—the main topic discussed at the January meeting. The evidence of Mr. Dubois, the Society's president is revealing:[47]

> Q. What you were looking for was somebody who would take the responsibility of publication off the shoulders of your executive?
> A. Yes Sir, with one proviso that it was in the framework of the Society.
> Q. That is a very broad statement but don't you mean so long as they published news relating to the Society?

[40] *Ibid.,* p. 31, paras 2 and 3; p. 140: 1.15-18; p. 142: 1.29.
[41] *Ibid.,* p. 58: 1.1-19. The Society contended that Kuys had acted without their permission although Kuys disputed this. *Ibid.,* p. 118: 1.16-18.
[42] *Ibid.,* p. 140: 1.10-15.
[43] *Ibid.,* p. 134: 1.37-39.
[44] *Ibid.,* p. 71: 1.56-60.
[45] *Ibid.,* p. 15, para. 1.
[46] See Lindley on Partnership (1st ed., 1860), p. 493. *Cf.* "He was in a very powerful bargaining position in the circumstances": *Canada Safeway Ltd.* v. *Thompson,* [1951] 3 D.L.R. 295, at p. 299, per Manson J.
[47] Record of proceedings, p. 39: 1.31-36 and 59. The treasurer, Renneburg, testified to the same effect: p. 10: 1.30.

A. No Sir, not quite . . . .
Q. Well what was it? The importance of having a monthly publication to the Society?
A. To maintain the contact between the members all over New Zealand.

Secondly, North P., in a passage cited with approval by the Privy Council said:[48]

> It is beyond my powers of credence to contemplate that Mr. Kuys would have been willing to incur all the risks . . . and then be obliged to hand over the newspaper to the Society . . . if, as proved to be the case, he ceased to be secretary of the Society.

If hindsight is relevant, is it not just as obvious that the Oranje Society would not have permitted Kuys to edit and publish the paper—whose circulation came almost exclusively from within the Society's own membership, whose publication leaned heavily upon the old bulletin's advertisers and the Society's facilities, and whose object was at the very heart of the Society's future—had they known in January that Kuys's intimate association with the Society and its objectives was somewhat tenuous and that Kuys was working for himself, not the Society.[49] These considerations, when seen in the context of Kuys's other activities as the Society's commission earning agent and officer, paint a fuller picture, making the "dispensation" finding more open to debate. However, because of the courts' emphasis on treating these matters as irrelevent *quoad* the paper, the baby may well have been thrown out with the proverbial bath water.

Thus, frequently it will prove artificial to sever different aspects of a fiduciary's obligations. Opportunity and information do not come neatly packaged into that which obviously concerns the official in his fiduciary capacity and that which obviously does not. Lord Hodson in *Boardman* v. *Phipps*[50] recognized this

[48] *Ibid.*, p. 148: 1.61-p. 149, 1.4. *Supra*, footnote 10, at pp. 1131G, H (W.L.R.), 1227c (All E.R.), 168 (N.Z.L.R.).

[49] Thus, when cross-examined about the information acquired in Holland in 1966, he was asked:

"Q. (acquired) to help Society or yourself?
A. For myself."

Record of proceedings, p. 53: 1.28-29.

[50] *Supra*, footnote 4, at p. 108, my emphasis; also, per Lord Guest, at p. 117. See *Industrial Development Consultants Ltd.* v. *Cooley*, *supra*, footnote 4, especially at pp. 173H-174A; the duty to pass on information directly relating to the company's business could not be severed because it was received in a personal capacity. As Prentice has emphasized, information is not usually equally available to both the director and his company: ". . . . the director acts as the conduct pipe through which the company receives information. It is because a company cannot know of information, whether it be confidential or otherwise, unless it is informed of it by its directors, that directors should feel themselves under some compulsion to relay potentially useful information to their companies.": (1972), 50 Can. Bar Rev. 623, at p. 632. For useful commentaries on the *Cooley* case see, Yoran (Jurkevitz) (1973), 89 L.Q. Rev. 187; Prentice, *op. cit.*, footnote 8 and Rajak (1972), 35 Mod. L. Rev. 655.

when he distinguished the partnership case of *Aas* v. *Benham*.[51]

> The case of partnership is special in the sense that a partner is the principal as well as the agent of the other partners and works in a defined area of business so that it can normally be determined whether the particular transaction is within or without the scope of the partnership. It is otherwise in the case of a trusteeship or fiduciary position such as was occupied by Mr. Boardman, *the limits of which are not readily defined.*

The decision in the *Oranje* case is important because the Privy Council adopts the approach of Dixon J., applying it outside its original partnership context to all types of fiduciary relationships.[52] In effect, this approach is used as the conclusive determinant of the perimeter of fiduciary duties. Dixon J.'s dictum defines scope of duty solely in terms of the *nature* of the fiduciary relationship concerned.[53] However, this is too simplistic; the scope of duty is not co-terminous with the nature of a fiduciary relationship. For instance, in *Trimble* v. *Goldberg*[54] the private business of a fiduciary was held to be outside that fiduciary's scope of duty even though it was of the same nature as the business of the fiduciary relationship. In other words, the nature of a fiduciary relationship is only one factor—albeit an important one—in determining the scope of a fiduciary's duties. Moreover, a test turning upon "the character of the venture or undertaking" is too ambiguous to provide detailed guidance. Other factors, such as the amount of uncontrolled power wielded by the fiduciary, whether the policy reasons for equity's intervention hold sway,[55] the respective interests of the beneficiary and fiduciary, the express and implied terms governing the relationship and the conduct of the parties are also important although each case will turn very much on its own facts.[56] Ultimately, "it is for the law to determine what is or is not agency, admittedly on the basis of the factual arrangements between the parties, but, in a sense, outside those arrangements, in that it is a question of legal construction rather than of mechanical determination".[57] The con-

[51] [1891] 2 Ch. 244.

[52] *Supra*, footnote 10, at pp. 1130E (W.L.R.), 1226b (All E.R.), 166 (N.Z.L.R.).

[53] The actual dictum is quoted *supra.*

[54] [1906] A.C. 494.

[55] See *supra*, footnote 8 where some of the relevant policy considerations are outlined.

[56] See *supra*, footnote 31. The United States courts are generally able to consider a wider range of considerations because of the flexible tests used by the courts to determine what is a corporate opportunity. The two main tests used are the "line of business" test exemplified in *Rosenblum* v. *Judson Engineering Corp.* (1954), 109 A. 2d 558 especially at p. 563 and the "interest or tangible expectancy" test which determined *Johnston* v. *Greene* (1956), 121 A. 2d 919 (Del. S.C.).

[57] Fridman, *op. cit.*, footnote 31, p. 10; see, generally, pp. 8-11.

sequence of treating the Dixon test as the conclusive determinant of scope of duty may be to exclude a variety of pertinent factors from consideration, with the effect of possibly narrowing the ambit of fiduciary duties, thereby weakening their impact as a check on fiduciaries' behaviour.

The approach endorsed by their Lordships is in line with the much criticized Canadian case of *Peso Silver Mines*.[58] In this case, the Supreme Court regarded the *bona fide* decision of the Peso board not to purchase certain silver mining claims as destroying any fiduciary duties *quoad* those claims. "This is surely too antiseptic a view of the facts"[59] of either case. In truth, the Oranje Society was in the same position as the plaintiff company in *Regal (Hastings) Ltd.* v. *Gulliver*[60]—it wanted the paper but could not finance it. If Kuys had an indication that a newspaper could be successfully produced and knew of the Society's aims regarding unification did he not have a duty to bring the matter before the January meeting? By deciding to act on his own behalf Kuys put himself in a position in which his interest and his duty conflicted; and the failure to disclose changed circumstances and new information is unequivocal in the *Oranje* case whereas it is mere speculation in the *Peso Silver Mines* case. To this extent, the *Oranje* facts comprise a stronger case than the *Peso Silver Mines* decision. In short, Kuys's position emerges as being closer to that of *Gulliver, Boardman* and *Cooley*.

Like the Supreme Court's judgment in the *Peso Silver Mines* case, the Privy Council by-passed the question of conflict in the *Oranje* decision by dealing with the case solely on a profit basis. This is another example of where the imposition of liability may depend on which principle is pleaded and dealt with by the courts, profit or conflict.[61] However, if the January meeting is read as removing a conflict of interest and duty, the Privy Council's decision may lend further support to the notion of a "remoteness" limitation to the conflict principle. The restrictive interpretation of *possible* conflict—an approach which has been gaining ground in the common law world[62]—treats the rejection of an oppor-

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[58] *Peso Silver Mines Ltd.* v. *Cropper*, [1966] S.C.R. 673 aff'g (1966), 56 D.L.R. (2d) 117. For an excellent in-depth critique of this case see Beck (1971), 49 Can. Bar Rev. 80; also Prentice (1967), 30 Mod. L. Rev. 450 and (1972), 50 Can. Bar Rev. 623, at p. 631, Hahlo (1968), 85 S.A. L.J. 71; Sealy, [1967] C.L.J. 83, at p. 98, n. 87. *Cf.* Jones (1968), 84 L.Q. Rev. 472, at p. 492.

[59] Beck, *op. cit., ibid.*, at p. 101, where he takes the view that a rejection does not always remove a possible conflict of interest and duty; Prentice has also espoused this view: *op. cit., ibid.*, at p. 632.

[60] *Supra*, footnote 8.

[61] See McClean, *op. cit.*, footnote 7, at pp. 218 and 236-237.

[62] The conflict doctrine applies whenever there is a possible conflict of interest and duty. However "possible" has been narrowly interpreted so

tunity by a beneficiary as making a *possible* conflict of interest and duty too remote.

It is implicit in the Privy Council's decision that the fiduciary duties owed to commercial concerns are, *prima facie,* wider than those owed to incorporated non-profit making societies. It is unfortunate that the Privy Council did not explicitly articulate the policy grounds justifying this distinction, for executive officers of such societies have been treated as analogous to company directors.[63] The real question—to paraphrase Professor Beck[64]—is not advanced by showing that such societies are not commercial concerns. It is advanced by asking whether the rationale of the fiduciary principle has relevance to executives of such societies given their management role, the legal and factual distribution of corporate power between the executive and the member, and the functional and procedural reality behind that distribution of power.[65]

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that it does not mean actually possible but what the reasonable man could regard as possible: Lord Upjohn in *Boulting* v. *A.C.T.A.T.*, [1963] 2 Q.B. 606, at pp. 637-638 and *Boardman* v. *Phipps, supra,* footnote 1, at p. 124B-C. As it was recently put, the "interest" should be "direct and certain and not remote or contingent", per Campbell J., in *Baker* v. *Palm Bay Island Resort Pty. Ltd. (No. 2),* [1970] Qd.R. 210, at p. 221. See also Kellock J., in *Crocker Ltd.* v. *Tomroos,* [1957] S.C.R. 151, at p. 155. As regards the profit rule, the Canadian courts have been prone to interpret "by reason and only by reason of the fact that they were directors" per Lord Russell in the *Regal* case, *supra,* footnote 8, at p. 387, as a "but-for" test requiring acquisition of corporate opportunities *because* the fiduciaries concerned were directors. This is to read the passage out of its context. Lord Russel's test ended with the words "and in the course of their execution of that office", although this sometimes seems to have been overlooked. See *Midcon Ltd.* v. *New British Dominion Oil,* [1958] S.C.R. 314; the *Peso* case, *supra,* footnote 58.

[63] Certainly this seems to be implicit in the judgment of Salmond J., in *Henderson* v. *Kane and Pioneer Club,* [1924] N.Z.L.R. 1073. The fact that an incorporated society does not, unlike a company, exist "for pecuniary gain" (ss 4(1) and 20(1), Incorporated Societies Act, 1908 (N.Z.)) makes no difference (s. 5(a) and see *Ashburton Veterinary Club (Inc.)* v. *Hopkins,* [1960] N.Z.L.R. 564 and *Bush and Southern Hawkes Bay Districts Veterinary Club (Inc.)* v. *Jacob,* [1961] N.Z.L.R. 146).

[64] *Op. cit.,* footnote 58, at p. 91.

[65] The effect of the Privy Council's judgment is to mete out the worst of both worlds for non-profit making associations. Their executives are treated like partners and directors to the extent that it is easier to separate the differing subject-matter of their fiduciary duties: *Supra,* footnote 10, at pp. 1130B-E (W.L.R.), 1225h-1226b (All E.R.), 166 (N.Z.L.R.), and also *Boardman* v. *Phipps, supra,* footnote 1, at p. 1101, per Wilberforce J. *Cf.* the discussion in the text, *supra* and text at footnote 50. However, the scope of duty of their executives is drawn in narrower terms than those of partners (*cf.* ss 29(1) and 30, Partnership Act, 1890) and directors.

As the *Oranje* case reflects, the opportunity of mischief is considerable in such ventures. Such associations face problems similar to those catalogued by Hadden in relation to the "unquoted company": Company Law and Capitalism (1972), Ch. 6. If this analogy is accurate, then these are strong grounds for treating such executives as stringently, if not more stringently than quoted company directors, see: (1968), 43 N.Y.U.L. Rev.

Perhaps the emphasis in *Oranje* on scope of duty will effect a reconciliation of the conflicting approaches reflected in recent Commonwealth decisions involving the conflict and profit doctrines.[66] A reconciliation began when the Privy Council confirmed that a fiduciary can use opportunities for personal advantage provided that *quoad* the relevant transaction he is outside the scope of his fiduciary duties. *Peso*[67] and *Regal*[68] can be seen as decisions on their particular circumstances, representing the outer limits of what is essentially a question of fact.[69]

Thus, scope of duty is a flexible policy control device; factors which the courts deem relevant in determining its width will directly affect the stringency or otherwise of equity's fiduciary principles. But the Privy Council has merely scraped the surface of what is a relatively unexplored area. No comprehensive picture exists of the factors relevant in ascertaining the scope of duty in any specific case. This is an important deficiency since scope of duty is a major avenue of escape for those fiduciaries seeking to suggest that in the circumstances the equitable doctrines do not apply. It is to be hoped that the courts, in building up this picture, will not resort to the kind of conceptualism which in this area has become little more than an alibi for a refusal to consider "out loud" the objects of equity's principles and their scope.[70]

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187, at pp. 190-191; Beck, *op. cit.*, footnote 58, at pp. 84-85 and 97, note 89; *Perlman* v. *Feldmann* (1955), 219 F. 2d 173, at p. 178 (2nd Cir.). For although in formal terms executives may be subject to much greater control by such associations and companies than is a trustee by his cestui, in real terms the difference may be negligible.

[66] For example, contrast *Crocker Ltd.* v. *Tornroos*, [1957] S.C.R. 151; *Midcon Ltd.* v. *New British Dominion Oil, supra,* footnote 62; *Peso Silver Mines Ltd.* v. *Cropper, supra,* footnote 58; *Baker* v. *Palm Bay Island Resort Pty. Ltd. (No. 2), supra,* footnote 62; *Canadian Aero Services Ltd.* v. *O'Malley, supra,* footnote 29; *cf. D'Amore* v. *Mcdonald* (1972), 32 D.L.R. (3d) 543, with *Regal (Hastings) Ltd.* v. *Gulliver, supra,* footnote 8, *Boardman* v. *Phipps, supra,* footnote 1 and *Industrial Development Consultants Ltd.* v. *Cooley, supra,* footnote 4; *cf. Holder* v. *Holder,* [1968] Ch. 353.

[67] *Peso Silver Mines Ltd.* v. *Cropper, ibid.*

[68] *Regal (Hastings) Ltd.* v. *Gulliver, ibid.*

[69] See *Boardman* v. *Phipps, supra,* footnote 1, at p. 125, per Lord Upjohn. The danger of developing propositions of law from what are special facts is akin to that in negligence: see *Qualcast Ltd.* v. *Haynes,* [1959] A.C. 743.

[70] I am particularly grateful to Dr. J. A. Farmer of Gonville and Caius College, Cambridge for providing me with a copy of counsels' arguments and the record of proceedings in *Oranje* v. *Kuys.*

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TORTS—RESCUES—FORESEEABILITY—CONTRIBUTORY NEGLIGENCE.—The decision of the Saskatchewan Court of Appeal in *Corothers* v. *Slobodian*[1] is unsatisfactory from both a legal and a normative standpoint. The decision is particularly unfortunate having regard to recent developments in Canada[2] in the area of law to which it relates, namely, the liability in tort owed to a rescuer for damage sustained by him in the course of a rescue attempt.

The facts, briefly, were as follows.

The plaintiff was driving on the Trans-Canada Highway when an accident occurred immediately in front of her, involving a car being driven negligently by the first defendant, Poupard, and another car. The plaintiff's car was damaged by debris from the accident and it came to stop close to where the two cars had crashed. The plaintiff went to check the wreckage at the accident scene, which must have been a gruesome experience, since at least two persons were killed and when "she went around behind her car [she] tripped over an arm of one of the bodies from the collision".[3]

The plaintiff ran[4] down the highway to telephone for help. She had proceeded either fifty feet or about a hundred yards—the conflict of evidence on this point is not resolved—when she saw the headlights of a semi-trailer unit, driven by the second defendant, Slobodian, approaching the scene of the accident.

Slobodian had seen the headlights of the plaintiff's car from a distance of about half a mile but, understandably, he did not appreciate at the time that there had been an accident. When the plaintiff saw Slobodian's vehicle approaching, "[she] stopped and waved her hand above her head to stop the on-coming vehicle. . . . Realizing that the truck would not or could not stop in time she froze in her tracks and that is all she remembers".[5] In fact, Slobodian braked when he saw the plaintiff, his truck jack-knifed and went into a ditch, injuring the plaintiff in its course.

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[1] (1973), 36 D.L.R. (3d) 597 (Sask. C.A.).

[2] Canadian courts have contributed a wealth of informed jurisprudence to the problems both of the duty to rescue and to the rescuer in the past three years: see *Horsley* v. *MacLaren*, [1972] S.C.R. 441; *Schacht* v. *Queen in Right of Ontario*, [1973] 1 O.R. 221; *Moddejonge* v. *Huron Board of Education*, [1972] 2 O.R. 437; *Menow* v. *Jordan House Hotel Ltd.* (1973), 38 D.L.R. (3d) 105 (S.C.C.); *Millette* v. *Cote*, [1971] 2 O.R. 255 (C.A.), at present on appeal to S.C.C., judgment reserved, February 6th, 1974.

[3] *Supra*, footnote 1, at p. 600.

[4] It would appear that she did not use her car because it had been immobilised by the debris from the collision. There is no direct reference to this point in the judgment, however, so it must remain only a hypothesis.

[5] *Supra*, footnote 1, at p. 601.

The plaintiff sued both Poupard's estate[6] and Slobodian for negligence. Davis J., in a brief unreported oral judgment, dismissed both actions.

On appeal,[7] the plaintiff was again unsuccessful. It is respectfully submitted that in regard to her claim against Poupard, the approach of the Saskatchewan Court of Appeal is indefensible from the legal viewpoint and unattractive from a moral (or, as the "received doctrine"[8] of academic conformity requires one to label it, "policy") standpoint.

Criticism of the decision may best be presented by firstly providing a brief summary of what *should* have been the appropriate relevant principles to be considered by the court and secondly by discussing the approach the court in fact adopted.

1) *Relevant Legal Principles.*

Professor Fleming has commented that "[a] remarkable change has overtaken the legal position of the rescuer. Once the Cinderella of the law, he has since become its darling".[9]

The development of the cases in this area makes it clear that the rescuer's claim in respect of the defendant's conduct is based "not in its tendency to imperil the person rescued, but in its tendency to induce the rescuer to encounter the danger".[10] If the defendant behaves substandardly towards another person, or even in respect of his own safety,[11] so as to induce a rescue attempt, he will be liable for injuries which the rescuer may sustain, provided that the rescue attempt was foreseeable.

Foreseeability is the key concept in the present context. Although it has been argued that foreseeability as a determinant of the scope of liability should, in the case of rescuers, be set aside in favour of the proportionate mechanism of contributory negligence,[12] it is clear that in Canadian law today only a foreseeably induced rescue attempt will entitle the injured rescuer to recover. Contributory negligence, foolhardiness or wantonness on the part of the rescuer will thus be relevant initially, not as criteria

[6] Poupard had been killed in the accident.

[7] *Supra,* footnote 1.

[8] The Law of Torts (4th ed., 1971), p. 122.

[9] *Ibid.,* p. 157.

[10] Fleming, *op. cit.,* footnote 8 (3rd ed., 1965), p. 166, cited with approval by Laskin J., as he then was, in *Horsley* v. *MacLaren, supra,* footnote 2, at p. 460. In the fourth edition see p. 158.

[11] The decision of the Saskatchewan Court of Appeal, apparently to the contrary in *Dupuis* v. *New Regina Trading Co. Ltd.,* [1943] 4 D.L.R. 275 has been discredited: see *Baker* v. *T. E. Hopkins & Sons Ltd.,* [1958] 1 W.L.R. 993, at p. 1004, per Barry J.; *Horsley* v. *MacLaren, supra,* footnote 2, at p. 460.

[12] Professor Linden has repeatedly and forcibly argued in favour of such a change: see, *e.g.,* A. Linden, Canadian Negligence Law (1972), pp. 294-297.

per se for denying him recovery, but, rather, as factors to be taken into consideration in assessing the foresight issue.

The issue in *Corothers* v. *Slobodian,* therefore, should have been simple to state, although its application to the fact situation might have been somewhat less simple: was the plaintiff's conduct, admittedly careless in respect of her own welfare, a reasonably foreseeable result of the negligence of the first defendant in creating a situation of peril?

The foresight criterion has, it is true, been subjected to sustained criticism[13] but, whatever its deficiencies, it is entrenched in Canadian negligence law. It is surely significant that in fact situations[14] similar to that of *Corothers* v. *Slobodian,* the courts in the United States have utilized the foresight concept with apparent ease, generally in favour of the rescuer.

2) *The Approach Adopted by the Court of Appeal in Corothers* v. *Slobodian.*

The most striking feature of the judgment delivered by Woods J.A. is the absence of reference to any "rescue" decision subsequent to the discredited *Dupuis.*[15] The current ubiquity not only of Canadian decisions in this area of the law but also of extensive commentaries thereon[16] makes a failure to consider these recent developments quite surprising.

Woods J.A. conceded that the claim of the rescuer constitutes an "exception to the doctrine of assumption of risk [which] is well established in our law".[17] Nevertheless, such exception could "only apply to the acts of the rescuer for so long as they fall within the ambit of the duty of the defendant".[18]

His Lordship disposed of the plaintiffs' claim against the first defendant in five sentences:[19]

[13] See, *e.g.,* Linden, *op. cit., ibid.,* pp. 273-274 and Linden, Down With Foreseeability! Of Thin Skulls and Rescuers (1969), 47 Can. Bar Rev. 545.

[14] See, *e.g., Scott* v. *Texaco Inc.* (1966), 48 Cal. Reptr. 785; *Provenzo* v. *Samm* (1968), 23 N.Y. 2d 256, 244 N.E. 2d 26; *Hammonds* v. *Haven* (1955), 280 S.W. 2d 814, 53 A.L.R. 2d 992 (Mo.); *Cf. Hobbs* v. *Renick,* (1962), 304 F. 2d 856 (Mo.); *Jobst* v. *Butler Well Servicing Inc.* (1962), 372 P. 2d 55 (Kan.). The limitations of recovery, generally, in this context, are discussed by W. Prosser, Handbook of the Law of Torts (4th ed., 1971), pp. 276-279.

[15] *Supra,* footnote 11.

[16] See, *e.g.,* Alexander, One Rescuers' Obligation to Another: The "Ogopogo" Lands in the Supreme Court of Canada (1972), 22 U.T.L.J. 98; Linden, Rescuers and Good Samaritans (1971), 34 Mod. L. Rev. 241; Comment (1970), 48 Can. Bar Rev. 541; Gray and Sharpe, Doctors, Samaritans and the Accident Victim (1973), 11 Osgoode Hall L.J. 1; Stewart, Comment (1970), 4 Ottawa L. Rev. 325; Beckton and Brent, Comment (1973), 37 Sask. L. Rev. 281; A. Linden, *op. cit.,* footnote 12, Ch. 6, pp. 287-297.

[17] *Supra,* footnote 1, at p. 599.

[18] *Ibid.*

[19] *Ibid.,* at p. 600.

> It is to be noted that the female plaintiff had completed all that she was going to do at the scene of the collision before the arrival of the truck driven by Slobodian. She had left the scene of the accident and her activities had reached a new stage. The situation of peril created by Poupard had ended. The plaintiff was not then acting in danger nor anticipating any danger created by the acts of Poupard. The injury suffered arose from a new act or circumstance, which was not one that ought reasonably to have been foreseeable by Poupard.

Accordingly the plaintiff's appeal against the first defendant, Poupard, was dismissed.[20]

It is conceivable that justice may have been done by such a disposition of the plaintiff's claim but it can hardly be said to be seen to have been done. It is true that technical deference is paid to the foresight criterion, but its presentation as an apparent conclusion to legally and factually suspect premises renders its efficacy questionable.

His Lordship appears to be arguing that *because* the plaintiff's injury occurred at the time when her activities as rescuer "had reached a new stage", when she "was not . . . acting in danger nor anticipating any danger created by the acts of Poupard", it was thereby not foreseeable. If this is the correct import of his Lordship's remarks, it can be refuted simply by pointing to the fact that the plaintiff *was* "acting in danger . . . created by the acts of [the defendant]". True, the danger to the plaintiff was not as blatant as the danger which resulted in the injuries (and, in at least one case, death) to the victims in the other car, but it was no less real simply because it was less obvious. If one induces another to make a rescue attempt in circumstances where that other, in the urgency of the situation, is likely to behave without normal regard for his or her personal safety, it is hardly an abuse of language to state that such rescuer is "acting in danger . . . created by [one's] acts".

Moreover, his Lordship's contention that "[t]he situation of peril created by Poupard had ended" constitutes, with all respect, a fundamental misconstruction of the situation on the fateful evening. It is surely mistaken to assert that the situation of peril had *ended* when the occupants of two cars were dying or were severely injured in circumstances where immediate medical attention—which the plaintiff was seeking—was imperative. If this was not a "situation of peril", it is difficult to conceive what would be.

[20] The plaintiff's claim against Slobodian, the second defendant, also failed. The Court of Appeal's treatment of this claim is unexceptionable and no criticism of this finding is made in the present Comment. It is, however, interesting to note that in *Scott* v. *Texaco Inc.*, *supra*, footnote 14, the plaintiff's status as rescuer was held to impose a higher duty on "third party" road-users in a similar position to Slobodian. Such is not, of course, the Canadian position.

If, on the other hand, his Lordship's argument that the injury suffered by the plaintiff was "not one that ought reasonably to have been foreseeable by [the defendant]" does not rest on its apparent premises, it is hardly more tenable for having been presented *in vacuo*. Even conceding that judgments in respect of foresight are essentially evaluative, it is surely desirable that such naked value choices should, so far as possible, be clothed with a rational justification. One is forcibly reminded of another recent decision of the same court in which an unconvincing value-judgment relating to foresight was presented without any "justification-process". The court in *Abramzik* v. *Brenner*[21] could at least avail itself of the plausible defence that, in respect of such an imperfectly protected interest as nervous shock, the foresight criterion may be applied restrictively so as not to open the floodgates of litigation. In *Corothers* v. *Slobodian*, however, no such policy considerations prevailed since the plaintiff was claiming in respect of straighforward physical injury.

On the facts of the case, a finding of contributory negligence against the plaintiff would have seemed appropriate. As always when evaluating human conduct, it would be impossible to reach a consensus as to the appropriate proportion. Having regard to recent decisions involving a finding of contributory negligence in regard to passengers either journeying with drunken drivers[22] or electing not to wear safety belts,[23] it would seem reasonable to estimate the contributory negligence of the plaintiff in *Corothers* v. *Slobodian* at a proportion not in excess of twenty five per cent.

Others may disagree with such an assessment. It is, however, to be regretted that the Saskatchewan Court of Appeal precluded discussion of such issue by its dismissal of the plaintiff's claim

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[21] (1968), 62 W.W.R. 332, 65 D.L.R. (2d) 639 (Sask. C.A.). It is perhaps significant that two members of the Court of Appeal in *Abramzik* (Woods and Brownridge JJ.A.) also participated in the decision in *Corothers* v. *Slobodian*. Glasbeek has stringently criticised the court's handling of the foresight issue in *Abramzik* v. *Brenner*: "If the Saskatchewan Court of Appeal claims that it truly faced the question whether it could be foreseen that the plaintiff might suffer emotional disturbance, surely it must have taken 'a gloomy view of human nature' to come to a negative answer. It is submitted that *nothing* could have been more readily foreseen than that nervous shock would be suffered by *this* plaintiff;" Comment (1969), 47 Can. Bar Rev. 96, at p. 104. Such remarks assume an ominous dimension in the context of *Corothers* v. *Slobodian*.

[22] *E.g. Stevens* v. *Hoeberg*, [1972] 3 O.R. 841, 29 D.L.R. (3d) 673 (25% contributory negligence).

[23] *Jackson* v. *Millar*, [1972] 2 O.R. 197 (10%), rev'd on another point, [1973] 1 O.R. 399; *Pasternack* v. *Poulton*, [1973] 2 All E.R. 74 (5%); *Cf. Dover* v. *Gooddy* (1972), 3 Nfld. & P.E.I.R. 143, 29 D.L.R. (3d) 639; *Hunt* v. *Schwanke*, [1972] 2 W.W.R. 541 (Alta S.C.) where *no* contributory negligence was found against the plaintiff.

on the ground of lack of foresight, in such an unsatisfactory manner.

WILLIAM BINCHY*

* * * *

CIVIL RESPONSIBILITY—RIGHT TO PRIVACY IN QUEBEC—RECENT CASES.—The right to privacy in Quebec was first affirmed jurisprudentially in 1957, in the case of *Robbins* v. *Canadian Broadcasting Corp. (Que.)*.[1] The case was an unusual one, in which servants of the defendant corporation in effect broadcast an invitation to the general public to harass the plaintiff at his home by way of letter and telephone. Since that time, rather surprisingly, the right to privacy has received very little judicial amplification, while the Quebec National Assembly has yet to adopt the 1968 recommendation of the Office of Revision of the Civil Code for legislative expression of the right.[2] Now, however, three recent Superior Court decisions suggest an increased interest in the judicial remedy for invasion of the right to privacy, and provide welcome information on the nature of the right and on the circumstances which may justify a *prima facie* violation.

All of the cases concern the allegedly unauthorized publication or diffusion of the plaintiff's likeness. In the first of them, *Field* v. *United Amusement Corporation*,[3] the petitioner unsucessfully sought an interlocutory injunction to prevent the commercial screening of a documentary film on the 1969 Woodstock Festival, a film in which he and a young lady were seen gambolling naked

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[1] [1958] S.C. 152, 12 D.L.R. (2d) 35 (S.C. Que.).

[2] Civil Code Revision Office, Report on Civil Rights (1968), article 5: "Toute personne a droit au respect de sa vie privée. Everyone has a right to privacy." The absence of express legislative texts in Quebec is in contrast with the situation prevailing in France since the passage of the law of July 17th, 1970, D. 1970.4.199, articles 22 and 23 of which enacted respectively the present article 9 of the French Civil Code and article 368 of the French Penal Code. Article 9: "Chacun a droit au respect de sa vie privée" confirms the civil remedy for invasion of privacy which had been developed by French jurisprudence and which, from as early as 1858, had clearly prohibited the unauthorized publication of a person's likeness. Trib. Seine, June 16th, 1858, D.P. 58.3.62. Article 368 of the French Penal Code is more innovative, however, in providing a *criminal* sanction for the unauthorized capturing or transmitting, with the use of an apparatus, the likeness of a person found in a private place. For summaries of recent French decisions, see Edelmann, Esquisse d'une théorie du sujet: l'homme et son image, D. 1970.1.119; Nerson, Chronique de la jurisprudence française en matière de droit civil (1971), 69 Rev. tr. dr. civ. 109 and 360.

[3] [1971] S.C. 283.

in the rain. Somewhat less interesting were the facts in *Deschamps* v. *Automobiles Renault Canada Ltée,*[4] in which the petitioner, a well-known Quebec entertainer, was granted an interlocutory injunction to prevent the use of his picture in posters advertising the automobile produced by the respondent corporation. Finally, in *Rebeiro* v. *Shawinigan Chemicals (1969) Limited,*[5] damages of $300.00 were awarded to a schoolteacher for the unauthorized use, for industrial publicity purposes, of a photo taken of him during his summer industrial employment. To assess the importance of these decisions, we propose to examine first the nature of the right which is beginning to emerge from the jurisprudence, and secondly the causes of exoneration which may relieve defendants from liability.

1) *The Right to Privacy.*

Whatever else it may include, the right to privacy in Quebec does include the right to prevent the unauthorized use of one's likeness. Previous doctrinal affirmations to this effect[6] have now received judicial application. That this represents a clarification of existing law is evident from the diversity of language employed in the three cases presently being examined. Thus, in the *Field* case, Mr. Justice Langlois appeared to reject the existence of a right to one's likeness, in declaring:[7]

> En soi, il n'y a pas de violation d'intimité ou de vie privée à publier la photographie d'un individu, sans son consentement, et l'intérêt public peut, à l'occasion, constituer une immunité relative.

Yet in spite of the breadth of the negative proposition announced, the doctrinal authority[8] cited by Mr. Justice Langlois, dealing with the defence of qualified privilege based on the public interest in defamation actions, suggests that he was concerned only to establish that the public interest may in some cases override any claim to the protection of one's likeness. This at least is the interpretation of the above passage adopted by Mr. Justice Rothman in the *Deschamps* decision, where he states, in granting the petitioner's request for an injunction:[9]

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[4] S.C. Mtl., no 05-818-140-71, Feb. 24th, 1972, by Mr. Justice Melvin L. Rothman, as yet unreported.

[5] [1973] S.C. 389.

[6] See, for example, Deleury, Une perspective nouvelle: le sujet reconnu comme objet du droit (1972), 13 C. de D. 529, at p. 547.

[7] *Supra,* footnote 3, at p. 285. It should be noted that Mr. Justice Langlois went on to find other reasons for rejecting the petitioner's claim. See the discussion of causes of exoneration, *infra.*

[8] Nadeau, Traité de droit civil du Québec, t.8 (1949), no 245, p. 227; Gatley On Libel and Slander (6th ed., 1967), nos 40 and 529, pp. 38 and 529 (The page references cited seem inexact. See instead pp. 18 and 243).

[9] *Supra,* footnote 4, at p. 7.

> Certainly, it cannot be contended that the mere publication of an individual's photograph or name is always and in itself a violation of his rights. (*Field* v. *United Amusement Corporation,* [1971] S.C. 283, 285). Clearly, there are instances, such as the reporting of news and the discussion of public issues and public figures, where the public interest may override private rights. But this is not one of those instances.

Finally, and most recently, the clearest enunciation of principle is that of Mr. Justice Perrault in the *Rebeiro* case:[10]

> Les photos non autorisées de personnes et publiées donnent ouverture à une action en dommages. . . . nul ne doit s'arroger le droit de faire paraître la photographie de quelqu'un, comme dans le présent cas, sans son autorisation.

This unequivocal statement should hopefully establish clearly the illegality of such unauthorized publications.

The cases not only attest to the existence of this right, but also provide some indications as to its nature. The first distinction to be drawn is that between intentional violation of the right to privacy and defamation. Generally, it can be said that the defamation action protects the *reputation* of the person, controlling the nature of public utterances about him. The action for violation of the right to privacy, however, is broader, and seeks to protect the *individuality* of the person, in *prohibiting,* among other things, unauthorized publication of his likeness or details of his personal life. The distinction was clearly drawn recently in the judgment of the French Court of Cassation in the *Belmondo* affair, in which, after unauthorized publication of the petitioner's name and likeness, a defamation action was found to be barred by the passage of time, but an action for violation of the right to privacy was allowed to proceed.[11] The existence of these two interests seems not to have been appreciated by counsel for the petitioner in the *Field* case, since only allegations of defamation were made and discussion of the right to privacy appears to have been raised only by the defence. Yet the existence of the broader area of actionable, non-defamatory publication seems clearly established by the decisions in the *Deschamps* and *Rebeiro* cases.[12]

These latter two cases are of value as well for the purpose of characterizing the right as one of property or of personality. The question is of importance, since treating the right as simply one of property may severely limit the range of persons who may

[10] *Supra,* footnote 5, at pp. 391 and 392.

[11] Civ., July 7th, 1971, Bull. Civ. no 248, p. 177.

[12] There is a suggestion in the judgment of Mr. Justice Perrault in the *Rebeiro* case, *supra,* footnote 5, at p. 391, that the action was well founded both because of unauthorized publication *and* because of injury to reputation. This would appear to constitute an unnecessary inflation of the defamation action.

benefit from it. Here it is necessary to recall that property rights, in either corporeal or incorporeal things, are traditionally limited to those rights having present economic value, susceptible of being evaluated in financial terms.[13] They may therefore exist in such intangibles as trademarks or inventions, but the notion of property has rarely been extended to encompass rights which do not possess any ascertainable market value. The movie star or football player may thus have a proprietary right in his name and likeness, because they are of commercial worth, but it is difficult to say the same of the ordinary citizen, whose name or likeness is not widely known or esteemed. If the notion of property is to be the only doctrinal foundation for protection of one's likeness, the protection accorded to film stars and football players is thus likely not to be accorded to the ordinary individual. Mr. Justice Rothman, in the *Deschamps* decision, is the most explicit in dealing with this point, in stating the following:[14]

> . . . the names and likenesses of petitioners involve proprietary rights which they are free to exploit commercially or to refrain from doing so, and equally free to decide the conditions under which such exploitation shall take place.
>
> *It is clear from the evidence that their names and likenesses have a real commercial value capable of being translated into money terms.* Specific proof was made as to the remuneration paid to the petitioners for their publicity services by various distributors of commercial products and services . . . .
>
> Now, if the right of commercial exploitation of a film star's name and image is a proprietary right, a real right in property which is capable of yielding a financial return, then it cannot be appropriated or used by anyone without the consent of its owner (arts 406 C.C. to 408 C.C.) . . . .

In reaching this conclusion Mr. Justice Rothman appears to have been influenced by the Ontario decision of *Krouse* v. *Chrysler Canada Ltd.*,[15] which he cites at length,[16] and in which, while expressly refusing to affirm the existence of a right to privacy in

[13] Montpetit et Taillefer, Traité de droit civil du Québec, t.3 (1945), p. 16; Carbonnier, Droit civil, t.3, Les Biens (6th ed., 1969), p. 8; Marty et Raynaud, Droit civil, t.1 (2nd ed., 1972), p. 266. Such property rights are frequently also described as patrimonial rights, while rights of personality (having no easily ascertainable market value) are often considered extra-patrimonial. A wider notion of patrimony, including both proprietary rights *and* rights of personality, has also received doctrinal support. See H., L. and J. Mazeaud, Leçons de droit civil, t.1 (4th ed., 1967), by Michel de Juglart, p. 645. Yet even though rights of personality could therefore come to be recognized as patrimonial, they would remain distinct from the classical conception of rights of property.

[14] *Supra,* footnote 4, at p. 8. Emphasis added. The reference is to petitioners in the plural since the motion was heard at the same time as a similar motion, based on the same facts, brought by another entertainer, Miss Dominique Michel, who was also shown in the posters.

[15] (1971), 25 D.L.R. (3d) 49 (Ont. H.C.).

[16] *Supra,* footnote 4, at pp. 11 and 12.

Ontario, Mr. Justice Haines awarded damages to a professional football player for unauthorized appropriation of his likeness, in violation of the plaintiff's property rights.

The *Rebeiro* decision suggests, however, that the right to privacy can be seen also as a right of *personality,* founded on the existence of the person and not dependent upon actual pecuniary worth. The likeness of the unknown young schoolteacher is therefore protected to the same extent as that of the professional actor, and its unauthorized publication may be enjoined or give rise to an action for damages. This notion of the right to one's likeness being a right of personality has clearly triumphed in contemporary French law, and occasional earlier efforts[17] to establish a proprietary foundation for the right have not been successful.[18] The same evolution appears likely in Quebec, where the notion of rights of personality, implicit in the recently enacted articles 18 and 19 of the Civil Code, is attracting justifiable support.[19]

2) *Causes of Exoneration.*

Violation of the right to privacy will constitute a civil fault, and it is natural that many of the well-established causes of exoneration in the area of delictual liability will operate here. The causes of exoneration which emerge most clearly from these decisions are those of lack of identification, consent—express or implied, and the public interest.[20] Such defences may be raised in response to an action for damages, an action for a permanent injunction, both combined, or, in cases of urgency, in answer to a motion for an interlocutory injunction. Their assessment will be different in the interlocutory proceedings, however, because of the particular onus placed on the petitioner in such proceedings.

a) *The nature of the causes of exoneration.*

Doubt as to whether the filmed likeness was clearly identifiable was relied upon by the court in the *Field* case to reject the petitioner's demand.[21] The need for such clear identification seems entirely reasonable in the present state of the law, and it appears

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[17] See, for example, Trib. Seine, Feb. 10th 1905, D. 1905.2.389.

[18] See Pradel, Les dispositions de la loi no 70-643 du 17 juillet 1970 sur la protection de la vie privée, D. 1971.1.111 and the authorities there cited. *Adde* Nerson, *op. cit.,* footnote 2; Mazeaud, *op. cit.,* footnote 13, p. 653.

[19] Montpetit et Taillefer, *op. cit.,* footnote 13, p. 17; Deleury, *op. cit.,* footnote 6, at p. 530.

[20] Other defences have received legislative approval in British Columbia and Manitoba. See the Privacy Act, S.B.C., 1968, c. 39, s. 3; The Privacy Act, S.M., 1970, c. 23, s. 5.

[21] *Supra,* footnote 3, at p. 286.

doubtful whether the protection should ever extend to prohibit publication of an unidentifiable image which is in fact that of the plaintiff.[22]

Consent expressly given was relied upon as a defence in only one of the cases, that of *Rebeiro*. The evidence there clearly established that there had been consent by the young schoolteacher to the *taking* of the photograph, but there was conflicting testimony on whether the consent extended as well to publication for advertising purposes. In rejecting the defence and affirming that it is the responsibility of the defendant to ensure that consent has been obtained to publication,[23] Mr. Justice Perrault adhered to the well-established principle that the onus of proving free and informed consent in such cases rests with the defence.[24]

Defences based on notions of *implied* consent were raised in both the *Deschamps* and *Field* decisions. In the *Deschamps* case the possibility of implied consent arose from the seeming carelessness on the part of the petitioner in allowing eighteen photographs to be taken without a clear understanding of their purpose. The court refused, however, to conclude that this in itself constituted tacit consent that the photographs be used for commercial purposes.[25] Implicit also in the decision is the finding that the public character of the petitioner's profession and the entertainer's traditional tolerance of publicity do not imply consent to such commercial exploitation of name or likeness. In French law, such traditional tolerance of publicity does not necessarily imply consent to even non-commercial publicity, in the form of entertainment reporting.[26]

The implied consent suggested in the *Field* case was based on the fact that the petitioner had chosen, as the scene of his frolic, what was in fact a very public place. In so doing, did he impliedly consent to the ensuing public attention? No such conclusion is suggested in the judgment, and it would seem proper to conclude that if there may be implied consent to observation by those in the vicinity, such consent cannot be extended to subsequent publication to the world at large.[27]

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[22] The Privacy Act of Manitoba, *supra*, footnote 20, s. 3(c), also refers to the necessity of identification, while the Privacy Act of British Columbia, *supra*, footnote 20, s. 4(3)(b) refers to "recognizability", though only in connection with group portraits.

[23] *Supra*, footnote 5, at p. 390.

[24] A. Nadeau and R. Nadeau, Traité pratique de la responsabilité civile délictuelle (1971), no 551, p. 515.

[25] *Supra*, footnote 4, at p. 7.

[26] See, for example, Civ., Jan. 6th, 1971, *Sachs*, J.P.C. 1971.2.16723; Paris, Feb. 27th, 1967, *Bardot*, D. 1967.2.450.

[27] French jurisprudence has drawn a similar distinction between consent to observation and consent to publication. See Trib. gr. inst. Grasse, Réf., Feb. 27th, 1971, J.C.P. 1971.4.16734. However, the new criminal

Finally, in the *Field* decision, the court indicated that depicting the behaviour of approximately 500,000 participants during the three-day 1969 Woodstock Festival was a matter of public interest, and that this was a ground for rejecting the petitioner's demand.[28] Subsequently, in the *Deschamps* decision, the court suggested that "the reporting of news and the discussion of public issues and public figures" were situations in which the public interest may override private rights.[29] These are the first judicial statements in Quebec on what is perhaps the most delicate of the issues surrounding the right to privacy. They both suggest that the public interest extends not only to what may be considered public affairs, but also to that which is simply newsworthy and of interest to the public. The individual's private life may therefore be publicly exposed, if it is in fact newsworthy. Such a definition of the public interest, as the United States experience has shown,[30] places a severe limitation on the right to privacy, since the reporters of news are in large measure responsible for defining that which is newsworthy. By the act of reporting they may thus secure a shield from the consequences of that same reporting. This wide notion of the public interest has generally not been adopted with regard to the same defence in matters of defamation,[31] nor has it received favour in French jurisprudence.[32] These initial judicial formulations of the public interest in matters of invasion of privacy may therefore not necessarily provide a sure guide for future developments.

b) *On a motion for an interlocutory injunction.*

By the terms of article 752 of the Code of Civil Procedure, the granting of an interlocutory injunction is subject to two

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offence (*supra*, footnote 2) of capturing or transmitting a person's likeness with an apparatus is limited to cases wherein the person depicted was in a private place. It is therefore not a *criminal* offence to take *or publish* a photograph of a young woman *seins nus* on the beach of St. Tropez. See Trib. gr. inst. Paris, March 18th, 1971, D. 1971.2.447.

[28] *Supra*, footnote 3, at p. 286.

[29] *Supra*, footnote 4, at p. 7.

[30] See generally Prosser, The Law of Torts (4th ed., 1971), ch. 21.

[31] See the authorities cited *supra*, footnote 8. *Adde* Nadeau and Nadeau, *op. cit.*, footnote 24, no 245, p. 259.

[32] See, for example, Paris May 15th, 1970, D. 1970.2.466, where the court expressed itself in these terms: "Considérant que si le droit à la liberté d'expression est certain, il n'est pas sans limite et ne peut s'exercer qu'à la condition de ne pas porter atteinte au droit au respect de la vie privée . . . ; que la liberté de la presse et le droit du public à l'information qui en est le corollaire ne sauraient justifier, même pour satisfaire une clientèle de plus en plus avide d'informations sensationnelles ou dans un esprit de lucre, des atteintes de plus en plus fréquentes au droit de chacun à la paix et à la tranquillité . . . ." See also Carbonnier, *op. cit.*, footnote 13, t.1, Introduction, Les Personnes, no 70, pp. 246, 247.

conditions. First, the applicant must appear to be entitled to an injunction—he must establish a *prima facie* case. Secondly, the injunction must be necessary in order to avoid serious or irreparable injury to him, or a factual or legal situation of such a nature as to render the final judgment ineffectual.[33]

The requirement of proving a *prima facie* case necessitates proof on the part of the applicant which, if accepted by the eventual trier of the case, would not only establish the factual circumstances of the violation of the right to privacy, but also rebut any particular cause of exoneration raised by the defence. Sufficient proof was thus offered in the *Deschamps* case to rebut the defence of implied consent,[34] and an injunction was granted. However, in the *Field* case, the applicant was unable to overcome defence arguments based on lack of identification[35] and the public interest,[36] and this contributed to the refusal of the application. The same causes of exoneration operate here as in the eventual trial on the merits, but the onus rests on the applicant to establish evidence which, if accepted, would *disprove* the existence of causes of exoneration. In contrast, as the *Rebeiro* decision well indicates,[37] in the trial on the merits it is for the defence to affirmatively prove the existence of such causes of exoneration.

In addition, the applicant for an interlocutory injunction must show serious or irreparable injury or a situation which may render the final judgment ineffectual. Again, this requirement was met in the *Deschamps* decision through proof that publication would irremediably identify the petitioner with the respondent's product in the eyes of the public.[38] In the *Field* case, however, the court was unable to find that serious and irreparable damage

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[33] These requirements are generally the same as those attached to the granting of interlocutory injunctions in common law jurisdictions, whence the Quebec injunction derives. It is interesting to note, however, the similarity between these requirements and that of French law, which permits interlocutory measures to be taken by the "juge des référés" only in cases where the violation of the right to privacy is of a "caractère intolérable". In France, jurisdiction to order such interlocutory measures in matters of invasion of privacy was given legislative expression through the enactment, by the Law of July 17th, 1970, *supra*, footnote 2, of the present article 9, alinéa 2 of the French Civil Code. The jurisdiction had been exercised previously, however, in cases of an "intolerable character", and this condition of intolerability has been reiterated in post-1970 jurisprudence. See Paris, March 13th, 1965, J.C.P. 1965.II.14223; Trib. gr. inst. Paris, Réf., Feb. 27th, 1970, J.C.P. 1970.II.16293; Paris, Dec. 21st, 1970, J.C.P. 1971.II.16653; Trib. gr. inst. Paris, Réf., Jan. 23rd, 1971, J.C.P. 1971.II.16758; J. Pradel, *op. cit.*, footnote 18, at para. 16.

[34] *Supra*, footnote 4, at p. 7.

[35] *Supra*, footnote 3, at p. 286.

[36] *Ibid.*

[37] See the discussion in the text accompanying footnote 24, *supra*.

[38] *Supra*, footnote 4, at p. 13.

was being caused, and relied in particular on the applicant's lack of diligence in presenting his motion.[39]

Conclusion

Though the volume of Quebec jurisprudence dealing with privacy is still small, these cases indicate that some considerable progress has been made towards defining a proper balance between the individual's right to be let alone and the competing interests of society. The problem is certain to require increasing judicial attention in the years to come.

H. PATRICK GLENN*

* * *

FIRE INSURANCE—INSURABLE INTEREST OF TRUSTEE HOLDING PROPERTY FOR BENEFIT OF ANOTHER WHERE INSURANCE POLICY LIMITS LIABILITY OF THE INSURANCE COMPANY TO "THE INTEREST OF THE INSURED IN THE PROPERTY".—The recent Ontario Court of Appeal decision in *Celia Marks* v. *Commonwealth Insurance Company*[1] may have serious implications with respect to the insurable interest of a trustee who holds property for the benefit of another.

Celia Marks was the registered owner of certain lands and premises located in Toronto, by virtue of a deed to her dated February 10th, 1965, and registered on March 4th, 1965. By a policy of insurance issued by the Commonwealth Insurance Company, the insurer insured Mrs. Marks as owner of the property against loss or damage by fire to the extent of $6,000.00. Under the contract, the insurer limited its liability to "the interest of the insured in the property".

On or about December 21st, 1966, the property was damaged by fire. There was no dispute between the parties that a loss insured against under the terms of the policy occurred; that a valid policy of insurance covering the loss existed; and that the policy was in full force and effect at the time of the loss.

The insurance company, though, contested the claim of Mrs. Marks, taking the position that she had no insurable interest in the property at the time of the fire, whereupon Mrs. Marks commenced an action in the Supreme Court of Ontario against the insurance company.

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[39] *Supra,* footnote 1, at pp. 286 and 287.

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[1] Unreported, Supreme Court of Ontario, per Galligan J.

At trial, the plaintiff tendered evidence that she was the registered owner of the property at the time of the fire. Furthermore, she had purchased the property with her own private funds, and together with her husband, Isaac Airst, and her brother-in-law, Herman Airst, managed and rented the property. Evidence showed that the solicitor, who acted on the purchase of the property, took instructions from, and reported to, the plaintiff, and made the necessary arrangements with respect to transferring the insurance policy, naming the plaintiff as beneficiary. Additionally, the plaintiff contended that she paid the taxes on the property by cash, and the mortgage by money order, and would have been personally liable in the event of non-payment. Lastly, the plaintiff alleged that, through an agent, namely her brother-in-law, Herman Airst, the premises were leased to one Clarence Ross at $80.00 per month, and that Ross was the tenant at the time of the fire.

The defendant's position was that the plaintiff was not the beneficial owner of the property, but was the *nominal* owner only, and held the property as a trustee for Isaac Airst, or Herman Airst, or both of them. At the trial, the defendant disputed the plaintiff's evidence. Although the plaintiff was the registered owner of the property, the offer to purchase was signed by "J. Harris", as purchaser, who was subsequently identified as Herman Airst. On March 23rd, 1965 (that is, after the registration of the deed naming the plaintiff as owner, but prior to the date of the fire), Clarence Ross entered into an agreement with Isaac Airst, whereby Ross would purchase the property from Airst, with payments of $80.00 per month on account of principal and interest. Clarence Ross had responded to a "House for Sale" advertisement in the *Toronto Daily Star,* which had been paid for by Herman Airst. It was argued that Isaac Airst's conduct was capable of two alternative interpretations: either Airst misrepresented the true situation to Ross when he purportedly sold the property to him, or Airst was the beneficial owner of the property and had the right to sell it to him. Mr. Justice Galligan commented: "The agreement, to put it mildly, is a strange one but it does state that upon acceptance of the offer Mr. Ross was to become 'owner at once'."[2]

According to the evidence, Mr. Ross made his monthly payments for five months after the fire. Mr. Justice Galligan stated: "Such payments, in my view, would be inconsistent with a landlord-tenant relationship in a case such as this where the property is destroyed by fire and uninhabitable. The recording of such payments would tend to weigh against her contention as set out

[2] Reasons for Judgment, at p. 2.

in the ledger sheet that a landlord-tenant relationship existed."[3] Additionally, the payments made by Mr. Ross subsequent to the date of the fire were by means of post-dated cheques payable to the Airsts, but the Airsts did not turn over these payments to the plaintiff. Thus, either the Airsts converted these payments to their own use and were thieves, or they kept these payments because they were the beneficial owners of the property. The court held that the latter alternative was the correct interpretation.

The defendant lastly alleged that at times, the plaintiff would allow Herman Airst to use her money for property purchases of his own. The plaintiff never took security with respect to such advances, nor did she charge interest.

Mr. Justice Galligan delivered written reasons for judgment, wherein he stated that the plaintiff's evidence was laced with inconsistencies and contradictions, and "that she has little regard for the truth and was quite prepared to make misstatements of fact under oath when it suited her".[4] He continued, ". . . records are non-existent or, if they exist, have been deliberately hidden from production to the Court. . . . [The plaintiff had] a deliberate intention to mislead counsel. . . . I do not believe her when she testified that she was the true and beneficial owner of this property".[5] Thus, Mr. Justice Galligan concluded that, "while there is no direct evidence that someone other than Mrs. Marks was the owner, there is *circumstantial evidence* which leads very strongly to the view that someone other than Mrs. Marks was the beneficial owner of this property. . . . In my view, Mr. Isaac Airst was the beneficial owner of the property or he and his brother Herman Airst were under some arrangement between themselves and they used Mrs. Marks solely as a nominal owner".[6]

In the light of this evidence, the court held that the deed in Mrs. Marks' name did not confer *beneficial ownership* of the property upon her; and, consequently, at no time did she have an insurable interest as "owner". Since the insurer limited its liability to the "interest of the insured in the property", the plaintiff's action was dismissed.

The plaintiff appealed the High Court decision to the Court of Appeal (Evans, Brooks, and Estey JJ.A.), and Mr. Justice Evans delivered a brief oral judgment, dismissing the appeal. The *ratio decidendi* of the appeal decision was that, in circumstances where the insurer limits its liability to the "interest of the insured in the property", the insurer is not liable under the policy of insurance where the insured was not the beneficial owner of the

[3] *Ibid.*, at p. 7.
[4] *Ibid.*, at p. 3.
[5] *Ibid.*, at p. 4.
[6] *Ibid.*, at p. 8.

property. In effect, the decision means that, notwithstanding the *prima facie* evidence of ownership which is to be found in the registered title documents, the insured under such an insurance policy has the *additional onus* of proving beneficial ownership of the property.

Furthermore, the Court of Appeal concluded that a corollary to the above principle is that, on the interpretation of Statutory Condition No. 2[7] of The Insurance Act,[8] the insurer is not liable for loss of property owned by anyone other than the named insured: "The proper test of this term of the contract is not whether or not the appellant is the owner but whether the property is owned by others . . .. If she has no beneficial interest it follows that others have all the beneficial interest and therefore the property is 'owned by others'."[9]

It is suggested that both the High Court and the Court of Appeal failed to comprehensively deal with the legal issues involved and similarly failed to consider the possible implications of their decision.

Firstly, could not a bare trustee initiate legal proceedings against a stranger, in trespass or nuisance?;[10] and, similarly, would not such a trustee be potentially liable in an action, brought by a stranger, in trespass, based, for example, on the doctrine in *Rylands* v. *Fletcher*[11] (that is liability for dangerous animals or the escape of dangerous substances)? In strict liability cases, such as in the latter example, and cases where the trustee has a cause of action for intentional interference with proprietary rights, such as in the former example, even a bare trustee would have an interest in land which should consequently be worthy of protection and thereby insurable.

Secondly, none of the courts dealt with the presumption of advancement of the property in favour of Mrs. Marks. At common

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[7] Statutory Condition No. 2: "Unless otherwise specifically stated in the contract, the insurer is not liable for loss or damage to property owned by any person other than the insured, unless the interest therein is stated in the contract."

[8] R.S.O., 1970, c. 224, s. 122.

[9] [1974] 2 O.R. (2d) 237, per Evans J.A. Evans J.A., at pp. 2-3.

[10] See Keeton, The Law of Trusts (8th ed., 1963), p. 11: "A trustee has full title to the trust property in law"; and, *ibid.*, at pp. 203-204: "[A trustee] may bring any action with regard to the trust property (in fact, in a Court of Law, he is the only person to bring such actions, for only Equity regarded the beneficiary as possessing any interest entitling him to sue)"; and see Rule 74(1) of the Supreme Court of Ontario, Rules of Practice, R.R.O. 1970, Reg. 545, as amended, which provides, in part: "Trustees . . . may sue and be sued on behalf of, or as representing, the party or estate of which they are trustees or representatives, without joining any of the persons beneficially entitled, and shall represent them."

[11] (1868), L.R. 3 H.L. 330.

law there is a presumption that the real property registered in the name of a wife belongs to her.[12] The presumption, though, is rebuttable, but the onus to be discharged involves tipping the "balance of probabilities" in favour of the husband.[13] Had the "circumstantial evidence" in the case the requisite gravity to affect the balance of probabilities in favour of Isaac Airst? It is suggested that, on the basis of the presumption of advancement, Mrs. Marks would have some beneficial interest in the property in question.

Thirdly, section 21 of The Trustee Act,[14] provides that a trustee may insure any building which forms part of the trust property against, *inter alia,* loss or damage by fire, without obtaining the consent of the beneficiary of the trust. Although the effect of this section is not to impose upon the trustee a duty to insure,[15] could it not create the requisite insurable interest in the property on behalf of the trustee?

Fourthly, Mr. Justice Galligan stated:[16]

> In this case I am satisfied that the deed placed the property in Mrs. Marks' name for the benefit of *either or both* the Messrs. Airst . . ..

If the court felt that Mrs. Marks' husband, Isaac Airst, either alone or in conjunction with Herman Airst, was the beneficial owner of the property, did not Mrs. Marks have an interest in the property, in respect of her dower rights?[17] The courts again failed to deal with this point at all, and it seems that neither the plaintiff-appellant nor the defendant-respondent put forward the argument (insofar as can be observed from the appeal briefs).

In the light of the foregoing, two questions come to mind:

1. If Mrs. Marks was found not to be a bare trustee, but had a hypothetical one per cent personal interest and a ninety-nine per cent interest as trustee, would the courts have found differently? Surely, in this situation, Mrs. Marks would have an insurable personal interest as part owner of the property; but it is important to note that, in *obiter,* the Court of Appeal commented:[18]

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[12] See Pettit, Equity and the Law of Trusts (2nd ed., 1970), p. 97 *et seq.*

[13] See Halsbury's Laws of England (3rd ed., 1957), Vol. 18, para. 738, p. 388; and see *Stock* v. *McAvoy* (1872), L.R. 15 Eq. 55; *Re Simpson,* [1941] 3 W.W.R. 268 (Sask.); *Re Kong Chee Ming Estate* (1969), 69 W.W.R. 759 (B.C.); *Pettit* v. *Pettit,* [1969] 2 All E.R. 385 (H.L.).

[14] R.S.O., 1970, c. 470.

[15] *Re McEacharn* (1911), 103 L.T. 900; and see Keeton, *op. cit.*, footnote 7, p. 220; Browne, MacGillivray on Insurance Law (5th ed., 1961), Vol. 2, para. 1972, pp. 959-960.

[16] *Supra,* footnote 2, at p. 10.

[17] See Megarry and Wade, The Law of Real Property (3rd ed., 1962), p. 525 *et seq.*

[18] *Supra,* footnote 9, at p. 238.

> The wording of the above condition (*i.e.*, Statutory Condition No. 2) is very broad and . . . might limit the insurer's liability to the extent of the named insured's ownership in the property covered by the policy.

The court is suggesting that, in this hypothetical instance, Mrs. Marks could recover only one per cent of the loss.

2. If Mrs. Marks entered into the insurance contract in the name of "Celia Marks, as Trustee", would the court have found differently? It is speculated that the insurance company refused recovery to Mrs. Marks in the first instance because it felt it was not fully informed in respect of who was the *actual* owner of the property. Although the court did not deal with this point, it goes without saying that uncertainty, on the part of the insurer, as to whether the insured or some other person is the owner of the property, is most material to the risk. In this view, the insurer may merely want to be informed at the outset that the insured, named in the contract of insurance, is holding the property in trust, for the benefit of others.

On the other hand, it is suggested that the *Marks* case may allow insurance companies to deny coverage to trustees, notwithstanding the fact that the insured discloses the fact in the insurance contract that the property is being held in trust. The *ratio* of the case seems to be as follows:

> Where X holds property as trustee, X does not have "beneficial ownership" of the property; and where an insurance contract limits its liability to the "interest of the insured in the property", X has no interest at all, and may not recover for loss or damage incurred and comprehended by the insurance contract notwithstanding evidence showing that X was the nominal owner.

This position would logically seem to apply whether or not X is identified as trustee in the insurance contract, since mere identification would not confer any beneficial ownership on X.

This situation could have serious effects in circumstances where property is registered in the name of a trustee, who holds for the benefit of undisclosed beneficiaries, or in situations where a mortgage is arranged through a trustee, who holds the mortgage for undisclosed beneficiaries.

A first suggestion to avoid the consequences of this decision might be simply to communicate with the insurance company in advance of the transfer of insurance so as to ascertain whether, upon full initial disclosure of the terms and beneficiaries of the trust, the insurer would acknowledge *in writing* that the insured, although holding property as a trustee and having no beneficial ownership in the property, would nevertheless be covered under the policy.

A second but less compelling suggestion might be to advise

persons, who hold property as trustees, to insert a clause in the insurance contract to the effect that ownership of the property does not necessarily mean beneficial ownership. Perhaps the following clause could be used:

> The insurer is not liable for loss or damage to property owned by any person other than the insured, but the insurer is precluded from denying recovery to the insured under this contract of insurance on the ground that the insured is a trustee of the property, thereby having no beneficial interest therein.

To protect against the situation set out in the *Marks* case, trustees, when purchasing property, should make sure that such a clause be included in the insurance contract prior to endorsing the documents for the transfer of coverage. This second suggestion, though, is less compelling than the first because insurance companies will generally refuse to change their standard form contract of insurance by the insertion of additional clauses, whose legal implications are uncertain at best, and prejudicial to their interests at worst.

HARVEY J. KIRSH*

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DROIT INTERNATIONAL PRIVÉ—CONFLITS DE JURIDICTIONS—RECONNAISSANCE D'UN DIVORCE ÉTRANGER.—La Cour suprême de l'Alberta vient de manquer une belle occasion d'appliquer la disposition de l'article 6(2) de la Loi sur le divorce[1] à la reconnaissance d'un jugement de divorce étranger obtenu en Hongrie, lieu du "domicile" de l'épouse.[2] Par contre, la Cour albertaine a appliqué à la reconnaissance de ce jugement, et pour la première fois au Canada à notre connaissance, le principe issu des arrêts anglais *Indyka* v. *Indyka*[3] et *Mayfield* v. *Mayfield*,[4] suivant lequel un jugement de divorce étranger sera reconnu s'il existe un "rapport réel et substantiel" (real and substantial connection) entre les parties, ou l'une d'elles, et le tribunal qui a rendu le divorce.

Les faits sont les suivants. Les époux se sont mariés en Hongrie en 1928. Ils étaient alors tous deux de nationalité hongroise et domiciliés en ce pays. En 1930, le requérant Kish abandonne son épouse et s'établit au Canada, dont il obtient la nationalité vingt cinq ans plus tard. En 1970, il s'adresse au tribunal hon-

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[1] S.R.C., 1970, ch. D-8.

[2] *Re Kish et al. and Director of Vital Statistics* (1973), 35 D.L.R. (3d) 530 (Alta).

[3] [1969] 1 A.C. 33 (Chambre des Lords).

[4] [1969] 2 All E.R. 219 (H.C.).

grois pour obtenir le divorce. A cette époque, il est domicilié au Canada; la défenderesse réside toujours en Hongrie. Le tribunal hongrois, ayant compétence suivant sa propre loi, prononce le divorce.

A notre étonnement, la Cour suprême de l'Aberta n'a fait aucune mention de l'article 6(2) de la Loi sur le divorce, dont l'application paraissait pourtant justifiée dans les circonstances. L'article 6 de la loi se lit comme suit:[5]

DOMICILE

6. (1) For all purposes of establishing the jurisdiction of a court to grant a decree of divorce under this Act, the domicile of a married woman shall be determined as if she were unmarried and, if she is a minor, as if she had attained her majority.

(2) For all purposes of determining the marital status in Canada of any person and without limiting or restricting any existing rule of law applicable to the recognition of decrees of divorce granted otherwise than under this Act, recognition shall be given to a decree of divorce, granted after the 1st day of July 1968, under a law of a country or subdivision of a 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 wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained her majority. 1967-68, c. 24, s. 6.

DOMICILE

6. (1) Aux fins d'établir si un tribunal a compétence pour prononcer un jugement de divorce en vertu de la présente loi, le domicile d'une femme mariée doit être déterminé comme si elle n'était pas mariée et, si elle est mineure, comme si elle avait atteint sa majorité.

(2) Aux fins de déterminer l'état matrimonial d'une personne au Canada et sans limiter ou restreindre les règles de droit existantes relatives à la reconnaissance des jugements de divorce prononcés en vertu d'une autre loi que la présente loi, un jugement de divorce prononcé après le 1er juillet 1968, en vertu de la loi d'un pays ou d'une subdivision d'un pays autre que le Canada par un tribunal ou une autre autorité qui avait la compétence de prononcer le jugement en vertu de sa loi, sera reconnu sur la base du domicile de l'épouse dans ce pays ou cette subdivision, déterminé comme si elle n'était pas mariée et, si elle était mineure, comme si elle avait atteint sa majorité. 1967-68, c. 24, art. 6.

Dans l'affaire *Re Kish*, l'épouse était domiciliée en Hongrie, au sens de l'article 6(2) de la loi. Domiciliée et résidant en ce pays lors du mariage en 1928, elle y avait encore sa résidence lors du divorce. Suivant les mots du juge en chef Milvain, "the wife was then, and at all times a resident of that land, and a citizen thereof".[6] Il ne fait aucun doute qu'en vertu de l'article 6(2), version française, ce jugement devait être reconnu au

[5] *Supra*, note 1.
[6] *Supra*, note 2, à la p. 532.

Canadá sur la base du domicile de l'épouse dans l'Etat d'origine. Malheureusement, la version anglaise de l'article 6(2) n'est pas aussi claire. En effet, on peut se demander si l'expression "on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried" se rattache à la reconnaissance du jugement, ou plutôt à la compétence du tribunal étranger. Cette difficulté d'interprétation a déjà été signalée par certains auteurs[7] qui optent en faveur de la première interprétation, sans toutefois invoquer la solution non équivoque de la version française du texte.

Il se peut, par conséquent, que le juge Milvain ait opté pour la seconde interprétation suivant laquelle le jugement étranger sera reconnu lorsque le tribunal étranger aura fondé sa compétence sur le domicile de l'épouse déterminé comme si elle n'était pas mariée. Le tribunal hongrois ayant apparemment fondé sa compétence sur la résidence de l'épouse et sur le fait que le mariage avait été célébré en Hongrie entre ressortissants de cet Etat, le juge Milvain aurait, dès lors, ignoré l'article 6(2) de la loi. Cela est peu probable cependant, compte tenu de son silence. Quoi qu'il en soit, et indépendamment de la version française du texte, cette interprétation ne serait pas fondée.

En exigeant à l'article 5(1)(a) que la requête en divorce soit présentée par une personne domiciliée au Canada, la loi privait l'épouse, éventuellement, du droit de présenter une requête lorsque son mari aurait établi son domicile à l'étranger; d'où l'article 6(1) de la loi accordant à l'épouse un domicile distinct de celui de son mari. Ce faisant, cependant, l'épouse, établie à l'étranger et donc y domiciliée au sens de l'article 6(1), était privée du droit d'obtenir un divorce contre son mari domicilié au Canada, et, en outre, se voyait privé éventuellement du droit à la reconnaissance au Canada d'un divorce qu'elle obtiendrait au lieu de son domicile, puisqu'en vertu de nos règles de droit international privé, un tel divorce n'eut pas été reconnu. Il était donc important d'adopter une disposition qui autorisât la reconnaissance d'un tel jugement; d'où l'article 6(2) de la loi.

Il s'agit donc d'une règle nouvelle s'ajoutant aux règles existantes relatives à la reconnaissance des jugements de divorce étrangers, et destinée, tout comme l'article 6(1), à corriger l'inégalité résultant du principe d'unité de domicile des époux. Jusque là, un jugement de divorce étranger était reconnu par nos tribunaux dans les seules circonstances suivantes: a) lorsqu'il

[7] Mendes da Costa, Some Comments on the Conflict of Laws Provisions of the Divorce Act 1968 (1968), 46 Rev. du B. Can. 252, à la p. 288; Jordan, The Federal Divorce Act (1968), and the Constitution (1968), 14 McGill L.J. 209, à la p. 244.

était obtenu au lieu du domicile des époux (donc du mari), déterminé suivant les conceptions du tribunal requis,[8] b) lorsque le jugement étranger était susceptible de reconnaissance par le tribunal du domicile des époux, déterminé suivant les mêmes conceptions,[9] et enfin, dans certaines provinces du Canada, c) lorsqu'il était obtenu dans des circonstances qui, *mutatis mutandis*, auraient fondé la compétence du tribunal requis.[10]

Ajoutons que, suivant la première règle, on n'exigeait pas du tribunal étranger qu'il ait fondé sa compétence sur le domicile des époux. Il importait peu pour les fins de reconnaissance du jugement au Canada que le tribunal étranger ait fondé sa compétence sur la nationalité des époux ou encore sur le fait de leur résidence en ce pays. Il suffisait, pour qu'elle soit reconnue, que la décision considérée ait été rendue au lieu du domicile des époux, déterminé suivant nos propres règles. Dans ces conditions, on ne voit pas très bien pourquoi le législateur, qui manifestement a voulu traiter les époux sur un pied d'égalité dans sa nouvelle loi, aurait exigé, dans le cas d'un divorce obtenu par l'épouse à l'étranger, ce qu'il n'a jamais exigé dans le cas où c'est le mari qui obtient ce divorce à l'étranger.

Voici d'ailleurs comment, lors des débats en Chambre des Communes, le ministre de la justice d'alors, l'honorable P. E. Trudeau, interprétait l'expression "domicile de l'épouse dans ce pays" à l'article 6(2) du projet de loi. Nous citons la version originale anglaise:[11]

> . . . when we find the word "domicile" in a Canadian statute . . . the Canadian courts interpret the word according to our law and not according to the law of whatever land is referred to. . . .
> This means that if a person goes to Reno and obtains a divorce on the basis of residence and the person is effectively domiciled in Nevada—domiciled, once again, as understood by our courts—we will recognize that divorce. . . .
> Let me try to illustrate by another example. . . . Let us consider the law of France. The law of that country will grant a divorce on the basis of nationality, not on the basis of domicile or residence or anything else. We would recognize a divorce granted in France by the authorities in that country authorized by their laws to grant divorce if the person asking for the divorce to be recognized in Canada was domiciled in France, not if he had the nationality of that country.

On présumera, faute d'en savoir davantage, que telle fut

[8] *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; *Gauvin* v. *Rancourt*, [1953] R.L. 517 (C.A.).

[9] *Armitage* v. *A.G.*, [1906] P. 135; *Wheeler* v. *Sheelan*, [1961] C.S. 480 (Qué.).

[10] *Travers* v. *Holley*, [1953] P. 246; *B & B* v. *Registrar of Vital Statistics* (1960), 24 D.L.R. (2d) 238 (Alta); *Re Allarie* (1964), 41 D.L.R. (2d) 553 (Alta); *Re Capon* (1965), 49 D.L.R. (2d) 275 (Ont.); *Januszkiewicz* v. *Januszkiewicz* (1966), 55 D.L.R. (2d) 727 (Man.).

[11] Canada, Debats, Chambre des Communes (1967), p. 5609.

l'interprétation retenue par le juge Milvain. Toutefois, plutôt que d'appliquer cette disposition de la loi à la reconaissance du jugement hongrois, il aura préféré appliquer une règle de common law tirée de l'arrêt anglais *Indyka* v. *Indyka*[12] dont le champ d'application est évidemment beaucoup plus étendu que celui de l'article 6(2). Si on ne peut dire quel sera le sort de cet arrêt au Canada, et en particulier au Québec, il paraît certain, par ailleurs, qu'en Alberta la disposition de l'article 6(2) de la loi ne présente plus guère d'intérêt puisque le cas visé par cet article tombera inévitablement sous le coup de l'arrêt *Re Kish*. C'est bien ce qu'avait prédit le professeur Mendes da Costa en commentant cette disposition de la loi dans son article déjà cité:

> . . . it seems clear that if the wide ratio of the *Indyka* case is accepted by Canadian courts, section 6(2) will thereby be rendered of diminished importance, if not otiose. If a court affords recognition to a decree under section 6(2), will it not usually follow that "a real and substantial connection" will exist between the wife and the foreign forum so as to also entitle the divorce to recognition under this authority.

MICHEL HETU*

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CONFLICT OF LAWS—FORUM SHOPPING—FORUM CONVENIENS.—So much disapprobation has recently become attached to the term "forum shopping" that it might be useful, at the outset, to consider the forms that forum shopping may take so that the recent litigation in the *Atlantic Star*[1] may be seen in perspective. Where a plaintiff has a cause of action which is justiciable in more than one forum and is in a position to invoke the jurisdiction in all of them he is faced with a choice and may shop around for the best bargain. In the vast majority of cases personal inclination, convenience, cost, availability of assets against which to enforce a favourable judgment and limited legal advice will effect a localization in the nearest forum but, occasionally, the substantive law or procedure of a forum farther afield will provide overriding advantages. In a true conflict situation, where the inter-state contacts are real rather than incidental or fortuitous, localization is impos-

[12] Pour l'analyse de cet arrêt, voir Mendes da Costa, *op. cit.*, note 7, à la p. 283. A noter que depuis l'adoption en Grande Bretagne de The Recognition of Divorces and Legal Separations Act 1971, ch. 53, cette règle a été abandonnée.

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[1] *The Atlantic Star. The Owners of the Atlantic Star* v. *The Owners of the Bona Spes*, [1973] 2 All E.R. 175 (H.L.) reversing the Court of Appeal, [1972] 3 All E.R. 705, which upheld Brandon J., [1972] 1 Ll. Rep. 534.

sible and the plaintiff may shop with complete propriety; where, however, the only foreign contact is the foreign forum, chosen for its peculiar advantages, condemnation of the plaintiff's conduct may be pertinent. Frequently, however, criticism of the shopper is misplaced as the fault really lies with the shopkeeper either because his choice of law rules increase the plaintiff's substantive rights[2] or because his jurisdictional rules encourage alien claims. On this latter count English courts live in a veritable crystal palace as common law jurisdiction may be invoked on the mere presence of the defendant within the jurisdiction,[3] while admiralty jurisdiction may be brought into play by the arrest, real or threatened, of a vessel belonging to the defendant at a British port, which gives rise to proceedings *in rem*, thereby furnishing an additional incentive in the effective provision of funds to meet the judgment.

In the *Atlantic Star* the House of Lords considered this second form of forum shopping and, by a majority,[4] decided in some circumstances to close the shop. The decision raises the whole question of that hitherto alien notion of *forum non conveniens*.

The story may be briefly stated. There was fog on the Scheldt. The Dutch appellants' ship, trying to negotiate a lock without the aid of tugs, sank a Dutch and a Belgian barge drowning two of the latter's crew, damaged the wall of the quay and put the port authority to expense in clearing the river. The owners of the Belgian barge and the respondents, owners of the Dutch barge, applied to the Antwerp Commercial Court for the appointment of a nautical surveyor to investigate the collision. The surveyor's report was not unfavourable to the appellants and it seems the Belgian courts would be likely to accept his findings in any proceedings before them. Proceedings were pending in Belgium against the appellants by the owners of the Belgian barge, the cargo owners of both barges, the port authorities and the deceaseds' dependants. The respondents, however, did not, at that time, bring proceedings in Belgium but, discovering that the Atlantic Star was due in Liverpool, brought proceedings in England. The appellants avoided the arrest of the ship by the deposit of £80,000 and entered a conditional appearance. They sought by motion to have the process set aside, or alternatively, for a stay of future proceedings, on the grounds *lis alibi pendens* or that the proceedings were oppressive and vexatious and an abuse of the process of the court.

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[2] *Machado* v. *Fontes*, [1897] 2 Q.B. 231 provides a particularly blatant example of this; happily the decision has been overruled (semble) by *Chaplin* v. *Boys*, [1971] A.C. 356.

[3] For example at Ascot Races, see *Maharanee of Baroda* v. *Wildenstein*, [1972] 2 Q.B. 283.

[4] Lords Reid, Wilberforce, and Kilbrandon. Lords Morris and Simon dissenting.

Before considering the major aspects of the decision of the House of Lords there are a few matters requiring brief comment.

Lis alibi pendens

Wherever parties to a suit in England are parties to foreign proceedings there is a potential, though by no means a *prima facie*, case for a stay of proceedings by the English court. That case is, obviously, strengthened when the parties are acting in the same capacities in both the English and the foreign courts. It should not be thought, however, that the plea of *lis alibi pendens* is anything other than an identification of a particular fact situation or that any special rules apply to it. There is no presumption that multiple proceedings are, in themselves, oppressive or vexatious.[5] In the *Atlantic Star* there was, in fact, no multiplicity—the respondents' application to the Antwerp court for the appointment of a surveyor did not, it was eventually conceded, amount to the invocation of the jurisdiction of that court;[6] and, although the respondents, after starting their English action, began proceedings in Belgium, Brandon J. was satisfied that they did so solely to avoid a time-bar and with no intent to harass the appellants.[7] The respondents gave, and were required to give, an undertaking to Brandon J. to discontinue their action in Belgium if their English proceedings were allowed to continue.[8]

Admiralty jurisdiction

The jurisdiction of the Admiralty Court, now assigned to the Queen's Bench Division,[9] was put on a statutory basis in 1956.[10] Although there are restrictions on actions *in personam*,[11] in line with the Brussels Convention of 1952,[12] to ensure some connection with the English court, and despite the limitation on actions *in rem*[13] the possibility of claims unrelated to England in fact or by prior agreement between the parties remains substantial.[14] The Convention itself,[15] which was implemented by the 1956 Act and also applies in Belgium, encourages a freedom in selecting the forum:

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[5] See *McHenry* v. *Lewis* (1882), 22 Ch. D. 397.
[6] [1972] 1 Ll. Rep., at p. 537.
[7] *Ibid.*
[8] *Ibid.*
[9] Administration of Justice Act 1970, s. 1(3).
[10] Administration of Justice Act 1956.
[11] *Ibid.*, s. 4.
[12] Cmnd. 8954 (1952).
[13] Administration of Justice Act 1956, s. 3.
[14] For example, wherever there is a maritime lien (s. 3(3)) and the right to arrest any of the defendant's vessels (s. 3 (4)).
[15] International Convention on Certain Rules concerning Civil Jurisdiction in matters of Collision, signed at Brussels May 10th, 1952. Cmnd. 1128.

> *Art. 1* (1) An action for collision between seagoing vessels, or between seagoing vessels and inland navigation craft, can only be introduced:
> (a) either before the Court where the defendant has his habitual residence or a place of business;
> (b) or before the Court of the place where arrest has been effected of the defendant ship . . . .
> (c) or before the Court of the place of collision when the collision has occurred within the limits of a port or inland waters.
> (2) It shall be for the plaintiff to decide in which of the courts referred to in s. (1) of this article the action shall be instituted.

But the permission contained in article 1 (2) of the Convention, while it arguably confers a right on the plaintiff, vis-à-vis the defendant, to select the forum for the adjudication of their dispute surely cannot, even if it has any application to domestic law[16] which Lord Wilberforce[17] and Lord Kilbrandon[18] strongly denied, give a plaintiff as against the court a right to have the action tried. To say that a court has jurisdictional competence is not to compel a decision. In the popular analogy, the shop is open but the shopkeeper is not forced to sell. Nevertheless, Lord Denning[19] and Cairns L.J.[20] and particularly Lord Simon[21] felt that a grant of stay would be an interference with the plaintiff's right. This is not the place for a consideration of the extent to which a treaty between states is capable of conferring rights on private individuals when the implementing statute confines itself to the jurisdiction of a court but, it is submitted, Lord Reid's rejection of the contention in this particular case would seem correct:

> The convention only purports to deal with jurisdiction and no one disputes that the English court has jurisdiction to deal with this case. But the respondents argue that this article must have been intended to have a wider effect because it would be a mockery to allow the plaintiff to choose the English court and then to make that choice ineffective by staying his action. But this argument proves too much. If right, it would prevent the English court from staying the action on any ground except perhaps bad faith . . . . So if this is the meaning of the convention there would have to be some changes in English law. Still more there would have to be a change in the law of Scotland: the plea forum non conveniens would have to be entirely excluded in collision cases.[22]

[16] The Act of 1956, which implements the provisions of the Convention (although ratification by the U.K. was only on March 18th, 1959) does not, of course, contain a provision equivalent to art. 1 (2).

[17] [1973] 2 All E.R., at p. 190.

[18] *Ibid.*, at p. 203.

[19] [1972] 3 All E.R., at p. 710.

[20] *Ibid.*, at p. 715.

[21] [1973] 2 All E.R., at p. 197: "To convenant in Art. 1 (2) that it shall be for the *plaintiff* to decide in which of the various courts open to him the action shall be instituted, and then to proceed to stay his action if he chooses the one most convenient to himself but not to everyone else, is to take back with one hand what we are by international treaty bound to give him with the other."

[22] *Ibid.*, at p. 182.

If Lord Reid's argument is accepted on this point nothing further turns upon the fact that the *Atlantic Star* happened to be an admiralty action *in rem*, and the decision to stay is equally applicable to any action begun in the English courts. One point should, however, be borne in mind: an action *in rem* by its nature provides some resources against which a successful plaintiff may proceed and, thereby, gives him a certain advantage; an advantage of which account should be taken in considering a stay. In fact the appellants gave an undertaking to Brandon J.[23] to provide reasonable security for the respondents' claim in Belgium so that a stay of proceedings in England would not be financially prejudicial to them.[24]

Jurisdiction to stay proceedings

Although the power to stay proceedings is part of the innate authority of the highest courts to control their own procedure, the jurisdiction to stay and the bases of pleas for a stay, though not the principles upon which the courts' discretion is to be exercised, are contained in statute[25] and rules of court.[26] Although applications for a stay of proceedings are, obviously, not confined to cases involving the conflict of laws, within the conflict context there are three main factual situations in which the court's power is likely to be invoked. Firstly, when proceedings between the same parties have been instituted elsewhere. As has been said earlier, there is no magic in the plea *lis alibi pendens*, it merely identifies a factual situation and it remains necessary for the applicant to establish that the English proceedings are oppressive,

[23] [1972] 1 Ll. Rep., at p. 537.

[24] The appellants' offer to provide security for the Belgian claim and the respondents' offer to discontinue the Belgian action were both given after proceedings had begun and Denning M.R. was in favour of ignoring them for the purposes of deciding upon the stay ([1972] 3 All E.R., at p. 708). Lord Reid, however, correctly it is submitted, considered that they should be taken into account for the purpose of the substantive claim though their lateness might affect the position on costs. ([1973] 2 All E.R., at p. 182).

[25] Supreme Court of Judicature (Consolidation) Act (1925), 15 & 16 Geo. 5, c. 49, s. 41. proviso (a): "Nothing in this Act shall disable either of the said courts [High Court and Court of Appeal], if it thinks fit so to do, from directing a stay of proceedings in any cause or matter pending before it."

[26] R.S.C., Order 18, Rule 19: "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process of the court: and may order the action to be stayed or dismissed . . . ."

vexatious or an abuse of the process of the court. If satisfied that a case for a stay is made out—for example, where the defendant is being harassed by multiple actions—the court may discontinue the English proceedings or, exceptionally, order the vexatious party to stop proceedings in the foreign court.[27] Secondly, where a party brings an action in England in defiance of a choice of jurisdiction clause in a contract. If the contract, and therefore the jurisdiction clause, is valid by English conflicts law an English court will order a stay of proceedings in England even though the contract is voidable for a fraud of disgraceful proportions.[28] Despite the much criticized decision of the Court of Appeal in *The Fehmarn*,[29] which in any case may be interpreted as merely an assertion that the court is not bound to recognize the parties' choice, in other words that the court retains a real discretion, the principles upon which the discretion should be exercised are fairly well settled and admirably set out in the judgment of Brandon J. in the *Eleftheria*.[30] While English courts retain the principle of contractual freedom there is unlikely to be any departure from the present practice, indeed it is a basis of criticism when a foreign court refuses to require the strict observance of the contract.[31] Thirdly, and the central issue in the *Atlantic Star*, where the applicant alleges that *forum non conveniens*. The convenience of the forum has not, before the English courts, save in the case of the *Fehmarn*,[32] been allowed to override a contractual selection nor has the manifest inconvenience of the forum itself provided justification for a stay. The acceptance of *forum non conveniens* in both Scotland[33] and the United States[34] was brought to the attention of their lordships but any benefit of consistency must surely be overborne by English notions of justice and the concept of the open forum.

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[27] The injunction, of course, is directed to the party not to the foreign court but English courts have been reluctant to proceed in this way and will continue to be so.

[28] See *Mackender* v. *Feldia A.G.*, [1967] 2 Q.B. 590.

[29] [1958] 1 W.L.R. 159 the aspects of this case pertinent to the issue of *forum conveniens* will be discussed later.

[30] [1970] P. 94.

[31] See the case of *The Chaparral* where the English jurisdiction selecting clause was upheld in England *sub nom. Unterwesser Reederei G.m.b.H.* v. *Zapata Off-Shore Co.*, [1968] 2 Ll. Rep. 158 (C.A., affirming Karminski J.) though initially rejected in America on the ground *forum non conveniens—sub nom. Zapata Off-Shore Co.* v. *The "Bremen" and Unterwesser Reederei G.m.b.H.*, U.S.C.A. (5th Cir.) reported at [1971] 1 Ll. Rep. 122 affirmed U.S.C.A. en banc [1971] 2 Ll. Rep. 348 reversed by U.S. Sup. Ct, [1972] 2 Ll. Rep. 315. See (1971), 20 Int. & Comp. L.Q. 550 (Collins), (1972), 22 Int. & Comp. L.Q. 329 (Becker) and 332 (Collins).

[32] *Supra*, footnote 29.

[33] See *La Société du Gaz de Paris* v. *La Société Anonyme de Navigation "Les Armateurs Français"*, [1926] S.C. (H.L.) 73.

[34] See *Gulf Oil Corp.* v. *Gilbert* (1947), 330 U.S. 501.

The exercise of the discretion to stay

The starting point for an examination of the practice of the English courts to stay proceedings is the well-known passage in the judgment of Scott L.J. in *St. Pierre* v. *South American Stores*:[35]

> The true rule about a stay under s. 41 . . . may I think be stated thus: (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant. These propositions are, I think, consistent with and supported by the following cases: *McHenry* v. *Lewis*;[36] *Peruvian Guano Co.* v. *Bockwoldt*;[37] *Hyman* v. *Helm*;[38] *Thornton* v. *Thornton*[39] and *Logan* v. *Bank of Scotland (No. 2)*.[40]

Brandon J., rightly it is submitted, took the view[41] that Scott L.J. was not commenting on the quality of any particular convenience factor when he said that "A mere balance of convenience is not a sufficient ground . . ." but was ruling convenience wholly out of court, as if he had said "convenience alone . . .". Thus, while there was no doubt whatsoever that Belgium was the *forum conveniens*,[42] Brandon J. based his decision on vexation, formulating two questions: "whether the plaintiff has any good reason for suing here, so that a stay would prejudice him; and whether the difficulties which the defendants would meet as a result of having to defend the action here would be so great as to cause them injustice?"[43] The plaintiffs' motive was in no way improper, they were not trying to harass the defendants, they simply sought to obtain a hearing subject to a procedure more favourable to their case—by hearing the oral testimony of the witnesses—than that obtaining in the Antwerp Commercial Court where the report of the special surveyor, though not conclusive, would most probably be accepted. Such a speculative advantage defies measurement but the test applied by Brandon J. seems to have been subjective: "[the plaintiff] has reasons for thinking so, which cannot fairly be categorized as either nugatory or unreasonable."[44] The answer to

[35] [1936] 1 K.B. 382, at p. 398.
[36] *Supra*, footnote 5.
[37] (1883), 23 Ch. D. 225.
[38] (1883), 24 Ch. D. 531.
[39] (1886), 11 P.D. 176.
[40] [1906] 1 K.B. 141.
[41] [1972] 1 Ll. Rep., at p. 539.
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*

the first question is also the answer to the second for, while Brandon J. suggests that inconvenience and expense could render the continuation of the plaintiff's action unjust to the defendant, the inconvenience and expense in the instant case did not, in his judgment, attain such a degree. It is not easy to imagine greater difficulties for the defendant, so the real ratio of the decision must be that no stay will be granted unless it can be said that the plaintiff has no reasonable belief that proceedings here will be advantageous to him, that is he is trying to harass the defendant.

The Court of Appeal,[45] Phillimore L.J. with some reluctance,[46] upheld Brandon J.'s ruling on the authorities and also approved his interpretation of the test of Scott L.J.[47] and its application to the particular facts. In a passage crying out for an Hohfeldian analysis Denning M.R. characterizes the attitude of the Court of Appeal to the precedents:

> The reasoning which lies behind these rules appears from the cases. When a plaintiff comes *as of right* to the courts of this country—without having to ask for leave of anyone—and seeks redress from a defendant who is here, or whose ship is here, it is *the duty of the courts* to award him the redress to which he is entitled.[48]

What Denning M.R. means by "as of right" must surely be the ordinary processes of invoking jurisdiction—the Mrs. Beeton or first catch your defendant principle—which in view of the tenuous jurisdictional nexus required at common law surely begs the question. To go further and see the authorities fettering the exercise of the discretion to stay as imposing the correlative duty on the courts to determine the issue is to harness the horse to the rear of the cart and view any potential change in the law by the House of Lords, as indeed occurred, as the deprivation of the plaintiffs' rights. That the plaintiffs were forum-shopping was of no consequence for, given the generosity of the English jurisdictional rules, to take advantage of English procedure was in no way objectionable. "The right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum-shopping' if you

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[45] *Supra*, footnote 1.

[46] *Ibid.*, at p. 712: "No doubt care should be taken before granting a stay in such a case. At the same time why is the discretion of the court not a discretion to be exercised unfettered in all the circumstances of the case?"

[47] See particularly Denning M.R., *ibid.*, at p. 709: "No one who comes to these courts asking for justice should come in vain. He must, of course, come in good faith. He must not do it from an unworthy motive . . . nor must he act oppressively. He must not in seeking justice himself, treat the defendant unjustly. At any rate, the judges will not allow him to go on, *if it would work an injustice to the defendant, without doing the plaintiff any advantage*." Italics supplied.

[48] *Ibid.*, at p. 708, Emphasis supplied.

please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service."[49]

The minority of the House of Lords—Lord Morris and Lord Simon—supported the Court of Appeal in its view of the authorities though not bound by them. What seems most to have exercised their lordships was the view, already examined in the judgment of Lord Denning, that any change in the existing exercise of the discretion to stay would involve an injustice to the respondent in defeating his reasonable expectations based on the present jurisdictional requirements, especially in the context of the maritime lien. Lord Simon presented his view of the problem directly:[50]

> Your lordships are here faced with two irreconcilable, and each entirely respectable, legal stances: though, since every obverse has its reverse, each has concomitant disadvantages. On the one hand there is the principle of *forum conveniens*. According to this doctrine, whatever the law may say about jurisdiction, the parties will be compelled through the court's exercise of its inherent or statutory power to stay proceedings, to litigate in the forum which in all the circumstances seems to the court the most appropriate one. On the other, there is the doctrine that, if a court has jurisdiction, which is invoked by a plaintiff, it will not deny him justice.

And on the danger to the maritime lien:[51]

> Ships are elusive. The power to arrest in any port and found thereon an action in rem is increasingly required with the custom of ships being owned singly and sailing under flags of convenience. A large tanker may by negligent navigation cause extensive damage to beaches or to other shipping: she will take very good care to keep out of the ports of the "convenient" forum. If the aggrieved party manages to arrest her elsewhere, it will be said forcibly (as the appellants say here): "The defendant has no sort of connection with the forum except that she was arrested within its jurisdiction." But that will frequently be the only way of securing justice.

Such a formulation of the case seems to me to be an overstatement of the problem in two material respects. Firstly, jurisdictional rules surely present the necessary but not the sufficient prerequisites for the determination of the substantive issue. So much is already established by any statutory or inherent power to stay actions. Nor does a widening of, or a removal of, the self-imposed fetters upon such a power to stay indicate how that discretion is in future to be exercised. It is thus not a case of giving with one hand—the jurisdictional rules—and taking away with the other—the exercise of the discretion to stay—but of imposing a further potential control over actions coming before the court, mindful always of the fact that the discretion operates in individual cases

[49] *Ibid.*, per Denning M.R., at p. 709.
[50] [1973] 2 All E.R., at p. 196.
[51] *Ibid.*, at p. 197.

and not over classes of action. There is no reason to assume that the plea *forum non conveniens* any more than the plea *lis alibi pendens*, already considered, should provide a charm for discontinuance. Secondly, and a related point, Lord Simon's words suggest that a decision by an English court that it is not the convenient forum for the disposition of the dispute involves a decision identifying the foreign court which is the convenient forum for the particular suit. It is only on this basis that his example of the errant ship avoiding the jurisdiction of the convenient forum has any significance. Now, there would seem to be only three situations in which an English court might be concerned to establish the convenient forum; firstly, where the court, in the exercise of its discretion, is asked to grant leave to serve process or notice of process outside the jurisdiction; here the fact that England is the appropriate forum for the disposition of the dispute would materially assist the applicant; secondly, where, as in the much criticized decision in the *Fehmarn*,[52] a choice of jurisdiction clause in a contract might be overridden by the paramount convenience of local trial; and thirdly, as in the instant case, where litigation in a foreign suit unconnected with England is actually taking place or is pending, or, at the very least, is immediately possible, in a foreign forum with which it is closely connected. In any true conflict situation there may be several courts sufficiently connected with the subject matter of the dispute and available to the plaintiff so that he may make his choice among them; a decision by an English court that it is *forum non conveniens* in no way localizes the suit in any one of them—such an action would be the complete negation of the very idea of conflict of laws—the plaintiff is free to make his choice and if, to return to Lord Simon's example, the ship never comes in, any forum in which it may be arrested becomes, by default, the convenient forum—any other result would involve a complete and intolerable denial of justice.

The majority decision

The majority of the Lords—Lord Reid, Lord Wilberforce and Lord Kilbrandon—declined to accept counsel's invitation to assimilate the law of England with the long-standing and approved practice of Scots law on the plea of *forum non conveniens*[53] feeling that neither the time nor the occasion was ripe for such a far-reaching alteration of English Law.[54] They preferred instead to

[52] *Supra*, footnote 29.

[53] See *La Société du Gaz de Paris* v. *La Société Anonyme de Navigation "Les Armateurs Français"*, *supra*, footnote 33.

[54] Lord Reid, [1973] 2 All E.R., at p. 181: "No doubt it is a desirable objective to diminish remaining differences between the laws of sister countries. But we must proceed with all due caution. That plea is particularly important in connection with the peculiar Scottish method of

give a more liberal interpretation to the words of Scott L.J. in *St. Pierre* v. *South American Stores*[55] than had been accorded to them by the lower courts over which the decision, though not its *ipsissima verba,* was binding. The attitude of the majority may, however, be seen in Lord Reid's rejoinder to Denning M.R.'s chauvinistic dictum on forum shopping.[56] "My lords, with all respect, that seems to me to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an inate superiority over those unfortunate enough to belong to other races. It is the function of this House to try, so far as possible, to keep the development of the common law in line with the policy of Parliament and the movement of public opinion. So I think that the time is ripe for a re-examination of the rather insular doctrine to which I have referred."[57]

There was at no time in the proceedings any doubt that the Belgian courts were the appropriate forum for this dispute. The initial analysis by Brandon J. was accepted throughout the appeals, he said:[58] "I have no doubt at all that, so far as convenience is concerned, the Commercial Court of Antwerp is by far the most appropriate forum. There are five main reasons why I am of that opinion. First, there is the close connection of the case with Belgium, and more particularly with Antwerp itself; under this head I include the facts (a) that the collision occurred in the port of Antwerp, (b) that navigation there is governed by Belgian law and local regulations and (c) that one of the ships concerned (though not the plaintiff's or the defendant's) was Belgian. Second, there is the circumstance that the Antwerp court has already, partly at the request of the plaintiff conducted through its appointed expert a preliminary enquiry into the case. Third, there is the fact that, following that preliminary enquiry, five other claims arising out of the same casualty are already pending before the Antwerp Court . . . . Fourth, it seems clear that the Antwerp Court is able to give the plaintiff the same remedy as he can obtain here . . . Fifth, the case has absolutely no connection with England except that, because the defendant's ship trades from time to

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founding jurisdiction by arrestment *ad fundandam jurisdictionem.* I cannot foresee all the repercussions of making a fundamental change in English law and I am not at all satisfied that it would be proper for this House to make such a fundamental change or that it is necessary or desirable." Similarly Lord Wilberforce, at p. 190: "The arguments in favour of *forum non conveniens* as a general rule are not so overwhelming that we should now make a radical change of direction; indeed there is much to be said for the English rule, provided that it is not too rigidly applied. I would not therefore favour accepting the radical solution."

[55] *Supra,* footnote 35, at p. 398.

[56] [1972] 3 All E.R., at p. 709.

[57] [1973] 2 All E.R., at p. 181.

[58] [1972] 1 Ll. Rep., at p. 539.

time to an English port, she is liable to arrest here." These findings are likely to be important in the future use of the precedent. Thus the majority in the Lords were faced with an interpretation of Scott L.J.'s dictum which would allow for such a massive weight of convenience against the continuation of the English suit. They found it in the term "oppressive".

> I think that a key to the solution of the problem may be found in a liberal interpretation of what is oppressive on the part of the plaintiff. The position of the defendant must be put in the scales. In the end it must be left to the discretion of the court in each case where a stay is sought, and the question would be whether the defendants have clearly shown that to allow the case to proceed in England would in a reasonable sense be oppressive looking to all the circumstances including the personal position of the defendants. That appears to me to be a proper development of the existing law.[59]

The authorities had taken the term "oppressive" to connote a harassing of the defendant by multiple or purely speculative or artificial proceedings, abusing the court's procedure to embarrass the defendant by making him defend on two fronts or stretching his limited financial forces. There was none of this in the present case: the defendant was not impecunious, the plaintiff believed there was a real advantage to him. May inconvenience amount to oppression? The majority thought so, if only on a very nice balance. Every case must be considered on its merits and a calculus of benefit and detriment made and, if Lord Wilberforce is right that all discretion is at base instinctive,[60] a balance of feelings arrived at.

The consequences of the decision

Much consideration has been given in this comment to the attitudes of the various judges hearing this case to what might be termed the principle of the open forum. The majority in the lords, while supporting the stay, gave no indication of any general preparedness fundamentally to depart from that principle. The decision may at its lowest be seen merely as a very minor extension from traditional restrictions of the discretion to stay to be exercised only where the convenience factor is as overwhelming as it is in this case. Indeed, despite Lord Reid's urgings[61] that Scott L.J.'s words should not be given quasi-statutory force, it would be possible to read these words, with the interpretation now put upon them, so closely with the facts found by Brandon J. and accepted, that a future court, believing in the principle of the virtually unrestricted open forum, could, on the basis of simple fact comparison, find any but the strongest of cases falling outside the precedent. On

[59] [1973] 2 All E.R., at p. 181.
[60] *Ibid.*, at p. 194.
[61] *Ibid.*, at p. 190.

the other hand, the decision can be seen as the first step towards an acceptance of the principle of *forum conveniens*. In short, the decision leaves a future court largely unfettered to achieve what has erstwhile been done by a strict adherence to precedent, by the exercise of its undoubted discretion.

On the issue of forum shopping the decision allows a court more freedom to declare an early closing day. This freedom is unlikely to be exercised save where the only link with England is the invocation of admiralty jurisdiction *in rem* or common law jurisdiction by personal service on the visitor; these being the vulnerable areas of present English jurisdiction. Why should a foreign plaintiff choose to follow the defendant in England rather than in a foreign, more appropriate forum? He may seek a procedural advantage, as in the present case, or a substantive benefit based on different choice of law rules—it is highly unlikely in the absence of a contractual jurisdiction clause, that an English court would stay an action where the governing law indicated by English conflict rules was English however convenient a foreign forum might be—or try to defeat a time-bar obtaining in the *forum conveniens*. Are all these advantages equally proper objects justifying the plaintiff's conduct? If not, is the discretion to stay, in default of the unlikely event of a change of jurisdiction rules, the only method open to defeat forum shopping? Firstly, procedural advantages; this presupposes that the substantive question remains the same but that the method of adducing or presenting evidence or the weight to be given to evidence is different. As the object of inquiry remains the same it follows that in most cases, without a full trial of the issue, any benefit is likely to be speculative and therefore any disadvantage or inconvenience to the defendant should weigh heavily against it. In this case a stay would seem to be a proper device to defeat the forum shopper. Substantive advantages are not so easily dismissed. Suppose the choice of law rules of the *forum conveniens* indicate their own law or the law of Y as the governing law while English rules indicate the law of X. Now, whether this occurs through a difference of classification of the subject matter or different choice of law rules is immaterial as it is unreasonable to expect an English court, in the absence of harassment, to decide that justice is best served by not applying the English solution. It would seem, therefore, the plaintiff's advantage would be allowed to outweigh mere inconvenience to the defendant unless it was accepted that the English rules were totally unsatisfactory and even then the likely result would be judicial amendment if at all possible.[62] Resort to second-

[62] I am thinking of a case like *Machado* v. *Fontes, supra,* footnote 2, but this depended upon a particular interpretation of *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1 favouring either the application of English law after the

ary classification, the use of renvoi, the movement towards open-ended choice of law rules and international efforts at unification can all help to reduce this type of forum shopping, but while individual systems of domestic law remain, conflicts rules are bound to reflect them. This form of forum shopping will continue to exist, in many cases it will not be objectionable, and a stay of proceedings would seem an inappropriate device for its control if, indeed, control is necessary. While English notions of justice, as embodied in English conflicts rules, will make an English court reluctant to deny a properly founded substantive claim on the basis of inconvenience; where a plaintiff invokes English jurisdiction to circumvent a time-bar the merit of his claim is more difficult to assess. Clearly to classify certain types of time-bars as substantive rather than procedural—as extinguishing the claim under the governing law not merely preventing the plaintiff from pursuing stale claims—is one way out of the difficulty but if this is not possible, should a plaintiff be allowed to take the benefit of a more generous limitation period in England? In the absence, through lapse of time, of a convenient forum, it would seem highly unlikely that an English court would stay an action in England. In short, the decision in the *Atlantic Star* is unlikely to discourage forum shopping in any situation save where the inconvenience or hardship to the defendant is considered to outweigh a speculative and procedural benefit to the plaintiff. The shop will usually remain open for business.

RAYMOND SMITH*

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satisfaction of the special jurisdictional rules or the use of the *lex fori* to determine tort cases after the minimum satisfaction of foreign actionability —a very special case which demonstrates a homeward-trendism not so blatantly apparent in other English choice of law rules.

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