COMMENTS
COMMENTAIRES

REAL ESTATE—PLAIN WORDS AND SECTION 26 OF THE PLANNING ACT—REFERENCE RE CERTAIN TITLES TO LAND IN ONTARIO.—

The recent opinion of the Ontario Court of Appeal in *Reference re Certain Titles to Land in Ontario*[1] dealt with the validity of a number of devices by which conveyancers sought to accomplish the alienation of their clients' land despite the provisions of section 26 of the Planning Act.[2] The court decided that all of the devices had been successful, and that some might still be used. The familiar common law formula that courts must declare the law, not make it, was repeated by the court,[3] presumably as a disclaimer of any intention to concern itself with the larger social good—a matter for the legislature. Yet some sense of purpose must have guided the court in its decision to answer the hypothetical questions propounded, "despite the well recognized principle that any decision of the court on such a reference has no binding force even upon the court which renders it".[4] Considera-

[1] [1973] 2 O.R. 613, 35 D.L.R. (3d) 10.

[2] R.S.O., 1960, c. 296, as am. by 1960-61, c. 76, s. 1; 1964, c. 90, s. 1; 1966, c. 116, s. 2; and 1968, c. 96, s. 2 (now s. 29, R.S.O., 1970, c. 349, as am). Section 26 read in part as follows:

"26(1) The council of a municipality may by by-law designate any area within the municipality as an area of subdivision control and thereafter no person shall convey land in the area by way of a deed or transfer on any sale, or mortgage or charge land in the area, or enter into an agreement of sale and purchase of land in the area or enter into any agreement that has the effect of granting the use of or right in land in the area directly or by entitlement to renewal for a period of twenty-one years or more unless,

(*b*) the grantor, mortagor or vendor does not retain the fee or the equity of redemption in any land abutting the land that is being conveyed or otherwise dealt with;

(4) An agreement, conveyance, mortgage or charge made in contravention of this section or a predecessor thereof does not create or convey any interest in land, but this section does not affect an agreement entered into, subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with."

[3] *Supra*, footnote 1, at p. 23 (D.L.R.).

[4] Page 6 of the unreported judgment of the Court of Appeal, dated December 10th, 1971, released after the preliminary hearing held on November 15th-17th, 1971.

tion of the approaches available to the court as well as the reasons given for the answers may cast some light on this purpose. It should at least help to clarify what so many lawyers are uncertain of, that is, whether our courts have provided a useful explanation of section 26 to guide conveyancers in their examination of affected titles.

The Conflict and the Power of Control.

The history of the Planning Act's provision for the imposition by a municipal council of subdivision control, and the exceptions to that control, were examined by Schroeder J.A. in delivering the judgment of the Court of Appeal in *Re Forfar and Township of East Gwillimbury et al.*[5] From this examination, he concluded that:

> . . . the legislative trend has been directed towards ever-increasing restrictions being placed upon an owner's use of his land, and it is obvious that s. 26(1) of the Act as it now stands, and as it stood before the 1970 amendment, had for its object the prevention of the unrestricted subdivision of land and had no reference to any particular mode of conveyance. It is the substance rather than the form of the transaction which is relevant.[6]

This last assertion did not prove to be a stumbling block to the court's answers in the *Reference* case, where the court took pains to explain that while the result of a transaction may offend against the policy of the Planning Act, it nevertheless might not contravene it "having regard to the clear words in which the prohibitions of the Act are couched".[7] What was important was not the object of subsection (1) of section 26, but the means used to circumvent the section. In *Re Forfar* "the transaction was bad because it fell squarely within the prohibitory words of the Act".[8] H. Bruce Forfar held approximately twenty acres under a grant to uses. In quick order, he executed a deed to himself in fee simple, a deed to uses to his solicitor's secretary, subject to a general and unlimited power of appointment in himself, and further deeds in which he exercised the power of appointment in favour of himself, his wife, and a company which he controlled. The result of these transactions was that no two adjacent parcels were in the name of any one person or corporation. His wife applied to the Township for a building permit, it was refused, and she sought an order of *mandamus* for the issuance of the permit. Osler J. in

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[5] [1971] 3 O.R. 337, 20 D.L.R. (3d) 377; aff'd. (1972), 28 D.L.R. (3d) 512 *n* (S.C.C.).
[6] *Ibid.*, at pp. 383-384 (D.L.R.).
[7] *Supra*, footnote 1, at p. 34 (D.L.R.).
[8] *Ibid.*, at p. 39.

Chambers granted the order, and the Township appealed. Counsel for the respondent admitted that the steps taken in the transaction followed the method used by the owner of land in *Re Carter and Congram,*[9] an application under the Vendors and Purchasers Act.[10] In that case, Fraser J. held that objections based on the effect of a township subdivision control by-law enacted pursuant to the Planning Act were not valid objections to title. In *Re Carter and Congram* a distinction was drawn between an estate in land, which was a property interest, and an authority to dispose of estates held by others, which was not. The word "fee" in paragraph (b) of subsection (1) of section 26 of the Planning Act was held to be "a legal word of art denoting a specific kind of property interest",[11] and since the grantor had divested himself of all save a power of appointment, he would not retain the fee abutting the land which he proposed to transfer by exercising his power of appointment.

Almost a year after the decision in *Re Carter and Congram,* Kelly J.A. pronounced the decision of the Court of Appeal in *Re Redmond et al. and Rothschild.*[12] All the lands in *Re Redmond and Rothschild* were subject to a subdivision control by-law passed pursuant to section 26 of the Planning Act. The grantor retained a first mortgage on abutting lands, and later the grantee entered into an agreement of purchase and sale with a third party who raised an objection to title on the ground that the earlier conveyance had contravened section 26. Kelly J.A. distinguished the form of a mortgage from its substance as a security interest, and stated that he did not consider:

> . . . that the word "fee" in the section where it is followed by the words "the equity of redemption", is to be given the meaning of the legal estate vesting in the mortgagors.
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> Having in mind the purpose of Part II of the *Planning Act,* and the context of the portions of the Act in which the words appear, it is my opinion that the retention of which the Legislature sought to prohibit by s. 26 was that of the power to dispose of the abutting lands as distinguished from an interest in those lands; "fee" must accordingly refer to such an interest in the abutting lands as confers on the holder thereof the absolute right to dispose of the lands.[13]

The grantor did not retain such an interest, and therefore specific performance of the later agreement of purchase and sale could be enforced. The construction of paragraph (b) of subsection (1) of section 26 in *Re Redmond and Rothschild* was adopted in *Re Forfar.* Schroeder J.A.'s explanation of its appli-

[9] [1970] 1 O.R. 800, 9 D.L.R. (3d) 550.
[10] R.S.O., 1970, c. 478.
[11] *Supra,* footnote 9, at p. 557 (D.L.R.).
[12] [1971] 1 O.R. 436, 15 D.L.R. (3d) 538.
[13] *Ibid.,* at p. 542 (D.L.R.).

cation to the facts of *Re Forfar* raises a question which becomes significant in determining the probable legal effect of certain transactions mentioned in the later *Reference* case.

> I take it to be the view of the members of Court who decided *Re Redmond et al. and Rothschild* that the term "fee" as used in s. 26(1)(b) meant such an estate or interest as was reasonably necessary to accomplish the purpose which the legislators had in view and was not used in its narrow, technical, legal sense. As laid down in *Walsingham's Case* (1573), 2 Plowden 547, 75 E.R. 805, an estate in fee simple is the greatest estate and most extensive interest which a person can possess in land and property, being an absolute estate in perpetuity. *Whether the grant made by H. Bruce Forfar to his solicitor's secretary in which he reserved to himself a general and unlimited power of appointment, in the absence of that reservation, would have conferred upon her the legal title to the property subject to a resulting trust in favour of Forfar* is of no particular significance, because it is abundantly plain in all the circumstances that Forfar had at all material times, dominion over the fee which he might exercise at his option. There is a wide distinction between a title in fee and a power to dispose of property, as under the latter the fee is not in the donee of the power but he has a dominion over it which he is free to exercise as he sees fit. It is against the retention of such power of control over alienation of the property abutting the land conveyed or otherwise dealt with that the prohibitory provisions of s. 26 are aimed.[14]

It is important to remember that *Re Redmond and Rothschild* did not involve a power of appointment, and while *Re Carter and Congram* was mentioned during the argument by one of the counsel concerned, Kelly J.A. made no reference to it in his judgment. His definition of "fee" as "the power to dispose of the abutting lands" did not, therefore, refer specifically to a power of appointment. The definition was paraphrased by Schroeder J.A. in the context of *Re Forfar* as a wide "dominion over the fee which he [the grantor] might exercise at his option". Since the reservation of the power of appointment gave the grantor in *Re Forfar* such dominion or power of control, it was unnecessary to consider whether the grant to uses raised a resulting trust in equity in favour of the grantor. If it did, the grantor would have retained the power of control by operation of law. Thus, the reservation of a power of appointment was merely an instance of retention of dominion or power of control over abutting lands. The wider purpose of the legislature, embodied in the prohibitory provisions of section 26, was to prevent the retention of such power of control, and it is submitted that it is against this wider purpose that the questions and answers in the *Reference* case must be examined.

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[14] *Supra*, footnote 5, at p. 384 (D.L.R.), italics mine.

The Common Law Restraint and Its Object.

An examination of the means used in the statute to effect the object of the legislature casts some light on the difficulties encountered in applying section 26 to various fact situations. A recent study observes that "the common law and equity have been traditionally hostile to restraints on the ability of the owner of an interest [in land] to do what he likes with it".[15] Another writer reminds us that in fact "a substantial portion of the history of real property law consists in the record of various legal devices whereby it was sought to make land inalienable, and of the means whereby the courts thwarted those efforts in order to protect what they deemed to be the larger social good".[16] Section 26 of the Planning Act was an attempt to prevent the unrestricted subdivision of land by imposing conditions on certain transactions involving designated land, and purporting to nullify dispositions which did not comply with the conditions. The latter is the usual result of a breach of a privately imposed valid restraint on alienation which is not followed by a gift over, that is, a disabling as opposed to a forfeiture restraint.[17] It is surprising that comparatively recent social legislation should have attempted to achieve its purpose by employing a device whose validity has been attended by so much uncertainty, especially in Ontario.[18] The enumeration of dispositions made in contravention of section 26 which the section declares not to create or convey any interest in land is reminiscent of the modes of alienation prohibited under the terms of wills designed to keep property in the family, or to restrain improvident dispositions by devisees, or to prevent land from coming into the possession of those whose plans for the land the testator did not approve. The widest of these restraints as to mode prohibited "disposing" of land, a comprehensive term whose use helped obviate[19] an inclination by some judges to permit a devisee to do

[15] Waters, Restraints on Anticipation and on Alienation, a Working Paper prepared for the Ontario Law Reform Commission's Law of Property Project (1971), p. 27.

[16] American Law of Property, Vol. VI (1952), pp. 409-410.

[17] *Blackburn* v. *McCallum* (1903), 33 S.C.R. 65, per Taschereau C.J. at pp. 74-75.

[18] See, for example, discussion in American Law of Property, *op. cit.*, footnote 16, pp. 433-434, 444-445, 471-473.

[19] See, for example, *Re Winstanley* (1885), 6 O.R. 315, where the restraint was "she shall not dispose of the same [a lot] only by will and testament". In *Chisholm* v. *The London and Western Trusts Company* (1896), 28 O.R. 347, the restraint was that the parcels of land "shall not be at their [the testator's sons'] disposal at any time until the end of twenty-five years from the date of my decease. And further, I will that the said parcels of land shall remain free from all encumbrances, and that no debts contracted by my sons . . . shall by any means encumber the same during twenty-five years from the date of my decease". It is important to remember that these restraints are generally found in wills, and the court

indirectly what he could not do directly.[20] An attempt was then made to limit the ambit of section 26 in accordance with the object of the legislation by providing an exemption in paragraph (b) of subsection (1) of section 26. It seems clear that the draftsman's preference for listing the prohibited modes of alienation instead of employing the more comprehensive term "disposing" led to his phrasing the exemption in terms of the prohibited modes of alienation and accordingly to what appears to be a distinction between "fee" and "equity of redemption". Creation of such a distinction is a natural result of repeating the prohibited modes, but is unnecessary if "the retention of power of control over alienation of the property abutting the land conveyed or otherwise dealt with" is what the prohibitory provisions of section 26 are aimed at. Drafting subsection (1) of section 26 as a comprehensive restraint on alienation would not have required the listing of particular modes of alienation, and it was repetition of the list in the exemption which introduced the apparent distinction mentioned above. Kelly J.A. in *Re Redmond and Rothschild* interpreted "fee" as "the legal and equitable estate where there has been no severance of these two estates".[21] This construction enabled the court to come to a decision consistent with the purpose of section 26. It is also consistent with the model of a privately imposed restraint on alienation.[22] A wide prohibition against "disposing"

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must, in interpreting them, attempt to ascertain the intention of the testator. The intention to prohibit alienation *inter vivos* was clear in *Re Winstanley* (per Boyd C. at p. 320), but it was not clear in *Chisholm* that the prohibition was intended to include devising. Note that s. 26 did not prohibit alienation by will.

[20] See *Re Macleay* (1875), L.R. 20 Eq. 186, criticized in *Re Rosher* (1884), 26 Ch. D. 801, and discussion in American Law of Property, *op. cit.*, footnote 16, pp. 472-473.

[21] *Supra*, footnote 12, at p. 543 (D.L.R.).

[22] The unfortunate failure of the courts to examine the wording of s. 26 in terms of this model has led to additional confusion. In *Re Dean and Coyle*, [1973] 3 O.R. 185, an application under the Vendors and Purchasers Act, *supra*, footnote 10, Fanjoy Co. Ct J., decided that the applicant, who had entered into an agreement of purchase and sale, did not need the consent of the committee of adjustment to the sale of her parcel of land, even though she and her husband held an adjacent parcel as joint tenants. He relied on the statement of Kelly J.A. in *Re Redmond and Rothschild* that the word "fee" "must . . . refer to such an interest in the abutting lands as confers on the holder thereof the absolute right to dispose of the lands". Fanjoy Co. Ct J., concluded that "clearly the applicant does not have the right to convey the abutting property by her act alone. Only in conjunction with the other joint owner does she have such a power" (at p. 187). But although Kelly J.A. referred to a single holder of abutting lands, he did not suggest that two or more persons could not have an absolute right of disposal. Such a suggestion would disregard the wife's beneficial interest in the abutting land, and the joint tenant's common law right to alienate. It is submitted that the decision of Cavers Co. Ct J., in *Re Venta Investments Ltd. and Newman*, [1970] 1 O.R. 589, a case involving a vendor who was tenant in common with another in abutting land, is to be preferred.

of land usually includes a prohibition against mortgaging.[23] Mortgaging is more than a matter of giving security: it may also be used by an owner to transfer the beneficial interest in land to a mortgagee through subsequent default in payment.[24] It was a transfer of the beneficial interest through the use of any mode of alienation which testators sought to avoid by the use of disabling restraints. The effect of a long-term lease was not overlooked.[25] The privately imposed restraint was not concerned with the actual terms of a mortgage, only with the possibility of effective absolute alienation by a person taking a beneficial interest in land. Since section 26 appears to follow this model both in the prohibition and exemption subsections, it is the vendor's retention of a beneficial interest in abutting lands in *Re Redmond and Rothschild* that would bring the transaction within the prohibition of subsection (1) of section 26. Kelly J.A. noted that the mortgage in *Re Redmond and Rothschild* continued to be in good standing, and left it at that. There is the possibility of foreclosure or sale either under the contractual power of sale in a mortgage or under the sale procedures provided for in the Mortgages Act.[25a] Examination of the possibility of characterizing the vendor's interest in abutting lands as a beneficial interest rather than merely a security interest was unnecessary in this case since the mortgage was in good standing.

Situations not caught by the model, because those imposing private restraints were not concerned with them, help us to see the limited formal purview of section 26. For example, a land assembly may involve the purchase of a parcel of land where the purchaser, not the vendor, has a beneficial interest in abutting lands.[26] The model does not cover the mortgage back from the purchaser to the vendor because private restraints are concerned only with the possibility of absolute alienation. Here the alienation by way of sale is not prohibited by section 26, and it would be surprising for a testator to allow alienation while prohibiting the devisee from taking a valid mortgage back to help finance the sale. Should the assembly fail, could the assembled lands be broken up again? The model is useful only insofar as section 26 can be characterized as a simple restraint on alienation. Presum-

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See, however, *Re Priamo et al. and H. Harman Leader Co. Ltd.*, [1970] 1 O.R. 591 (Co. Ct) regarding adjacent land held as partnership property.

[23] *In re Rosher, supra,* footnote 20, argues that even a restraint against "sale" should be interpreted as a prohibition against mortgaging, as well as against leasing for a long term.

[24] See American Law of Property, *op. cit.*, footnote 16, p. 472.

[25] *Ibid.*, p. 473.

[25a] R.S.O., 1970, c. 279.

[26] See, for example, *John Spang* v. *Century City Developments Limited et al.*, No. 4918/71 in the Supreme Court of Ontario.

ably the section was intended to be more than that. Its social object was said to be "the prevention of the unrestricted subdivision of land", but unfortunately its form appears to embody only an object to which the courts have traditionally been hostile. In the absence of knowledge of the precise objects of section 26, the courts have no considered legislative guidance on questions such as the permissibility of breaking up assembled land, though a literal interpretation of section 26 may prevent such action.[27]

A Useful Approach to the Reference.

While the model of a privately imposed restraint on alienation provides a basis for answering some questions of interpretation of section 26, it cannot clarify the policy objectives of the legislation. Examination of the arrangements used by conveyancers to circumvent section 26 must begin with analysis of the legal principles which govern these arrangements. It may be that such analysis will find these arrangements substantially ineffective in avoiding section 26 viewed as a simple restraint, as well as in not complying with what may be the wider object of the section. A useful guide to the examination of these arrangements has been provided by the Court of Appeal. In *Re Forfar,* Schroeder J.A. compared the case before him with *Re Carter and Congram*:

> In the *Carter and Congram* case, Fraser J., gave the word "fee" in s. 26(1) its restricted technical meaning. It does not appear whether the grantee to uses in that case was a bare trustee for the vendor Carter, or if the relationship between the grantor and the grantee to uses was of a nature which supported the right of the grantor to claim the exclusive beneficial interest in the property in question or power to control the disposition of the fee apart from the unlimited power of appointment reserved to himself.
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> In the present case the grantee to uses was, as stated, the legal secretary of H. Bruce Forfar's solicitor and she paid only a nominal consideration for the transfer, if indeed the consideration was paid at all. The evidence on this point is somewhat shadowy.[28]

The *Reference* case involved situations where an unlimited power of appointment was absent. The substantial question in the *Reference* was whether the situations posed to the court disclosed a right to control the disposition of abutting fees. Schroeder J.A.'s remarks in *Re Forfar* indicate that in the absence of a power of

[27] The Ontario Branch of the Canadian Bar Association has recommended the repeal of section 29 or, in the alternative, several "minimal exemptions". One of these is "that a historical parcel of land separate as to ownership as of a particular date should always be capable of being dealt with as a separate parcel notwithstanding that the ownership may have been amalgamated subsequent to that date." Ontario Bar News, March, 1973.

[28] *Supra,* footnote 5, at pp. 380-381 (D.L.R.).

appointment in the grantor, the court will be concerned to ascertain whether the grantor retains control over abutting fees in two situations. The first is where, on a conveyance of land, a presumption of resulting trust of the entire beneficial interest arises in favour of the grantor by operation of law. On a voluntary grant to uses ("unto and to the use of X") there was a conflict of opinion among the writers on the question of whether equity would raise a resulting trust in favour of the grantor, by analogy with the doctrine of resulting use which obtained before the Statute of Uses, 1535. The preponderant opinion was that a resulting trust would arise.[29] Resulting trusts will not be excluded merely by the presence of nominal consideration.[30] The second is where the conveyance to the grantee is made pursuant to an agreement which expressly or impliedly constitutes the grantee a mere nominee, and leaves with the grantor the power to control the disposition of the fee. A useful approach to the substantial question posed in the *Reference* must therefore take into account the model of a privately imposed restraint on alienation, the guidelines suggested by Schroeder J.A. in *Re Forfar*, and the incidental questions of law raised by the hypothetical situations presented to the court and the questions which proceed from those situations.

Assumptions

1. That all parcels of land referred to were and continued to be subject to The Registry Act, being chapter 348 of the Revised Statutes of Ontario, 1960, as amended;
2. That the title of A in each case is not in dispute but is assumed to be valid;
3. That no consent under Section 26 of The Planning Act was given in respect of any transaction.
4. That subsections 1 and 4 of Section 26 of The Planning Act, as re-enacted by subsection 1 of Section 1 of The Planning Amendment Act, 1960-61, and subsequently amended before the dates mentioned in the situations hereinafter described are to be considered in relation to each situation.
5. That, for the purpose of simplicity, each situation, as hereinafter described, involves the division of one parcel of land into two smaller parcels only.

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[29] See Cullity, Property Rights During the Subsistence of Marriage, in D. Mendes da Costa, ed., Studies in Canadian Family Law (1972), Vol. 1, p. 179, at pp. 187-188. The controversy is thoroughly canvassed in Waters, The Doctrine of Resulting Trusts in Common Law Canada (1970), 16 McGill L.J. 187, at pp. 200-202. His conclusion as to the preponderant view among the writers is at p. 201. See also Megarry and Wade, The Law of Real Property (3rd ed., 1966), pp. 454-455; and *Neazor* v. *Hoyle* (1962), 37 W.W.R. 104, 32 D.L.R. (2d) 131, at pp. 137-141 (Alta S.C., App. Div.).

[30] Megarry and Wade, *op. cit.*, *ibid.*, p. 455. In *Niles* v. *Lake*, [1947] S.C.R. 291, 2 D.L.R. 248, the presence of a seal did not prevent appellants from showing that there was no consideration.

Situation 1

On January 2, 1969, A, as grantor, executed a deed conveying a parcel of land, Greenacre, to B, as grantee, and the deed was registered on that date. Greenacre was not within an area of subdivision control on that date.

On January 9, 1969, one deed purporting to convey the North half of Greenacre from B to C, and another deed purporting to convey the South half of Greenacre from B to D were executed and registered. Both C and D were trustees or agents for B, or the same beneficial owner.

On January 16, 1969, subdivision control was made to apply to Greenacre.

On January 23, 1969, a deed purporting to convey the North half of Greenacre from C to E was executed and registered.

On January 24, 1969, a deed purporting to convey the South half of Greenacre from D to F was executed and registered.

Both E and F were bona fide purchasers for value.

Question No. 1:

In Situation 1, did subsection 4 of Section 26 of The Planning Act prevent the operation of either of the last two deeds?

The court states that in conveying the north half of Greenacre to C and the south half to D "B no doubt retained control over his trustees or agents, but not over the land . . . ".[31] We are entitled to assume that prior to the conveyances of January 23rd and 24th there was nothing to prevent B, the beneficial owner, from controlling Greenacre in the hands of his nominees.[32] This analysis follows from the questions raised by Schroeder J.A. in *Re Forfar,* though he found it unnecessary to pursue them in the circumstances. If C and D were agents for B, the agency agreement would confirm that these nominees were not intended to take beneficially, and the resulting trust in favour of B would leave B with the power of control over Greenacre. The suggested distinction between a right *in personam* and one *in rem* is meaningless[33] if the criterion is a power of control. In retaining this power, the position of B is similar to that of the grantor in *Re Forfar.* E and F's lack of notice of the fact that C and D were nominees of B is not material.[34] The statute plainly states that a

[31] *Supra,* footnote 1, at p. 24 (D.L.R.).

[32] This seems to be recognized in the Minister's advice that he will not validate affected dispositions under s. 29a of the Act where the land is still held by nominees: see footnote 34, *infra.* S. 29a was added to the Act by The Planning Amendment Act, 1973, s. 7, which was proclaimed in force on January 9th, 1971.

[33] See Hanbury, Modern Equity by R. H. Maudsley (9th ed., 1969), pp. 16-17.

[34] Whatever the criteria the Minister chooses to apply, s. 29a of the Act empowers the Minister to validate dispositions only when contraventions occurred before March 19th, 1973, the date the opinion in the *Reference* was given. In The Toronto Star of December 5th, 1973, the then Attorney General is said to have agreed that the *Reference* "had not settled the

conveyance which contravenes section 26 does not create or convey any interest in land. For the same reason, registration cannot give validity to the convenyances to E and F.[35] A court may understandably be more sympathetic to a purchaser who knew nothing of an attempt to avoid subsection (1) of section 26 of the Planning Act than to an applicant for a building permit who had acted in concert with her husband to circumvent the provisions of the Act. But the plain words of the statute must be given effect if they are capable of only one meaning.[36]

Situation 2

On January 2, 1969, A, as vendor, entered into an enforceable agreement to sell a parcel of land, Greenacre, to B, as purchaser. Greenacre was not within an area of subdivision control on that date.

On January 9, 1969, one deed purporting to convey the North half of Greenacre from B to C, and another deed purporting to convey the South half of Greenacre from B to D were executed and registered.

Both C and D were bona fide purchasers for value.

On January 16, 1969, subdivision control was made to apply to Greenacre.

On January 23, 1969, a deed purporting to convey Greenacre from A to B was executed and registered.

Question No. 2:

In Situation 2, did subsection 4 of Section 26 of The Planning Act frustrate the operation of the doctrine of feeding the estoppel, so as to preclude the conveyance of interests in Greenacre to C and D?

If we follow the suggested model for section 26, this situation would not fall afoul of the section. Since on January 2nd, A had agreed to sell to B, and B's interest had been granted to C and D on January 9th, everything necessary for effective alienation in equity had been done by A and B before the imposition of subdivision control. In *Township of Nepean* v. *Leikin*,[37] the court observed that rights were acquired and obligations incurred as a result of an agreement of purchase and sale, and that these survived repealing legislation which was not made clearly retroactive. *Re Redmond and Rothschild* also dealt with the significance of the beneficial interest, as did *229822 Realty Ltd.* v. *Reid, et al.*,[38] which applied

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specific problems of the checkerboard situation", but "people might have taken action as a result of the Appeal Court answers, and transactions made after that date would not be validated by special order".

[35] An ineffective conveyance does not become good simply by registration, though a grantee under a good conveyance which is unregistered may be deprived of his estate through the registration of a second conveyance of the same land, which, until registered, is inoperative because the fee is in the first purchaser. See Armour, Titles to Real Property in Ontario (4th ed., 1925), pp. 94-95. See also Falconbridge, The Law of Mortgages of Land (3rd ed., 1942), p. 147: "Registration is not a panacea."

[36] See the *Reference, supra,* footnote 1, at p. 21 (D.L.R.).

[37] [1971] 1 O.R. 567, 16 D.L.R. (3d) 113 (C.A.).

[38] [1973] 1 O.R. 194, 30 D.L.R. (3d) 542 (C.A.).

Re Redmond and Rothschild. All of these cases were referred to in the *Reference,* but neither they nor the *Reference* dealt with the significance of an effective transfer of the beneficial interest in frustrating the usual aim of the restraint device used in section 26 to effect the purpose of the legislature.[39] Had they done so, the court might have found unnecessary its discussion of certain other doctrine.

Question No. 3:

Would the answer to Question No. 2 be different if the instrument entered into on January 2, 1969 had been an option which was not exercised by B until after January 16, 1969?

If an option to purchase is an equitable interest in land, then the object of a privately imposed restraint will again have been frustrated before the imposition of subdivision control.

Question No. 4:

Would the answers to Questions Nos. 2 and 3 be different if C and D had been trustees or agents for B or for the same beneficial owner instead of bona fide purchasers?

If C and D were nominees of B, then after the imposition of subdivision control we may assume that there is nothing to prevent B from controlling Greenacre in the hands of his nominees. The above comments on Question Number 1 therefore apply.

Situation 3

On January 2, 1969, A, as grantor, by a deed purported to convey the North half of Greenacre to B, and by the same deed purported to convey the South half of Greenacre to C, and the deed was registered on that date. Both B and C were bona fide purchasers for value. Subdivision control applied before January 2, 1969 and continued to apply to Greenacre after that date.

Question No. 5:

In Situation 3, did subsection 4 of Section 26 of The Planning Act preclude the conveyance of interests in Greenacre to B and C?

The exception in paragraph (b) of subsection (1) of section 26 is directed to what a vendor does not retain, rather than what he is permitted to convey to a purchaser. Thus, where no interest in or power of control over abutting land is retained, the exception fails to carry out the section's object of preventing the unrestricted subdivision of land. The effect of a 1971 amendment[40] is to prohibit simultaneous conveyances. However, in maintaining the inappropriate structure of what is now section 29, recent

[39] Apparently *Township of Nepean* v. *Leikin* was not cited in *Capital Quality Homes* v. *Colwyn Construction Ltd.*, [1973] 3 O.R. 651, nor did the court deal with the important consideration that a restraint is usually intended to prevent alienation of a beneficial interest.

[40] The Planning Amendment Act, 1971, S.O., 1971, c. 2, s. 1(1), which added ss. (5a) to s. 29.

amendments have done nothing to clarify the precise objects of the section. For example, the breaking up of assembled lands is still not dealt with expressly.

Situation 4

On January 2, 1969, A, the owner of Greenacre, as mortgagor, executed a mortgage on the whole of Greenacre in favour of B, as mortgagee, and the mortgage was registered on that date. Subdivision control applied before January 2, 1969 and continued to apply to Greenacre after that date.

On January 9, 1969, B, the mortgagee, executed a partial discharge of mortgage, discharging the South half of Greenacre from the mortgage, and the partial discharge was registered on that date.

Subsequently, after apparent default by A in making repayment in accordance with the provisions of the mortgage, B obtained and registered before 1971 a judgment in foreclosure under which A's equity of redemption in respect of the North half of Greenacre was absolutely debarred and foreclosed.

Question No. 6:

In Situation 4, did subsection 4 of Section 26 of The Planning Act preclude the operation of Section 70 of The Registry Act, (R.S.O. 1960, c. 348, as amended) to effect a reconveyance of the legal estate in the South half of Greenacre from B to A through the registered partial discharge?

Question No. 7:

In Situation 4, did subsection 4 of Section 26 of The Planning Act preclude the foreclosure of A's equity of redemption in respect of the North half of Greenacre?

Question No. 8:

Would the answers to Questions Nos. 6 or 7 be different if B had enforced the mortgage in respect of the North half of Greenacre by proceeding under either the contractual power of sale in the mortgage or under the sale procedures in The Mortgages Act, instead of proceeding with an action for foreclosure?

Paragraph (b) of subsection (1) of section 21 is ineffective here for the reason given in connection with Question Number 2. Restraints usually prohibit mortgaging because mortgaging may be used as a device to transfer the beneficial interest in land, which is precisely what was done here with the North half of Greenacre. The usual restraint would be ineffective where a mortgage has already been executed.

Question No. 10:

Would the answer to any of the preceding questions be different if the provisions of Section 26 of The Planning Act, as re-enacted by Section 1 of The Planning Amendment Act, 1970 and amended by Section 1 of The Planning Amendment Act, 1971 had been applicable as of January 1, 1969?

Since it was posited that subdivision control was in effect before any of the transactions referred to in Questions Numbers

6, 7 and 8, province-wide subdivision control would not affect the answers to these questions. The legislature's approach to some of the devices mentioned in the *Reference,* including the partial discharge of mortgage, has been to deal with them specifically and to deem the person dealing with the lands to retain an interest in or power over abutting land.[41] It has thus maintained the statutory emphasis on retention, and the section's silence on precise objects. This policy has made the section increasingly grotesque in appearance while it awaits its quietus in the form of legislation designed to deal with increasingly urgent social needs.

How Useful is the Reference?

Question No. 9:

> Would the answer to any of the preceding questions be different if the court were satisfied that the division of ownership as outlined in any of the situations described above was a scheme or part of a scheme devised to circumvent Section 26 of The Planning Act, whether or not there were a multiplicity of divisions of ownership?

The court's answer to this question, like its statement that "the words used [in s. 26(1)(b)] are now plain and unambiguous",[42] and its interpretation of section 10 of the Interpretation Act,[43] must be seen in light of the unenviable position in which the Court of Appeal was placed by the Ontario Government's decision to refer these questions to the court pursuant to section 1 of The Constitutional Questions Act[44] at a time when the government was about to call an election.[45] The court held a preliminary hearing in order to determine whether the questions were properly referrable to the court under the Act and whether the questions were such as should be answered by the court, and concluded that the Lieutenant Governor in Council had the power to refer the questions. The court was, however, concerned that other courts might face "all sorts of problems" regarding the application of the court's opinions, arrived at on the basis on given facts, to actual cases involving similar or analogous circumstances. This concern was voiced during the preliminary hearing by the member of the court who, it is suggested in one newspaper account, later wrote the opinion of the court in the *Reference* case.[46] The court

[41] In addition to the amendment referred to in footnote 40, *ibid.,* see The Planning Amendment Act, 1973, s. 6, which was given Royal Assent on December 17th, 1973. S. 6 added ss. (5b) (effect of partial discharge of mortgage) to s. 29.

[42] *Supra,* footnote 1, at p. 21 (D.L.R.).

[43] R.S.O., 1970, c. 225.

[44] R.S.O., 1970, c. 79.

[45] See The Toronto Star, December 16th, 1971.

[46] See The Toronto Star, November 18th, 1971 and March 23rd, 1973. The reference is to Schroeder J.A., who delivered the judgment of the court in *Re Forfar, supra,* footnote 5.

decided not to proceed to hear the questions until the *Forfar* case had been decided by the Supreme Court of Canada. The refusal to proceed was said at the time to indicate the court's refusal to relieve the government of the need to deal with a political embarrassment.[47] However, the delay answered the government's need well enough. It could not dispel the concern of the court regarding the effect of the answers on private rights. This concern has been expressed from time to time by the courts, and has been criticized on the ground that "it is a difficulty familiar to the common law system. . . . The real fault lies, not in the initial reference decision having possible implications for private individuals, but rather in the misplaced fidelity with which such decisions are subsequently followed".[48] Courts settle disputes on the basis of the facts before them. Settlement of the particular dispute is the primary benefit of the decision: the secondary benefit is any guidance it may provide (a) to the arrangement of future transactions or (b) to the resolution of other disputes. No actual dispute was before the court in the *Reference* case. The situations and questions posited were prepared from an examination of various devices whose histories were obtained from the Registry Office. There was no attempt to obtain additional facts which might be relevant to individual cases. As to guidance for the resolution of disputes, the government's immediate concern was to deal in some fashion with the complaints of purchasers of affected lands, many of whom were refusing to make mortgage payments pending clarification of their titles. The court's opinion may have given these purchasers some sense of security,[49] but its ultimate usefulness depends on whether subsequent purchasers and lenders are prepared to rely on the reasoning of the court. That in turn depends on the caution of solicitors, who must consider not only the significance of the particular facts of their case, a common and familiar difficulty, but in addition the essential conflict of the *Reference* with the approach taken in *Re Forfar*. It is this additional difficulty which raises a serious doubt as to the ultimate usefulness of the *Reference*. Had the court in the *Reference* been prepared to undertake an analysis of the device used in section 26 to effect the purpose of the legislature, it could

[47] See The Toronto Star, December 16th, 1971.

[48] Strayer, Judicial Review of Legislation in Canada (1968), pp. 134 and 201.

[49] It is interesting to note that following the opinion in the *Reference* case one of the companies whose land sales were affected by the opinion sent a "good news" letter to their clients informing them that in the opinion of the company's solicitors, the "judgment" of the Court of Appeal "fully validates all land transfers executed by our Company to our clients". The bulletin, dated April 19th, 1973, was headed "Court Decision Clears Your Land Title".

have provided useful guidelines for the examination of affected titles, and the clarification of error which should precede suggested legislative reform.

When it finally came to consider the questions, there were at least three approaches for the court to consider.

1. It could attempt to pursue the object of section 26, which involved adopting the premise that it was substance rather than form which was relevant. This had been the approach of the court in *Re Forfar*. But some of the questions involved innocent third parties, which was not the case in *Re Forfar*.

2. It could pursue the consequences of the model of a restraint on alienation used in section 26. This approach involves recognizing the draftsman's unhappy choice of an inappropriate device for carrying out the purposes of the Act, and offers a logical basis for answering the questions submitted to the court. By recognizing this unfortunate choice, it also cautions the legislature against using this device as a basis for further amendments. The court did not take the above approach, and the legislature has since enacted another amendment to the Planning Act which continues the use of this device.[50]

3. It could adopt a formalistic approach, look to the "clear words in which the prohibitions are couched", and concentrate on form rather than substance.

It is submitted that in choosing the last course, the court sought to do the best it could for innocent third parties. The policy of the Act does not govern: the conveyancer's ingenuity is rewarded. Spurious transactions are invalid, but this offers little solace to solicitors for future purchasers of affected lands and lenders. Are solicitors for these parties entitled to rely on the court's opinions regarding the use of nominees, the application of the doctrine of *bona fide* purchaser for value without notice, or the argument viewed with some sympathy, though not resolved by the court, regarding the possible protection afforded by the Registry Act? Not necessarily, due to "the well recognized principle that any decision of the court on such a reference has no binding force even upon the Court which renders it". The court's dilemma may be seen in its analysis. Unlike the English Interpretation Act,[51] section 10 of the Ontario Interpretation Act provides that all provisions shall be deemed remedial. Yet the court makes no use of this provision. The English Law Commission's *Report on the Interpretation of Statutes* points out that although similar provisions have been enacted in a number of Commonwealth

[50] See The Planning Amendment Act, 1973, s. 6, which added ss. (5b) (effect of partial discharge of mortgage) to s. 29.

[51] Interpretation Act, 1889, 52 & 53 Vic., c. 63.

countries, they "do not appear to have had any very marked effect in practice on the interpretation of statutes".[52] The precise objects of the legislation must still be ascertained; and since the court is no longer content to rely on the "obvious" object of section 26, it does not follow the first of the three approaches suggested above. Its emphasis on plain and unambiguous words resulting from prior decisions is consistent with the court's approach, but is otherwise indefensible. Words take meaning from their context, and are not clear when the context is not clear. Section 26 can be properly understood only in light of the object of the model of a privately imposed restraint on alienation, and the words of section 26 are meaningful only in relation to that model. Once the model is used, the location of the beneficial interest in land becomes a useful guide to the solution of questions posed in the *Reference*. Regrettably, the court did not provide a useful rationale for the application of a defective statutory device. The court has not raised the legal profession in the estimation of the public by approving the devices of ingenious conveyancers, particularly when it is the public who will continue to be affected by the continuing uncertainty attending the numerous transactions involved. One could, of course, praise the court for attempting to help innocent purchasers, and lay the blame at the feet of the Ontario government, which one newspaper editorial described as "consistent in its evasion of responsibility to thousands of people who bought country lots in recent years".[53] Certainly government reluctance to take any action in the face of legal advice, obtained in the course of a 1969 government of Ontario investigation, which warned of the probable invalidity of a great many titles to land being sold in the province,[54] is open to criticism, as is the solution offered by recent legislation which allows the Minister to validate dispositions where local municipal councils have passed by-laws requesting the Minister to make such orders.[55] Courts, however, do not have available to them the expedients of the politician, while in matters of public interest they do not escape publicity. The "legitimate ingenuity of conveyancers opera-

[52] Law Com. No. 21, Scot. Law Com. No. 11, at p. 20. See the *Reference, supra,* footnote 1, at p. 40. (D.L.R.).

[53] The Toronto Star, December 8th, 1973.

[54] The Toronto Star of September 14th, 1971 contains what are stated to be extracts from "the last and most comprehensive" of three opinions filed with the Department of Financial and Commercial Affairs.

[55] The Planning Amendment Act, 1973, s. 7, which added s. 29a to the Act. See The Toronto Star, December 5th, 1973, and the critical editorial in The Toronto Star of December 8th, 1973. Validating legislation is not new in this area. See The Planning Amendment Act, 1960-61, S.O., 1960-61, c. 76, s. 1(2); The Planning Amendment Act, 1967, S.O., 1967, c. 75, s. 10(3).

ting under 20th century conditions"[56] has been shown to be a matter of concern to the public, and the press has reflected that concern. The glare of publicity brings into question both the ethics of the legal profession and the role of the courts as guide. In a newspaper account of *Re Forfar,* Spence J. is reported to have said it would have been unwise to base a person's land purchase on the ruling of a single court case. "If John Brown chooses to rely on a single court judgment that holds valid a scheme that is avowedly worked out to go around a statute, don't you think he was pretty bold?"[57] The *Reference* case has not convincingly answered his question, either for lawyers or the public they serve.

BERNARD STARKMAN*

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CONFLICT OF LAWS—JURISDICTION—SERVICE EX JURIS—PLACE OF TORT.—The question whether a court will assert jurisdiction over a non-resident tortfeasor has been a vexed one. A rule of court common to England and to several Canadian provinces is that an order for service outside the jurisdiction will be granted when the action "is founded on a tort committed within the jurisdiction". That rule gives rise to difficult questions of interpretation in cases in which acts or omissions in jurisdiction A have caused injury in jurisdiction B. The decision of the Supreme Court of Canada in *Moran et al* v. *Pyle National (Canada) Ltd.*[1] is an important chapter in the history of those questions.

The rule had previously been before the court in *C.A.P.A.C.* v. *International Good Music, Inc., et al.*[2] There it was alleged that the defendant, from its American television transmitter, had communicated, by television programmes beamed at Canada, musical works in which the plaintiff had copyright.
Martland J., speaking for the court, said:[3]

[56] Per Laskin, J.A. in *Re Sutherland and Volos and Lebopal Realty Ltd.,* [1967] 1 O.R. 611, 62 D.L.R. (2d) 11, at p. 20, referred to by the court in the *Reference, supra,* footnote 1, at p. 38 (D.L.R.).

[57] The Globe and Mail, October 13th, 1972, referred to in a case comment by H. R. Nathan on *Re Forfar,* in (1973), 11 Osgoode Hall L.J. 335, at p. 340.

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[1] [1974] 2 W.W.R. 586.

[2] [1963] S.C.R. 136.

[3] *Ibid.,* at p. 143.

> I have not formed, and would not, at this stage of the proceedings, wish to express, an opinion as to whether or not, assuming as established the allegations contained in the statement of claim, the appellant has a good cause of action against the respondents, but I am satisfied that, on the basis of those allegations and the other material which was before the learned President, the appellant has got "a good arguable case". To me it seems arguable that a person who has held himself out to advertisers as being able to communicate, by means of his American television transmitter, with some 1,000,000 persons in British Columbia, if he transmits musical works, of which the appellant has the Canadian copyright, to viewers in Canada who receive such programmes, has thereby communicated in Canada such musical works by radio communication, within the provisions of the Copyright Act, R.S.C., 1952, c. 55. The purpose of this action is to determine that very legal point and, in my opinion, it should not be determined at this stage of the proceedings, but ought to be tried.

The basis for the judgment appears to be that the principal issue in the action was the same as the issue in the application, namely, whether the works had been communicated in Canada, and that, there being a good arguable case, the matter should not be disposed of in the interlocutory application.

In a later decision, the court refused leave to appeal from the decision of the Appellate Division of the Supreme Court of Alberta in *Town of Peace River* v. *British Columbia Hydro and Power Authority*.[4] The majority of the Appellate Division refused to set aside an order for service *ex juris* in a case based on allegations that interference with the flow of a river in British Columbia, the upstream jurisdiction, caused injury in Alberta, the downstream jurisdiction. They held that the action was based upon a tort committed in Alberta, and they applied the *C.A.P.A.C.* case.[5] Dickson J., who delivered the judgment of the court in the *Moran* case,[6] did not refer to the *C.A.P.A.C.* and *Peace River* cases.

In the *Moran* case, a deceased electrician employed by a company was fatally injured while removing a spent light bulb manufactured by the defendant. The accident occurred in Saskatchewan, and, though the judgment does not expressly say so, it appears likely that the deceased was resident in that province. The widow and the children sued in Saskatchewan alleging that the accident was caused by the negligence of the defendant in the manufacture and construction of the light bulb and in failing to provide an adequate system of safety checks to prevent its product containing faulty wiring from leaving its plant, or from being distributed or sold or used. The defendant did not carry on business in Saskatchewan and had no property, salesmen, or agents in Saskatchewan.

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[4] (1972), 29 D.L.R. (3d) 709, [1972] 5 W.W.R. 351.
[5] *Supra*, footnote 2.
[6] *Supra*, footnote 1.

It sold all its products to distributors and none directly to consumers. The plaintiffs obtained an order for service outside the jurisdiction. The order was set aside by the Saskatchewan Court of Appeal[7] but was restored by the Supreme Court of Canada. The sole issue before the Supreme Court was "whether the tort alleged was committed within the Province of Saskatchewan".

The judgment does not attach importance to the precise wording of the rule of court. It uses the phrase "was committed"[8] and the phrase "to have occurred"[9] interchangeably. It discusses the case of *Distillers Co. (Bio-chemicals) Ltd.* v. *Thompson*[10] as if that case involved the same considerations, though the question in the *Distillers* case was whether the cause of action arose in New South Wales rather than whether a tort was committed in New South Wales. The task to which the judgment addressed itself is "the task of determining the situs of the tort". The court of last resort having spoken, there is no point in further agitating the argument that "to commit" is equivalent to "to perform" and (unlike "to occur") is inseparable from an actor who "commits" or "performs". The important thing is to determine just what the court has decided and what will be the effects of the decision.

The court decisively rejected what it referred to as the "place of acting" theory, that is, the theory that the tort was committed at "the place where the original act of the defendant which caused the final damage occurred". If the defendant acts in state A and the plaintiff suffers injury in state B, "the tort could reasonably for jurisdictional purposes be said to have occurred in both states or, on a more restrictive approach, in neither state. It is difficult to understand how it can properly be said to have occurred only in state A".[11] "For myself, I have great difficulty in believing that a careless act of manufacture is anything more than a careless act of manufacture. A plaintiff does not sue because somebody has manufactured something carelessly. He sues because he has been hurt. The duty owed is a duty not to injure."[12] There is no tort until there is an injury, and therefore there is no tort committed in state A. These propositions dispose of a series of English and Canadian cases where orders for service outside the jurisdiction have been refused on the grounds that the defendants' actions were performed outside the territorial jurisdiction of the court.

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[7] [1972] 5 W.W.R. 456, 30 D.L.R. (3d) 109.
[8] *Supra*, footnote 1, at p. 589.
[9] *Ibid.*, at p. 590.
[10] [1971] A.C. 458, [1971] 1 All E.R. 694.
[11] *Supra*, footnote 1, at p. 590.
[12] *Ibid.*

The court considered at length the decision of the Judicial Committee of the Privy Council in the *Distillers*[13] case. There, the defendants' product, which contained thalidomide, was sold to the plaintiff's mother in New South Wales. The question before the court was whether the cause of action was one which arose within New South Wales so as to give jurisdiction under New South Wales legislation over a non-resident defendant. The Judicial Committee held that it did.

The Judicial Committee considered three theories.[14] The first theory was that "the cause of action must be the whole cause of action, so that every part of it, every ingredient of it, must have occurred within the jurisdiction". The Judicial Committee ruled out this theory on the grounds that it was "too restrictive for the needs of modern times". Dickson J. characterized it as "draconian". The second theory was "that it is necessary and sufficient that the last ingredient of the cause of action, the event which completes the cause of action and brings it into being, has occurred within the jurisdiction". The Judicial Committee rejected this theory. "The last event might happen in a particular case to be the determining factor on its own merits, by reason of its inherent importance, but not because it is the last event." The third theory is "that the act on the part of the defendant, which gives the plaintiff his cause of complaint, has occurred within the jurisdiction". The Judicial Committee thought that this rule is "inherently reasonable, as the defendant is called on to answer for his wrong in the courts of the country where he did the wrong". The Judicial Committee, however, refrained from expressing an opinion about the case where the defendant was negligent in country X and the injury occurred in country Y. In the *Distillers* case, the Judicial Committee did not have to express that opinion, because the defendant's negligence took place in New South Wales. It consisted of the failure to warn the plaintiff's mother of the danger from the drug.

What Dickson J. derived from the *Distillers* case, however, was that "Lord Pearson . . .[15] would seem to be moving toward a form of 'real and substantial connection' test." He said:[16] "consideration of the second theory was concluded with this observation: 'the right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question: where in substance did this cause of action arise?' " He added: "As I understand it, their Lordships rejected any mechanical

[13] *Supra,* footnote 11.
[14] *Ibid.,* passim.
[15] *Ibid.,* at p. 700.
[16] *Supra,* footnote 1, at p. 597.

application of the 'last event' theory in favour of a more flexible, qualitative and quantitative test."[17] He also stated:[18]

> Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the *Distillers* case and again in the *Cordova* case[19] a real and substantial connection test was hinted at. Cheshire, 8th ed., p. 281, has suggested a test very similar to this: the author says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties.

This last passage appears to contain the basic reasoning upon which the decision was based. There should be no arbitrary rule, and in particular no "place of acting" or "place of harm" rule. A tort occurs either where there is a "real and substantial connection" or in any country which is substantially affected by what the defendant did and the law of which is likely to have been reasonably contemplated by the parties.

Dickson J. then went on, apparently referring to the "real and substantial connection test":[20]

> Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.

The element included in this test which would not be included in a mere "place of harm" test is that the manufacturer must be taken to have contemplated the use of the goods in the territorial jurisdiction within which the consumer was injured. This element appears from the stipulation that the product "enters into the normal channels of trade" and that "it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it". The rule is stated again in a succeeding passage:[21]

> By tendering his products in the market place directly through normal distributive channels, the manufacturer ought to assume the burden of

[17] *Ibid.*
[18] *Ibid.*, at p. 598.
[19] *Cordova Land Co. Ltd.* v. *Victor Bros. Inc.*; *Cordova Land Co. Ltd.* v. *Black Diamond S.S. Corp.*, [1966] 1 W.L.R. 793.
[20] *Supra*, footnote 1, at p. 598.
[21] *Ibid.*

> defending his products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.

Presumably the specific rule to be applied to a case of careless manufacture is only a particular application of the "real and substantial connection test". In other cases, the particular rule might be different. Even in the case of careless manufacture the specific rule merely sets out circumstances under which a court may assume jurisdiction by granting an order for service outside the jurisdiction; it does not say that there are no other circumstances under which it may do so. Indeed, if the specific rule enunciated in the judgment exhausts all cases of careless manufacture in which a court should take jurisdiction, it is somewhat "inflexible", though rather less "arbitrary" than the "place of acting" and "place of harm" rules. In order to forecast the future development of the "real and substantial connection" test, it is probably useful to consider whether the policy considerations behind the service *ex juris* rule as interpreted by the judgment can be identified.

A "real and substantial connection" test is more often thought of in connection with the choice of law than in connection with the choice of forum.[22] It might be thought that it would be better to have an action tried in the forum whose law is being applied, and that this is a reason for using a test for choice of forum similar to one which might be used for choice of law. It seems unlikely that this is a valid reason. For one thing, the judgment recognizes that "the rules for determining situs for jurisdictional purposes need not be those which are used to identify the legal system under which the rights and liabilities of the parties fall to be determined".[23] For another, while it may be somewhat more difficult for a court to apply the law of another territorial jurisdiction, it is by no means impossible for it to do so, and indeed all Canadian legal systems require it to do so upon occasion.

Another policy reason might be the desirability of elegance. The judgment reflects a desire to avoid "any arbitrary set of rules". However, a desire for elegance would not have produced the service *ex juris* rules in the first place and seems to be too flimsy a justification for the substantial intellectual effort involved in the judgment.

It may be thought that any court is likely to have a bias in favour of taking jurisdiction, and that this bias, rather than any

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[22] See the discussion of Lown, A Proper Law of Torts in the Conflict of Laws (1974), 12 Alta L. Rev. 101.

[23] *Supra,* footnote 1, at p. 589.

substantial policy, would cause the court to assume jurisdiction. This hypothesis would not explain the number of decisions discussed in the judgment where jurisdiction was rejected, including the decision of the Saskatchewan Court of Appeal in the *Moran* case itself. It would not explain, either, the decision of the Supreme Court of Canada which could not be said to have any bias in favour of extending the jurisdiction of the Saskatchewan courts at the expense of the Ontario courts which were the alternative forum.

In order to get at the policy reason, it seems better to look at what the service *ex juris* rule actually does and at the actual effect of the decision under discussion. In the absence of the rule,[24] jurisdiction "depends upon the presence of the defendant within the territorial limits of the court or upon the voluntary submission of the defendant to the authority of the court". Unless he thought that he could entice the defendant into another jurisdiction, the plaintiff would therefore have to sue in the jurisdiction in which the defendant was to be found. Such a course of action is likely to involve a great deal of trouble and expense, and the effect in many cases would be to deprive the plaintiff of a remedy which it was within his power to pursue. It seems likely that the policy of the rule and of the courts (particularly as exemplified by the judgment under consideration) is to allow the plaintiff an opportunity to obtain relief. Indeed, the judgment quotes from the judgment in the *Distillers* case as follows:[25]

> The defendant has no major grievance if he is sued in a country where most of the ingredients in the cause of action against him took place. In such a case, if the first theory were accepted, *the plaintiff, if lacking time and money for following the defendant to the defendant's country and suing him there, would be deprived of any remedy.*

I think that it may safely be assumed that this is the basic policy reason behind the service *ex juris* rule under consideration.

It might be useful to consider one or two possible variations of the *Moran* case. Suppose, for example, the deceased himself had bought the light bulb in Saskatchewan, but, instead of using it there, had taken it with his personal effects in the course of moving his residence to Alberta, where the accident occurred. Would the court hold that the Alberta courts should make an order for service *ex juris*? It will be remembered that one element in the test laid down in one statement of the test is that the forum is the "one that he (the manufacturer) reasonably ought to have had in his contemplation when he so tendered his goods", or that "it is reasonably foreseeable that the product would be used or

[24] *Ibid.*
[25] *Ibid.*, at p. 596. Emphasis added.

consumed where the plaintiff used or consumed it". Upon these suggested facts, nothing but the injury would have occurred in Alberta, but the plaintiff would be resident there, and it would suit his exigencies better to let him sue there. However, his right to sue there would be dependent upon a court finding that it was reasonably foreseeable to the defendant that the product would be used or consumed there; he would otherwise have to sue in Ontario, Saskatchewan being ruled out by the fact that the harm did not occur there. In the *Distillers* case, Lord Pearson put a somewhat similar example, with the difference that the plaintiff's mother returned to New South Wales after a temporary absence during which the drug was taken, and suggested that it would not be a sensible result that the forum of the temporary residence where the injury occurred should have jurisdiction.

Or suppose that before the action was tried, the defendant had left Ontario but had some property there, and that the deceased had been injured but not killed as a result of the occurrence in Saskatchewan, and had subsequently moved back to Ontario and wished to sue there. The judgment makes it clear that there is a choice of jurisdictions to be made, and there is some suggestion in passages quoted with apparent approval from the *Distillers* case that the choices are mutually exclusive. Under these suggested circumstances, it seems likely that a court would feel a strong impulse to allow the action to be brought in Ontario, but the test set out in the judgment would still suggest Saskatchewan.

If the policy reason behind the rule is that the plaintiff should not, merely because he lacks the time and money to follow the defendant to the defendant's country, be deprived of all remedy, these examples suggest that there is a conflict between the requirements of the rule and the requirements of the policy behind the rule. If so, the rule should be formulated in different terms. No doubt a plaintiff will more often than not want to sue in the jurisdiction where the injury was suffered so that if a general rule is to be established that one or the other jurisdiction must be preferred, it would be better to assign all such actions to the jurisdiction where the injury was suffered rather than to the jurisdiction where the defendant is to be found. However, if the policy is to assist the plaintiff, it might be better yet to permit a choice of jurisdiction by reference to his exigencies rather than by circumstances which have no logical relation to them. Any such statement of the rule would be beyond the function of the court interpreting a rule for service *ex juris,* but it would presumably be within the power of the rule-making authority.

Some consideration, however, might also be given to the exigencies of the defendant. Not all plaintiffs are poor and not

all defendants are affluent. A defendant should not be deprived of the ability of making his defence merely because he lacks the time and money to follow the plaintiff to the plaintiff's country. He may be protected to some extent by the discretion of the court and the "forum conveniens" rule. However, if the service *ex juris* rule should be formulated so as to have regard to the exigencies of the plaintiff, it should also have regard to the exigencies of the defendant.

Some consideration should also be given to the consequences of giving the plaintiff a chance to engage in forum-shopping. It is usually the plaintiff who effectively makes the choice, and it is not altogether fair to a defendant to enlarge the plaintiff's chances of finding a more favourable forum than he would be afforded by a rule which did not give a choice of forum. Different jurisdictions may well have different limitation periods, for example, or the plaintiff might reasonably think that he would fare better in a forum whose substantive law was more favourable even though that forum would not necessarily apply its own law.

The judgment gives rise to one problem of proof. The plaintiff can easily establish for the purposes of the application that he bought the goods within the territorial jurisdiction in which he is suing. It may seem unfair to require him to establish the additional facts necessary to show that it was reasonably foreseeable to the manufacturer that the product would be used or consumed where the plaintiff used or consumed it; he would have to acquire some knowledge of the way in which the manufacturer conducted his business. On the other hand, the plaintiff should not be entitled to make an allegation of that fact in his statement of claim and to ask the court to assume its correctness in the same way as it assumes the correctness of the allegations forming part of the cause of action. If a plaintiff can establish jurisdiction by an unsubstantiated pleading, he will in effect have an unlimited choice of forum.

It remains to consider whether the judgment has implications which extend beyond the mere question when a court will issue an order for service outside its territorial jurisdiction. That is the question which was before the court, and that is the question to which the decision would normally be taken to be restricted. However, there are passages in the judgment which might indicate that the court had in mind a broader question than the circumstances under which a particular court should assume jurisdiction. That broader question would relate to the circumstances under which the courts of other territorial jurisdictions will recognize a judgment given in the exercise of a jurisdiction so assumed.

Leaving aside possible arguments based upon domicile and

nationality, the traditional view has been that for purposes of the external recognition of judgments a court has jurisdiction over a person only if he was within the territorial jurisdiction of the court when the action was commenced or if he has in some way submitted to its legal jurisdiction. If the court purports to render a judgment against a person over whom it does not have that kind of jurisdiction, then that judgment will not be recognized or enforced elsewhere. In 1938 it was clear to one writer that legislation conferring competence on a court to entertain actions which it had no jurisdiction at common law to entertain conferred only a local judicial competence and did not amount to an acquisition of jurisdiction.[26] *Travers* v. *Holley*[27] was then decided with "its basic premise that we recognize in others what we ourselves are prepared to do in comparable circumstances" and it was possible for another writer to argue that "there is nothing at common law or in statute to have prevented the recognition or enforcement" in British Columbia of a default judgment in Quebec against a non-resident of Quebec.[28] However, although a dictum of Lord Denning has given some support to the latter proposition[29] the earlier view does no seem to have been displaced.[30] Nor do other jurisdictions appear to have applied *Travers* v. *Holley* to foreign judgments *in personam*.[31] A plaintiff who obtains an order for service *ex juris* as the foundation for his action still takes the risk that he will obtain a judgment which is unenforceable outside the province in which it is obtained, and is therefore empty unless the defendant has assets within that province.

The judgment in the *Moran* case recognized the general rule:[32]

> Jurisdiction, therefore, normally depends upon the presence of the defendant within the territorial limits of the court or upon the voluntary submission of the defendant to the authority of the court: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote,* [1894] A.C. 670; *Lung* v. *Lee* 63 O.L.R. 194, [1929] 1 D.L.R. 130 (C.A.).

But the next words may suggest that the service *ex juris* rule brings about a true exception to the traditional conflicts rule:[33]

> But to this general rule there are exceptions, one of which is the assertion by the courts of England and Canada of jurisdiction in respect of

[26] Read, Recognition and Enforcement of Foreign Judgments (1938), p. 128.

[27] [1953] 2 All E.R. 794.

[28] Kennedy, Recognition of Judgments in Personam: The Meaning of Reciprocity (1957), 35 Can. Bar Rev. 123.

[29] *Re Dulles Settlement (No. 2),* [1951] Ch. 842, at p. 851.

[30] See for example *Mattar and Saba* v. *Public Trustee,* [1952] 3 D.L.R. 399, referred to with approval in *Wedlay* v. *Quist,* [1953] 4 D.L.R. 620, both being decisions of the Appellate Division of the Supreme Court of Alberta.

[31] See cases cited by Morris, The Conflict of Laws (1971), p. 428.

[32] *Supra,* footnote 1, at p. 589. [33] *Ibid.*

> torts committed within the territorial limits of the court. Over a tort committed in the Province of Saskatchewan the courts of the Province of Saskatchewan have jurisdiction wherever the residence of the defendant may be. Rule 27(1)(e) . . . recognizes this . . . .

And later on:[34]

> The issue, therefore, before us, the sole issue, is whether the tort alleged was committed within the Province of Saskatchewan. If so, Pyle, a federally incorporated Canadian company, not resident in the Province of Saskatchewan, is subject to the jurisdiction of the courts of the Province of Saskatchewan.

In this passage, the judgment does not differentiate between jurisdiction as recognized by the law of Saskatchewan and jurisdiction as recognized by the law of other parts of Canada. Later,[35] the judgment quotes from the *Distillers* case[36] as saying "the search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor", and it might be thought that if the result was to identify "the most appropriate court", the judgment of the court so identified should receive outside recognition, at least in other Canadian provinces. The "real and substantial connection test" is one which, though not previously fully recognized, more usually relates to choice of law for the resolution of conflicts, rather than to the choice of forum, and may be intended to have significance outside Saskatchewan itself.

It may well be that the law relating to the recognition of foreign judgments should be made more certain and more rational. Presumably the law will continue to recognize a judgment obtained in the forum of the defendant's residence. That leaves a question as to how many other courts should be able to assert jurisdiction which will be recognized externally and how they will be chosen. Should there be a test which will exclude all but one? Should the test relate to the situs of the tort or to the circumstances of the parties? Both plaintiff and defendant should be able to forecast with reasonable certainty whether or not a judgment rendered in one forum will be recognized externally.

It should perhaps be noted that the Uniform Foreign Judgments Act adopted by the Commissioners on Uniformity of Legislation in Canada would recognize the jurisdiction of the courts over non-residents only in limited classes of cases. One is where the cause of action arises out of business done within the territory of the other forum through a business office operated by the

[34] *Ibid.*
[35] *Ibid.*, at p. 596.
[36] *Supra*, footnote 11, at p. 699.

defendant in that territorial jurisdiction. The other is where the defendant operated a motor vehicle or airplane in the territorial jurisdiction of the other forum and the action involves a cause of action arising out of that operation.[37]

There is a danger in using for the choice of forum a test which is also appropriate to the choice of law. That danger is that, once the choice of forum has been made, it may be assumed or inferred that the choice of law has also been made, and that is not necessarily as it should be. Taking the *Moran* case as an example, it is not necessarily right that it should be decided by the law of Saskatchewan. If there was negligence, and if that negligence was in the manufacturing operation in Ontario there may be a strong reason for the law of Ontario rather than the law of Saskatchewan to determine whether the defendant was liable. On the one hand, the general duty in Ontario may be higher, or there may be applicable Ontario regulations which establish a certain standard of care. Even if the Ontario standards of care are lower than those of Saskatchewan, it does not follow that the manufacturer should be held to the higher Saskatchewan standard; even if he reasonably contemplated that the light bulb would find its way to Saskatchewan, that is not necessarily a reason why he should be required to conform to a law which did not apply to him at the time of manufacture.

There is a question whether any rationalization can, insofar as Canada is concerned, be effected by the Supreme Court of Canada through its nation-wide jurisdiction. There is a question as to whether anything should be done where the tort is international rather than interprovincial.

It may be that the judgment of the Supreme Court on appeal from the decision of the Manitoba Court of Appeal in *Reg.* v. *Interprovincial Co-operatives Ltd. et al.*[38] will throw further light on all these questions, involving as it does a question of the location of a tort consisting of the pollution of interprovincial streams which may be held to be lawful in the upstream jurisdiction and unlawful in the downstream jurisdiction.

In any event, the important questions which flow from the decision in the *Moran* case deserve consideration.

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[37] Proceedings of the 46th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1964), p. 107.

[38] [1973] 3 W.W.R. 673.

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DEFERRED COMMUNITY OF GAINS—A NOTE OF WARNING.—

Matrimonial property regimes based on equal sharing of gains on dissolution of the marriage—variously referred to as systems of deferred community of gains or acquests, participation or partnership systems, or systems of the equalizing or balancing claim—caught the imagination of law reformers in the late fifties and early sixties. It is curious to find that the Ontario Law Reform Commission in its monumental *Report on Matrimonial Property Law* recommends the adoption of a deferred community of gains as the matrimonial regime for Ontario at the very moment when those countries which have adopted such a system have begun to have second thoughts about it.

When I first became acquainted with the concept of the deferred community of gains, I was enthusiastic. Here, I thought, had a solution at last been found to the, at first blush, almost insoluble problem of combining within the same matrimonial property regime separation and sharing. Basically, subject to obviously necessary restrictions on gratuitous dispositions, each spouse retains during the subsistence of the marriage his or her separate estate and remains free to acquire and dispose of property as if the spouses were separate as to property, which indeed during the marriage they are. On the dissolution of the marriage by death or divorce a community of profits is established: the net gains derived from the efforts of the spouses during the marriage are (notionally) pooled and equally divided. There was no doubt in mind that this was the matrimonial property regime of the future, and that it would be eagerly embraced by the people.

This is not, however, what has happened. In Germany, a system of deferred profit-sharing was adopted as the legal regime under the title of *Zugewinngemeinschaft* by *Gesetz über die Gleichberechtigung von Mann und Frau* of June 18th, 1957.[1] Though no statistics are available to me, I have been reliably informed by German lawyers and judges that the new system is not popular. Prior to the introduction of *Zugewinngemeinschaft*, when the legal regime was substantially one of separation of goods, contracts excluding the legal regime were extremely rare. Today, they are frequent.

When France reformed her matrimonial property system by *Loi* No. 65-570 of July 13th, 1965 (*portant réforme des régimes matrimoniaux*), she adopted as the legal regime a community of after-acquired property[2] which, according to Professor Otto Kahn-Freund, is no community in the traditional sense at all, but a sys-

[1] B.G.B., § 1363 *et seq.*
[2] C.N., art. 1422 *et seq.*

tem of separation.[3] Under the name of *régime de participation aux acquêts* a system of deferred community of gains was introduced as a conventional alternative,[4] but according to what practising French lawyers have told me no one ever chooses this system.

Under the title of *société d'acquêts* ("partnership of acquests") a deferred community of gains became the legal regime of Quebec in 1970.[5] Again, no statistics are available to me, but the impression I have gained from conversations with practitioners in Montreal is that, as under the old community regime, couples with means continue to prefer separation of goods.

In England, the Law Commission in its *First Working Paper on Matrimonial Property*[6] gave serious consideration to the adoption of a deferred community regime on Continental models, but the Law Commission in its *First Report on Family Property: A New Approach*[7] is clearly opposed to it, and it now appears extremely unlikely that this or any other community system will be adopted.

That English lawyers are not in favour of a deferred community of gains is not difficult to understand. To the common lawyer, any community system, universal or partial, is an unfamiliar concept. What is not equally easy to understand is why deferred community of gains regimes have not proved more successful in civil law countries. The well-known conservatism of the legal profession may be a possible explanation, but I believe that the matter goes deeper than that. The man (or woman) in the street does not trust a property regime which is not simple and straight-forward. A deferred community of gains is anything but simple—it is only necessary to look at Recommendations 1 to 53 of the Ontario Law Reform Commission[8] to realize how complicated it is. There is a "day of reckoning", on dissolution of the marriage, at which gains have to be determined and accounted for, and the whole system puts a premium on accurate book-keeping, a mercenary practice hardly to be encouraged as between spouses. Moreover, on dissolution of the marriage by death the calculation of the "equalizing claim" may lead to bitter disputes

[3] "It [matrimonial community of property] was also rejected in France (in fact if not in name) when in 1965 the new wine of separation was poured into bottles bearing the old label '*communauté*', a cherished *appellation controlée* which Frenchmen did not want to miss. In the classical country of matrimonial 'community' a true community of goods can now exist only by virtue of a contractual arrangement." In Recent Legislation on Matrimonial Property (1970), 33 Mod. L. Rev. 601, at p. 631.

[4] C.N., art. 1569 *et seq.*

[5] C.C., art. 1266c *et seq.*

[6] No. 42 of 1971.

[7] Law Commission, No. 52 of 1973.

[8] Pp. 189-195.

between the surviving spouse and the children of the marriage, and result in a lasting rift in the family. It is for this reason that in Germany equal sharing of gains applies on dissolution of the marriage by divorce, but not on dissolution of the marriage by death, where the surviving spouse, in lieu of his share in the gains of the marriage, receives a fixed portion of the estate of the first dying.

Last, but by no means least, a deferred community of gains system by no means always produces equitable results. As Professor Max Rheinstein in a recent address pointed out:[9]

> Is a *fifty-fifty* split proper under all circumstances including the case of a short-lived marriage of, let us say, a highly paid movie star to a lazy bum?
>
> Or take another, hypothetical but by no means unlikely, case: At the time of the marriage, the husband is worth $150,000.00, the wife $10,000.00. Twenty years later, when the marriage is dissolved by divorce, the husband is still worth $150,000.00, having lived on his income and neither gained nor lost, but the wife is now worth $30,000.00. Under a system of deferred profit-sharing, the husband has an equalizing claim for $10,000.00 against his wife, hardly an equitable result.

There are numerous possible solutions other than a deferred community of gains by which the objectives which the Ontario Law Reform Commission has rightly set itself, can be achieved. One of them is the deferred universal community of property, which Sweden adopted in 1920, and which was subsequently taken over, with minor modifications, by the other Nordic countries. Here, all the assets of the spouses, including (unless the donor or testator has otherwise provided) gifts and successions, are pooled and equally shared. I understand that very few couples—not more than one in twenty, I was told in Scandinavia—contract out of it. Other possible solutions are joint ownership of the matrimonial home, often the main, if not the only capital asset of the spouses, and legal rights of inheritance.

My own inclination would be to distinguish between the case where the marriage is dissolved by death and the case where it is dissolved by divorce.

Where the marriage is dissolved by death, adequate provision for the surviving spouse can generally be made under the existing Dependants' or Family Relief legislation. If this is not considered sufficient, the survivor can be given a legal right of inheritance to a fixed share in the estate of the first dying—say a quarter or a third, adding a proviso empowering the court in exceptional circumstances to reduce the surviving spouse's share, for instance,

[9] (1973), 68 Northwestern U.L. Rev. 463, at p. 476.

where the marriage has lasted a short time only or the spouses at the time of the death of the first-dying were living apart owing to the fault of the surviving spouse.

Where the marriage is dissolved by divorce, an automatic pooling of assets or gains appears to me inappropriate. Circumstances vary too much from case to case. What is right and proper where the marriage has lasted thirty years may be wrong where it has broken up after thirty months. A solution which may be satisfactory where the failure of the marriage was due to faults on both sides or to incompatibility may be grossly inequitable where the breakdown of the marriage was caused by outrageous misbehaviour of one of the spouses. The only possible solution, it appears to me, is to take a leaf out of the English Matrimonial Causes Act, 1973[10] by vesting the courts with wide discretionary powers to award maintenance, redistribute property, provide for settlements, and vary or abrogate existing settlements. In addition, the courts must have powers to allocate the rights under a pension or annuity scheme to which the spouses have contributed during the marriage, an asset which is playing an increasingly important role.

I am not unaware of the dangers of wide discretionary powers. As Professor Max Rheinstein points out:[11]

> . . . distribution depends upon the unpredictable discretion of the judge, and where a settlement is sought through bickering, the outcome often depends largely upon such factors as the comparative skill of the attorneys, the urgency with which the divorce is sought to be obtained and the decency or greed of the parties.

However, I fail to see any acceptable alternative. Cases such as *Wachtel* v. *Wachtel*[12] illustrate how the English courts have used the powers which they now have on divorce to bring about a sharing of assets where this seems just.

The test of a good matrimonial property regime is that it is accepted by the great mass of the people. Prophesying is a notoriously hazardous occupation, and I may well be wrong, but in the light of experience elsewhere I venture the guess that Canadians will shy away from a deferred community of gains, with all its potential complexities.

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[10] S. 21 *et seq.*
[11] *Op. cit.*, footnote 9, p. 474.
[12] [1973] 1 All E.R. 113.
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