COMMENTS

COMMENTAIRES

CONTRACTS—MISTAKE—RECTIFICATION WITH OPTIONAL RESCISSION.—*Riverlate Properties Ltd.* v. *Paul*[1] raises some important points concerning written documents and mistake in the law of contracts, and is of particular interest to Canadian lawyers because of its discussion of a case decided by the Ontario High Court.[2] The *Riverlate Properties* case arose out of a dispute between a lessor and a lessee over the cost of repairs. The lessor's evidence was that the cost of exterior repairs was intended to be included in a list of shared expenses, and certain aspects of the drafting of the document made its evidence inherently credible. The lessee, however, gave evidence that her understanding was that the lessor was to pay the full cost of exterior repairs, and her understanding was, without doubt, the only possible meaning of the words used in the document.

On the basis of this evidence the lessor claimed that it was entitled to rectification of the lease, with an option in the lessee to rescind. The court, however, refused any remedy. Russell L. J., giving the judgment of the court, said that rectification would be available only if the lessee shared the lessor's mistake or if, knowing of the mistake, she deliberately kept silent seeking to take advantage of it (conduct which the court referred to as "sharp practice"). The court disapproved of a number of cases[3] including the Ontario one mentioned above[4] in which a mistaken party had been granted an order of rectification with an option in the other party to rescind. The *Riverlate Properties* decision suggests an "all or nothing" approach. Either the defendant knows of the mistake, in which case the plaintiff is entitled to

[1] [1974] 3 W.L.R. 564.

[2] *Devald* v. *Zigeuner* (1958), 16 D.L.R. (2d) 285.

[3] *Garrard* v. *Frankel* (1862), 30 Beav. 445; *Harris* v. *Pepperell* (1867), L.R. 5 Eq. 1; *Paget* v. *Marshall* (1884), 28 Ch. D. 255; *Bloomer* v. *Spittle* (1872), L.R. 13 Eq. 427.

[4] *Supra*, footnote 2.

rectification, or he does not know of it, in which case the plaintiff receives no relief at all. The court seems to see no place for the intermediate form of optional remedy.

The decision may be given a limited welcome for finally disposing of the myth that mutual mistake is a requirement of rectification,[5] and for making it clear that relief is available to the mistaken party at least in the case of actual knowledge by the other party of his mistake.[6] It is, however, in my view, unduly rigid in its apparent failure to recognize the extension of relief to a case where the defendant ought to have known of the mistake, but cannot be shown to have had actual knowledge, and in its rejection of the useful and flexible device of the optional order developed in the nineteenth century equity cases, and applied in Ontario in *Devald* v. *Zigeuner*.[7] The two points are related, for it is in cases where the non-mistaken party ought to have known, but cannot be shown actually to have known, of the other's mistake that the optional order is necessary.

In my view relief should be available to the mistaken party not only when the other party knows, but also where he ought to know of the former's mistake. This had previously been recognized in *Hartog* v. *Colin & Shields*,[8] and in *McMaster University* v. *Wilchar Construction Ltd.*[9] In the latter case, the Ontario High Court said:

> In this context it should be stressed that one is taken to have known that which would have been obvious to a reasonable person in the light of the surrounding circumstances.[10]

It is very common in these cases that the court, though obviously suspicious, hesitates to make a positive finding that the defendant had actual knowledge of the plaintiff's mistake.[11]

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[5] See Palmer, Mistake and Unjust Enrichment (1962), pp. 19-21.

[6] The court approved *Roberts & Co. Ltd.* v. *Leicestershire County Council*, [1961] Ch. 555. A case denying relief is *Blay* v. *Pollard and Morris*, [1930] 1 K.B. 628, forcefully criticized by Spencer, Signature, Consent and the Rule in L'Estrange v. Graucob, [1973] Camb. L.J. 104, at p. 116. Whether the proper form of relief is always simple rectification, however, is discussed below in footnote 19. See also *Farah* v. *Barki*, [1955] S.C.R. 107.

[7] *Supra*, footnote 2.

[8] [1939] 3 All E.R. 566, and see Spencer, *op. cit.*, *supra*, footnote 6, at p. 106, note.

[9] (1971), 22 D.L.R. (3d) 9.

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

[11] In this comment I have used "plaintiff" to refer to the mistaken party who seeks relief from the written terms, and "defendant" to refer to the non-mistaken party who seeks to uphold the writing. Of course, their positions may be reversed.

Such a finding carries an implication of sharp practice if not of fraud, and the courts are rightly reluctant to make it.[12] As Bacon V. C. said in *Paget* v. *Marshall*:[13]

> That there was to some extent a common mistake I must in charity and justice to the defendant believe, because I cannot impute to him the intention of taking advantage of any incorrect expression in this letter. He may have persuaded himself that the letter was right; but if there was not a common mistake it is plain and palpable that the plaintiff was mistaken . . . .[14]

In *Devald* v. *Zigeuner*, McRuer C.J.H.C., quoting this passage, said that his state of mind was "much the same" as Bacon V. C.'s. He continued:

> I hesitate to find that the defendants are wilfully putting forward a claim that they know to have no foundation, but I have no hesitation in finding that the plaintiffs had no intention of parting with the new barn . . . .[15]

Surely, it should be sufficient for the plaintiff to prove that a reasonable man in the defendant's position would have realized that the plaintiff had made a mistake. The law of contracts protects reasonable expectations, not unreasonable ones,[16] and the objective theory of contract formation cuts both ways.

This is not necessarily to disagree with the result in *Riverlate Properties*. The plaintiff's mistake, when explained to the court, appeared convincing, but it may not have been at all obvious to the defendant or her legal adviser when the document was executed. Having engendered a reasonable expectation, it was right that the plaintiff should bear the consequences of its own mistake.[17] But the test should be, in my view, the reasonableness of the expectation rather than proof of actual knowledge.

If this view is accepted, the need for the optional form of remedy becomes clear. Very commonly, as described above, the court thinks that a reasonable man in the defendant's position would have known of the plaintiff's mistake, but hesitates to make

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[12] In *Riverlate Properties, supra,* footnote 1, at pp. 569-570, Russell L.J. described the defendant's conduct as "a form of dishonesty and sharp practice which might well require proof beyond a reasonable doubt, or, as we believe it is now phrased in the criminal law, require the tribunal of fact to be 'sure'". In the face of such a formidable requirement of proof, relief would be rare indeed.

[13] *Supra,* footnote 3.

[14] *Ibid.,* at p. 266.

[15] *Supra,* footnote 2, at p. 291.

[16] Corbin, Contracts (1952), p. 1.

[17] See *Hobbs* v. *Esquimalt & Nanaimo Railway Co.* (1899), 29 S.C.R. 450.

a positive finding against the defendant. The effect of the optional form of remedy is that the defendant must choose between submitting to rectification or throwing up the whole transaction. The court can, moreover, as in *Paget* v. *Marshall*[18] impose on the plaintiff, as a condition of relief, in case the defendant chooses rescission, the payment of all or part of the defendant's expenses incurred in reliance on the agreement. The effect is that the defendant loses his expectation interest but can be compensated in whole or in part for his reliance interest, with the option of holding the plaintiff to the bargain originally intended by the latter. Where the defendant's initial expectation was unreasonable, this treatment seems quite generous. The plaintiff, of course, loses his expectation interest too, and, since the whole trouble has arisen from his mistake, this seems a just deprivation. He has a weak case for imposing his own terms on the non-mistaken party (simple rectification) unless the latter has at some stage agreed to them or, at the very least, is proved to have had actual knowledge of them.[19] Certainly, if the court stops short of finding actual knowledge of the mistake, the defendant must, if rectification is decreed, be given the option to rescind, for he has never known, still less agreed to, the plaintiff's terms. The other possible disposition is rescission without an option, but this also goes too far, for the plaintiff should not by his own mistake entitle himself to avoid even the transaction he intended. To remove the optional order from the court's armoury of remedies is to invite the court to deny any relief at all to the plaintiff unless he surmounts the formidable hurdle of proving actual knowledge of the mistake. But such denial would, in many cases,[20]

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[18] *Supra*, footnote 3, at p. 267: "The plaintiff does not object if the agreement is annulled to pay the defendant any reasonable expenses to which he may have been put by reason of the plaintiff's mistake." It may still be right to compensate reliance even where the expectation is unreasonable, for naïveté should not necessarily be penalized by out of pocket loss.

[19] Even where the defendant knows of the plaintiff's mistake it does not always follow, I suggest, that simple rectification is the proper form of relief unless the defendant's conduct leads the plaintiff reasonably to believe that the defendant is contracting on the plaintiff's terms. Knowledge of another's mistake is not always the same as a promise on the other's terms, though it may sometimes found an estoppel; see *Roberts* v. *Leicestershire County Council*, *supra*, footnote 6, at p. 570.

[20] *Paget* v. *Marshall*, *supra*, footnote 3, where enforcement of the document would have deprived the plaintiff of premises needed for the business use of other adjoining accommodation. *Devald* v. *Zigeuner*, *supra*, footnote 2, where the plaintiffs would have been deprived of a barn which they needed for farming land retained by them.

operate extremely harshly against the mistaken plaintiff, and secure to the defendant a contractual benefit of which he had no reasonable expectation, but only an unreasonable (though concededly honest) expectation. This would be an accidental enrichment (because caused by the plaintiff's mistake) and an unjust one (because not justified by a reasonable contractual expectation). The conclusion is that the unjust enrichment should be avoided, but not necessarily that the plaintiff's terms should be imposed on the defendant. Hence the need for the optional form of remedy.

The conditions of relief should be stringent, as they must be whenever a party seeks to contradict a document that he has executed.[21] In the cases where relief has been granted the plaintiff's evidence of his mistake has been confirmed by surrounding evidence making it inherently probable.[22] Similarly where the court stops short of finding actual knowledge of the mistake in the other party, the circumstances have been such that any reasonable man in his position "must have known" of the mistake.[23] This is not a head of relief that is likely to strike at the foundations of contractual stability, and experience suggests that an over rigid rule serves neither justice nor certainty.[24] In this situation a decree of rectification, with an option of rescission and a discretion to order compensation for reliance expenses, offers, I suggest, as near an approach to justice as can be expected in an imperfect system. It is to be hoped that Canadian cases will follow the Ontario High Court in maintaining a useful and flexible remedial device, rather than the dicta of the English Court of Appeal that appear to reject it.

S. M. WADDAMS*

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[21] Not because of special rules of evidence, but simply because one who denies what he has written sets himself an onerous task, see *Joscelyne* v. *Nissen*, [1970] 2 Q.B. 86. The plaintiff will always have to rebut the obvious suspicion that he is having second thoughts about a bad bargain.

[22] In *Paget* v. *Marshall*, *supra*, footnote 3, the plaintiff obviously intended to keep his storage room. In *Devald* v. *Zigeuner*, *supra*, footnote 2, they obviously intended to keep their barn. In *Riverlate Properties*, though relief was refused, the plaintiff's evidence was believed because the internal evidence of the document itself showed that there had, in all probability, been a drafting error at some stage.

[23] Again, as in *Paget* v. *Marshall* and *Devald* v. *Zigeuner*, *supra*, footnotes 3 and 2.

[24] See Waddams, Comment (1971), 49 Can. Bar Rev. 579, at p. 598.

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TORT—NEGLIGENCE—BREACH OF STATUTORY DUTY—COMMON LAW DUTY OF CARE—AFFIRMATIVE DUTIES—CONTRIBUTORY NEGLIGENCE—VOLENTI NON FIT INJURIA—EX TURPI CAUSA NON ORITUR ACTIO—DRINK NOW—SUE LATER.— Affirmative duties have always presented problems for tort law since they offend against the basic individualist philosophical foundation of its structure,[1] as well as presenting a myriad of conceptual and administrative difficulties.[2] Professor Bohlen, writing over sixty years ago, described them as being "of small importance, of rare occurrence, and . . . a little understood and disturbing anomaly in the body of the law of tort".[3]

Times and mores change, however. Throughout the common law jurisdictions, a large number of affirmative duties has been established so that the general rule that no liability will attach in tort law for failure to act has become more honoured by the breach than in the observance.

Canadian courts, not famous for their creativity,[4] in comparison to their Australian counterparts,[5] have in recent years

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[1] Hale, Prima Facie Torts, Combination and Non-Feasance (1946), 46 Col. L. Rev. 196, at p. 214; Snyder, Liability for Negative Conduct (1949), 35 Va. L. Rev. 446, at pp. 449-453; Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability (1908), 56 U. Pa. L. Rev. 217, 316, at pp. 220-221, 335-356, n. 89; Linden, Tort Liability for Criminal Nonfeasance (1966), 44 Can. Bar Rev. 25, at pp. 29-30; McNiece and Thornton, Affirmative Duties in Tort (1949), 58 Yale L.J. 1972, at p. 1988; Feldebrugge, Good and Bad Samaritans (1966), 14 Am. J. Comp. L. 630, at pp. 652-653; Anon., Note (1964), 18 Vand. L. Rev. 323, at pp. 324; Rudzinski, The Duty to Rescue: A Comparative Analysis, in The Good Samaritan and the Law, ed. by J. Ratcliffe (1966), p. 91, at pp. 119-120; Anon., The Failure to Rescue: A Comparative Study (1932), 32 Col. L. Rev. 631, at pp. 632-633; Linden, Rescuers and Good Samaritans (1971), 34 Mod. L. Rev. 241, at p. 242; Canadian Negligence Law (1972), p. 218; Minor, Moral Obligation as a Basis of Liability (1923), 9 Va. L. Rev. 420, at p. 422; J. Fleming, An Introduction to the Law of Torts (1967), p. 61 *et seq.*; The Law of Torts (4th ed., 1971), pp. 140-141; N. Chavet, The Legal Implications of Emergency Care (1969), p. 37.

[2] See, Linden, Tort Liability for Criminal Nonfeasance, *op. cit.*, *ibid.*, at pp. 31-32; Canadian Negligence Law, *op. cit., ibid.*, pp. 220-221, McNiece and Thornton, *op. cit., ibid.*, at p. 1288; Linden, Rescuers and Good Samaritans, *op. cit., ibid.*, at p. 242.

[3] *Op. cit.*, footnote 1, at p. 226.

[4] "[O]ne is struck repeatedly by the paucity of fruitful and original ideas which have emerged from Canadian Courts in dealing with tort problems": Atiyah, Book Review (1969), 10 J. Soc. Pub. Teach. L. 232, at p. 232. *Cf.* Prosser: "It strikes me that the Canadian Law . . . is, if not always better than that south of the border, at least quite as good": Book Review (1969), 47 Can. Bar Rev. 129, at p. 131.

[5] An ironic comparison may be made between the Canadian and Australian courts in relation to their respective approaches to occupiers'

contributed a wealth of jurisprudence in respect of affirmative duties in tort law, predominantly sympathetic to extending the area of recovery for injuries resulting from deficient inactivity.[6]

One such decision which must have the most important implications for all Commonwealth jurisdictions is that of the Supreme Court of Canada in *Jordan House Ltd.* v. *Menow and Honsberger.*[7]

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liability. Whilst the Australian courts struggled under the overlordship of the Privy Council, in particular its decision of *Commissioner for Railways* v. *Quinlan*, [1964] A.C. 1054, and invented devious stratagems to dissipate its efficacy (see, *e.g.*, *Munnings* v. *Hydro-Electric Commission* (1971), 45 A.L.J.R. 378; *Cooper* v. *Southern Portland Cement Ltd.* (1972), 46 A.L.J.R. 302, perceptively analyzed by Keeler, Recent Developments in the Law of Occupiers and Trespassers (1972), 46 A.L.J. 444) the Canadian courts, freed from Privy Council jurisdiction in 1949, have until very recently preferred to cling to the rule in *Addie (Roberts) & Sons (Colliers), Ltd.* v. *Dumbreck*, [1929] A.C. 358, which Lord Pearson has described as "an incumbrance impeding the proper development of the law": *Herrington* v. *British Railways Board*, [1972] A.C. 877, at p. 929. *Herrington* has received the endorsement of the Supreme Court of Canada in two decisions, *Mitchell* v. *C.N. Ry* (1974), 46 D.L.R. (3d) 363 *obiter* and *Vienot* v. *Kerr Addison Mines, Ltd.*, judgment delivered October 2nd, 1974, not yet reported, although it is by no means clear whether those who dissented in *Vienot* were disposed to afford to *Herrington* more than the narrowest of "factual" operation in relation to injuries sustained by trespassers.

[6] The duties to rescue and to the rescuer, respectively, have been analyzed in *Horsley* v. *MacLaren*, [1972] S.C.R. 441; *Schacht* v. *Queen in Rt. of Ontario*, [1973] 1 O.R. 221 (C.A., now on appeal to the Supreme Court of Canada, judgment reserved, February 7th, 1974); *Moddejonge* v. *Huron County Board of Education*, [1972] 2 O.R. 437 (H.C., Pennell J.); *Millette* v. *Coté*, [1972] 3 O.R. 224 (C.A., now on appeal to the Supreme Court of Canada, judgment reserved, February 6th, 1974); *Corothers* v. *Slobodian* (1973), 36 D.L.R. (3d) 597 (Sask. C.A.). The duty to warn in respect of a deficient and dangerous product, even where only economic loss results from failure to do so, has been recognized in *Rivtow Marine Ltd.* v. *Washington Iron Works Ltd.*, [1973] 6 W.W.R. 692 (S.C.C.). Considered by Waddams, Products Liability (1974), Chap. 2. Academic commentary on the "rescue cases" (and associated "Good Samaritan" legislation) has been ubiquitous. See, *e.g.*, Alexander, One Rescuer's Obligation to Another: The "Ogopogo" Lands in the Supreme Court of Canada (1972), 22 U. of T. L.J. 98; Linden, Rescuers and Good Samaritans, *op. cit.*, footnote 1; Comment (1970), 48 Can. Bar Rev. 541; Gray and Sharpe, Doctors, Samaritans and the Accident Victim (1973), 11 Osgoode Hall L.J. 1; Stewart, Comment (1970), 4 Ottawa L. Rev. 325; A. Linden, Canadian Negligence Law, *op. cit.*, footnote 1, Chap. 6, and pp. 287-297; Beckton and Brent, Comment (1973), 37 Sask. L. Rev. 281; Scott, (1974), 6 Ottawa L. Rev. 622.

[7] (1973), 38 D.L.R. (3d) 105 (S.C.C.), aff'g, *sub nom. Menow* v. *Honsberger et al.*, [1971] 1 O.R. 129, 14 D.L.R. (3d) 545 (C.A.), aff'g [1970] 1 O.R. 54, 7 D.L.R. (3d) 494 (H.C., Haines J.).

The facts, very briefly, were as follows: the plaintiff was a frequent patron of the defendant hotel's beverage room, where beer was served. The plaintiff's propensity to drink to excess and thereafter to make himself a nuisance to other patrons was well known to the proprietor of the establishment as well as to other employees—indeed the plaintiff had been barred from the premises for a period of about a year before the events which gave rise to the action occurred.

On the fateful evening, the plaintiff arrived at the defendant's establishment at about five o'clock in the afternoon, in the company of his employer and commenced drinking. His employer left shortly afterwards but the plaintiff remained, being served drinks until ten o'clock in the evening, "past the point of visible or apparent intoxication".[8] At that time the plaintiff began wandering around to other tables, and he was evicted by the hotel proprietor, who had been aware of the plaintiff's deteriorating condition for over three hours.

The proprietor knew that the plaintiff would have to make his way to his home "probably . . . on foot"[9] by way of a busy thoroughfare.

Shortly afterwards, the plaintiff was struck by a car and severely injured.

The driver of the car was held liable in negligence to the plaintiff since he had failed to respond adequately to a warning by another car of the plaintiff's presence on the highway. This aspect of the case need not, however, be discussed further since it does not relate to the central area of consideration, namely, the duty of protection owed to the plaintiff by the defendant hotel.

In respect of the plaintiff's claim against the hotel, Haines J., at trial,[10] held that, although section 64 of the Liquor Licence Act[11] could not apply so as to give him a remedy, since his injuries

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[8] *Ibid.*, at p. 107, *per* Laskin J., as he then was.

[9] *Ibid.*

[10] [1970] 1 O.R. 54, 7 D.L.R. (3d) 494.

[11] R.S.O., 1960, c. 218, now R.S.O., 1970, c. 250, s. 68. The section provides as follows:

> "Where any person or his servant or agent sells liquor to or for a person whose condition is such that the consumption of liquor would apparently intoxicate him or increase his intoxication so that he would be in danger of causing injury to his person or injury or damage to the person or property of others, if the person to or for whom the liquor is sold while so intoxicated,
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> (a) commits suicide or meets death by accident, an action under *The Fatal Accidents Act* lies against the person who or whose servant or agent sold the liquor; or

fell outside its compass,[12] nevertheless the plaintiff's claim for negligence based on breach of statute was entitled to succeed since the defendant hotel, in breaking the provisions of section 53(3) of the Liquor Licence Act[13] and section 81 of the Liquor Control Act[14] "contravened . . . provisions which were enacted not only to protect society generally, but also to provide some safeguard for persons who might become irresponsible and place themselves in a position of personal danger".[15] His Lordship relied on a number of American decisions[16] which held that "if a legislative enactment establishes a standard of conduct such as we have in our liquor

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(b) causes injury or damage to the person or property of another person, such other person is entitled to recover the amount to compensate him for his injury or damage from the person who or whose servant or agent sold the liquor."

The section has an interesting history. It originated in 1851, and imposed not only civil liability (subject to a maximum of $100) but also criminal liability on the tavern proprietor where the person whom he wrongfully supplied with "spiritous liquors" died "by committing suicide, or by drowning or perishing from cold, or any other accident": S. Can., 13 & 14 Vict., c. 27, s. VI. The criminal aspect of the section was removed in 1864: S. Can., 27 and 28 Vict., c. 18, s. 40. Supplying Indians with "spiritous liquors" was prohibited as early as 1840: S. Can., 2 and 3 Vict., c. 13.

Civil liability on "dram shops" was first imposed in the United States in 1851 — the same year as Canada — in the state of Maine. Judicial interest in such provisions was dormant until 1870 when "a great wave of temperance reform, spearheaded to a great extent by women, swept the nation". Ogilvie, History and Appraisal of the Illinois Dram Shop Act, [1958] U. Ill. L. Forum 175, at p. 176. Such distaste for purveyors of alcohol is evident in as recent a decision as *Lichter* v. *Scher* (1956), 11 Ill. App. 2d 441, 138 N.E. 2d 66, at p. 71, where Schwartz J. stated: "The Dram Shop Act is unique. . . . It is designed to discipline a legal but ill-favored trade."

[12] The plaintiff had neither committed suicide nor been killed and accordingly had no claim under paragraph (a) of the section; paragraph (b) obviously was not applicable to the case.

[13] *Supra*, footnote 11, s. 56(3). The section provides as follows:

"No liquor shall be sold or supplied on or at any licensed premises to or for any person who is apparently in an intoxicated condition."

[14] R.S.O., 1960, c. 217, now R.S.O., 1970, c. 249, s. 69. The section provides as follows:

"No person shall sell or supply liquor or permit liquor to be sold or supplied to any person under or apparently under the influence of liquor."

[15] *Supra*, footnote 10, at pp. 59-60 (O.R.), 499-500 (D.L.R.).

[16] *Smith* v. *Clark* (1963), 411 Pa. 142, 190 A. 2d 441; *Soronen* v. *Olde Milford Inn* (1964), 84 N.I. Super. 372, 202 A. 2d 208; *Schelin* v. *Goldberg* (1958), 188 Pa. Super. 341, 146 A. 2d 648; *Smith* v. *Evans* (1966), 421 Pa. 247, 219 A. 2d 310.

statutes, then it may infer that the legislation intended to provide for tort liability if the standard is not maintained".[17]

Haines J. went on to consider an important "alternative ground for imposing liability"[18] on the defendant hotel independent of the crutch of breach of statutory duty. The defendant hotel had argued that it had a statutory right, indeed duty, under subsections 53(4) and (6) of the Liquor Licence Act[19] to evict the plaintiff. His Lordship responded to such contention as follows: "The crucial question now becomes, is this an absolute right or is it qualified by a duty of care not to eject the plaintiff if it is reasonably foreseeable that as a result of such an eviction he will be placed in a position of personal danger."[20]

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[17] *Supra*, footnote 10, at pp. 60 (O.R.), 500 (D.L.R.). The concept of an immutable legislative "intention" in this context stretching back to 1851 would, of course, be misleading. The risks against which the statutory provision seeks to provide protection have multiplied enormously. In the United States this factor has been appreciated: "At the time of the original enactment of the Dram Shop Act of 1873, the automobile had not been invented and modern highway traffic was a figment of the imagination. The rural Inn and small town tavern were patronized by the local citizenry or by travelers in horse-drawn vehicles. Today, the hazards of travel by automobiles on modern highways has become a national problem. The drunken driver is a threat to the safety of many . . . . It is understandable that early cases did not recognize any duty of an inn keeper to the travelling public because a serious hazard did not exist"; *Berkeley* v. *Park* (1963), 262 N.Y. Supp. 2d 290, at p. 293, *per* Brink J. See also Ricci, Dram Shop Liability — A Judicial Response (1969), 57 Cal. L. Rev. 995, at p. 999. The paradoxical situation has now been reached that the *rural* inn, historically more socially integrated than its urban counterpart, is now far more lethal than that of the town; the automobile is much more likely to play a dangerous role in respect of the rural inn — as, indeed, it did in *Jordan House Hotel Ltd.* v. *Menow and Honsberger* — since it is both more necessary and likely to be travelling faster in the country than in the town: see Ogilvie, *op. cit.*, footnote 11, at pp. 183 - 184.

[18] *Ibid.*, at pp. 61 (O.R.), 501 (D.L.R.).

[19] *Supra*, footnote 11, s. 56(4) and (6).

The relevant portions of the section provide as follows:

"(4) No person holding a licence under this Act shall permit or suffer in the premises for which the licence is issued. . . .

(b) any gambling, drunkenness or any riotous, quarrelsome, violent or disorderly conduct to take place. . . . .

(6) Any person holding a licence under this Act who has reasonable grounds to suspect from the conduct of any person who has come upon the premises in respect of which such licence is issued that such person, although not of notoriously bad character, is present for some improper purpose or is committing an offence against this Act or the regulations, may request such person to leave the licensed premises immediately and, unless the request is forthwith complied with, such person may be forcibly removed."

[20] *Supra*, footnote 10, at pp. 61 (O.R.), 501 (D.L.R.).

After considering Canadian and American authorities concerned with the duty of carriers to passengers,[21] his Lordship concluded: "In the present case, the defendant's employees undertook affirmative action to remove the plaintiff from the premises. In so doing, they assumed a duty of care to take reasonable precautions to ensure that his safety was not endangered as a result of their actions."[22]

Haines J. was anxious to dispel the impression that in reaching such a decision he was "implying that [he is] imposing a duty on every tavern-owner to act as a watch dog for all patrons who enter his place of business and drink to excess. Each case must depend upon its own particular facts".[23]

In respect of the facts of the instant case, his Lordship stressed the fact that the plaintiff was a long-standing patron of the defendant hotel's tavern and that his propensity to drink to excess was notorious among the defendant's employees.

As regards how the defendant hotel could have discharged its duty towards the plaintiff, his Lordship stated: "The defendant's employees had various alternatives opened to them. They could have summoned a cab or called the plaintiff's employer to come and fetch him or telephoned the police and asked them to either arrest him or take him home in safety. They failed to take any of these steps. As a direct[24] result of this negligent conduct the plain-

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[21] *Dunn* v. *Dominion Atlantic R. Co.* (1920), 60 S.C.R. 310; *Howe* v. *Niagara, St. Catharines & Toronto R. Co.*, [1925] 2 D.L.R. 115 (Ont. C.A.); *Black* v. *New York, New Haven and Hartford R. Co.* (1907), 193 Mass. 448, 70 N.E. 797; *Depue* v. *Flateau* (1907), 100 Minn. 299, 111 N.W. 1; *Galvin* v. *Jennings* (1961), 289 F. 2d 15 (U.S.C.A. 3rd Cir.). *Cf.* the accurate prophecy of Warner, Duty of a Railway Company to Care for a Person it has Without Fault Rendered Helpless (1919), 7 Cal L. Rev. 312, at p. 321: "Is it not possible that these cases concerning a carrier's duty to passengers and trespassers with dicta on the duty of a railway to act according to the dictates of humanity are mere forerunners of an attempt to get away from the Common Law rule that there is no legal duty to act the Good Samaritan?"

[22] *Supra*, footnote 10, at pp. 63 (O.R.), 503 (D.L.R.).

[23] *Ibid.* His Lordship quoted in support the statement of Riley J., in *Hesse* v. *Laurie and Morinville Hotel Ltd.* (1962), 38 W.W.R. 321, at p. 324 (Alta., S.C.):

> "No doubt the operators of beer parlours must exercise 'anxious care' for the safety of their partons from the very nature of the business carried on, but that 'anxious care' surely must be judged with due regard to all the circumstances, such as the locality of the hotel, the type and character of its usual patrons, the size of its operations and what circumstances ought reasonably to be anticipated and guarded against."

[24] *Directness* as the criterion for remoteness has, of course, been replaced by foreseeability. It would appear that his Lordship is using the

tiff was involved in an accident from which he suffered serious permanent injury."[25]

Having found the defendant hotel liable to the plaintiff, Haines J. apportioned responsibility equally between it, the defendant driver of the automobile which struck the plaintiff and the plaintiff himself for his contributory negligence.[26]

The appeal by the defendant hotel to the Ontario Court of Appeal[27] was unsuccessful. Aylesworth J.A., in a short oral judgment reaffirmed liability on the part of the defendant hotel in the following laconic terms: "As to liability, we place our dismissal of the appeal on the simple ground that, so far as the hotel is concerned, there was a breach of the common law duty of care owed to the plaintiff in the circumstances of this case."[28]

On further appeal by the defendant hotel to the Supreme Court of Canada,[29] the judgment of Haines J., was again unanimously upheld, although Richie and Spence JJ. differed from the majority in respect of the derivation of such liability. Mr. Justice Ritchie's four sentence judgment[30] may be quoted in full:[31]

> I agree with my brother Laskin that this appeal should be dismissed. For my part, however, the circumstances giving rise to the appellant's liability were that the innkeeper and his staff, who were well aware of the respondent's propensity for irresponsible behaviour under the influence of drink, assisted or at least permitted him to consume a quantity of beer which they should have known might well result in

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word in its every day sense in the present context and that if an officious bystander were to call him to task for having adopted the wrong criterion, he would respond that, as a member of the judiciary with a considerable interest in tort law (see, *e.g.*, his writings on the subject in Linden (ed.), Studies in Canadian Tort Law (1968), Chap. 2; The Conduct of a Malpractice Action, Special Lectures of the Law Society of Upper Canada (1963), p. 273 and Fatal Accident Damages — Deductions for Contingencies and Collateral Benefits, Special Lectures of the Law Society of Upper Canada (1973), New Developments in the Law of Torts, p. 27), he is well aware of the existence of the *Wagon Mound* decisions: *(U.K.) Ltd.* v. *Morts Dock & Engineering Co., Ltd.*, [1961] A.C. 388 and *Overseas Tranship (U.K.) Ltd.* v. *The Miller Steampship Co.*, [1967] 1 A.C. 617.

[25] *Supra*, footnote 10, at pp. 64 (O.R.), 504 (D.L.R.).

[26] The finding of 33⅓% contributory negligence against the plaintiff is certainly not ungenerous to him. *Cf. Nash* v. *Sullivan*, [1973] 1 O.R. (2d) 133 where a relatively minor driving error was considered by the court to merit a finding of 50% contributory negligence. Menow's default was surely far more serious having regard to the *duration* of time in which he exposed himself to the risk of death or injury.

[27] [1971] 1 O.R. 129, 14 D.L.R. (3d) 545.

[28] *Ibid.*, at pp. 130 (O.R.), 546 (D.L.R.).

[29] *Supra*, footnote 7.

[30] With which Spence J. concurred.

[31] *Ibid.*, at pp. 105-106.

> his being incapable of taking care of himself when exposed to the hazards of traffic. Their knowledge of the respondent's somewhat limited capacity for consuming alcoholic stimulants without becoming befuddled and sometimes obstreperous, seized them with a duty to be careful not to serve him with repeated drinks after the effects of what he had already consumed should have been obvious.
> In my view, it was a breach of this duty which gave rise to liability in the present case.

Whilst it is well recognized that the determination of the duty issue in negligence will ultimately reduce itself to an intuitive value-judgment,[32] the frankness of his Lordship in revealing so openly this process is not usual for appellate judges. Ritchie J. adopted a similar approach towards the derivation of a duty in respect of negligently caused economic loss in the recent decision of *Rivtow Marine Ltd.* v. *Washington Iron Works Ltd.*,[33] although in the latter case, his Lordship did enter into a discussion—with scarcely any critical analysis—of relevant decisions in the area.

There is, of course, nothing wrong with Ritchie J.'s approach; it is certainly preferable to disguising judicial creativity by hiding it behind the skirts of precedent.

Laskin J., speaking for the majority,[34] approved, with some amendments, of the approach of Haines J. Insofar as his Lordship states his interpretation of the trial judge's legal findings, Laskin J. may be criticized for some degree of misunderstanding.

In respect of the first basis of liability found by Haines J., namely, breach of statutory duty, Laskin J. did "not read [the trial judge's] reasons as holding that the mere breach of [section 53(3) of the Liquor Licence Act and section 81 of the Liquor Control Act] and the fact that [the plaintiff] suffered personal injury were enough to attach civil liability to the hotel. He regarded them rather as crystallizing a relevant fact situation which, because of its authoritative source, the Court was entitled to consider in determining, on common law principles, whether a duty of care should be raised in favour of [the plaintiff] against the hotel".[35]

With all respect to Laskin J., such an interpretation misrepresents Haines J.'s position. It is true that there has been considerable academic controversy about the nature of the claim for "breach of statutory duty".[36] Whereas, in England, the remedy

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[32] "Behind Lord Atkin's discussion of the duty problem there lies . . . a whole theory of social relations with all its attendant assumptions", J. Stone, The Province and Function of Law (1946), p. 557.

[33] *Supra*, footnote 6.

[34] Laskin, Martland and Spence JJ.

[35] *Supra*, footnote 7, at p. 110.

[36] Linden, Canadian Negligence Law, *op. cit.*, footnote 1, pp. 82 - 93, and the many references cited therein at p. 82, n. 1.

(if it is found to exist) is generally conceived as flowing from the statutory breach, in the United States and Canada such a remedy is more explicitly envisaged as a particular species of common law negligence, sometimes described as "statutory negligence", but nevertheless constituted as a remedy by virtue ultimately of the determination of the trial court.[37]

Whatever the jurisprudential merits of either view, it is clear that Haines J. was not wishing to "demote" the remedial relevance of the statutory provisions which the defendant hotel had broken to the level of "crystallizing a fact situation" or, as Laskin J. has stated on another occasion, "a fortifying element in the recognition of a common law duty".[38]

There are merits to Laskin J.'s conception of statutes as signposts rather than determinants of common law liability since, although such an approach sacrifices the procedural strait-jacket in which the defendant is placed if "true" breach of statutory duty is established, it assists the plaintiff in respect of a far wider range of statutory provisions, since the issue of legislative intention[39] need no longer detain the court at the threshold of the plaintiff's claim.

Laskin J. again appears to have misunderstood Haines J. in respect of the holding of the trial judge that "the defendant's employees undertook affirmative action to remove the plaintiff from the premises. In so doing, they assumed a duty of care to take reasonable precautions to ensure that his safety was not endangered as a result of their actions".[40]

Laskin J. interprets this as "a third position imposing liability on the hotel"[41] and, not surprisingly, argues that the act of eviction should not be looked at in isolation and that "it can only be considered in the present case as wrapped up in the duty of care, if any, resting upon the hotel towards an intoxicated person".[42] It would seem, however, that Haines J. was not attempting to

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[37] There is, however, some evidence of a growing orientation in Canadian decisions towards the English approach, particularly in respect of novel heads of statutory liability; see, *e.g.*, *Cunningham* v. *Moore*, [1972] 3 O.R. 369, aff'd. [1973] 1 O.R. 357; *Re MacIsaac and Beretanos* (1971), 25 D.L.R. (3d) 610 (B.C., Prov. Ct, Levey Prov. Ct J.).

[38] *Horsley* v. *MacLaren, supra*, footnote 6, at p. 463.

[39] Stigmatized as fictional by Harper and James, The Law of Torts, (1956), p. 995; Fleming, The Law of Torts, *op. cit.*, footnote 1, p. 122; Linden, Tort Liability for Criminal Nonfeasance, *op. cit.*, footnote 1, at p. 35; Canadian Negligence Law, *op. cit.*, footnote 1, p. 85.

[40] *Supra*, footnote 10, at pp. 63 (O.R.), 503 (D.L.R.).

[41] *Supra*, footnote 7, at p. 108. *Cf.* Scott, *op. cit.*, footnote 6, at pp. 627 - 628.

[42] *Ibid.*

establish an "eviction duty" in isolation and that his so-called third finding was really part of his second finding of common law liability, with which Laskin J. concurs.

The remainder of Laskin J.'s judgment amounts to an enlarged and conventional presentation of the identification of a breach of duty of care which Ritchie J. disposed of in four sentences.

His Lordship stated:

> The common law assesses liability for negligence on the basis of breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another. This is the generality which exhibits the flexibility of the common law; but since liability is predicated on fault, the guiding principle assumes a nexus or relationship between the injured person and the injuring person which makes it reasonable to conclude that the latter owes a duty to the former not to expose him to an unreasonable risk of harm. Moreover, in considering whether the risk of injury to which a person may be exposed is one that he should not reasonably have run, it is relevant to relate the probability and the gravity of injury to the burden that would be imposed upon the prospective defendant in taking avoiding measures. *Bolton et al.* v. *Stone*,[43] in the House of Lords and *Lambert et al.* v. *Lastoplex Chemicals Co. Ltd. et al.*,[44] in this court illustrate the relationship between the remoteness or likelihood of injury and the fixing of an obligation to take preventive measures according to the gravity thereof.[45]

It is interesting to contrast the use of such a conservative conceptual framework so as to impose an onerous, almost revolutionary, liability onto a defendant with the adoption by Lord Denning M.R. of the most *avant garde* concepts in *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.*[46] so as to restrict the area of recovery. The lesson must surely be that courts, like politicians, should be judged by what they do, not by what they say.

Like Haines J., Laskin J. was anxious to make it clear that a finding of liability against the defendant hotel in the instant case did not involve an opening of the floodgates in respect of all purveyors of alcohol. "If the hotel's only involvement was the supplying of the beer consumed by the plaintiff, it would be

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[43] [1951] A.C. 850 (H.L.).

[44] [1972] S.C.R. 569.

[45] *Supra*, footnote 7, at pp. 110 - 111.

[46] [1973] 1 Q.B. 27, at p. 37 (C.A.). Lord Denning M.R.'s abandonment of the "pigeon-holes" of duty and remoteness of damage in favour of naked policy consideration in this case has met with some criticism: see Jolowicz, Comment, [1973] Camb. L.J. 20, Jacobs, Comment (1973), 36 Mod. L. Rev. 314; *Cf.* Goodhart's support for Lord Denning's approach as constituting "an admirable statement of the Law as it is or ought to be": Comment (1973), 89 L.Q. Rev. 10, at p. 12.

difficult to support the imposition of common law liability upon it for injuries suffered by the plaintiff after being shown the door of the hotel and after leaving the hotel."[47] Nor would other persons on the highway who saw the plaintiff and appreciated his condition "by reason of that fact alone, come under any legal duty to steer him to safety, although it might be expected that good Samaritan impulses would move them to offer help".[48] The defendant hotel, however, was not in such a neutral position.

> It was an invitor-invitee relationship[49] with [the plaintiff] as one of its patrons, and it was aware, through its employees, of his intoxicated condition, a condition which, on the findings of the trial Judge, it fed in violation of applicable liquor licence and liquor control legislation. There was a probable risk of personal injury to Menow if he was turned out of the hotel to proceed on foot on a much-travelled highway passing in front of the hotel.[50]

Laskin J. pointed to alternative steps which the hotel could have taken involving "[n]o inordinate burden . . . upon it".[51] Thus "a call to the police or a call to his employer immediately come to mind as easily available preventive measures; or a taxi-cab could be summoned to take him home, or arrangements made to this end with another patron able and willing to do so".[52]

Throughout the Commonwealth, hotel and public house proprietors should take note of this decision and treat its implications with "anxious care", for it is by no means certain, despite Mr. Justice Laskin's protestation of innocence to the charge of imposing "a duty on every tavern-owner to act as a watch dog"[53] for all drunken patrons, that the limitations to such universal liability referred to in Mr. Justice Laskin's judgment constitute

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[47] *Supra*, footnote 7, at p. 111.

[48] *Ibid.*

[49] His Lordship does not expand on the relevance of such "invitor-invitee relationship", wisely, it is submitted. As Professor Linden has somewhat indelicately commented, "[i]t is pretty well agreed that the Canadian law of occupiers' liability is a mess". (1967), 45 Can. Bar Rev. 831, at p. 836. It would seem clear, however, that the invitor-invitee relationship in the circumstances of *Menow*'s case would have been displaced by the straightforward duty of care embodied in the negligence concept, since the hotel occupier's default was of an active rather than a static nature: *Cf., e.g., Slater* v. *Clay Cross Ltd.*, [1956] 2 Q.B. 264 (C.A.); *Heard* v. *N.Z.L.R. Products Ltd.*, 1960 N.Z.L.R. 329. One Canadian decision has gone so far as to construe the relationship between the tavern proprietor and imbibing guests as being of a contractual nature: See *Cosgrave* v. *Busk* (1965), 55 D.L.R. (2d) 98.

[50] *Supra*, footnote 7, at p. 111.

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid.*, at p. 113, per Laskin J., quoting from the judgment at trial of Haines J., *supra*, footnote 10, at pp. 63 (O.R.), 503 (D.L.R.).

a significant restriction to its scope. As his Lordship states, "a great deal turns on the knowledge of the operator (or his employees) of the patron and his condition".[54] It is true that the plaintiff in *Menow* was in a somewhat unusual position in that two important aspects of his plight, which could separate him from the ordinary drunk, were known to the hotel employees, namely his propensity to drink to excess and thereafter to "act recklessly"[55] and the fact that in order to reach his home he would be obliged to travel some distance along a busy highway.

On consideration, these "individuating" aspects do not amount to very much. Most persons when drunk behave recklessly—Mr. Menow's conduct was surely no worse than what one would expect of even the most reasonable of men when under the influence of alcohol.[56] Moreover, the actual knowledge by the employees that Menow would be obliged to use the highway to get to his home is surely not significantly different to the strong belief which would have existed in respect to any other *first-time* customer that in order to reach his home, wherever it was, he would have to use either the unpathed highway, or—even more dangerous—his car.

As has been discussed above,[57] rural taverns have, on this account, become even more lethal than urban ones, but it would seem only reasonable that if such a person as Mr. Menow can impose liability on a tavern, then very many car owners who drink to excess can also do so. The implications in regard to potential liability to third persons injured by drunken drivers are immense.[58]

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[54] *Ibid.*

[55] *Ibid.*, at p. 107.

[56] In *Stephens* v. *Corcoran* (1965), 65 D.L.R. (2d) 407, at p. 411 (Ont. H. C.), Wilson J. considered it possible to apply a standard of care relating to "a reasonable man who had had several drinks". If so, some revision is necessitated of the classic judgment of the Master of the Rolls in *Fardell* v. *Potts* (A.P. Herbert, Uncommon Law (1935), (New ed., 1969), p. 1), where his Lordship states (at p. 4) that a reasonable man is one "who uses nothing except in moderation".

[57] *Supra*, footnote 17.

[58] In the United States, third parties injured by drunken drivers have sued the proprietors of taverns which supplied the drink, with mixed success. See, *e.g.*, *Fleckner* v. *Dionne* (1949), 94 Cal. App. 2d 246, 210 P. 2d 530; *Seibel* v. *Leach* (1939), 233 Wis. 66, 288 N.W. 774; *Lee* v. *Peerless Inns. Co.* (1966), 248 La. 982, 183 So. 2d 328, in all of which the plaintiff's action failed. The decision which represents the turning of the tide in favour of the plaintiff is *Rappaport* v. *Nichols* (1959), 31 N.J. 188, 156 A. 2d 1. See also *Jardine* v. *Upper Darby Lodge No. 1973, Inc.* (1964), 413 Pa. 626, 198 A. 2d 550; *Adamian* v. *The Three Sons Inc.* (1968), 353 Mass. 498, 233 N.E. 2d 18. Considerable academic interest

Like Haines J., Mr. Justice Laskin considered that Menow was contributorily negligent to the extent of thirty three and one third per cent of his injuries. As has been remarked above, such a finding is of unsurpassable magnanimity to the plaintiff whose conduct was of the most reckless degree in respect of his own welfare and continued for a considerable time.

It is in respect to two issues, one considered by Mr. Justice Laskin, the other not, that this decision can be most severely criticized.

The first is that of the application of the defence of *volenti non fit injuria*. Unlike in England, where the range of the defence has been "severely limited"[59] in Canada, *volenti* is thriving. In recent years, a large number of decisions has deprived the plaintiff of any compensation by virtue of his voluntary assumption of the risk arising from the defendant's conduct.[60] Mr. Justice Laskin's treatment of the *volenti* issue in *Menow* is, it is respectfully submitted, inadequate and mistaken.

His Lordship disposed of the issue in the following terms:[61]

> The argument [of the defendant in respect of *volenti*] is untenable, whether put on the basis of Menow's self-intoxication or on the basis of the situation that faced him when he was put out of the hotel. In his condition, as found by the trial Judge, it is impossible to say that he both appreciated the risk of injury and impliedly agreed to bear the legal consequences.

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in such developments is evident: See, *e.g.*, Jack, Comment (1960), 20 La. L. Rev. 800; Anon., The Common Law Liability of Minnesota Liquor Vendors for Injuries Arising from Negligent Sales (1965), 49 Minn. L. Rev. 1154; Anon., Comment (1960), 14 Rutgers L. Rev. 618; Anon., Comment (1960), 60 Col. L. Rev. 554; Cahn, New Common Law Dramshop Rule (1960), 9 Clev.-Mar. L. Rev. 302; Miller, Comment (1960), 58 Mich. L. Rev. 1075; McClintock, Common Law Remedy for Negligent Acts of the Drunk (1960), 5 Tulsa L.J. 288; Ricci, *op. cit.*, footnote 17, at pp. 1005-1009.

[59] *Nettleship* v. *Weston*, [1971] 2 Q.B. 691, at p. 701 (C.A., per Lord Denning M.R.). The death knell for the efficacy of the *volenti* defence in the context of motor vehicles has been sounded by the Road Traffic Act, 1972, c. 20, s. 148(3). For a consideration of the implications of this statutory execution, see Raisbeck, Injured Passengers — The Road to Compensation, [1973] J. Bus. L. 322, at pp. 326-327.

[60] *E.g.*, *Conrad* v. *Crawford*, [1972] 1 O.R. 134, 22 D.L.R. (3d) 386 (H.C., Hughes J.); *Tomlinson* v. *Harrison*, [1972] 1 O.R. 670, 24 D.L.R. (3d) 25 (H.C., Addy J.); *Priestly* v. *Gilbert*, [1973] 1 O.R. (2d) 365 (C.A.); *Boulay* v. *Wild*, [1972] 2 W.W.R. 234, 25 D.L.R. (3d) 249 (Alta S.C., App. Div.); *Allen* v. *Lucas*, [1972] 2 W.W.R. 241, 25 D.L.R. (3d) 218 (Sask. C.A.); *Tallow* v. *Tailfeathers*, [1973] 6 W.W.R. 732 (Alta S.C. App. Div.); *Deskan v. Dziuma*, [1973] 3 O.R. 101 (H.C., Keith J.); *Benjamin* v. *Boutilier* (1970), 3 N.S.R. (2d) 282 (S.C., Trial Div., Dubinsky J.); *Ruest* v. *Desjardins* (1972), 7 N.B.R. (2d) 91 (S.C., Q.B.D., Robichaud J.).

[61] *Supra*, footnote 7, at p. 113.

No cases were cited by Mr. Justice Laskin in this cavalier dismissal of the *volenti* defence. Had his Lordship referred to the authorities, he would have discovered that the essential issue in *Menow* of progressive intoxication affecting the plaintiff's capacity for voluntary conduct had been considered by the Supreme Court of Canada in *Miller* v. *Decker*.[62] There, the court held that the issue of *volenti* was not to be considered as arising at the *end* of a concerted expedition to become drunk, but rather towards the beginning. If individuals come together with the intention of drinking to excess in each other's company, the court held, the appropriate temporal location of the issue of voluntary assumption of the risks inherent therein and consequent thereto was at the commencement or at least in the early, rational, period of such debauch. As Mr. Justice Rand stated:[63]

> The terms to be inferred, then, on the understandings which ordinary persons of their age, aware of their situation and as it would develop, as reasonable and prudent young men, would have proposed and accepted. That standard is imposed on those whose minds are clear and those who deliberately commit themselves to the vortex of such risks can claim no greater indulgence.

Applying such a criterion to the fact-situation of *Menow*, it is surely obvious that, at the *commencement* of his drinking on the fateful evening, Mr. Menow was as *volens* as ever a man could be in respect of the hotel's prospective negligent conduct towards him. All the aspects of the plaintiff's individual circumstances which were relevant in cementing the case of negligence against the hotel should have been taken into consideration in respect of the issue of voluntary assumption of risk. If it is not fictional to imply an agreement between the plaintiff and the defendant when nothing has been expressly stated by either party—and this is the basis of the *volenti* defence—then, having regard to the fact that Mr. Menow had repeatedly become intoxicated on the defendant's premises, without subsequent protest by him to the defendant for its negligent conduct towards him, the only reasonable inference is that Mr. Menow "risked his own skin as the old saying goes".[64]

It must strike any objective bystander as hypocritical and unjust that a person who is anxious to become intoxicated can "have it both ways" towards his anti-social benefactor. Whilst it is true that certain individuals succeed in becoming drunk despite their best intentions, there are many others, of whom the plaintiff in *Menow* would appear to be a prime example, who become intoxicated simply because they want to. Being persons of at least

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[62] [1957] S.C.R. 624, 9 D.L.R. (2d) 1.
[63] *Ibid.*, at pp. 631 (S.C.R.), 3 (D.L.R.).
[64] *Ruest* v. *Desjardins, supra*, footnote 60, at p. 94.

moderate intelligence (and no one suggested otherwise in regard to Mr. Menow),[65] they must realize that drunkenness carries with it its own hazards. It surely constitutes a total rejection of the concept of individual responsibility, on which tort law is based,[66] to permit persons who intentionally become intoxicated to sue the hand which feeds their appetite.

A further, and more technical objection to Mr. Justice Laskin's treatment of the *volenti* issue is that, whereas his Lordship was adamant that the defendant's negligence should relate not to its eviction of the plaintiff at the termination of his drinking but rather to its general breach of duty to the plaintiff (extending over a long period), his Lordship nevertheless located the *volenti* issue at or around the time of the eviction—thereby drawing a temporal distinction between the default of the defendant and the subsequent alleged consent thereto by the plaintiff. No consideration is thus given by his Lordship to the *volenti* issue in regard to the time when the defendant was behaving negligently towards the plaintiff, which is the conventional and logical period for judicial scrutiny.

The second aspect of *Menow* which renders suspect the efficacy of the decision relates to an issue not considered in the judgment of Mr. Justice Laskin, namely, the possible application of the defence of *ex turpi causa non oritur actio*. Canadian courts have afforded a warm reception to this defence in recent years,[67] and, applying the criteria generally adopted in such decisions, it would seem certain that Mr. Menow should have been deprived of his right to recover from the defendant hotel. It would be difficult to describe the conduct of the plaintiff on the fateful evening otherwise than as being of "such an anti-social quality that a court will lend it no countenance".[68]

Menow is an important decision with implications of revolutionary dimensions. Those who favour an enterprise liability solution to tort law may be disposed to rejoice at the tendency to attach to the purveyors of alcohol the price of losses incidental to their trade. Others may lament the implicit denigration of individ-

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[65] Mr. Menow's employer's wife described him at trial as follows: "[H]e appeared to me to be, like, alert and with it, so to speak. . . . I thought he was quite intelligent to speak to and if we explained any work to be done he seemed to grasp it very readily."

[66] See Mansfield, Informed Choice in the Law of Torts (1961), 22 La. L. Rev. 17, for an eloquent defence of the necessity for retaining *volenti* in tort law.

[67] See *e.g.*, *Tomlinson* v. *Harrison*, *supra*, footnote 60; *Boulay* v. *Wild*, *supra*, footnote 60; *Tallow* v. *Tailfeathers*, *supra*, footnote 60.

[68] *Tallow* v. *Tailfeathers*, *ibid.*, at p. 741, per Clements J.A.

ual responsibility which the decision involves. Those who drink socially may ponder on the irony that drunkards who formerly gave drinkers a bad name have now handed to them a potential *carte blanche* to drink irresponsibly and pass the tab for consequent damage to those who, for motives of profit, aided and abetted their debauch.

WILLIAM BINCHY*

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MARRIAGE—VALIDITY OF CONSENT—ANOTHER STEP IN THE WRONG DIRECTION.—The decision of Van Camp J. of the Ontario Supreme Court in the case of *Feiner* v. *Demkowicz (Feiner)*[1] raised[2] once more the issue of the nature of consent in the marriage relationship. In that case, the plaintiff had gone through a form of marriage with the defendant, who was his aunt, in Poland; the purpose of the marriage was to enable the defendant to leave Poland, which she wished to do because of the political situation which existed there. The parties subsequently entered Canada, where the plaintiff intended to remain and planned to marry. The defendant, on the other hand, went on to Rome where she also planned to marry. The plaintiff brought an action for annulment on the grounds of non-consummation, consanguinity and lack of consent. Van Camp J. rejected the claims based on the first[3] and third grounds but held the marriage to be void on the basis of consanguinity. It is the purpose of this comment to consider the law and policy bases for Van Camp J.'s decision on the consent issue.

At the outset, it must be stated that it is my view that the "immigration cases", as Van Camp J. referred to them,[4] are not a particularly happy collection. The true author of the mischief, it is suggested, is a decision of Clayden J. of the Supreme Court of South Africa in *Martens* v. *Martens*.[5] There, whilst on

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[1] (1974), 42 D.L.R. (3d) 165.

[2] Important issues were also raised in relation to private international law.

[3] Van Camp J. held, (1974), 14 R.F.L. 27, at p. 29, that the fact of non-consummation alone could not be the basis for a decree of annulment, but must be coupled with physical or psychological incapacity. See *Foisy* v. *Foisy*, [1954] 4 D.L.R. 155, at p. 157 per Schroeder J. (Ont. H.C.).

[4] *Supra*, footnote 1, at p. 173.

[5] [1952] 3 S.A.L.R. 771 (W.L.D.).

holiday in Greece, the female defendant had met one H., who was a married man, and determined to go to South Africa and live with him. In order that she could be admitted to South Africa it was necessary that she enter the country to be married and, thus, H. persuaded the plaintiff to act as husband in a marriage ceremony. Immediately afterwards, the defendant went off with H. and subsequently lived with him. On two occasions, the plaintiff had asked the defendant to live with him but she had refused: the plaintiff then petitioned unsuccessfully for a decree of nullity. The reasons which were given by Clayden J. in dismissing the petition were, it is suggested, highly unsatisfactory in almost all respects. First, the judge was of the view[6] that the evidence showed that the parties intended to *marry* rather than merely to go through a *form of* marriage. The main reason which led him to this conclusion was that it appeared that the parties had appreciated the need for divorce to terminate such relationship as existed. It is suggested that this conclusion was erroneously drawn by Clayden J. for the simple reason that few people who do not have formal training in the law are likely to appreciate the distinction between divorce and annulment and there was no evidence to suggest that the parties in *Martens* possessed that knowledge or training. Further, Clayden J. went on to say that,[7] "... the facts show that the parties did intend that the defendant should become the wife of the plaintiff. That was the very object of the ceremony so that she could remain in the country...". This is a remarkably self contradictory statement for, although it was true that the aim of the ceremony was to enable the defendant to remain in South Africa, the purpose of her remaining in South Africa was not to act as the plaintiff's wife in any real sense. Clayden J., hence, seemed to regard the crucial part played in the proceedings by H. as irrelevant.

Although Van Camp J. did not make reference to *Martens* in *Feiner* v. *Demkowicz (Feiner)*, he did refer to two English cases: *H.* v. *H.*[8] and *Silver (Kraft)* v. *Silver.*[9] The facts in *H.* differed from those in *Martens* and *Feiner* v. *Demkowicz (Feiner)*[10] in that an additional element, in the shape of fear or duress, was present in *H.* In that case, a woman, resident in Hungary was desperately anxious to leave the country because in view of the political situation, she entertained what Karminsky

6 *Ibid.*, at pp. 774-775.
7 *Ibid.*, at p. 775.
8 [1954] P. 258.
9 [1955] 2 All E. R. 614.
10 *Supra*, footnote 1, at p. 173.

J. considered to be justifiable fears for her life, virtue and freedom. Therefore, in order to obtain a foreign passport, she went through a form of marriage with a French citizen and separated from him immediately afterwards. She duly escaped from Hungary and presented a petition for nullity on the ground of duress, even though she made no allegations against the respondent. Karminsky J. granted the decree and, after describing *Martens* as, ". . . more convincing in its relation to English law than contrary authority"[11] went on to say[12] that, "If the present case was devoid of the element of fear I should be compelled to find that the parties to the present suit intended that the petitioner should become the wife of the respondent", a comment which was adopted by Van Camp J. in *Feiner* v. *Demkowicz (Feiner)*.[13] The facts in *Silver (Kraft)* v. *Silver* were virtually identical to those in *Martens* except that the petitioner also petitioned for divorce on the grounds of the respondent's adultery. Collingwood J. followed *H.* v. *H.* and thus refused to grant a decree of nullity on the ground that no element of fear or duress was present. On the issue of nullity, the judge commented[14] that, "The voluntary consent of both parties is necessary for a valid marriage and the marriage is void if such consent is lacking as, for example, where it is procured by threats or duress; but mental reservations on the part of the parties to a marriage do not affect its validity". However, Collingwood J. granted the petition based on the ground of adultery and specifically stated[15] that he could see, ". . . no social advantage in insisting on the maintenance of a union which has been a mere travesty from the beginning". One wonders how Collingwood J. was logically able to uphold both propositions at the same time, as it is quite clear from earlier remarks that he would have been prepared to accord the mere travesty legal effect had there been no petition for divorce.

Van Camp J. in *Feiner* v. *Demkowicz (Feiner)* also referred to another line of authority based around the decision of Schroeder J. A. in *Iantsis (Papapatheodrou)* v. *Papapatheodrou*[16] concerning consents to marriage which were procured by fraud. The first case, in the series which was not referred to by Van Camp J., was the Saskatchewan case of *Kokkalas (Rokana)* v.

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[11] *U.S.* v. *Rubenstein* (1945), 151 F. 2d 915.

[12] *Supra*, footnote 8, at p. 269.

[13] *Supra*, footnote 1, at p. 173.

[14] [1955] 2 All E. R. 614, at p. 615.

[15] *Ibid.*, at p. 616.

[16] (1971), 15 D.L.R. (3d) 53 (Ont. C.A.).

Kokkalas[17] where the plaintiff and defendant had gone through a marriage ceremony, on the completion of which the defendant was assured by the registrar that he could remain in Canada. He then said to the plaintiff, "Now I don't need you anymore" and left. Sirois J. held that the plaintiff's petition for nullity would fail as the judge considered[18] that she had freely consented to the marriage although, ". . . obviously she would not have done so had it not been for the deceit of the defendant". With respect, it is submitted that this statement is palpably absurd: it is scarcely possible to have a consent which was freely given and, at the same time, given as the result of deceit. A different approach, however, was adopted by Stewart J. of the Ontario Supreme Court in *Johnson* v. *Smith*.[19] There, the defendant had also used his marriage to the plaintiff as a means of entering Canada and Stewart J. granted the plaintiff a decree of nullity. Stewart J. specifically followed the remarks which had been made by Learned Hand J. in *U.S.* v. *Rubenstein*[20] who had stated that, "Mutual consent is necessary to every contract and no matter what forms or ceremonies the parties go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved . . . if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relations as it is ordinarily understood, and it is not ordinarily understood as merely a pretence, or a cover to deceive others". Further, Stewart J. went on to comment[21] that, "It is quite obvious that the plaintiff was tricked into marriage by the fraudulent intention of the defendant. It is equally obvious that the defendant at no time had an intention truly to marry the plaintiff. It is also, it seems clear, equally obvious that the plaintiff would not have entered into the marriage had she been aware of the fraud that was being perpetrated on her". In addition, Stewart J. ordered that the defendant be deported.

Despite what appear to me to be its obvious merits of fairness, simplicity and commonsense, it is clear from the decision in *Feiner* v. *Demkowicz (Feiner)* that *Johnson* v. *Smith* has not

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17 (1965), 50 D.L.R. (2d) 193 (Sask. Q.B.).

18 *Ibid.*, at p. 194.

19 (1968), 70 D.L.R. (2d) 374 (Ont.).

20 *Supra*, footnote 11, at p. 918.

21 *Supra*, footnote 19, at p. 375.

found subsequent favour with Canadian courts. Notably,[22] in *Iantsis (Papapatheodrou)* v. *Papapatheodrou*[23] Schroeder J. A. in the Ontario Court of Appeal considered that *Johnson* v. *Smith* was wrongly decided. The facts in that case were effectively identical with those in *Kokkalas* and *Johnson* v. *Smith* and Schroeder J. A. stated[24] that, "In the *Johnson* case, and in the case which gave rise to the present reference, all that is alleged is a mental reservation on the part of the defendant in the suit, and under the governing law of England and Ontario that is not sufficient to derogate from the effect to be given to the solemn declaration of the spouses made in the course of the marriage ceremony".

At this point, it is worth mentioning that further authority, consonant with the views expressed in *Rubenstein* and *Johnson* v. *Smith*, exists in the shape of the two Scots cases of *Brady* v. *Murray*[25] and *Orlandi* v. *Castelli*.[26] In *Brady* v. *Murray*, the parties were Roman Catholics and had gone through a civil marriage in an attempt to induce their church to marry them, as they considered, properly. Lord Moncrieff granted a decree of nullity as he accepted the parties' evidence that they did not regard a civil ceremony of marriage as, to use the judge's own phrase, a matrimonial fact. Although *Brady* v. *Murray* is not an immigration case it is interesting in that it contains a valuable statement of principle by Lord Moncrieff who said,[27] "I . . . hold it proved that the consent to marry which they interchanged, although this was not made known to the witnesses, was exchanged subject to a reservation on both sides which had been communicated by one party to the other; and that in terms of this reservation they by joint arrangement withheld actual consent to marry, and only interchanged for a purpose remote from marriage a formal and ostensible consent". *Brady* v. *Murray* thus demonstrates a judicial approach entirely different from that in *Iantsis (Papapatheodrou)* v. *Papapatheodrou*. *Brady* v. *Murray* was followed in *Orlandi* v. *Castelli*, where a woman of British nationality resident in Glasgow brought her Italian fiancé to Scotland to stay. After three months, his resident permit expired but he desired to remain longer. One way of enabling him to do so was for the parties to marry and, hence, they went through

[22] See also *Gardner* v. *Gardner* (1970), 13 D.L.R. (3d) 250 (B.C.S.C.), not considered by Van Camp J., where the matter was mentioned.

[23] *Supra*, footnote 16.

[24] *Supra*, footnote 16, at p. 58.

[25] 1933 S.L.R. 534.

[26] 1961 S.C. 113.

[27] *Supra*, footnote 25, at p. 535.

a form of marriage at a registry office even though both were Roman Catholics and did not regard the civil ceremony as a genuine marriage. They neither cohabited nor had sexual relations after the ceremony. The wife then brought an undefended action for declaration of nullity; however, the Lord Advocate entered an appearance in the public interest and raised certain defences. It was conceded by counsel for the wife that all the formalities for a civil ceremony of marriage had been fulfilled but claimed that there had been no true consent. Lord Cameron accepted this contention, holding that compliance with statutory formalities was not conclusive proof of a marriage's validity. "[W]here it can be shown", he said,[28] that there has been no true matrimonial consent, and that the ceremony was only designed as a sham or as an antecedent to true marriage, it is competent to found upon that absence of the consent for the purpose of setting aside a marriage regularly celebrated. In addition to *Brady* v. *Murray*, Lord Cameron relied chiefly[29] on the English cases of *Hall* v. *Hall*,[30] *Kelly* v. *Kelly*[31] and *Ford* v. *Stier*[32] all of which concerned mistake as to the nature of the ceremony.

Central to the issues raised in *Feiner* v. *Demkowicz (Feiner)* is the question of the policy behind the various decisions. In *Feiner* v. *Demkowicz (Feiner)*, Van Camp J. commented[33] that, "The refusal to declare a marriage void in these circumstances is not stated to be the result of any principle of public policy". It is suggested that the policy consideration cannot fairly be evaded and that two such considerations are apparent in any analysis of these cases: first, the relationship between immigration laws and marriage laws and, second, the attitude to the institution of marriage which the cases demonstrate. With regard to the first consideration, it is suggested that it is quite improper for immigration laws to be enforced through the agency of the marriage laws by holding empty, marriages, such as that in *Martens* v. *Martens*. In *Johnson* v. *Smith*, Stewart J. ordered that the fraudulent defendant be deported and it is suggested that this sanction, together with any other criminal sanctions which the

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[28] *Supra*, footnote 26, at p. 120.

[29] Also on the following Scots institutional writers: Stair, Notes (More's ed.), p. xiii; Erskine, Institutes (1838), Vol. 1, tit. vi, para. 2; Bell, Principles, para. 1517; Hume, Lectures on Marriage (1939), Vol. I, p. 26 and Fergusson Consistorial Law (1829), pp. 143 and 160.

[30] (1908), 24 T.L.R. 756.

[31] (1932), 49 T.L.R. 99.

[32] [1896] P. 1.

[33] *Supra*, footnote 1, at p. 173.

relevant legislature sees fit to impose, is the correct approach to abuse of immigration laws.

The attitude demonstrated by the courts in *Martens*, *Kokkalas*, *Iantsis* and *Feiner* towards the marriage relationship is, it is suggested, profoundly disturbing in that it appears to lay greater emphasis on the maintenance of marriage as an institution rather than on marriage as a successful personal relationship.[34] *Johnson* v. *Smith* which seems to me to have much to commend it has been severely criticised on the score of policy by Professor Bromley.[35] It is, he suggests,[36] "very much in the public interest that persons should not be permitted to abuse the marriage laws of the state by entering into a marriage purely to obtain some collateral advantage and with no intention of fulfilling the purpose for which marriage exists . . . in other words, if two people take advantage of the opportunity to marry that the law provides, they will be saddled with all the legal consequences of their act". He then went on to say[37] that the decision in *Johnson* v. *Smith*, ". . . [strained] the law of nullity so far that the whole concept of marriage as a social institution might be threatened". It is submitted that these comments are entirely misconceived. As has already been observed, the fact that one disapproves of abuse of immigration laws does not necessarily mean that every marriage entered into for that purpose should be regarded as valid. Further, it is suggested that the social policy of freeing a petitioner from a meaningless marriage should override the more amorphous policy of protecting marriage as a social institution. If the institution of marriage is to remain a vital part of the social and personal life, it is the successful marriage which must be maintained and encouraged, not the hollow and meaningless. Decisions such as that in *Feiner* v. *Demkowicz (Feiner)* can do nothing to advance the state of marriage in our society, where it is under continuous attack from many groups. One is the more disappointed with the decision when strong authority, which would justify a contrary finding, clearly exists.

FRANK BATES*

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[34] For a fuller discussion of the judicial attitude towards the matrimonial relationship see Bates, The Enforcement of Marriage (1974), 3 Anglo-Am. L. Rev. 75.

[35] The Validity of "Sham Marriages" and Marriages Procured by Fraud (1969), 15 McGill L.J. 319.

[36] *Ibid.*, at p. 322.

[37] *Ibid.*, at p. 325.

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MATRIMONIAL PROPERTY DISPUTES—RESULTING AND CONSTRUCTIVE TRUSTS—RESTITUTION.—*Fiedler* v. *Fiedler*[1] was yet another case where a wife was claiming a share in property acquired in her husband's name, but to the acquisition of which she alleged that she had made a substantial contribution by the money and personal effort which she had expended upon the family. The parties had been married for twenty-one years when they were divorced in 1971. The husband had been engaged in farming during the first years of the marriage, but only after 1955 when he acquired his second farm did he have success, and by the time of the divorce he had expanded the farm by subsequent land purchases. During the marriage, of which two children were born, the wife had exercised her profession of school teaching, and her earnings, which were found to have amounted in all to some $51,000.00, had been used to pay for food for the family, clothes, dental bills, school books for the children, furniture and other such items. She had done work on the farm when her husband needed her help, kept a large vegetable garden, and was described at trial as a good wife and mother. It was also found that her husband had agreed with her continuing to teach, because this brought in valuable income for the family.

No agreement as to how the farm lands should be owned was made between husband and wife when the lands were acquired. Indeed, the evidence strongly pointed to the conclusion that they had not given their minds to the matter; Mrs. Fiedler discovered from her solicitor only in 1973 that all the land was solely in her husband's name. She admitted that, perhaps by "tradition", she had left such things to her husband. These then were the salient facts, and at first instance Moore J.'s interpretation of them was that the wife's contribution to the family's support had enabled the husband to make the purchases, and that that contribution was substantial. This led him to the conclusion that the wife was entitled to a half share.

It is true that the wife's earnings were not employed in the purchase of the lands, either for down payment or mortgage repayments, and that, though the wife knew of the land purchases, there was no suggestion of there having been any agreement between husband and wife. But these elements did not prove insurmountable, and indeed they have not frustrated earlier courts, both in England and Canada, which determined that in the circum-

[1] [1974] 6 W.W.R. 320, 48 D.L.R. (3d) 714, reversed and remitted to the lower court, Feb. 24th, 1975, Appeal No. 9528 (Alta C.A.).

stances the particular non-titled spouse should have a share.[2] In the Appellate Division, however, a divided court did not sustain the trial judge's conclusion. Sinclair J.A.[3] took the view that the husband and wife had had no understanding of any kind as to the ownership of the farm lands, and that this was the answer to the wife's proprietary claim.[4] The dissent of McDermid J.A. on the other hand echoed something of the trial judge's line of thinking. Given the extent to which the wife's financial input had freed the husband's resources for the purchase of land, it was only fair that she should have a proprietary share in that property.

At first instance Moore J. discussed the precedents at length, but on appeal Sinclair J.A. considered it unnecessary that he "deal at length with current trends of judicial opinion concerning the determination of matrimonial interests in property acquired during marriage". He adopted Martland J.'s words in *Murdoch* v. *Murdoch*,[5] and considered that Moore J. "in his careful judgment" had not attached the importance to "intention or belief" which the instant facts required. McDermid J.A. for his part ranged himself one hundred per cent behind an unjust enrichment approach.[6] It is these features of the case which underline the significance of the reasoning which Moore J. pursued, and his thoughtful interpretation of the precedents.

The series of cases in England and Canada involving husband and wife property disputes is now so long that one assertion can be made with some confidence. The courts are the scene of a contention between two schools of judicial thought. The first is of the view that husband and wife are no exception to the rule that property interests only pass between persons as the result of a contract or gift. It follows that, if A and B agree to acquire an

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[2] *E.g.*, *Trueman* v. *Trueman*, [1971] 2 W.W.R. 688, 18 D.L.R. (3d) 109 (Alta C.A.), followed in *Wiley* v. *Wiley* (1971), 23 D.L.R. (3d) 484 (B.C.).

[3] With whom Moir J.A. concurred.

[4] "The vital question in the present case is whether in [teaching and devoting her earnings to family support] Mrs. Fielder acted in the reasonable belief [based on her husband's words or conduct] that she was obtaining a beneficial interest in the lands."

The court remitted to the trial court the question of what lump sum should be awarded for maintenance. This had been sought in the alternative by the wife, but the matter had not been fully considered below. The present comment does not concern itself with Sinclair J.A.'s consideration of the power of the court under s. 11 of the federal Divorce Act, R.S.C., 1970, c. D-8, to entertain a maintenance claim when no such claim is made until after the award of a decree absolute.

[5] [1974] 1 W.W.R. 361, 41 D.L.R. (3d) 367 (S.C.C.).

[6] Alternatively, he considered that the principle of *Trueman* v. *Trueman*, *supra*, footnote 2, applied.

asset and to share it, but take the property in the name of A, B has a beneficial interest if he was a party to the consideration, but not if he is a volunteer. The only concession is that where A and B are husband and wife such an agreement (or common intention) prior to the acquisition will be enforced, whether or not that agreement is contractual or results in a declaration of trust by A.[7] The second school sees marriage as a *sui generis* relationship, a sharing of lives, and as therefore giving each spouse a right to a share in assets they use or enjoy together, but acquired in the name of one. Such a right emanates not from any agreement, but from the desire of the courts to deal justly and equitably between persons whose energy and effort have jointly gone into the marriage, and the acquisition of "family assets". The first school expresses itself through the resulting trust (the enforcement of intent); the second school, being concerned with justice and equity, would therefore logically express itself through the constructive trust, meaning an order securing restitution.

However, because the views of the resulting trust school are still accepted by the highest appellate courts, the other school is compelled, sometimes unconsciously, to find intent when a wife's input into the marriage is such that in justice and equity she deserves a share in the disputed asset. "A fair man could not have accepted all this effort from his wife, if he had not earlier led her to understand that he and she were to share the asset acquired in his name"—so the argument goes. In other words, this "discovery" of an implied common intention prior to the acquisititon is in many cases a mere vehicle or formula for giving the wife a just and equitable share in the disputed asset. It is in fact a constructive trust approach masquerading as a resulting trust approach.

The confusion is exacerbated by two further factors. First, given any set of facts, who can be dogmatic that labour freely forthcoming from the wife, which results in the creation, building up or improvement of the disputed asset, does not reveal a pre-acquisition common intention? Even if the wife has restricted her activities to being a good housewife and mother to the children (which would seem to be just too remote to show implied intent in relation to the acquisition by her of an interest even in the home), it may still be possible to find implied intent on the particular facts. Secondly, the judicial proponents of the prevailing intent school *will* not clarify their terms. In *Gissing* v. *Gissing*[8]

[7] Husband and wife do not generally intend their arrangements to be contracts or to have legal consequences: *Balfour* v. *Balfour*, [1919] 2 K.B. 571. See also *Pettitt* v. *Pettitt*, [1970] A.C. 777, [1969] 2 All E.R. 385 (H.L.).

[8] [1971] A.C. 886, [1970] 2 All E.R. 780.

members of the House of Lords spoke of "resulting, implied, or constructive trust", and said it matters not which one calls the trust which enforces intent. It was that language which was adopted by the majority in the Supreme Court of Canada in *Murdoch* v. *Murdoch.*

Lord Diplock's language in *Gissing* v. *Gissing*, adopted in *Murdoch*, and by Sinclair J.A. in *Fiedler*, serves as a useful instance of this thinking. Referring to the fact that the statute does not require "a resulting, implied or constructive" trust of land to be in writing, he continued:[9]

> A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between these classes of trust—is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by a trustee of a legal estate in land, wherever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

Of course, Lord Diplock made it clear in *Pettitt* v. *Pettitt*[10] that, given a free hand, he would be more persuaded by the justice and equity school. But in this same case Lord Reid, Viscount Dilhorne, and Lord Morris all refer to a "resulting, implied or constructive trust". Yet Lords Dilhorne and Morris are firmly convinced members of the intent school, and Lord Reid, who is not, hoped the law permitted the "imputation of a deemed intention", though he thought it might require the inferring of intent. Lord Pearson, also an adherent of the intent school, alone stuck firmly to the sole term, resulting trust.

To my mind it matters a great deal what sort of trust we are concerned with among that trio. Despite the expansive *obiter* dicta of Lord Diplock, above, it is striking that each member of the House in *Gissing* does not go beyond "inferred" intent. Lord Reid alone speaks of imputation, and in the manner already mentioned. In the same vein as his dicta quoted earlier, Lord Diplock does expand a little. Under the English law of "constructive, implied or resulting trusts", he says, "effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself."[11] But what *in toto* these final appellate courts appear to be saying is

[9] *Ibid.*, at p. 790 (All E.R.).
[10] *Supra*, footnote 7.
[11] *Supra*, footnote 8, at pp. 790-791 (All E.R.).

this: "when there is no evidence of an express intent, there may yet be evidence of an implied intent. Express intent in the form of an express trust makes the spouse with title an express trustee; express intent not couched in the form of an express trust, or implied intent, make him some other kind of trustee. What other kinds of trustees are there? Well, there are implied, resulting, and constructive trustees. It does not really matter in this context which term we use. They are all concerned with intent which, where it is not express, is implied or inferred. That is what we are talking about. The judicial task is to find what the parties intended, if they intended anything at all."

It was left to Laskin J. in *Murdoch* v. *Murdoch* to point out that a constructive trust has nothing to do with intent. The court merely utilizes the machinery of the trust to express the judicially imposed obligation upon A to restore or hand over property to B. A's obligation arises out of the fact that in justice and equity that is precisely what A ought to do, and, B having no other remedy, will be compelled to do.

In England, however, this conception of the constructive trust has yet to be accepted by the highest appellate court, and therefore in these husband and wife cases the justice and equity school, still compelled to express its conclusions in terms of intent, seizes upon the appellate talk of "imputed" intent to justify its veiled justice and equity decisions. This, one would respectfully suggest, is what Lord Denning did in *Falconer* v. *Falconer*.[12] Referring to the judicial decisions holding husband and wife each to have a share in a matrimonial home acquired in the name of one of them, he said:[13]

> It is done, not so much by virtue of an agreement, express or implied, but rather by virtue of a trust *imposed* by law. The law imputes to husband and wife an intention to create a trust, the one for the other. It does so by way of an *inference* from their conduct and the surrounding circumstances, even though the parties themselves made no agreement on it.

It will be evident that there is some degree of licence in summarizing even Lord Diplock's judgment in this manner. In *Gissing* Lord Diplock does not speak of "a trust imposed by law", and he does not anywhere say that "the law imputes . . . an intention". What the law does do, said Lord Diplock, is to infer an intention—that the party without title should have an interest—from words or conduct which a reasonable man, hearing those words or witnessing that conduct, would construe as having

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[12] [1970] 1 W.L.R. 1333, [1970] 3 All E.R. 449 (C.A.).

[13] *Ibid.*, at p. 452 (All E.R.).

that meaning.[14] However, as we have seen, Lord Diplock alone was prepared to entertain such an objective evaluation of the evidence. The second thing to notice is that Lord Denning in the *Falconer* case referred only to "a trust". Nowhere does he, or any other member of that court, particularize the trust in question as a resulting trust, or implied trust, or constructive trust.[15]

This brings us to *Fiedler* v. *Fiedler*. At first instance Moore J. referred to the judgments in *Pettitt* v. *Pettitt* and *Gissing* v. *Gissing*, and he drew attention to the fact that four out of five law Lords in *Gissing* had said that the facts might give rise to "an implied, resulting or constructive trust".[16] He then cited the passage from Lord Diplock's judgment given above, and continued:[17]

> It appears that the definition of a constructive trust above set forth is the only one of the three trusts in which the intention of the parties is irrelevant. The application of such a trust, it is contended by some authorities, would result in a definite acceptance of the principle that the law may impute intentions to parties, an acceptance which was not clear in the *Pettitt* case.

He went on to cite the passage from Lord Denning's judgment in *Falconer* v. *Falconer* also quoted in this comment, and concluded, "Lord Denning clearly has set forth a concise statement of the general principle after reviewing both *Pettitt* and *Gissing*".[18]

At this stage two points will be evident. First, the *ratio decidendi* of *Pettitt* and *Gissing* does not appear in Moore J.'s judgment; Lord Diplock's views in *Gissing* went considerably beyond those expressed by the majority of the law Lords in those decisions, even though he said he felt compelled to withdraw from his opinion in *Pettitt* that, when the parties have formed no intention at all at the time of acquisition, the law can infer what a reasonable couple might have intended.[19] Secondly, no

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[14] In the earlier *Pettitt* decision Lord Diplock does speak of imputed intent, though he was alone in that House to do so. He appears to withdraw to the word "infer" in *Gissing*.

[15] Later, in *Hussey* v. *Palmer*, [1972] 1 W.L.R. 1286, [1972] 3 All E.R. 744 (C.A.), Lord Denning did describe this trust as being a constructive trust, but Phillimore L.J. thought it was "more appropriate" to call it a resulting trust. The court issued a resulting trust declaration.

[16] *Supra*, footnote 1, at p. 327 (W.W.R.).

[17] *Ibid.*, at p. 328. On appeal, however, Sinclair J.A. did not consider that the trial judge had necessarily applied such a trust in reaching his result. "The learned trial judge has decided that the husband holds the farm lands in trust for both spouses—the kind of trust is not specified."

[18] *Ibid.*, at p. 329.

[19] In view of the complete text of his judgment in *Gissing*, it is not easy to determine what is the significance of this withdrawal. Nor does one envy the trial judge his lot who must correctly apply these nice propositional distinctions to the evidence of rudimentary intent so often before him.

judgment in *Pettitt*, *Gissing*, or *Falconer* associated the constructive trust with imputed intent. This is Moore J.'s deduction.

As to the first point, no one reading *Pettitt* and *Gissing* together could argue that, taken as a whole, Lord Diplock's words did represent even the majority view in the House. His expressions of the principle, even in the later *Gissing* decision, are quite distinct in a five man court. Nor is there anything perceptive in my comment; it is plain for any reader of the judgments to see. Indeed, it is difficult to resist the conclusion that in the post-*Gissing* decisions courts are extracting carefully selected passages from the judgments in those cases. Proponents of the justice and equity school cite Lord Diplock, with assistance from the judgments of Lord Denning in the lower court, and sometimes of Lord Reid. Proponents of the intent (express or implied) school usually cite the *ratio decidendi* of those cases, that is, the views of Viscount Dilhorne, and Lords Upjohn, Hodson, Pearson and Morris.[20] The majority in *Murdoch* v. *Murdoch* clearly associated themselves with the intent (express or implied) school,[21] which means that subsequent justice and equity proponents have to distinguish *Murdoch*. This is normally done by avoiding the conclusions of law in *Murdoch*, and distinguishing on the facts. It is rarely a convincing performance, but out of enterprise emerge justice and equity, and who but a purist would quarrel with that.

As to the second point, those who do not count themselves trust lawyers must now be confused. In the *Gissing* judgments, and it is repeated in subsequent Canadian judgments, including *Fiedler*, the comment is made that these husband and wife disputes do not involve the law of contract but the law of trusts.[22] Yet we now seem to have two kinds of constructive trust; Moore J.'s which is associated with "imputed" intent, and Laskin J.'s in *Murdoch* which has nothing to do with intent.

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[20] Some passages of Lord Upjohn's judgment in *Pettitt* have been drawn upon by the justice and equity school, but all of his lordship's remarks must be read in context.

[21] Though Martland J.'s majority judgment is unusual, something which has not always been acknowledged by its critics, it adopts Lord Diplock's language. However, Lord Diplock later withdraws to a more traditional expression by saying (also cited by Martland J.) that the court must be "satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse" with the legal title (*supra*, footnote 8, at p. 793 (All E.R.)).

[22] This is because the express or implied agreement between husband and wife would very rarely be couched as, or intended to be, a contract (*supra*, footnote 7). The situation gives rise to equitable principles; there is more than a gift, and something less than a contract.

The *Murdoch* constructive trust was part of the dissenting judgment. But has Moore J. now found a way of getting a constructive trust out of the leading authorities? If he is right, can the courts be asked quite simply to "impute" intent and so remedy unjust enrichment between husband and wife? This would accomplish Laskin J.'s purpose, and in Canada the justice and equity school would finally have won the day. On the contrary, in my view, Moore J.'s constructive trust is in fact a resulting trust. It is built upon the word "imputation", and it has an unavoidable concern with intent. Moreover, the record of judicial controversy in this area suggests that this will ultimately be brought to light.[23]

A constructive trust is the term used to express the obligation of A to hand over property (or a share in it) to B. In that sense A is made a trustee for B. But the obligation does not arise from any intention of A or B; it is equity's description of an existing obligation (for instance, the vendor's obligation under a specifically enforceable contract to convey) or a judicially imposed obligation where A ought in justice and equity to account to B. It is a constructive trust in the sense that it is "constructed" by the court. The adjective does not mean "construed" in the sense that one might construe a document. This is why it is so unfortunate that the House of Lords in *Gissing* did not define its terms; the House may seem to be using the term, constructive trust, in this latter sense. With respect, Laskin J.'s use of the term was quite correct; the bringing about of justice and equity is precisely how the constructive trust, if is is to arise at all, must arise in the husband and wife situation. There is no existing obligation; if there were, it would be handled by the resulting trust. That is why Lord Pearson used only the term, resulting trust; he emphasizes that the courts are concerned with express or implied intent of the husband and wife.

If A and B agree prior to or at the time of the acquisition that they shall each have an interest in the asset, and the title is then taken in the name of A, equity truly imposes a trust upon the parties—A as the trustee, B as the beneficiary—and it does so as a means of enforcing the obligation that arises out of the agreement (or common intention). The name of that trust is the resulting trust; a trust arising by operation of law. What the House of Lords was no doubt recognizing in *Gissing* is that a trust arises by operation of law—call it what you will; resulting,

[23] In the *Fiedler* case on appeal McDermid J.A. advocated the adoption of the principle of an unjust enrichment remedy. He made no reference to Moore J.'s constructive trust.

implied or constructive—in order to enforce the intention of A and B, and the obligation arising therefrom.[24] The crucial point is the intention; this creates the obligation which the trust enforces.

Where there is no express agreement, it will be possible to imply it (assuming that B is a spouse) where B's conduct prior to or after the acquisition is sufficiently compatible with the agreement or common intention, which he alleges, that the court can imply that agreement or intention. Even when there is no evidence at all of an agreement, provided there is also no compelling evidence that there was not such an agreement, the court may still be able to find from the character of the conduct of A and B that this common intention must have existed, though they did not actually put it into words. It is in this sense, to use Lord Reid's words, that the court may appear to impute a deemed intent. In my view this is what Lord Denning meant in the *Falconer* case.

The resulting trust is not available (that is, cannot be imposed) where the imputation of intention is impossible or unreasonable. If A acquires an asset, but before he acquires it he tells B or otherwise makes it obvious to him that, though B may share the enjoyment of that asset with A, it is to remain A's property, B's subsequent conduct is of no significance. It is impossible to infer an intention that each should have an interest when the evidence is clear that there was an intention to the contrary. Then, as to the unreasonable, one cannot imply any intention that B should have an interest if B's conduct before or after the acquisition is wholly ambiguous, its association with an alleged agreement altogether tenuous. Nor can A be deprived of his property by B's unsolicited or even solicited effort expended upon that property after acquisition by A. If B was solicited to expend effort, he may be entitled to compensation as an agent, but his rights are strictly personal rights only. If his efforts are unsolicited, he has no *in personam* remedy because the common law does not recognize the doctrine of *negotiorum gestio*.

What then is the position when it is impossible or unreasonable to infer a common agreement, prior to the moment of acquisition, that A and B should each have an interest in the property acquired? The intent school argues that nothing can be done. B can only then acquire an interest in property which is in A's name, if A has subsequently contracted with B to convey an interest to

[24] The House also seems to have had in mind, since the case concerned land, that all trusts arising by operation of law are expressly excluded from the requirement of the Statute of Frauds that all transfers of land must be in writing.

him[25] or has given him an interest. Moreover, if the property remains in A's name after the words of giving have been spoken, there is no perfected gift, and the force of this conclusion must apply even if A and B are husband and wife. Nor will the courts readily infer a common intention alleged to have been formed after the property was acquired by A with his own resources. This is why credit purchase arrangements are so valuable to wives; they have the effect of stretching the moment of acquisition over what can be a considerable period of time.

However, if there is no contract (or inter-spouse agreement) at the moment of acquisition, or at a later time, then the only other remedy the common law affords is the principle of estoppel by acquiescence. This is the principle to which Lord Diplock was presumably referring in *Gissing*, in the passage which Moore J. quoted. But the fullest extent to which the estoppel principle has been recognized is contained in the precedents flowing from *Dillwyn* v. *Llewelyn*.[26] Totally unambiguous words or conduct are wanted from A before B can pin his alleged reliance and detriment upon A, and so successfully assert an interest in the disputed property. In fact all the *Dillwyn* v. *Llewelyn* authorities involve situations where A's intent to give was expressed in wholly unambiguous words.[27] Estoppel by acquiescence arises where A already owns property, and expresses the intention to give it (or a share in it) to B. Lord Diplock's estoppel on the other hand, as he says, requires A's words or conduct to have occurred prior to or at the moment of acquisition. Presumably this is an extension of the *Dillwyn* v. *Llewelyn* principle to pre-acquisition words or conduct of A. It has the effect of depriving A of the full beneficial rights in the disputed property on his acquisition of it. Nevertheless, stripped of its estoppel clothing, this is still the common intention or understanding with which the courts have always been concerned.[28]

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[25] If spouse B alleges that an agreement (common intention or understanding) concerning title was made after spouse A has acquired title in his own name with his own resources, a resulting trust in favour of B will be imposed provided B can produce evidence of an express agreement, or the words or conduct of each party allows the court to imply such an agreement. In *Pettitt* the husband claimed that improvements he had made to the wife's house revealed such an understanding that he should have a beneficial interest.

[26] (1862), 4 De G.F. & J. 517, 45 E.R. 1285.

[27] Lord Upjohn refers to this estoppel principle in *Pettitt*, *supra*, footnote 7, at p. 409 H (All E.R.).

[28] Lord Diplock himself recognizes this a few paragraphs later in his *Gissing* judgment. Martland J. picked up that fact when in the *Murdoch* case he cited Lord Diplock's words. Nor was it lost on Sinclair J.A. in the *Fiedler* appeal.

English law does not recognize the doctrine of restitution,[29] nor has the constructive trust been generalized as a remedy for unjust enrichment.[30] This is of considerable significance. That is why such firm proponents of the justice and equity school as Lords Diplock and Denning cannot go further than they have done in *Gissing* and *Falconer* respectively. In Canada on the other hand the doctrine of restitution has taken root, and has been accepted by the Supreme Court. Then in *Murdoch* Laskin J. expounded for the first time in Canada the concept of the constructive trust as a remedy for preventing unjust enrichment. This is the true constructive trust, totally divorced from intent, imputing intent to no one.

However, the Supreme Court of Canada remains committed to the intent school where husband and wife property disputes are concerned. Restitution principles and Laskin J.'s constructive trust—the natural recourse of the justice and equity school—have not been allowed to enter this arena. The consequence is that, while litigating wives look to the courts for an unjust enrichment remedy, the courts are committed to the intent (express or implied) approach. Very often this approach will afford a wife the relief she seeks, because in the absence of an express agreement she will have contributed financially towards the acquisition, or her physical effort is both sufficiently substantial and concerned with the disputed asset, that she can reasonably assert a pre-acquisition agreement or common understanding. But too often, it seems, there will be circumstances where, lacking such a financial contribution, the wife is hard put to it to convince the court that monetary contribution to the marriage or her physical effort is of a kind or quantum that it can reasonably be said to imply any agreement or common understanding.

It is on occasions like this, when in the setting of a husband and wife relationship an unjust enrichment remedy will readily seem appropriate, that judicial adherents of the justice and equity school will lean over backwards to find that that monetary con-

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[29] It continues to think in terms of particularized remedies in distinct legal situations, which some writers have generalized as a principle of restitution. R. Goff and G. Jones, The Law of Restitution (1966), p. 13.

[30] Goff and Jones, *op. cit.*, *ibid.*, pp. 36, 37. In *Pettitt* Lord Reid said (*supra*, footnote 7, at p. 390 (All E.R.)) of the doctrine of unjust enrichment, "And in any case it would only result in a money claim whereas what a spouse who makes an improvement is seeking is generally a beneficial interest in the property which has been improved". This observation was noted by McDermid J.A. in *Fiedler*, and he could not understand why the doctrine should be so confined. Of course, Lord Reid was not referring to the constructive trust; he was probably thinking of "unjust enrichment" as a quasi-contractual claim.

tribution or physical effort *does* reasonably imply such an agreement or understanding. On such findings of fact, however, courts can differ, and so there is always the temptation upon the losing spouse to appeal. Moreover, the controversy over the correct finding of fact is only compounded when the court decides to reinforce its finding with a review of the authorities. The highest appellate decisions are lacking in an unanimous expression of the governing legal principles, as we have seen, and often that judicial review suffers from the well-intentioned desire to support the justice and equity case. Judgment becomes veiled advocacy.

It is impossible to resist the conclusion that the lower courts today are pressing for a discretionary remedy permitting them to do justice and equity between husband and wife. As in England, most Canadian courts are able to do just that by a careful handling of the criteria required by the intent school. After all, in few cases will the inferring of an agreement be impossible[31] or unreasonable, and, where it is so, justice and equity may well come to the same conclusion as that produced by the law of resulting trusts. But too often the resulting trust theory produces a result at odds with what would seem the more desirable outcome, or there is a fight through the appeal courts, and then what may well be difference of judicial opinion on the factual merits becomes a difference on the subtleties of the law of trusts. It seems so regrettable that a factually simple situation like that in *Murdoch* or *Fiedler*, one which is constantly before the courts, should involve complex argument on the law of trusts. The problems involved in achieving an equitable settlement of matrimonial property disputes are sufficiently demanding, without the attention of the courts being cluttered with trusts law.

Yet, while most people recognize the regrettable effect of the present law, few are convinced they know what should take its place. Certain it is that the lower courts can do nothing. The authorities commit them to the principle that a party intends to transfer his asset; the asset cannot be allocated to another regardless of his intent. It is no good the lower courts seizing

[31] It is not necessarily fatal to the spouse, who took no legal title, if he (or she) admits that he knew legal title was being taken in the other's name, and did not question that course of action. The concern of the court is with the beneficial interests (the equitable interests) in the disputed asset. The court may yet spell evidence of an implicit agreement that each should have a share, *i.e.*, a beneficial interest, out of what may be called the spouses' life style throughout the marriage. If that unspoken agreement is found, then the spouse with legal title becomes a resulting trustee of his legal title.

upon appellate dicta to the effect that the presumptions of resulting trust and advancement are today weakened; any change in the quantum of proof required does not do away with the necessity to prove intent. Only the Supreme Court can shift the judicial approach on to the basis of remedying unjust enrichment. As for non-judicial opinion, the debate seems destined to be continued in Canada for a long time to come. The Ontario Law Reform Commission's *Report* commending an optional community of deferred sharing of property is forcefully argued, but there is a substantial body of opinion favouring the conferment upon the courts of a discretion to make a property allocation between the parties, tailored to the equities of the situation between each set of spouses.[32] Such a discretion is now successfully operating in England and New Zealand.

This brings me to the point of this comment on the *Fiedler* case. In all these circumstances, is this not the moment for the Supreme Court, once it has the opportunity, to give the unjust enrichment remedies their head, and let us all—spouses, women's groups, law reform agencies, and society at large—see how such an overt discretion works out? The English have found that section 25(1) of the Matrimonial Causes Act, 1973,[33] which was first enacted in 1970, is working well. In Canada we could work towards similar criteria judicially, if only Laskin J.'s constructive trust were given an appellate blessing.[34] Since the Supreme Court has already accepted the obligation of restitution, that is a very small step.[35]

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[32] For a recent view along these lines, see Wolfe D. Goodman (1974), 1 Estates and Trusts Q. 315.

[33] C. 18.

[34] It is natural enough that the courts should have present to their minds any matrimonial fault of either spouse, but, as McDermid J.A. said in the *Fiedler* case, fault is strictly irrelevant to a property settlement. One would add that it must be irrelevant to a resulting trust declaration which is merely the enforcement of a property sharing agreement. It should preferably be absent from the constructive trust considerations. However, the conduct of the parties is required to be taken into account under s. 25(1) of the 1973 Act, *ibid.*, but see *Wachtel* v. *Wachtel*, [1973] Fam. 72, at pp. 89-90, [1973] 2 W.L.R. 366, at pp. 371-372, [1973] 1 All E.R. 829 (C.A.) for the relevance of this element. See, generally, on the scope and exercise of this statutory discretion, *Trippas* v. *Trippas*, [1973] Fam. 134, [1973] 2 All E.R. 1 (C.A.); *Harnett* v. *Harnett*, [1973] Fam. 156, [1973] 2 All E.R. 593 (C.A.); *Griffiths* v. *Griffiths*, [1974] 1 W.L.R. 1350, [1974] 1 All E.R. 932 (C.A.); *Allen* v. *Allen*, [1974] 1 W.L.R. 1171, [1974] 3 All E.R. 385 (C.A.).

[35] "I believe the courts themselves should seek solutions to the domestic problems of husbands and wives in discharge of their duty to adopt the common law to our changing society, and if any error be made it may be corrected by the legislative process"; McDermid J.A. in the *Fiedler* appeal.

However, some may say that that is alright so far as it goes, but the problem is different. It is not so much that the highest appellate court *cannot* make this move to an overt discretionary remedy; it is *whether* it should do so. This, it may be said, is a policy issue for the legislatures; it is not for the courts to make any change that is necessary. This is a forcible argument, and both English and Canadian appellate judges have said as much,[36] but to my mind much of the force of this policy argument is lost when one examines what the first instance and lower appellate courts in Canada (like the English courts before them) are actually doing. Nor is it a real issue that the courts without statutory authority would be taking ownership from one and giving it to another. By the application of equitable principles situations already exist even in English law, which does not recognize the right of restitution or the remedial constructive trust, where the courts will "alter ownership" by ordering A to transfer to B property which is owned by A.[37]

Given, therefore, that the objections are not compelling, my conclusion is that positive gain would flow from a judicial shift in this area to the unjust enrichment principle. The path to the solution of these matrimonial property disputes would be conceptually clear and direct.[38] Into the bargain, in my view, the judicial adoption of the constructive trust approach, though far-reaching in significance, is not likely to produce a major change of direction. So many matrimonial property disputes in the courts are presently successfully handled through the freedom of movement the justice and equity school has given itself within the resulting trust approach. It seems unlikely that the sort of decision the courts would have to make, given a constructive trust, would differ significantly from present practice.

However, one can envisage some situations where there would be a difference. For instance, in appropriate circumstances it would be possible for the courts to declare spouse B as having an interest in the disputed property where B has made *any* contribu-

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36 "Nor can ownership of property be affected by the mere circumstance that harmony has been replaced by discord. Any power in the court to alter ownership must be found in statutory enactment"; Lord Morris in *Gissing* v. *Gissing*, *supra*, footnote 8, at p. 784 (All E.R.).

37 Goff and Jones, *op. cit.*, footnote 29, pp. 39-40.

38 In view of the difficulties this controversial and sensitive subject is providing for the law reform agencies, and for the governments and legislatures which have to consider the proposals ultimately made, there is now a convincing argument in my opinion that an important reform role exists for the judiciary in this area which only they can discharge. See Waters, Law of Trusts in Canada (1974), pp. 317, 318.

tion to the acquisition, building up, or improvement of the property in A's name. In other words the nature or quantum or degree of directness[39] of the contribution would not alone determine the right to an interest. That would be new.[40] Again, B may have made a contribution, but A made it clear at the time of his purchase out of his own resources that the property was to be his alone. Despite A's intentions, it would still be possible to award B an interest. That also would be new. All the same, the principle in both cases is not unfamiliar. If A stands by and allows B to improve or otherwise contribute towards property which is A's, it may well be just and equitable that A should be estopped from objecting to the granting of an interest in the property to B.

Naturally there will be borderline cases. Spouse A may have been ill for a protracted period or absent from the country, and neither known of, nor acquiesced in, any contribution made by B in his absence. Yet B may have acted as he did to preserve or enhance an asset with which both spouses were concerned. That asset may be, for instance, the family home, or the husband's farm or business.[41] But for all its borderline character, this situation can still be handled by the standard question of what is the most equitable solution, given all the facts. It may be that B should have a lump sum compensation or lien rather than a beneficial interest in the disputed asset. When the possible outcome is put in this way, it becomes clear that the adoption of the constructive trust approach is unlikely to result in the allocation of assets

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[39] See Lord Reid's judgment in *Gissing* concerning indirect contributions. His lordship's words might almost have been written with Mrs. Fiedler's situation and evidence in mind.

[40] It would also be an improvement on the legislation which was enacted in England to overcome the *Pettitt* decision. See H. Lesser, (1973), 23 U. of T. L. J. 148, at pp. 187, 188.

[41] In *Trueman* v. *Trueman* the contribution of the wife was indirect, *i.e.*, it relieved the husband's resources which were then available for the making of purchases. In *Murdoch* Martland J. distinguished this case on the basis *inter alia* that it concerned the family homestead, as did the *Pettitt* and *Gissing* cases, whereas Mrs. Murdoch was claiming a proprietary share in her husband's ranching business. Mrs. Fiedler, too, was claiming a proprietary share in her husband's farm lands. Each woman initially launched her claim on the basis of partnership, which is an effective acknowledgment that she was claiming a share in more than so-called "family assets". To my mind, as I have said elsewhere, it is difficult to grasp why there should be a distinction between the home on the one hand, and a spouse's business, including land and chattels, on the other. The House of Lords for its part has said that the term, family assets, has no legal meaning, and this surely implies that the onus upon the claimant of a proprietary share is merely heavier when the asset in question is more remote from the immediate living circumstances of the family.

between spouses on any pretext.[42] It is difficult to imagine that the courts would often consider it just and equitable to confer upon B an interest in A's property, as opposed to monetary provision,[43] when B's conduct or effort is totally unconnected with the asset in dispute.

As to what would happen when the remedial constructive trust became established (and this could well happen in a short space of time), much would depend on how society and the courts are prepared to conceive of the relationship of husband and wife. In a real sense when man and woman share life together no effort of either which contributes to the enhancement of that life can be said to be totally unconnected with the assets which have been put to the use and enjoyment of both in the living of that life. For instance a woman, who has been a faithful housewife and devoted mother, can only be said to have no entitlement to a proprietary interest in the house provided by her husband as the home, if reduced to its essentials one regards marriage as some form of joint business venture. The same issue is posed if a man crippled with illness lives with his wife in a house which years before he transferred into her name, or which she inherited. The added dimension which minor children introduce need not even be considered. In truth marriage cannot be analogized to any other relationship known to the law. If anything, it is like joint tenancy; the interest of each participant is the whole, and each bears the responsibilities of the whole. The withdrawal of either ends its existence, and subject to the circumstances the only fitting mark of that termination may well be a reasonable division of the assets which were the substructure of the former life together.

But, if this is so, and the constructive trust could lead to such an allocation of assets so as to express the interdependence of the relationship, the bankruptcy of the resulting trust approach is more than evident. It is not only unperceptive of the nature of marriage, it is positively cynical. A critic might be tempted to observe at this point that the law is the expression of society's faith in its institutions; cynicism is the weapon of destruction of that faith.

DONOVAN WATERS*

[42] Recognition in principle of the remedial constructive trust will permit Canadian courts gradually to tie together the law concerning equitable liens, equitable licences, *quantum meruit* claims, and damages. For a valuable note on this subject, see G.R. Strathy, (1974), 32 U. of T. Fac. L. Rev. 83.

[43] An alternative restitution provision; a monetary satisfaction of a proprietary claim. It has no connection with lump sum maintenance provision, the authority for which is statutory, and the limits of which are set by available resources and maintenance needs.

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MUNICIPAL LAW—BUILDING PERMIT REFUSED BECAUSE OF PROPOSED CHANGE IN ZONING—ENTITLEMENT TO MANDAMUS.—Since there is no absolute or perfect use that can be ascribed to any particular land, it is clearly conceivable that a municipality can change its corporate mind as to the appropriate land use designation for particular land as often as there are council meetings. Thus, if a specific piece of land was zoned to permit high-rise building uses yesterday, as a result of such things as neighbour pressure, the actuality of a high-rise dwelling being built, or as happened notably in Toronto, a change of council personnel, that designation may appear wholly erroneous tomorrow. The record of this phenomena is found in the numerous decisions where councils have sought to deny the issuance of a building permit for a particular authorised use on the basis that a change in use designation or zoning was being contemplated.

It is the purpose of this comment to analyze those decisions[1], sometimes referred to as the *Boyd Builders* cases, after one of the landmark decisions in the area[2], to ascertain the constituent elements that determine these issues.

All of the decisions of consequence that have dealt with this question, and that have been reported, have arisen in Ontario[3]. A few decisions in British Columbia have dealt with similar situations, but in a manner different to the *Boyd Builders* line of reasoning.[4]

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[1] Since cases of this nature seem to appear in every new issue of the reports, it may be wise to state that this comment takes account of decisions reported up until [1975] 5 O.R. (2d) 728.

[2] *City of Ottawa* v. *Boyd Builders*, [1965] S.C.R. 408, 50 D.L.R. (2d) 704.

[3] An early Quebec case, *Canadian Petrofina Ltd.* v. *Martin*, [1959] S.C.R. 453, was decided in a way that was consistent with the pre-*Boyd Builders* cases. Provisions in the City of Montreal Charter specifically authorize the withholding of a permit when a zoning change is contemplated: *Lajeunesse* v. *Montréal*, [1963] Que. S.C. 364, and municipal corporations generally in Quebec appear to have discretionary power to refuse permits: *Sun Oil Co.* v. *Verdun*, [1951] Que. K.B. 320, aff'd., [1952] 1 D.L.R. 529 (S.C.C.).

[4] The British Columbia cases have examined the relationship of zoning to building permits by analyzing whether the zoning by-law is discriminatory by, *inter alia*, preventing a proposed development. The tests of discrimination are set out in *Standard Oil Co. of B.C. Ltd.* v. *Kamloops*, [1972] 5 W.W.R. 660, 29 D.L.R. (3d) 577. Also, see *The North Vancouver Zoning By-Law 4277*, [1973] 2 W.W.R. 360 (in regard to a subdivision) and *Cloverlawn Investments* v. *Burnaby*, [1972] 1 W.W.R. 628. This was the approach of some early Ontario cases, for example: *The Skyway Drive-in Theatres Ltd. and the Township of London*, [1947] O.W.N. 489. For a discussion of the power in Halifax to issue a permit contrary to the zoning, see: *Re Brodie and Halifax* (1975), 48 D.L.R. (3d) 742 (S.C.C.).

Model Set of Facts

Although the factual situations have variations in each case, it is possible to construct a "model" fact situation upon which the development of the decisions can be analyzed.

A developer is desirous of building a twenty storey high-rise building and has managed to assemble all the land under option agreements. A preliminary feasability study indicates that the project is economically sound and an investigation of the existing zoning requirements reveals that such a project is a permitted use for that area. The options are exercised and mortgage commitments are entered into by the developer, say on January 10th.

An architect is retained to design the project and upon approval of the design by the developer, the architect begins preparation of the working drawings to obtain a building permit for the project. The architect prepares the plans which account for the excavation of the site, the foundation and the superstructure and all the other necessary structural, mechanical and electrical drawings, specifications and quantities required to obtain a building permit under the relevant municipal building by-laws.[5]

On January 12th, at the municipal council meeting, one council-person brings to the attention of the others the activities of the developer. After some discussion it is decided that a high-rise building in that area would be to the detriment of the community and the town planning committee is requested to investigate a change in the permitted use of that area to prohibit high-rise development. On January 25th, a proposed amendment to the zoning to change the area to permit only single family residential dwellings is placed before council for discussion and, at a subsequent meeting on February 2nd, is passed as an amendment to the zoning by-law.

The formal application for the building permit is made on February 1st, the day before the zoning by-law is passed. The developer is notified immediately that the permit is refused on the basis that a change in the zoning of the area is contemplated.

Pursuant to The Judicial Review Procedure Act 1971[6], an application for an order in the nature of mandamus is made to the Divisional Court on behalf of the developer to compel the municipality to direct that the permit is issued. The developer indicates, in the grounds for relief, that compliance has been made with the requirements of the building by-law and that the zoning by-law *in force* permits use of the land for high-rise dwellings. The basis of this last claim is that by section 35(9) of The Planning

[5] *E.g.*, art. 6 of The City of Toronto Building By-Law 300-68.
[6] S.O., 1971, c.48.

Act[7] the amending zoning by-law does not have any force without the approval of the Ontario Municipal Board.[8]

The municipality seeks to have the mandamus proceedings adjourned, pending the determination of the Ontario Municipal Board, whereupon, if the zoning by-law is approved, the proposed project will conflict with the zoning by-law amendment and an order in the nature of mandamus would be improper.

Theoretical Approaches

As with all zoning decisions, these cases clearly present the conflict that arises from a comparison of the sanctity of private rights, interfered with by the zoning change, with the necessity of making land use decisions for the good of the community in general. Quite simply, a court predisposed to uphold private rights as the pre-eminent consideration might place a heavy burden on the municipality to attain an adjournment of the mandamus proceedings and, conversely, if emphasis is on community needs, then a light obligation may be imposed.

The arguments in support of either approach are quite straight-forward and are of equal merit. On the one hand, it can be said that the essence of our system of jurisprudence is a concept that the law be certain and ascertainable so that at a given moment an individual can act with some degree of confidence. Thus, for instance, a statute or by-law could be declared invalid as being "uncertain" if an individual could not, by any method of calculation, ascertain whether compliance was attained.[9]

In addition, it may be said that our system recognizes that when rights are established under existing law they remain inviolate until affected by repeal or alteration by a new law. This is especially so with zoning legislation as it has been a consistent aspect of that legislation in Canada that even subsequent amendments should not affect a prior lawful non-conforming use. This is given further credence upon realization that a proposed zoning change can be formulated arbitrarily and to defeat a particular project. In that case: "[o]ne need not be very sophisticated to visualize the tremendous opportunity for evil that would be created

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[7] R.S.O., 1970, c.349.

[8] It should be noted that by s.35(25) of The Planning Act, *ibid.*, where there is an official plan in effect and no notice of objection is filed in relation to a zoning by-law, approval of the Ontario Municipal Board is not necessary. This section has not yet been implemented by legislation.

[9] For example, *Dery and Staples* v. *Victoria* (1962), 38 W.W.R. 215 (B.C.); *Fredericton* v. *Horizon Realty Ltd. (No. 2)* (1973), 6 N.B.R. (2d) 846 (N.B.).

if applicants for building permits were to be subjected to *ex post facto* legislation by municipal councillors . . . ."[10]

On the other hand, there is the argument that the essence of a system of city planning is that private property rights must be subjugated to the changing needs of the general community, and even though an optimal state of land use allocation is never obtained in practice, some individuals will inevitably have to suffer from a planning decision while some will always benefit.

The resolution of these theoretical alternatives in other classes of cases has become obvious in the last decade to observers of municipal law. For instance, the 1971 decision of *Re Bruce and City of Toronto*[11] resolved that zoning by-laws should be given a liberal interpretation in favour of a municipality rather than a strict construction in favour of the property owner, as had often been the case previously. In addition, the well-known *Forfar*[12] decision appeared to be straining to give municipalities the benefit of subdivision controls, while the decision in *Zadrevec* v. *Town of Brampton*[13] rejected the application of the rules of natural justice to the process of enacting a zoning by-law insofar as a hearing was concerned.

Occasionally the resolution of the approaches appears to be determined, or at least greatly influenced, by the external factor of the personalities of the parties. Thus, in a 1973 decision,[14] the

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[10] Keith J. in *Re Bala Investments Co. Ltd. and City of Hamilton*, [1969] 2 O.R. 490, 5 D.L.R. (3d) 696 (H.C.), in a situation where the change was proposed specifically to defeat a project. In *Re Triforce Construction Ltd. and City of Toronto*, [1974] 4 O.R. (2d) 729 (Div. Ct), an unsuccessful attempt was made to argue that a zoning by-law is retrospective in effect to the point of time when Council initially expressed an intention to pass the by-law. There is limited retrospectivity under The Planning Act, s.19(2), *supra*, footnote 7, in relation to by-laws passed when an official plan amendment is pending.

[11] [1971] 3 O.R. 62, at p. 67, 19 D.L.R. (3d) 386, at pp. 390-391 (C.A.). Compare, in cases involving building permits, the possible argument that the consequences of non-compliance with the building by-laws render them "penal" and attract a strict interpretation: *Regina* v. *Church of Scientology of Toronto*, [1974] 4 O.R. (2d) 707 (Cy Ct).

[12] *Re Forfar and Township of East Gwillimbury et al.*, [1971] 3 O.R. 337, 20 D.L.R. (3d) 377, aff'd in S.C.C.: 28 D.L.R. (3d) 512.

[13] [1972] 3 O.R. 514, 37 D.L.R. (3d) 326; for a recent qualification, see *Re Multi Mills Inc. and Attorney General for Ontario*, [1975] 5 O.R. (2d) 248.

[14] *Re Fairmeadow Development Ltd. and Town of Markham*, [1973] 3 O.R. 144, 36 D.L.R. (3d) 168 (Div. Ct). It has been said that the motives of the applicant are relevant in the determination of whether the extraordinary remedy of mandamus will issue: *Re Burgin and Township of King*, [1973] 3 O.R. 174, 36 D.L.R. (3d) 198 (Div. Ct).

"aggressiveness" of the developers in "purchasing the 'brown bread' of a residential site with the hope of converting the use to the 'whipped cream' of a commercial development" appears to have a rather significant effect on the final determination.

Similarly, although as will be recounted the issue of good faith of a municipality is relevant in these cases, the obstructionist attitudes of municipalities have been particularly catalogued and, in consequence, municipalities have been warned that they may face costs on a solicitor and client basis[15] or be denied costs even if successful.[16]

Before 1954 in Ontario, when the case of *Hammond and Hammond* v. *City of Hamilton*[17] was decided, there is a noticeable confusion in the decisions as to where the appropriate emphasis should rest. Thus, for example, in *Re Robertson* in 1934[18] mandamus proceedings were adjourned *sine die* on the basis that council should be given a chance to carry out its planning function, while in *Re Greene* in 1951[19] no adjournment was given on the basis that it is the court's function to preserve existing rights.

In the *Hammond* decision, the facts of which were comparable to the "model" situation, the Ontario Court of Appeal was confronted with a Privy Council decision[20] that postulated that the power of councils to pass by-laws is paramount to the rights of individuals. In the Supreme Court of Canada the opposite approach, in favour of private rights of individuals, had been adopted. Roach J.A. in *Hammond*[21] was able to distinguish the Privy Council decision as having been not directly concerned with the adjournment of mandamus proceedings, which he considered was the issue before him, and was able to ignore previous decisions as conflicting. Thus, he resolved the conflict of approaches without hindrance and he did so in a manner which became the foundation

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[15] *Re Chalet Oil Ltd. and Borough of North York*, [1973] 3 O.R. 812, at p. 818, 38 D.L.R. (3d) 328, at p. 331 (Div. Ct).

[16] *Re Cambridge Leaseholds Ltd. and City of Toronto*, [1973] 3 O.R. 378, 37 D.L.R. (3d) 43 (Div. Ct); *Re Cambridge Leaseholds Ltd. and City of Toronto (No. 2)*, [1973] 3 O.R. 395, 37 D.L.R. (3d) 60 (H.C.). The conduct of the applicant in *Re Labelle and Township of East Valley*, [1970] 2 O.R. 458, 11 D.L.R. (3d) 168 (H.C.) led to an order that each party bear their own costs.

[17] [1954] O.R. 209 (C.A.).

[18] *Re Robertson and the City of Toronto*, [1934] O.W.N. 429.

[19] *Re Greene and City of Ottawa*, [1951] O.W.N. 674.

[20] *City of Toronto Corporation* v. *Trustees of the Roman Catholic Separate Schools of Toronto*, [1924] S.C.R. 368, [1924] 3 D.L.R. 113, rev'd [1926] A.C. 81, [1925] 3 D.L.R. 880. The interpretation of that decision as used in the *Hammond* case was taken from Orde J.A. in *Re Upper Canada Estates Ltd. and Mae Nicol*, [1931] O.R. 465, [1931] 4 D.L.R. 459.

[21] *Supra*, footnote 17, at p. 220.

for the *Boyd Builders* decision and the state of the law in relation to these questions.

Initially, he reiterated that legal rights, once established, should not be interfered with lightly and indicated that the discretion to adjourn mandamus proceedings should be "rarely exercised". He then established "tests", the purpose of which were to establish the circumstances in which an adjournment may be granted. Fundamentally, if there was a clear decision, prior to the motion for mandamus, to restrict the use of land sought in the application for a building permit, and council has since proceeded to implement that decision by by-law or, if a formal by-law was in fact enacted, has acted in good faith and with all reasonable despatch to have it approved by the Municipal Board, mandamus proceedings may be adjourned.

The "tests" were refined in the *Boyd Builders* case and thus it is not necessary to analyze the constituent elements of the *Hammond* decision. What is significant about *Hammond* is a rationalization that the alternative approaches both have merits and under defined circumstances the balance should be resolved in a particular manner.

Interestingly, recent decisions indicate a reluctance to be fettered in the determination of these issues on the basis of "tests". These cases have re-established the possibility that the weight given to alternative approaches will be significant in determination of these matters by expounding the importance of the relative "equities" of the parties.[22]

City of Ottawa v. *Boyd Builders*[23]

The factual situation in *Boyd Builders* is comparable to the "model" situation and the motivation for the zoning change was apparently a petition from a majority of property owners opposed to the construction of a high-rise building in their area. Roach J.A., in the Court of Appeal,[24] who had decided *Hammond*, concluded that the council was not acting in good faith as it had caused a decision to be made on the basis of external neighbourhood pressure and in an attempt to block the specific development.

The "tests" of Spence J. in the Supreme Court of Canada[25]

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[22] See *infra*.

[23] *Supra*, footnote 2.

[24] [1964] 2 O.R. 269, 45 D.L.R. (2d) 211.

[25] *Supra*, footnote 2. In the result, the decision of Roach J.A. in the Court of Appeal was upheld on the grounds, essentially, of the lack of good faith on the part of the council.

have become the classic starting point for these cases and accordingly need to be set out:[26]

> An owner has a *prima facie* right to utilize his own property in whatever manner he deems fit subject only to the rights of surrounding owners; *e.g.*, nuisance, *etc.* This *prima facie* right may be defeated or superseded by rezoning if three prerequisites are established by the municipality, (a) a clear intent to restrict or zone existing before the application by the owner for a building permit, (b) that council has proceeded in good faith, and (c) that council has proceeded with despatch.

The sequence in which the "tests" would be examined is firstly that there exists a *prima facie* right to a permit upon compliance with the building by-laws and upon refusal there is a *prima facie* right to a mandatory order that it should be granted. Thus, in the mandamus proceedings, once this *prima facie* right is established, the onus is on the municipality[27] to show the clear intent, good faith and despatch in order to have the proceedings adjourned.

(a) *Prima facie right to a building permit*

Building by-laws are designed to establish standards of construction and of the nature of materials in the erection of buildings and also to set minimum safety standards for new and existing buildings. However, these are all they were meant to accomplish and numerous decisions have declared that the proposed use of the building in a way that is likely to cause a nuisance or be immoral or illegal has no bearing on the determination of whether a building permit should issue.[28] In fact, even if a new

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[26] *Ibid.*, at p. 705 (D.L.R.).

[27] The placement of the onus upon the municipality was mentioned by Spence J. in *Boyd Builders* in contrast to when the onus is on an applicant who seeks to quash a municipal by-law. The placement of the onus has not been questioned in any subsequent decision (See, *e.g.*, *Re Solmar Builders Ltd. and Town of Mississauga*, [1973] 3 O.R. 521, at p. 527, 37 D.L.R. (3d) 349, at p. 354 (Div. Ct)), although it seems to have been reversed in *Kerr and Township of Brock*, [1968] 2 O.R. 509 (H.C.) where the test was whether a municipality had disentitled itself to relief. Onus may no longer be relevant under the new criteria of balancing the equities between the parties.

[28] *R.* v. *Preston Rural District Council; Ex parte Longworth* (1911), 106 L.T. 37; *R.* v. *Corporation of Preston* (1887), III T.L.R. 665; *Mackenzie* v. *Toronto* (1915), 7 O.W.N. 820; *O'Connor* v. *Jackson*, [1943] O.W.N. 587, [1943] 4 D.L.R. 682; *Ex parte Carvill* (1920), 47 N.B.R. 357, 52 D.L.R. 417, and the analogy in *Re Smith and Municipality of Vanier*, [1973] 1 O.R. 110, 30 D.L.R. (3d) 386 (H.C.). Lord Denning, in a decision which has yet to be followed, has stated that the aesthetics of a project is a relevant consideration in respect of a building permit: *Maurice* v. *London County Council*, [1964] 1 All E.R. 779.

building is unsaleable because of lack of subdivision approval, this is no basis for denying a permit.[29]

By the building by-laws, for instance article 7 of By-Law 300-68 of The City of Toronto, the Commissioner of Buildings *must* issue a permit where the application, plans, specifications, drawings, block plan and survey comply with the by-law *and the proposed work complies with all by-laws of the corporation* and all laws of the Municipality of Metropolitan Toronto and the laws of Ontario.[30] Section 38(1) of The Planning Act of Ontario, which authorizes the enactment of building by-laws,[31] specifically allows a municipality to make the issuance of a permit subject to other laws. Thus, zoning by-laws become relevant in the consideration of whether to grant a building permit.[32]

In the "model" fact situation, and in all these cases, the situation exists that there is *no effective* by-law, as Ontario Municipal Board approval has not yet been obtained or, in fact, the zoning by-law implementing the proposed change of use has itself not been passed but merely "intended". It has been decided that the employees of a municipality are bound to exercise their discretion in accordance with a duly enacted by-law even though it is not yet in force.[33] It has, in addition, been suggested that it is also

[29] *Re W.L. Angus and Associates Ltd. and City of Toronto*, [1974] 4 O.R. (2d) 529 (Div. Ct).

[30] See a similar section in British Columbia:*The Murray Co. Ltd.* v. *Burnaby*, [1946] 2 D.L.R. 541. An illustration of the effect of this provision in relation to the Public Health Act is found in: *Re Ormerod and Township of Ancaster*, [1971] 3 O.R. 729, 21 D.L.R. (3d) 541 (H.C.).

[31] *Supra*, footnote 7. Similar power exists for the City of Toronto under the City of Toronto Act, S.O., 1939, c.73, as am.

[32] As a "law of Ontario", a ministerial order made pursuant to s. 32 of The Planning Act, *supra*, footnote 7, would be a revelant consideration: see *Re Calitri and Town of Markham*, [1974] 4 O.R. (2d) 414. The licensing power contained under various enactments may not be used to control the use of land: *Active Trading* v. *New Westminster*, [1974] 5 W.W.R. 354 (B.C.) but it is arguable that if a license for a use must first be obtained it is a "law of Ontario". A proposed expropriation would consequently not be a ground for refusing a permit: *Re Brownlow Mount Pleasant Developments and City of Toronto*, [1974] 2 O.R. (2d) 390. Of course, the by-laws or law must be valid *per se* in order to be a relevant consideration. See an attempt to withhold a permit for non-compliance with an *ultra* vires by-law: *Re O'Donnell and City of Belleville*, [1969] 1 O.R. 361, 2 D.L.R. (3d) 460. In *Nuberg & Dale Construction Ltd. and Borough of North York*, [1973] 3 O.R. 597, 37 D.L.R. (3d) 520 (H.C.), a condition of the planning board that the application for a permit must first go to the committee of adjustment because the board had changed the zoning requirements was said to be *ultra vires.*

[33] *R.* v. *City of Toronto; Ex parte Lawson*, [1971] 1 O.R. 451, 15 D.L.R. (3d) 553 (H.C.), per Wright J.

the duty of municipal employees to conform to the intentions or policy of council.[34]

As between the employee and the municipality this may be the situation, but the terms of the building by-law refer to actual laws and not intentions and thus, technically, an intention or policy is not a ground for refusing an applicant a permit. However, "intention" to enact a by-law becomes relevant in these cases as a way in which mandamus proceedings may be adjourned under the *Boyd Builders* tests and consequently become a means, although technically improper, for refusing a permit.

The applicant for the building permit is the owner or the owner's agent, and "owner" would include a purchaser under an agreement of purchase and sale.[35] For some time in Toronto the practice existed of requiring applications for building permits in three stages: excavation, foundation and superstructure. A permit for one stage would not apparently have any direct influence on approval for a subsequent stage. However, when a permit was given for one of these stages, when the plans for the whole development were satisfactory, the Court of Appeal held that the "balance of equities" was in favour of the applicant on a basis that sounds much like estoppel.[36]

This practice was apparently abandoned subsequently and an application for a permit would now have to contain all the plans and other requirements for all aspects of the development. The change in practice can be no grounds for complaint as "courtesy, kindness and consistent dealing towards applicants are graceful attributes to the discharge of public responsibilities but they are not legal duties . . ." .[37]

The issue of the effect of incomplete plans arose specifically in the first of the *Cambridge Leaseholds* cases[38] where an application was made for a permit for the excavation and foundation of part of a shopping centre complex, but did not include plans for

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[34] *Re David Gallo Building Co. Ltd. and City of Toronto*, [1973] 3 O.R. 892, at pp. 899-900, 38 D.L.R. (3d) 536, at pp. 543-544. (Div. Ct), per Wright J. elaborating on his comments in the *Lawson* case.

[35] *Re Solmor Builders Ltd. and Town of Mississauga*, [1973] 3 O.R. 521, 37 D.L.R. (3d) 349 (Div. Ct) followed in *Re Harju and City of Thunder Bay*, [1974] 4 O.R. (2d) 61 (Div. Ct).

[36] Laskin and Jessup JJ.A. in *R.* v. *City of Barrie; Ex parte Berrick*, [1970] 1 O.R. 200, 8 D.L.R. (3d) 52 (C.A.). Reliance on the permit is the important ground for determining these issues in the United States, although there is relatively little litigation on the subject: *Brett* v. *Building Commission of Brookline* (1924), 145 N.E. 269 (Mass.).

[37] Wright J. in *Re David Gallo Building Co. Ltd. and City of Toronto*, *supra*, footnote 34.

[38] *Supra*, footnote 16.

the superstructure. Wright J. in the Divisional Court found that the right to a permit only arises when there is *complete* compliance with the building by-laws and was thus able to deny the request for mandamus as no *prima facie* right to a permit existed. Although the commissioner had discretion to issue permits at stages, no right, sufficient to attract mandamus, arose until the plans for the whole building were filed.

There are some judgments that suggest that if a municipality will refuse a permit regardless, because of a policy or intention, it is not necessary to file a complete application.[39] Surely, however, these decisions are incorrect in that mandamus cannot be sought to compel issuance of a permit until the commissioner is under a duty to do so.[40] Until complete documents are filed according to the building by-law, there is no right to obtain a permit.

If an application must be complete before the *prima facie* right may be said to arise, the question remains of "how complete". It has been stated[41] that as a result of the decision in *Cambridge Leaseholds*, the court must be presented with *prima facie* evidence that there is a full compliance with the building by-laws. What then of minor defects in the specifications or drawings such as an improper measurement? When does the legal duty of the commissioner to grant a permit arise when there are defects and how thoroughly should the court examine the plans before a *prima facie* right to a permit is said to exist?

A number of judgments in this area[42] have been concerned with situations where there were defects in the application for a permit, but they do not represent any consistent approach or guide for the determination of this issue in general, but were merely specific factual determinations. The first decision that attempted to propose a method of approach to these questions was the *David Gallo* decision in 1973.[43] Part of the facts of that case required a determination as to whether materials filed to cure a defective application amounted to a fresh application where the dates were

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[39] *Ziff* v. *Township of Bertie*, [1953] O.W.N. 236; *Re Bridgeman and City of Toronto*, [1951] O.R. 489; *Re Labelle and Township of East Valley*, *supra*, footnote 16.

[40] This reasoning is found in: *R.* v. *Toronto; Ex parte 99 Crescent Road Ltd.*, [1961] O.W.N. 129; *Karavos* v. *Toronto and Gillies*, [1948] O.W.N. 17, [1948] 3 D.L.R. 294 (C.A.), per Laidlaw J.A.

[41] *Re Chalet Oil Ltd. and Borough of North York*, *supra*, footnote 15, at pp. 816-817 (O.R.), 328-332 (D.L.R.).

[42] *E.g.*, *Re Old Park Investments Ltd. and City of Toronto*, [1955] O.W.N. 630.

[43] *Re David Gallo Building Co. Ltd. and City of Toronto*, *supra*, footnote 34.

highly significant.[44] However, the more important aspect of the decision was the formulation of questions to resolve the issue of whether a permit application may be considered to be complete.

In essence, the decision suggests that the first question to be asked is: to what extent was the application in order at the time it was made? Secondly, have any deficiencies been cured by the conduct of the municipality, apparently, although this was never set out in the judgment, by action in the form of a waiver by the commissioner that specifications sufficiently conform to the by-law. This, of course, would be dangerous to rely on as the commissioner must be under an actual rather than a perceived duty to grant the permit for mandamus to lie. Lastly, can the deficiencies be cured or disregarded, which should be read as a disjuncture proposition.

Apparently, although not mentioned in the judgment, "disregarded" refers to the minor or inconsequential defects. This was elaborated upon in subsequent judgments which are mentioned below. "Cured" refers then to defects that can be remedied by the applicant at the late date of after trial. This can be accomplished by a "conditional" mandatory order, whereby the order of mandamus is granted but the operation is stayed until after the defects are remedied. The conditions that must exist for this to be an appropriate disposition are stated in the *Gallo* case as:[45] "The blanket willingness to meet any objections of the city at any time, is not enough. The original application for a building permit must be essentially in order, and any amendments should be *specific and in train.*"

The complete edition of *The Oxford English Dictionary* supplies a number of definitions of "train" that would give the proposition meanings which are inconsistent, such as an amendment that should have been made but is merely delayed. The most consistent definition would lead to the interpretation that the

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[44] Although not cited in the *Gallo* case, in *Re Ryan and McCallum* (1912), 4 O.W.N. 193, 7 D.L.R. 420, it had been suggested that once plans were lodged and deviations were thereafter submitted, the deviations may be considered a fresh application.

[45] *Supra*, footnote 34, at pp. 903 (O.R.), 547 (D.L.R.), emphasis added. It should be mentioned, as it was in the judgment, that the need for a minor variance to a zoning by-law is not capable of being "cured" by the court, as that power rests with the Committee of Adjustment. *Re Bruce and City of Toronto, supra,* footnote 11, is authority for this proposition and is cited in *Gallo*. It may be possible, as a convenient means to dispose of the issue before seeking an order for mandamus, although it has apparently never been attempted, to seek a declaration under Rule 611 of the Ontario Rules of Practice that an application absolutely complies with a building by-law, which may be said to be "an instrument" under the Rule: see the analogy in *Re W.J. Blainey Ltd. and Toronto,* [1935] O.R. 476.

amendment must be to a specific aspect of the application rather than the whole and is part of an ongoing series of actions on the part of the applicant. In other words, the defects should be such that if the opportunity arose, they would have been remedied in due course.

In *Re Cogan and City of Toronto*[46], one of the earlier reported cases caused by the attempted height restriction by-law of the City of Toronto[47], a number of defects in the application were considered. Although no test was formulated, there seemed present a common sense approach whereby it was asked: do these defects really effect the building as a whole or are they just minor ones? In a subsequent decision of the Divisional Court[48], with no intervening decisions, it was stated[49]: "It is now established that a good test is whether the defects found in the application are so serious that it cannot be the basis for the granting of the extraordinary remedy of mandamus and whether the required changes transform the application into a substantially new entity." In yet another decision[50], it was stated:[51] "Time was when the Court confined the *prima facie* right to strict compliance. Immersed in the progress of the law the rules to that effect yielded to 'substantial compliance'."

All of these statements have the disadvantage of requiring the court to examine technical specifications to see if they are substantial or minor and there is no decision which indicates when substantial compliance in these situations is met. As a result, some decisions order a conditional mandamus while others conclude that the defects are so minor that the order can be made unconditional. It seems that it would be more appropriate to base the final determination and order on whether the defects could

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[46] [1974] 3 O.R. (2d) 661 (Div. Ct).

[47] The scope of that by-law (Nos. 347-73 and 345-73) is set out in the body of the *Re Cogan* decision with some interesting comments by way of *obiter* that because it is a development control by-law, whereby uses are subject to permission being first obtained, it may be in conflict with the Bill of Rights, R.S.C., 1970, Appendix III. A section 35a was added to The Planning Act by S.O., 1973, c. 168, which allows municipalities to exercise development control powers to a limited extent. The Toronto by-law was not approved by the Ontario Municipal Board as being, essentially, too arbitrary and inconsistent with the intent of The Planning Act (decision of the Board, December 9th, 1974). City Council resolved (adopting essentially Report No. 47 of the Executive Committee) that the decision be appealed to the Lieutenant Governor in Council (December 13th and 16th, 1974).

[48] *Re 261532 Development Corporation Ltd. and City of Toronto*, [1974] 4 O.R. (2d) 614 (Div. Ct).

[49] *Ibid.*, at p. 618.

[50] *Re Triforce Construction Ltd. and City of Toronto, supra*, footnote 10.

[51] *Ibid.*, at p. 734, per Pennell J.

be remedied without having to change the structure of the building as presented by the application. If the defects are *at all* capable of being remedied without changing the structure or form of the building as originally presented, then mandamus could issue. In this situation the order should be an unconditional order for mandamus giving the respondent municipality the chance to set aside the order within a specified period if all the defects are not satisfied absolutely.[52] This would make the order of mandamus, at first instance, in the nature of an order nisi.

(b) *Right to mandamus*

There are extremely few decisions in Canada where the question of *locus standi* to seek the remedy of mandamus has been dealt with separately from the merits of the particular case.[53] This is certainly not unique to Canada. All common law jurisdictions, with the exception of Scotland,[54] where a distinct body of jurisprudence has developed in relation to standing, lack a coherent set of criteria with which to determine the threshold question of standing in relation to mandamus. However, the standing question in a case involving a building permit is usually not a difficult one in relation to mandamus as a proper applicant for a permit is certainly a proper applicant for the remedy and it is doubtful or, at least, unusual that others would seek the remedy.

By section 9(2) of the Judicial Review Procedure Act[55] the person who refuses to exercise the power is a proper party and thus the Commissioner of Buildings is named personally in mandamus proceedings. Technically, it does not seem necessary to add the municipality as a party since the municipality cannot, theoretically, require the commissioner not to issue a permit, as the sole duty to do is contained in the building by-law. Of course, however, the commissioner is a municipal employee and practically will obey the municipality and thus the municipality should be joined as a party.[56] Under the Act,[57] the application for

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[52] A similar order was made in *Re Cambridge Leaseholds Ltd. and City of Toronto (No. 3)*, [1974] 2 O.R. (2d) 451, 43 D.L.R. (3d) 195 (Div. Ct).

[53] See, *e.g.*, *Hayes* v. *Montréal-Nord*, [1944] Que. S.C. 415, where mandamus was refused to an applicant with no interest except of a general member of the public.

[54] Scottish Law Commission, Memorandum No. 14, Remedies in Administrative Law, p. 49.

[55] *Supra*, footnote 6.

[56] Note that where the Minister has taken over the zoning power, the municipality cannot be compelled to "recommend" a change to the Minister and therefore need not be added: *Re Calitri and Town of Markham*, *supra*, footnote 32, at p. 420.

[57] *Supra*, footnote 6, s.6.

mandamus is made at first instance to the Divisional Court, although if the case is one of urgency and an application to the Divisional Court is likely to involve a failure of justice, the application can be made, with leave, to the High Court.[58]

The law to be followed in relation to granting mandatory relief has been considered by every decision that has had occasion to refer to authority, as that stated in *Karavos* v. *City of Toronto and Gillies*.[59] Essentially, the tests as to whether mandamus will issue are: (1) a clear legal right to have the thing sought by it done, (2) the duty must be actually due and already under an obligation to perform, (3) the duty must not arise under a discretionary power, (4) there must be a demand and refusal to perform the act. The third test does not arise in these cases and has probably been qualified as a result of subsequent decisions.[60]

The time to look at the alleged "right" according to the *Boyd Builders* case[61] was at the date of filing the application for the permit and not at the date of the hearing of the mandamus proceedings. The other relevant date that would be considered is when the municipal council clearly manifested an intention to proceed with the zoning change.[62]

It has been conclusively stated[63] that the *Boyd Builders* tests of good faith, intent and despatch should not be at all considered in the determination of whether mandamus should be granted. The tests are relevant to determine if an *adjournment* should be had by the municipality only *after* the entitlement to mandamus is made out by the applicant. "The adjournment is not the right being considered. It is only an indulgence. The right is the entitlement to the permit."[64]

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[58] For example, *Re Nuberg & Dale Construction Ltd. and Borough of North York*, [1973] 3 O.R. 597, 37 D.L.R. (3d) 520 (H.C.).

[59] *Supra*, footnote 40, at pp. 18 (O.W.N.), per Laidlaw J.A. A similar statement is found in *R. ex rel Johannesson* v. *Rural Municipality of Carter*, [1922] 2 W.W.R. 670, 68 D.L.R. 741.

[60] See, C.E.D. (Ont. 3rd ed., 1974), Vol. 1, tit. 3, para. 164.

[61] *Supra*, footnote 2, at p. 410 (S.C.R.). Followed in *Re Fairmeadow Developments Ltd. and Town of Markham*, [1973] 3 O.R. 144, at p. 154, 36 D.L.R. (3d) 168, at p. 178 (Div. Ct). The *Hammond* decision, *supra*, footnote 17, had suggested the time of the hearing was the relevant date. See the clarification in *Re Bala Investments Ltd. and City of Hamilton*, *supra*, footnote 10, at pp. 494-495 (O.R.), 697-775 (D.L.R.).

[62] *Re 261532 Development Corporation Ltd. and City of Toronto*, *supra*, footnote 48, at p. 617. The "intention" is considered in relation to the date of the application for the permit to see if it was manifested clearly *before* that date.

[63] *Cambridge Leaseholds Ltd. and City of Toronto (No. 3)*, *supra*, footnote 52.

[64] *Ibid.*, at pp. 457 (O.R.), 291 (D.L.R.).

(c) *Good faith*

As a legal concept, "good faith" is amphorous. When used in an attempt to show a by-law is *ultra-vires*, as in a motion to quash, the criterion has always been phrased as the existence of *bad* faith, which itself is vague[65] and very difficult to prove.[66] The *Hammond* decision[67] had mentioned good faith as existing when a municipality had an unbiased and objective view when passing the by-law and *Boyd Builders*[68] had mentioned the need for frankness and impartiality. What were in fact in issue in these cases were the actions of the municipality implementing a zoning change because of neighbourhood pressure or the desire to stop one particular use (rather than acting for the good of the community generally).

In fact, the legal issues presented by the criteria of impartiality and unbiased and objective views are not concerned with "good faith" as that term has become used in an attack on a by-law as being *ultra vires.*[69] Impartiality and objectivity are more closely related to whether the by-law was passed in the private as opposed to the public interest and whether the enactment of the by-law was discriminatory. The former criterion is extremely difficult to prove as it would require a finding that a municipality did not at all consider the public interest when it was interfering with a private interest.[70] As to discrimination, recent decisions here almost expressly condoned this action on the part of the municipalities on the basis that it is implicit in the zoning power to single out particular lots for attention.[71]

"Frankness" as a criterion could possibly be connected with the need for a municipality to give proper notice of an intention

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[65] Bad faith includes all sinister or collateral purposes: *Re McCormick and Toronto Township*, [1948] O.W.N. 435; *Re Hamilton Powder Co. and Township of Gloucester* (1909), 13 O.W.R. 661.

[66] See a successful attempt in *Re Burns and Township of Haldimond* (1966), 52 D.L.R. (2d) 101).

[67] *Supra*, footnote 17, at p. 221.

[68] *Supra*, footnote 2, at p. 415 (S.C.R.).

[69] See the discussion of the various indicia of *ultra vires* in: Allen, Attaching By-Laws: Zoning and the Traditional Rules (1971), 21 U.N.B.L.J. 1 and (1973), 22 U.N.B.L.J. 5; Weir, Quashing Invalid By-Laws and Other Remedies, Law Society of Upper Canada Special Lectures (1956), p. 7; Stein, The Municipal Power to Zone in Canada and the United States: A Comparative Study (1971), 49 Can. Bar Rev. 534.

[70] *E.g., Re Howard and City of Toronto*, [1928] 1 D.L.R. 952.

[71] Most notable is *Township of Scarborough* v. *Bondi*, [1959] S.C.R. 444, 18 D.L.R. (2) 161. Also *Polai* v. *Toronto* (1972), 28 D.L.R. (3d) 638 (S.C.C.); *Texaco Canada Ltd.* v. *Oaks Bay* (1971), 20 D.L.R. (3d) 351 (B.C.C.A.). *Cf. Re Dellabough and Township of Esquimalt* (1967), 62 D.L.R. (2d) 653. (B.C.S.C.).

to pass the by-law or to give a chance of a hearing before council enacts the by-law.[72] However, there are recent decisions that deny a landowner the right to notice and to a hearing[73] and thus these no longer can be said to be elements of good faith in the context of attacking a by-law.

In the second *Cambridge Leaseholds* case [74] Hughes J. had stated[75] that the bad faith required to quash a by-law was of no "deeper dye" than that needed to defeat an application by a municipality to adjourn mandamus proceedings. In the third *Cambridge Leaseholds* case[76] Wright J. in the Divisional Court accepted that proposition but stated most significantly that the proposition does not conclude the issue on an application for adjournment of mandamus proceedings where a broader enquiry as to good faith should be undertaken. He made the essential point that the *Boyd Builders* tests do not relate good faith to a by-law but rather to a "clear plan for zoning" which must be proceeding in good faith and with despatch. He then concluded: "It appears to us that among the things to be considered in weighing the request for an adjournment is not necessarily 'good faith' or 'bad faith' in the sense that would strike down a by-law but the essential fairness of the municipality's position."[77]

On the merits of the case, Wright J. found the municipality "unfair" as it had known of the developer's commitment to the project and the action of the municipality to stop the developer was negative in nature and not part of a positive scheme to advance any clear plan already conceived by the municipality. On the one hand this seems to bring the situation back to the *ultra vires* criterion of discrimination or the statements in previous decisions of the need for impartiality and objectivity. However,

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[72] This is suggested as part of "good faith" in *Re Bala Investments Co. Ltd. and City of Hamilton, supra,* footnote 10, at pp. 495 (O.R.), 696 (D.L.R.).

[73] In *Re Florence Nightingale Home and Scarborough Planning Board,* [1973] 1 O.R. 615 (Div. Ct) the court suggested there was a moral duty to give notice but that the actions of the planning board were not the type of decisions that were reviewable under the Judicial Review Procedure Act, *supra,* footnote 6. However, after *Zadrevec* v. *The Corporation of the Town of Brampton, supra,* footnote 13, it seems a certain proposition that notice and a hearing are not required. *Zadrevec* was followed in *Re Therrien and Township of Herschel,* [1973] 3 O.R. 997 (Div. Ct) where the issue of lack of notice was before the court in a *Boyd Builders* situation. See, however, the recent discussion in the *Re Multi Mills* case, *supra,* footnote 13.

[74] *Supra,* footnote 16.

[75] *Ibid.,* at pp. 397-398 (O.R.), 62-63 (D.L.R.).

[76] *Supra,* footnote 52.

[77] *Ibid.,* at pp. 458 (O.R.), 202 (D.L.R.).

the significance of the decision is the recognition that the absence of "good faith" is not necessarily that required to quash a by-law but that required to defeat an application to adjourn mandamus proceedings, which, as has been stated, is an indulgence. Thus, the absence of good faith in these situations could include the absence of notice of the municipality's intentions, an attempt to enact a by-law aimed directly at a developer or the absence of any intention to change the zoning prior to discovering that the developer was undertaking a particular project. "Good faith" then, in these situations, equals fairness by the municipality towards the developer.

This test of fairness has become merged in those decisions, which will be discussed, where the *Boyd Builders* tests have given way to a consideration of the equities between the parties. Nevertheless, in consideration that the municipality, in a request for an adjournment, is in conflict with a *prima facie* right to a mandamus order, a wide definition of good faith is eminently acceptable.

(d) *Intention*

The *Boyd Builders* case makes reference to a clear intent to restrict or zone that exists before the application for the permit is made. In the *Hammond* decision it was stated[78] that the intention can be manifested not only by passing a by-law but by a decision of the council which it is proceeding to implement by means of a by-law. It has been held that the clear intent can be manifested validly by a resolution[79] or even a by-law which is invalid.[80] In the *City of Peterborough*[81] decision, intention was proved by an official plan not yet approved by the Minister without even any implementing zoning by-law drafted or proposed.

Laskin J.A. had made the comment[82] that an official plan by itself was not irreversible or unamendable and thus did not constitute a clear intention sufficient to satisfy the *Boyd Builders* test. Although this comment has not been followed, and appears to be inconsistent with other decisions, it raises the question of how definite or "clear" should the intention be to entitle a municipality to an adjournment. The issue was discussed in some

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[78] *Supra*, footnote 17, at p. 221.

[79] *Re Overcomers Church and City of Toronto*, [1974] 1 O.R. (2d) 123, at p. 126 (Div. Ct).

[80] *Re Harju and City of Thunder Bay*, *supra*, footnote 35. At the time of the application for the permit in this case there was a remedial statute enacted to cure the invalidity, but it had not received Royal Assent.

[81] *Re Donald Bye Excavating Co. Ltd. and City of Peterborough*, [1973] 1 O.R. 39, 30 D.L.R. (3d) 415 (C.A.).

[82] *R.* v. *City of Barrie; Ex parte Berrick*, *supra*, footnote 36, at pp. 201 (O.R.), 52-53 (D.L.R.).

detail in the *Overcomers Church* case[83] which was one of a number of decisions concerning the City of Toronto's by-law to prohibit apartment hotels in certain areas.

Among the arguments in the *Overcomers Church* case was that the intention of the municipality was not clear because it had held public meetings on the proposed by-law which was inconsistent with the forming of a definite intention. In answering this argument, Wright J. in the Divisional Court compares the municipality to a legislature that was carrying out a valid legislative practice of giving prior notice of impending legislation and a chance for representations to be submitted accordingly. He then undertook a detailed discussion of "intention" by analyzing how that term had come to be used under the English Landlord and Tenant Act[84] where consideration is taken of the intention of a landlord in relation to certain actions. The recital of various definitions in the English cases is straight-forward and makes considerable sense in the determination of intention in the *Boyd Builders* cases.

Drawing from those English cases, the proposition emerges that an intention can be revocable but, when made, must not be provisional in the sense that further consideration is reserved for the future. Thus, if a municipality decides to change the zoning in a particular area it must make that a complete and absolute decision at that time which is not then deprived of being a "complete" intention because it might possibly be revoked in the future. Furthermore, an intention may not be said to be manifested unless there is a reasonable likelihood of bringing the decision about. Thus, for instance, if a municipality resolved that the whole municipality be rezoned for open space uses only, there is no conceivable way practically, although there is theoretically, that this may be instituted. Viewed in this light, an official plan or resolution is acceptable for "intention" purposes while an invalid by-law is not.

Some difficulty arises as to whether an intention is manifested by what have become known as holding or freezing by-laws or interim development controls, which are designed essentially to give a municipality a breathing space while more detailed proposals for zoning are studied and in the meantime to allow development only subject to permission and have also been used as a timing device to prevent land from being utilized until the area is ripe for development. It has now been held by the Supreme Court

[83] *Supra*, footnote 79.

[84] 1927, c.36 and 1954, c.56.

of Canada that these devices are valid[85], but the question remains as to whether they represent a "clear plan" to restrict the land in that the essence of these by-laws is that there is not yet a clear plan and thus all uses should be frozen pending further study. A decision[86] respecting the Toronto holding by-law, which provided for height and size maxima for certain areas has stated that these by-laws indicate only an intention that further studies are to be done.

Although these devices have been in existence for decades in other jurisdictions,[87] they were most certainly not in the contemplation of the Supreme Court of Canada when *Boyd Builders* was decided. Nevertheless, they are legitimate planning tools and it seems suitable that a clear intention to freeze development of land is a positive action in respect of the future of a municipality's zoning process and should be recognized by the courts as satisfying the intention test of *Boyd Builders*. The consequence of this, obviously, is that all municipalities could enact holding by-laws and thus arbitrarily deny building permits. However, this is not grossly different from the present situation where a municipality in a desire to restrict high rise development in a certain area, could resolve to change the zoning to prohibit such uses and in effect say "lets intend that".

There is an implication in the Ontario Municipal Board decision in respect of the height limitations by-law that if discretion to permit uses in a development control by-law is not "unbridled", a by-law of that type may be approved. Furthermore, the recent amendment to The Planning Act, adding section 35a to permit a form of development control, and the enactment of The Niagara Escarpment Planning Act in 1973,[88] which contemplates extensive use of development control, and the recommendations of the 1971 *Report* of the Ontario Law Reform Commission following up Professor Milner's earlier work, all suggest that holding by-laws will become a common means to control the use of land. This in turn suggests that the device must be recognized as a manifestation of a clear intention on the part of the municipality to restrict the use of land in a way that is consistent with proper planning principles.

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[85] *Soo Mill & Lumber Co. Ltd.* v. *City of Sault Ste. Marie* (1974), 47 D.L.R. (3d) 1. *Cf. Re O'Donnell and City of Belleville, supra*, footnote 32.

[86] *Re Cogan and City of Toronto, supra*, footnote 46, at p. 673.

[87] In the United States, see Freilich, Interim Development Control: Essential Tools for Implementing Flexible Planning and Zoning (1971), 49 J. Urban L. 65. In Australia, Stein, Urban Legal Problems (1974), Chap. 5.

[88] S.O., 1973, c.52.

There is one final aspect of intention that may forestall any need to refer to the *Boyd Builders* tests. Section 35(7)(b) of The Planning Act provides, essentially, that a zoning by-law, where it prohibits a use, will not prevent the erection of a building for that use which "prior to the day of the passing of the by-law" has been approved by the building inspector. There is no longer any doubt that the approval referred to is in respect of compliance with the zoning by-law and not the building by-law.[89]

(e) *Despatch*

The last test of the *Boyd Builders* decision has not been subject to any separate analysis by the decisions in this area. It is, of course, referable to the clear intention to restrict the use of land or zone and thus it is this intention that must be subject to proceeding with despatch. In the *Hammond* decision, in the course of affirming that a mere decision to change the zoning is as satisfactory as an actual by-law, the condition was added that the decision must be proceeded with by council to implementation by by-law with "reasonable promptitude".[90] A logical interpretation of despatch is, that whatever the form in which the decision of council is manifested, it must be carried through to implementation and final approval in, at least, the normal course of events.

On the one hand, it could be said that in a situation as was presented in the *City of Peterborough* case,[91] where zoning by-laws had not been drafted pending ministerial approval of the official plan, there was an excessive delay in *final* implementation of the clear plan to zone. However, it seems a doubtful proposition that a municipality should be forced to carry out the various procedures in The Planning Act in a way that is more swift than is required. What appears to be appropriate is some continuing and consistent action on the part of the municipality in the implementation of a decision to change the permitted use of the land. In respect of a holding by-law, it would be consistent to charge the municipality to carry out studies and investigations in a continuous and uninterrupted process to determine the eventual planning for the area.

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[89] *Mapa* v. *Township of North York and Beckitt*, [1967] S.C.R. 172, 61 D.L.R. (2d) 1. Also *Re Walmar Investments Ltd. and City of North Bay*, [1970] 1 O.R. 109, 7 D.L.R. (3d) 581 (C.A.). If the plans are approved as to zoning and the by-law is passed on the same day, the section is no help as there is no "day" of passing the by-law which the approval is prior to: *R.* v. *City of Barrie; Ex parte Berrick, supra,* footnote 36. The Divisional Court has rejected the attempted interpretation that the section operates only when the plans are approved *and* the permit is issued: *Re Peek-Ron Construction Co. Ltd. and City of Orillia*, [1974] 2 O.R. (2d) 181.

[90] *Supra*, footnote 17, at p. 221.

[91] *Supra*, footnote 81, at p. 130 (O.R.).

Departure from the Boyd Builders Case

The application of the *Boyd Builders* tests to a particular fact situation will allow a court little discretion in most decisions. There either is a clear intention to zone in a particular case or there is not and such matters as the hardship to the applicant or the obstacles placed in the applicant's path by the municipality are probably irrelevant. There are situations when a strict application of *Boyd Builders* has not coincided exactly with the merits of a case as perceived by a court, and on at least two occasions it has been stated[92] that the *Boyd Builders* tests are not part of a statute and that the meaning of the tests must be viewed in light of the particular facts.

In the *Berrick* decision[93] in 1969, Laskin J.A.[94] stated without explanation of why he was adopting the criterion, that: "The balance of the equities favours the owner." Jessup J.A. in the same case[95] in the Court of Appeal adopted the same approach of comparing the relative "equities" between the parties but did so on the basis that an appeal court should only interfere with the discretion of a trial judge in limited circumstances; when the judge acted upon a wrong principle of law or the decision will result in some injustice being done. It is this consideration of "injustice" that leads to the questions raised distinctly in the subsequent decision in the *Harju* case:[96]

1) What would be the injustice to the applicant if his application is dismissed?
2) What would be the injustice to the municipality if the application is granted?

An enquiry into the relative injustices may be appropriate when the appeal court is considering the effect of a determination by a trial judge. However, in respect of the well-established tests of *Boyd Builders*, it would appear to be irrelevant and contrary to the spirit of that decision which adjusted a balance between claims of equal merit. In the *Re Bismark Holdings* decision[97] the Divisional Court, indicated that the *Boyd Builders* tests were *not*

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92 Re *Overcomers Church and City of Toronto, supra,* footnote 79; *Cambridge Leaseholds Ltd.* v. *City of Toronto (No. 3), supra,* footnote 52, at p. 457 (O.R.).

93 *Supra,* footnote 36.

94 *Ibid.,* at pp. 202 (O.R.), 54 (D.L.R.).

95 *Ibid.,* at pp. 205-206 (O.R.), 57-58 (D.L.R.).

96 *Re Harju and City of Thunder Bay, supra,* footnote 35, at p. 70.

97 *Re Bismark Holdings Ltd. and City of Toronto,* [1973] 3 O.R. 887, at pp. 890-891, 38 D.L.R. (3d) 531, at pp. 534-535 (Div. Ct). The decision in *Re Bruce and City of Toronto, supra,* footnote 11, was also cited, but does not seem to contain much support for the proposition.

very helpful as they were directed to the particular facts of that case. The Divisional Court cited the *Berrick* decision in the Court of Appeal as supporting the proposition that "in appropriate cases" consideration may be given to the equities as between the citizens of a municipality as represented by its council and the applicant for a building permit. This view has since been followed in another decision of the Divisional Court.[98]

The difficulties of this approach have already been discussed and essentially consist of the possibility of confusion and inconsistency in subsequent cases in the absence of criteria to resolve the alternative theoretical arguments that arise in these cases; that private rights should not be interfered with and that private rights must give way to public good. The only apparent usefulness of an "equities" approach could be to prevent abuses of the *Boyd Builders* tests that may take place by municipalities "intending" in advance to change zoning in a certain area in anticipation of future development of a certain type taking place. This would be especially so if the enactment of a holding by-law is considered to manifest a clear intention to restrict the use of land.

It appears eminently reasonable that a court should not be strictly bound by the words of the *Boyd Builders* decision and should be able to take into account other factors which bear upon a proper determination. It should not be necessary however, to renounce the *Boyd Builders* tests and take up an open-ended standard related to the "equities" between the parties to accomplish flexibility. The *Boyd Builders* tests are compromises but have as their major advantage a sequence of criteria which present a workable framework to evaluate conflicting interests.

LESLIE A. STEIN*

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98 *Re Cogan and City of Toronto, supra*, footnote 46, at pp. 676-677. To the same effect: *Re 261532 Development Corporation Ltd. and City of Toronto, supra*, footnote 48.

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CRIMINAL LAW—JURISDICTION—ILLEGAL ARREST—DUE PROCESS—VIOLATION OF INTERNATIONAL LAW.—In the absence of universal criminal jurisdiction, it is well established that only the state whose criminal law has been violated[1] may try the person accused of the violation. If the accused has sought refuge abroad, he must be brought within the state in which he is to stand trial in order to give the appropriate court of this state jurisdiction over his person. His presence may be secured lawfully by way of extradition or, unlawfully, by kidnapping him in the state of refuge, or by enticing him to come into the state of prosecution by fraud, deception or trickery, rather than force.

Will the accused be able successfully to resist any attempt to prosecute him on the ground that his presence within the territorial jurisdiction of the court has been illegally obtained?

Kidnapping may involve a violation of customary or conventional international law when officials of the prosecuting state or private persons at the instigation of such officials perpetrated it. In this case, the kidnapping of the accused constitutes a violation of the territorial sovereignty of the state of refuge. A violation of international law may also occur where the accused has been seized in breach of a treaty of extradition.

In Canada, the courts seem to be of the opinion that an accused cannot succeed in escaping justice because he was brought to trial against his will. This practice has its source in the Roman law maxim *mala captus bene detentus*. On the other hand, in the United States of America, some courts have begun to adopt a different opinion on this question.

In *Re Hartnett and The Queen; Re Hudson and The Queen*,[2] the applicants who resided in the United States of America sought, by way of *certiorari*, to quash their committal for trial on charges of fraud. The informations had been laid by an investigator with the Ontario Securities Commission in January, 1973, after an investigation which had begun in 1972. The applicant Hudson who had voluntarily appeared before the Commission on two previous occasions and the applicant Hartnett had been asked to appear again before the Commission to give evidence under oath in January, 1973. They journeyed from Dallas, Texas, to Toronto, but were arrested before they could attend the hearing. The applicants took the position that they were enticed into

[1] In Canada jurisdiction over offences is mostly based on the territorial principle. See ss. 5(2) and 6 of the Criminal Code, R.S.C., 1970, c. C-34, as am. Jurisdiction generally means the capacity of a state under international law to make or to enforce a rule of law.

[2] [1974] 1 O.R. (2d) 206.

Canada on the pretence that the further assistance of Hudson and the additional assistance of Hartnett were required by the Ontario Securities Commission when the real purpose of the Commission staff was to have them arrested. They argued that in a civil proceeding service of a writ effected in this way would be set aside, and that for the purposes of the criminal law, what had happened amounted to denying them that "due process of law" which Canadian subjects and the subjects or citizens of any other state to whom the laws of Canada applied, were guaranteed by section 1(a) of the Canadian Bill of Rights which states:[3]

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

The process of law owed to them included the right to have extradition proceedings taken against them in the United States of America. Failure to take such proceedings denied them this right as well as natural justice and in consequence the Provincial Court judge had no jurisdiction to conduct the preliminary hearing on the charges which were laid against them in Canada.

The Ontario High Court dismissed the applications on the ground that the method used in bringing an accused to Canada does not affect the jurisdiction of the judge to conduct the preliminary hearing.

There was no denial of "due process of law". The court relied on the Supreme Court decision in *Curr* v. *The Queen*[4] where Mr. Justice Ritchie stated that the "meaning to be given to the language employed in the Bill of Rights is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that, in my opinion, the phrase 'due process of law' as used in s. 1(a) is to be construed as meaning 'according to the legal processes recognized by Parliament and the courts in Canada' ".[5]

In that case Mr. Justice Laskin made an extensive review of the meaning of "due process of law" in which he referred to the origins of the phrase and its application in decisions of the United States Supreme Court. However, he declined to take the phrase

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[3] S.C., 1960, c. 44, now R.S.C., 1970, App. III.

[4] [1972] S.C.R. 889, 7 C.C.C. (2d) 181.

[5] *Ibid.*, at pp. 916 (S.C.R.), 185 (C.C.C.) For earlier cases see S. M. Beck, Electronic Surveillance and the Administration of Criminal Justice (1968), 46 Can. Bar Rev. 643, at p. 659 *et seq.* The purpose of the Bill of Rights is to make existing rights more enforceable. It does not create new rights. Still a right exists even though it is often violated.

"except by due process of law" beyond its antecedents in English legal history in order to view it in terms that have had sanction in the United States of America, ". . . in the consideration there of those parts of the Fifth and Fourteenth Amendments to the American Constitution that forbid the federal and state authorities respectively to deprive any person of life, liberty or property without due process of law".[6] Section 1(a) essentially points to procedural considerations. As his Lordship said: "I am unable to appreciate what more can be read into s. 1(a) from a procedural standpoint than is already comprehended by s. 2(e) ('a fair hearing in accordance with the principles of fundamental justice') and by s. 2(f) ('a fair and public hearing by an independent and impartial tribunal')".[7] In other words, section 1(a) would seem to refer to procedural regularity or procedural fairness in the criminal courts and not to the manner in which the accused is brought before these courts.

Although Mr. Justice Laskin stated that the Crown conceded that section 1(a) could have application to pre-trial matters affecting the person who is about to be charged with an offence, this issue was not pursued.[8] Nor did the High Court of Ontario in the *Hartnett* case accept Mr. Justice Martland's invitation in *Curr* to expand the law when he said: "I do not adopt as final, any specific definition of the phrase 'due process of law' as used in s. 1(a) of the Canadian Bill of Rights."[9]

The Ontario High Court merely applied *R.* v. *Isbell*[10] where it was held that an illegal arrest does not deprive the judge of jurisdiction to entertain the prosecution of the accused. The court pointed out that although this case was decided before the enact-

[6] *Ibid.*, at pp. 896 (S.C.R.), 190 (C.C.C.).

[7] *Ibid.*

[8] Pre-trial police misconduct that would be prohibited is that which would tend to convict an innocent man, such as an illegally obtained confession.

[9] *Ibid.*, at pp. 914 (S.C.R.), 184 (C.C.C.). Note that *Hartnett* is not a case where the infringement of the Bill of Rights would render a federal enactment inoperative. All that is needed is for the courts and the police to exercise their powers in accordance with s. 1(a) of the Bill of Rights. For support by analogy see Laskin J. in *Brownridge* v. *R.*, [1972] S.C.R. 926, at pp. 954-955.

[10] (1928), 63 O.L.R. 384, 51 C.C.C. 362, [1929] 2 D.L.R. 732. This view implies a literal interpretation of s. 428(a) of the Criminal Code, *supra*, footnote 1, which provides that "... every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence (a) if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court;".

ment of the Bill of Rights, it was still good authority since the arrest of the applicants was not unlawful in its domestic aspects and all they were complaining of was that, by virtue of such arrest, they had been denied the right to be heard in extradition proceedings, a circumstance which, in the view of the court, did not invalidate the process, although it may have constituted a violation of the United States-Canada Extradition Treaty.

The Ontario High Court also refused to apply by analogy the well-settled rule applicable to civil proceedings that where a non-resident defendant is enticed into the state by the fraud of the plaintiff, the court will not exercise jurisdiction over him[11] on the ground that: "Analogy may be useful and persuasive but it cannot be used to make law. . . ."[12]

By contrast, in the United States of America, the Federal Court of Appeals for the Second Circuit, in a remarkable opinion, came to the conclusion that the requirement of due process, as understood in that country, requires the criminal court to divest itself of jurisdiction over the accused where it has been acquired as a result of the illegal conduct of law enforcement authorities. Such conduct debases the processes of justice and cannot be ignored by the court.

In *United States* v. *Toscanino*,[13] the accused, an Italian citizen, was appealing from a conviction in the Eastern District Court of New York for conspiracy to import and distribute narcotics. He contended that the court had acquired jurisdiction over him unlawfully through the conduct of American agents who kidnapped him in Uruguay with the connivance of the United States Government, used illegal electronic surveillance, tortured him and abducted him via Brazil to the United States to prosecute him there.

The accused did not question the sufficiency of the evidence against him, nor did he claim any error as regards the trial itself. His argument both prior to the trial and after the verdict of the jury was returned, was that the proceedings in the District Court were void because his presence within the territorial jurisdiction of the court had been illegally obtained. At no time had the United States formally or informally requested the Government of Uruguay to extradite him. No effort was made to proceed through legal channels, but rather the whole operation was conducted willfully and unlawfully, violating the domestic laws of three separate

[11] *Lewis* v. *Wiley* (1923), 53 O.L.R. 608, at p. 609, per Riddell J.

[12] *Supra*, footnote 2, at p. 210.

[13] (1974), 500 F. 2d 267 (2nd Cir.). Re-hearing denied (Oct. 8th, 1974), 43 U.S.L.W. 2175.

countries, as well as treaties to which the United States was a party. The government prosecutor neither affirmed nor denied these allegations but claimed that they were immaterial to the District Court's power to proceed.

The Court of Appeals considered whether a federal court must assume jurisdiction over an accused who is illegally apprehended abroad and forcibly abducted by government agents to the United States for the purpose of facing criminal charges. Under the so-called *Ker-Frisbie* rule,[14] which resulted from two decisions of the United States Supreme Court that have laid the foundations of cases of this nature, "due process of law is satisfied when one present in court is convicted of crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards",[15] regardless of the manner in which jurisdiction was obtained over the accused. However, later on, the United States Supreme Court widened its interpretation of the doctrine of due process to bar the government from realizing the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial[16] while other courts and writers[17] criticized the *Ker-Frisbie* rule: The requirement of due process must extend to the pre-trial conduct of law enforcement authorities. Today, these two cases can no longer be reconciled with the principle expressed in *Wong Sun* v. *United States*[18] that the government should be denied the right to exploit its own illegal actions. Having unlawfully seized a person in violation of the Fourth Amendment, which guarantees "the right of the people to be secure in their persons . . . against unreasonable . . . seizures", the government should as a matter of fundamental fairness be obliged to return him to his previous status.[19]

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[14] See *Ker* v. *Illinois* (1886), 119 U.S. 436, 72 S. Ct 225, 30 L. Ed. 421, and *Frisbie* v. *Collins* (1952), 342 U.S. 509, 72 S. Ct 519, 96 L. Ed. 541. For an earlier case see *United States* v. *Insull* (1934), 8 F. Supp. 310 (N.D. Ill.).

[15] *Frisbie* v. *Collins*, *ibid.*, at p. 522 (U.S.).

[16] See *Wong Sun* v. *United States* (1963), 371 U.S. 471, 81 S. Ct 407, 9 L. Ed. 2d 441. Also *Rochin* v. *California* (1952), 342 U.S. 165, 72 S. Ct 205; *Mapp* v. *Ohio* (1961), 367 U.S. 643, 81 S. Ct 1684.

[17] *E.g.*, *United States* v. *Edmons* (1970), 432 F. 2d 577, at p. 583 (2nd Cir.); R. M. Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized (1968), 56 Cal. L. Rev. 579, at p. 600; A. W. Scott, Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud (1953), 37 Minn. L. Rev. 91, at pp. 102, 107.

[18] *Supra*, footnote 16.

[19] Compare the power of the federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured

In *Toscanino*, the court pointed out that the accused was abducted by federal agents in contravention of the provisions of the Charters of the United Nations[20] and of the Organization of American States[21] which were binding upon the United States and Uruguay. Since in these international treaties the United States had agreed not to violate the territorial integrity of Uruguay but had broken this obligation by abducting Toscanino, the allegations made against the government were not governed by *Ker* where no treaty obligation had been found to be broken. The relevant authority was *Cook* v. *United States*,[22] where it was held that the court had no jurisdiction since, under a treaty between the United States and Britain, forcible seizure was incapable of giving that court power to adjudicate title to a vessel regardless of its physical presence within the jurisdiction.

The *Toscanino* case constitutes a new logical expansion of the notion of due process in the United States of America.[23] It also

by fraud. See *In re Johnson* (1896), 167 U.S. 120, at p. 126, 17 S. Ct 735, 42 L. Ed. 103; *Fitzgerald Construction Co.* v. *Fitzgerald* (1890), 137 U.S. 98, 11 S. Ct 36, 34 L. Ed. 608.

[20] See the Charter of the United Nations, art. 2, par. 4, which obligates "All Members" to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state . . .".

[21] See O.A.S. Charter, art. 20, which provides that the "territory of a state is inviolable; it may not be the object, even temporarily, . . . of . . . measures of force taken by another state, directly or indirectly, on any grounds whatever . . .".

[22] (1933), 288 U.S. 102, esp. at p. 121, 53 S. Ct 305. On this point see also *Ford* v. *United States* (1927), 273 U.S. 593, at pp. 605-606, 47 S. Ct 531, 71 L. Ed. 793.

[23] The court's conclusion in *Toscanino* was that the case should be remanded for further proceedings, not inconsistent with the opinion given. Should Toscanino provide evidentiary credible supporting evidence that the action was taken by or at the discretion of United States officials, an evidentiary hearing would have to be held. *Toscanino* was partly distinguished in *United States* v. *Herrera* (1974), 504 F. 2d 859 (5th Cir.) and the *Ker-Frisbie* rule reaffirmed. In *United States ex. rel. Lujan* v. *Gengler* (1975), 510 F. 2d 62 (2nd Cir.), the court distinguished and explained *Toscanino*, its own previous decision, on the ground that the abduction of a suspect from another country violates international law only when the offended state objects to that conduct. Toscanino had offered to prove that the Uruguayan government had condemned his apprehension as alien to its laws whereas Lujan had failed to allege that Argentina or Bolivia protested his abduction. A careful reading of *Toscanino* does not seem to bear this out. From an international law point of view, the decisive factor seemed to have been the violation of two treaties by the United States rather than any protest by the countries involved. Also in *Lujan* the court held that the absence of any contention that the accused was subjected to torture, terror or custodial interrogation of any kind did not constitute a violation of due process which would require the federal courts to divest themselves of jurisdiction over him. Thus, *Toscanino* was not applicable. In footnote 9, at p. 68,

emphasizes the fact that in that country an accused may successfully raise the question of violation of international law in the domestic courts.

When an accused is kidnapped in the state of refuge and forcibly brought within the jurisdiction by agents of the prosecuting government, he may obtain his freedom as the violation of the sovereignty of the foreign state engages the responsibility of the state of arrest, provided the state of refuge complains that his abduction was in violation of international law and requests his return. This would also be the case where the provisions of a valid extradition treaty in force between the state of refuge and the state of arrest have been ignored or violated, as for instance where the demanding state after receiving the fugitive tried him for a crime other than that for which he was extradited.[24] When the extradition treaty has deliberately been ignored by both states, it would be more difficult for the accused himself to invoke a violation of international law. The merit of *Toscanino* is clearly to point out that a violation of international law is not merely a political matter to be settled through diplomatic channels by the states involved[25] but can also be relied upon by the accused in the domestic courts. Not only has the territorial state a claim against

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the court pointed out that unlike the exclusionary rule which prohibits use of illegally obtained evidence or confessions, the adoption of an exclusionary rule here would confer a total immunity to criminal prosecution. This did not seem to be favoured by the court which pointed out that since there was probable cause for Lujan's arrest and since the failure of Argentina or Bolivia to object suggested they would have been receptive to his extradition, the extreme remedy of requiring dismissal of the indictment was not necessary. The court did not reject *Toscanino* in its entirety. Government agents do not have a *carte blanche* to bring defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct. However, *any* irregularity in the circumstances of a defendant's arrival in the jurisdiction does not always vitiate the proceedings of the criminal court. A simple abduction is not necessarily a violation of due process.

[24] *United States* v. *Rauscher* (1888), 119 U.S. 407, 7 S. Ct 234. In Canada see J.-G. Castel, S. Williams, International Criminal Law (1st ed., 1974), p. 557 *et seq*. Note that an illegal arrest could constitute a serious violation of an internationally protected human right under the Charter of the United Nations (art. 55(i)), the Universal Declaration of Human Rights (arts 3, 9, 10), and the International Covenant on Civil and Political Rights (arts 9, 12, 13) to the extent that these are part of the law of Canada and therefore enforceable in our country. See also W. J. Brennan Jr., International Due Process and the Law (1962), 48 Va. L. Rev. 1258.

[25] See *State* v. *Brewster* (1835), 7 Vt. 118; *United States* v. *Unverzagt* (1924), 299 F. 1015 (D.C.), (1919-42), 11 Annual Digest (Supplementary Vol.), Case No. 53, p. 101. In the case of violation of a treaty, appeal must be made to the executive branches of the treaty governments for redress.

the arresting state under international law but the accused has a defense based upon the arrest in violation of customary or conventional international law. This is the law in the United States especially in the case of violation of a treaty which is part of the law of the land. In Canada the same rule should prevail under the common law doctrine of incorporation and, in the case of a treaty, if it has been implemented by legislation when this is necessary.[26]

When Eichmann[27] was kidnapped in Argentina by a group of Israelis who took him back to Israel to stand trial for the murder of more than six million Jews, it was recognized that it is a principle of international law that kidnapping of a person on the territory of a state by foreign agents is an infringement of that state's sovereignty and *prima facie* a breach of international law. There is an obligation on the part of the state of arrest to restore the accused to the state of refuge and to punish or extradite the offending agents, provided the injured state makes a diplomatic reclamation to that effect.[28] The same appears to be true when the accused has been induced by fraud to leave the state of refuge by individuals acting with the complicity of agents of the arresting state.[29] No such international obligation exists when the kidnapping or the enticement was the act of a private person without official complicity on the side of the prosecuting state. Obviously,

[26] See J.-G. Castel, International Law Chiefly as Interpreted and Applied in Canada (1965), Ch. II. Professor M. C. Bassiouni, in Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition (1973), 7 Vanderbilt J. of Transnational L. 25, at p. 27 points out that: "Aside from the flagrant violation of the individual's human rights, these practices affect the stability of international relations and subvert the international legal process." See also M. H. Cardozo, When Extradition Fails, Is Abduction the Solution? (1961), 55 Am. J. Int. L. 127; A. E. Evans, Acquisition of Custody over the International Fugitive Offender — Alternatives to Extradition: A Survey of United States Practice (1964), 40 Br. YrBk Int. L. 77.

[27] *The A.-G. of the Government of Israel* v. *Eichmann*. Criminal Case No. 40/61 (1961), 36 I.L.R. 5, aff'd (1961), 36 I.L.R. 277. It was assumed that the kidnappers were acting on behalf or with the tacit approval of the State of Israel.

[28] See L. Preuss, Kidnapping of Fugitives from Justice on Foreign Territory (1935), 29 Am. J. Int. L. 502 who gives some examples; also E. D. Dickinson, Jurisdiction Following Seizure or Arrest in Violation of International Law (1934), 28 Am. J. Int. L. 231; T. H. Sponsler, International Kidnapping (1971), 5 Int. L. 27. In 1974, the U.S. government returned to Canada an American draft evader, resident in British Columbia, who had been illegally arrested within a few feet of the Canadian border as he was attempting to enter the State of Washington. For other recent incidents involving Canadians, see C. V. Cole, Extradition Treaties Abound But Unlawful Seizures Continue, International Perspectives. March-April 1975, p. 40.

[29] However, see *Ex parte Brown* (1886), 28 F. 653 (N.D.N.Y.) and *Ex parte Ponzi* (1926), 106 Tex. Crim. 58.

too, there is no obligation to release the accused when officials of the state of refuge participated in the irregular arrest.[30]

In the past, British and American courts have been reluctant to hold that a violation of international law is a defence which may be invoked by the accused.[31] Thus, in *Eichmann*,[32] the accused could not question the jurisdiction obtained by the Israeli courts. It was a matter between the states involved.

The problem of whether an individual can be a subject of international law depends on the given situation and the relevant applicable international instrument. This instrument may make him a subject but without procedural capacity or it may do both.[33] Argentina could have officially contested the apprehension of Eichmann on her soil but not on behalf of the individual.[34] Argentina accepted Israel's apology and did not assert her sovereign rights by demanding the restitution to her territory of the accused. Thus Eichmann could not benefit from the violation of Argentina's sovereignty. Germany (or Austria) as the state where the accused served as an official or of which he was a national, could also have protested. Eichmann's only claim could have been a civil one against his Israeli abductors. The fact that the United Nations requested Argentina to accept Israel's apology in order for Eichmann to be tried seems to indicate that, with respect to international crimes, kidnapping does not affect the jurisdiction of the court over the person of the accused.[35]

In *United States* v. *Sobell*[36] it was held that the fact that the defendant had been forcibly returned to United States authorities by the Mexican security police did not impair the power of the federal District Court to try him for espionage conspiracy. Sobell did not make a pre-trial motion challenging the jurisdiction and the court held that this precluded the assertion of such a matter by

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[30] *Savarkar Case* (1911), Scott Hague Court Reports (1916), 275.

[31] For a survey see P. O'Higgins, Unlawful Seizure and Irregular Extradition (1960), 36 Brit. YrBk Int. L. 279, at p. 302; M. R. Garcia-Mora, Criminal Jurisdiction of a State over Fugitives Brought from Foreign Country by Force or Fraud: A Comparative Study (1957), 32 Ind. L. J. 427. See also Restatement of the Law Second, Foreign Relations Law of the United States (1965), s. 8, comment f.

[32] *Supra*, footnote 27.

[33] H. Lauterpacht, The Subjects of the Law of Nations (1948), 64 L. Q. Rev. 97.

[34] P. Cutler, The Eichmann Trial (1961), 4 Can. Bar J. 352.

[35] E. Heazlett, The Kidnapping of Eichmann (1962), 24 U. Pitt. L. Rev. 116.

[36] (1957), 244 F. 2d 520 (2nd Cir.), cert. den. (1957), 355 U.S. 873, 78 S. Ct 120, re-hearing denied (1958), 335, U.S. 926.

motion in arrest of judgment.[37] He did, however, raise the matter in later appeals[38] and, relying on *Cook*,[39] argued that his kidnapping violated the Extradition Treaty with Mexico and since that treaty was the law of the land its violation deprived the United States courts of jurisdiction over the offence with which he was charged. He contended that his "objection to national and consequently, judicial power [did] not rest on the kidnapping or abduction . . . but rather upon the violation of the treaty".[40] The court did not find any violation of the Extradition Treaty with Mexico and applied the rule in *Ker* v. *Illinois*[41] that the power of a court to try a person for a crime is not impaired by the fact that he has been brought into the jurisdiction of the court by a forcible abduction, provided he was physically present at the time of the trial.

In *United States* v. *Toscanino*,[42] the Court of Appeals, in fact, rejected the authority of *Ker*[43] and *Frisbie*[44] on the ground that they had been eroded by subsequent decisions of the Supreme Court of the United States.

Since for years the *Ker-Frisbie* rule has resisted attacks based on the extradition clause in the United States Constitution,[45] the federal Kidnapping Act[46] and the due process clause of the Fourteenth Amendment, it is doubtful whether the Supreme Court of the United States will approve the reasoning of the federal Court of Appeals in *Toscanino*.[46a]

In *Ker* v. *Illinois*[47] the court stated that seizure by United States officials of fugitive criminals on the territory of a state with whom the United States has an extradition treaty is not *ipso facto* a breach of that treaty. In that case the defendant was indicted for embezzlement and larceny by an Illinois grand jury while he was residing in Peru. The President on the request of the Governor of Illinois invoked the Extradition Treaty between the United

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37 *United States* v. *Rosenberg* (1952), 195 F. 2d 583 (2nd Cir.).

38 *Supra*, footnote 36.

39 *Supra*, footnote 22.

40 *Supra*, footnote 36, at p. 524.

41 *Supra*, footnote 14.

42 *Supra*, footnote 13.

43 *Supra*, footnote 14.

44 *Ibid.*

45 Art. IV § 2, cl. 2 and 18 U.S.C. § 3182 (1948).

46 18 U.S.C. § 1201 (1948).

46a In *Gerstein* v. *Pugh* (1975), 95 S. Ct 854, at p. 865, the U.S. Supreme Court stated: "Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction", and cited *Ker* and *Frisbie*.

47 *Supra*, footnote 14 and see Effect of Illegal Abduction into the Jurisdiction on a Subsequent Conviction (1952), 27 Ind. L. J. 292, at p. 294.

States and Peru and issued a warrant to a Pinkerton agent to receive the fugitive from the Peruvian authorities. The agent never served the warrant, nor did he make any requests to the Peruvians for Ker's surrender to him, but rather he forcibly arrested Ker, placed him aboard an American ship and kept him in detention until the ship reached California. From there he was delivered to the State of Illinois. The Supreme Court stated that the "due process of law" guaranteed by the Fourteenth Amendment is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trials, and when in that trial and proceedings, he is not deprived of any rights to which he is lawfully entitled. The court held that Ker's irregular arrest did not deny him any right under the constitution, laws or treaties of the United States and that as an individual he possessed no right of asylum in Peru.[48]

The Supreme Court faced this same question sixty-six years later in *Frisbie* v. *Collins*[49] where a prisoner from the State of Michigan, on *habeas corpus,* alleged that he had been abducted from Illinois to Michigan by Michigan police officers. He claimed that his conviction in Michigan violated the due process clause of the Fourteenth Amendment as well as the federal Kidnapping Act, and was therefore null and void. The Supreme Court rejected his claim basing its decision on *Ker.*

> This court has never departed from the rule announced in *Ker* v. *Illinois*, 119 U.S. 436, 444, that the power of a court to try a person is not impaired by the fact that he had been brought within the court's jurisdiction by means of a "forcible abduction". No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.[50]

In other cases the same pattern was adhered to. In *United States ex rel. Voigt* v. *Toombs*[51] it was held, following *Ker,* that jurisdiction once acquired in a criminal case is not impaired by

[48] Preuss, *op. cit.*, footnote 28, at p. 502. See also Fairman, Ker v. Illinois Revisted (1953), 47 Am. J. Int. L. 678. In *United States* v. *Caramian* (1972), 468 F. 2d 1370 (5th Cir.), the court applied *Ker* and stated that even if no extradiction hearing had been conducted in the state of refuge, this fact would not affect the jurisdiction of the court to try the accused on the charges pending against him. See also *United States* v. *Herrera, supra,* footnote 23, and *United States* v. *Winter* (1975), 509 F. 2d 975 (5th Cir.).

[49] *Supra,* footnote 14.

[50] *Ibid.*, at p. 522.

[51] (1933), 67 F. 2d 744 (5th Cir.).

the manner in which the accused is brought before the court. In *Stamphill* v. *Johnson*[52] it was concluded that the personal presence of a defendant before a District Court gives that court complete jurisdiction over him, "regardless of how his presence was secured, whether by premature arrest . . . wrongful seizure beyond the territorial jurisdiction of the court . . . false arrest . . . or extradition arising out of an offence other than the one for which he is being tried",[53] and the court cannot decline to exercise jurisdiction. In *United States* v. *Vicars*[54] it was held that even if, as the defendant claimed, he was illegally arrested in the Panama Canal Zone and brought to the United States, this was not a ground for requiring that the trial court should release and discharge him without trial. The most recent case decided prior to *Toscanino* was *United States* v. *Cotten and Roberts*.[55] There it was conceded that the appellants, who were convicted of conspiracy and theft of government property, had been kidnapped or forcibly removed from the Republic of Vietnam to the territorial limits of the United States by the order of government personnel. The court held that this fact did not preclude assertion of jurisdiction over their persons. To the court the *Ker* principles remained firm. Although the court recognized that the doctrine had been criticized and that its validity may be questioned, it felt that recent legislation and constitutional protections enunciated in the last decade provided viable alternative protection against undisciplined law enforcement activities.[56]

The confusion which has arisen from the *Ker* decision can be traced back to two English cases, *R.* v. *Sattler*[57] and *Ex parte Susannah Scott*[58] on which *Ker* was founded. *Ex parte Susannah Scott* is the earliest case in which the irregular apprehension of an accused abroad and its effect on the jurisdiction of the court was considered. The accused was arrested in Brussels by a British police officer, who had a warrant for her arrest on a charge of perjury. She was forcibly brought back to England to stand trial and raised the alleged illegality. Lord Tenterden C. J. held that the court could not inquire into the circumstances under which

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[52] (1943), 136 F. 2d 291 (9th Cir.).

[53] *Ibid.*, at p. 292.

[54] (1972), 467 F. 2d 452 (5th Cir.), cert. den. (1973), 410 U.S. 967.

[55] (1973), 471 F. 2d 744 (9th Cir.).

[56] *Ibid.*, at p. 748. See also *United States* v. *Caramian, supra*, footnote 48. In the *Cotten* case, the forcible abduction of the accused did not violate international law as he had been voluntarily turned over to United States representatives by the South Vietnamese authorities.

[57] (1858), 1 D. and B. 539, 169 E.R. 1111.

[58] (1829), 9 B. and C. 446, 109 E.R. 166.

she was brought into the jurisdiction.[59] In *R.* v. *Sattler* the accused committed a felony in England and subsequently fled to Hamburg, where he was arrested by an English detective with the help of the local police. The detective had no warrant and there was no extradition treaty between Hamburg and Britain. On the voyage Sattler shot the detective who later died. It was held that offences commited by foreigners on British vessels on the high seas may be tried by any court within whose jurisdiction the offender is found and that the court did not thus have to decide on the illegality of the original arrest.

As the legal reasoning upon which these two decisions are based is rather unconvincing, it is surprising that the United States courts were so ready to follow them as "authorities of the highest respectability".[60] English courts have, however, continued to follow the pattern that possession of the offender gives jurisdiction and forcible arrest or abduction does not impair that jurisdiction. In *R.* v. *Officer Commanding Depot Battalion R.A.S.C. Colchester, Ex parte Elliot*[61] a deserter was arrested at Antwerp by British officers accompanied by two Belgian police officers. He contended that his arrest and subsequent detention by the military authorities was illegal because the British officers had no authority to arrest him in Belgium and he was arrested contrary to Belgian law. The court held that if a person is arrested abroad and brought before a British court charged with an offence which that court has jurisdiction to hear, the court has no power to go into the circumstances of the arrest once the person is in lawful custody in Britain, but has jurisdiction to try him for the offence in question.

In the case of *R.* v. *Hughes*[62] the accused, a police constable, procured a warrant to be illegally issued, without written information or oath for the arrest of one Stanley, on a charge of "assaulting and obstructing" the police officer "in the discharge of his duty". Upon this warrant Stanley was arrested, tried and convicted. Hughes was later tried for perjury committed at Stanley's trial and was convicted. The court held that Hughes was rightly

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[59] See also F. Morgenstern, Jurisdiction in Seizures Effected in Violation of International Law (1952), 29 Brit. YrBk Int. L. 265, at p. 273. It is surprising that Lord Tenderten paid no heed to violations of international law.

[60] O'Higgins, *op. cit.*, footnote 31, at pp. 283-284.

[61] [1949] 1 All E.R. 373 (K.B.).

[62] (1879), 4 Q.B.D. 614.

convicted, notwithstanding that there was neither written information, nor oath to justify the issue of the warrant.

Leachinsky v. *Christie*[63] definitively established that an illegal arrest does not affect the competence of the judge or the jurisdiction of the court to deal with the case. The presence of the offender is basically the original starting point of any criminal proceeding.

Canadian practice has adopted the same rule, as has been noted in the *Hartnett*[64] case. It is of no relevance in the courts of Canada that the accused has been brought illegally into the jurisdiction. In *R.* v. *Walton*[65] the court held that although the accused had been wrongfully arrested at Buffalo and forcibly brought into Canada against his will and not under the provisions of the Extradition Treaty in force between Canada and the United States of America, this did not impair the jurisdiction of the court to try him. Rather it was the duty of the court, once the accused was within the jurisdiction, to make him amenable to justice. Basing its findings in part on *Ex parte Scott* and *Ker* v. *Illinois,* the court held that the remedy for illegal arrest and kidnapping is by proceedings at the instance of the government whose territorial sovereignty was violated, or at the suit of the injured party against the individual or individuals who committed the trespass to his person.

Case law involving purely domestic situations supports the same position. In *R.* v. *Bourgeois*[66] it was held that if the accused is present before the magistrate and the magistrate has jurisdiction over the offence charged, he has jurisdiction to proceed with the hearing no matter how illegal may have been the procedure which caused the accused to be before him. An improper arrest does not fault the jurisdiction of the magistrate. This proposition is supported by many other decisions including *Ex parte Giberson,*[67] *R.* v. *McDougall, Ex parte Goguen,*[68] *R.* v. *Benoit*[69] and more recently *Re Regina and Groves.*[70]

If one turns from criminal cases to civil cases, one finds that a party who is enticed into the state by fraud or force will not

[63] [1945] 2 All E.R. 395, 61 T.L.R. 584 (C.A.). See also *Christie* v. *Leachinsky*, [1947] A.C. 573 (H.L.).

[64] *Supra*, footnote 2.

[65] (1905), 10 C.C.C. 269 (Ont. C.A.).

[66] (1948), 92 C.C.C. 229 (N.B.C.A.).

[67] (1898), 34 N.B.R. 538 (C.A.).

[68] (1916), 35 D.L.R. 269 (N.B.).

[69] (1952), 105 C.C.C. 185 (Que.).

[70] (1972), 5 C.C.C. (2d) 90 (B.C.S.C.), and cases cited therein.

be subject to the jurisdiction of that state as the courts will not be a party to any abuse of its own process.[71]

In the light of these precedents, the decision reached by the Ontario High Court in *Hartnett*[72] is hardly surprising. The applicants in that case argued that *R.* v. *Isbell*[73] to which one can add all the other cases of that era, were decided before the enactment of the Canadian Bill of Rights, and thus today should no longer be followed. This was not accepted by the Ontario High Court. Had the applicants merely relied on the fact of their arrest being unlawful, the court might have taken a more enlightened approach[74] and not relied on the heavy measure of case law discussed above. They lost their case by merely asserting that they were denied the right to be heard in extradition proceedings, a circumstance which in the view of the court did not invalidate the process.[75]

In *In re Johnson* the court decided in part:[76]

> The law will not permit a person to be knidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest.

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[71] *Lewis* v. *Wiley* (1923), 53 O.L.R. 608, at p. 609. In *Lawrence* v. *Ward*, [1944] O.W.N. 199, [1944] 2 D.L.R. 724, the defendant was not in Ontario as the result of enticement or physical violence. He was a member of the Canadian Navy, and although in Ontario under orders and not voluntarily, he did not come within the qualifications expressed in *Lewis* v. *Wiley* and was not thus exempt from jurisdiction. See also *Doyle* v. *Doyle* (1974), 6 Nfld. & P.E.I.R. 110 (Nfld. S.C.). In *Watkins* v. *North American Land and Timber Company* (1904), 20 T.L.R. 534, the House of Lords dealt with the service of a writ on the defendant who claimed he was enticed to enter the jurisdiction of the court by fraud. The court decided that, had there been any element of fraud, the service of the writ would have been set aside as an abuse of process. However, it was found that the intention of the directors of the plaintiff company was to discuss with the defendant certain matters in difference between them. There being no element of fraud, the defendant was properly within the jurisdiction. Also *Colt Industries* v. *Sarlie*, [1966] 1 All E.R. 673 (Q.B.D.). Here the defendant, domiciled in the United States, visited London for a few days on business and was served there with a writ. The court held that there was no fraud or enticement to induce the defendant to come to England, and thus the writ was well founded. In the United States of America see cases cited, *supra*, footnote 19.

[72] *Supra*, footnote 2.

[73] *Supra*, footnote 9.

[74] However, note that in another context, the majority of the Supreme Court of Canada was not prepared to declare inadmissible, evidence obtained before the accused had an opportunity to consult his lawyer: *Hogan* v. *The Queen* (1974), 48 D.L.R. (3d) 427 to be compared to *Brownridge* v. *The Queen* (1972), 7 C.C.C. (2d) 417, 28 D.L.R. (3d) 1, [1972] S.C.R. 926.

[75] No violation of the U.S.-Canada treaty was involved.

[76] (1897), 167 U.S. 120, at p. 126.

Beale also states that:[77]

> The effect of physical force, whether human force or *vis major*, should be, on general principles, to nullify jurisdiction. . . . Where the defendant was brought into the state by the unlawful use of force the court should not exercise jurisdiction over him in a civil case. . . .

The underlying principle seems to be that the courts will not allow a plaintiff to profit from underhand conduct. In *United States v. Cotten and Roberts*,[78] the appellants, relying on the analogy of criminal to civil procedure, stated that as a court will not exercise civil jurisdiction over a defendant brought into a state by the unlawful force or fraud of the plaintiff, similarly a state should not be permitted to benefit from the illegal activities of its agents. In such case the court should exercise its discretionary powers and refuse to sanction unreasonable conduct by withholding jurisdiction.

The theory behind the courts' refusal to adopt the logic of the above approach is that in a civil case the plaintiff who uses fraud or violence is himself guilty of a misdemeanor. Yet why should police conduct be whitewashed? In *State* v. *Ross*[79] it was stated that:

> There is no fair analogy between civil and criminal cases in this respect. In the one (civil) the party invoking the aid of the court is guilty of fraud or violence in bringing the defendant . . . within the jurisdiction of the court. In the other (criminal) the people, the state, is guilty of no wrong.

Even if one accepts the view that the state is a compact entity, and that what the people or agents of the state do is done by the state itself, this has not prevented American courts from excluding evidence secured by illegal searches, seizures and even voluntary confessions when made while in unlawful police detention.[80] Thus, analogy between civil and criminal cases is not totally irrelevant. One American author[81] suggests that states should refuse to sanction the trial of offenders whose presence in the jurisdiction has been secured in breach of federal and state kidnapping and extradition laws. However, he recognizes that it may be difficult to achieve this result by a simple process of statutory interpretation. He suggests that it would be better to resort to common law rules which can be influenced by policy

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[77] Conflict of Laws (1935), Vol. 1, p. 341.

[78] *Supra*, footnote 55, at p. 747.

[79] (1866), 21 Iowa 467.

[80] *McNabb* v. *United States* (1943), 318 U.S. 332, 63 S. Ct 608, 87 L. Ed. 819.

[81] See Scott, *op. cit.*, footnote 17, at p. 105.

considerations.[82] To prevent physical abductions and lawlessness *in toto* which seems to be a valid objective in a democratic society, the courts must refuse to try persons whose presence was secured illegally. As indicated in the *Toscanino* case, this could be done by interpreting due process more broadly and discarding the *Ker-Frisbie* rule which has become outmoded. The criminal procedure of a court is degraded when it is used against a defendant who is the subject of a flagrant illegality.

One of the major problems raised by the present uncertain tendencies of the law concerning unlawful arrest is the question of policy. The interests of the individual offender are in juxtaposition with those of the state. Canadian as well as American courts have tended to promote the idea that illegality of some pre-trial events, although infringing the accused's rights, should not nullify his detention and excuse him from a crime he has committed. They have weighed the illegal arrest against the merits of the criminal charge. However, there is a conflicting theory as to the thought that criminals should be punished, and that is that a government should obey the law — even where criminals are concerned. Jurisdiction gained through illegal acts tends to reward brutality and lawlessness. Thus, one must consider whether it is in the social interest to excuse a criminal because the police or government agents used illegal means to bring him before the court.[83]

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[82] As to the common law duty to act fairly, that is judicially, in the context of a decision of an administration board, see the dissenting opinion of Dickson J. in *Howarth* v. *National Parole Board*, Supreme Court of Canada, October 11th, 1974, not yet reported.

[83] In *Hogan* v. *The Queen*, *supra*, footnote 74, Laskin J. (as he then was) in a dissenting opinion, gives a good analysis of the social interest involved in connection with the admissibility of illegally or improperly obtained evidence. After noting that, in Canada, the choice of policy has been to favour the social interest in the repression of crime despite the unlawful invasion of individual interests and despite the fact that the invasion is by public officers charged with law enforcement, he comes to the conclusion that "We would not be justified in simply ignoring the breach of a declared fundamental right or in letting it go merely with words of reprobation." At pp. 442-443. His reasoning is equally applicable to illegal arrest: "It may be said that the exclusion of relevant evidence is no way to control illegal police practices and that such exclusion merely allows a wrongdoer to escape conviction. Yet where constitutional guarantees are concerned, the more pertinent consideration is whether those guarantees, as fundamentals of the particular society, should be at the mercy of law enforcement officers and a blind eye turned to their invasion because it is more important to secure a conviction. The contention that it is the duty of the Courts to get at the truth has in it too much of the philosophy of the end justifying the means; it would equally challenge the present law as to confessions and other out-of-Court statements by an accused." *Ibid.*

This trend of thought appears in a dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States*:[84]

> The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . .

Government officials should not have a separate set of rules as regards their conduct. Respect for the authority of a government will seriously be affected if it fails itself to observe the law faithfully, and individual citizens feel that their liberty is at stake. A government should set an example to its people and if it is known to be breaking the law in order to secure criminal convictions what hope is there for society in general. The right to be protected from abduction into the jurisdiction of a state is a basic human right in a free society.[85] The misplaced sense of justice on the part of governments or individual agents not to comply with legal machinery to bring offenders into the jurisdiction of the court must be condemned.[86] The official who acts in an unlawful way may be criminally liable for kidnapping. He may also be liable civilly to the victim for trespass to the person. The criminal penalties are seldom used as there is no tendency on the part of states to prosecute their officers, and as regards the civil measures, there is little doubt that policemen are not affluent enough to warrant action against them personally unless their employers are made jointly liable.[87] Thus, the most definite way by far of deterring the police from wilful lawlessness is to make it clear that criminals will not be tried who have been illegally secured.[88]

The United States Supreme Court in *Mapp* v. *Ohio*[89] interpreted the due process clause in the Fourteenth Amendment to require that the exclusionary rule be applied in state as well

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[84] (1928), 277 U.S. 438, at pp. 484-485. Note that in *Ex parte Brown*, *supra*, footnote 29, the court stated: "The criminal law, administered, as it is for the protection of the whole people does not take cognizance of the means by which illegal offenders are apprehended, *so long as no act is done which in itself is an infraction of the law*.", at p. 656, italics mine.

[85] See, for instance, International Covenant on Civil and Political Rights, 1966, article 9, Brownlie, ed., Basic Documents in International Law (1967), pp. 153-154.

[86] Would Canada allow the kidnapping on her territory of fugitives from justice by agents of foreign states?

[87] See for instance Ontario Police Act, R.S.O., 1970, c. 351, as am., s. 24.

[88] Scott, *op. cit.*, footnote 17, at p. 101.

[89] *Supra*, footnote 16, at p. 646.

as federal prosecutions. Thereafter evidence obtained by illegal search or seizure could no longer be admitted in a state criminal trial of a person from whom it was seized.[90] If illegal seizures and searches cannot be used in evidence as contrary to public policy, this can surely be extended to prevent police kidnapping, and to close the courts to the trial of an individual wrongly brought into the jurisdiction.

As one author has put the problem succinctly:[91]

> It seems that the courts have simply fallen into the habit of repeating, parrot-like, that a court does not care how a defendant comes before the court, without thinking whether such a rule is sound on principle. In these days of low moral standards among public officials, both law enforcement officers and others, it is especially important to re-establish public respect for the law. This simply cannot be done if the very people who enforce the law are themselves guilty of serious violations of law. A rule of procedure which would forbid courts to try accused persons who have been subjected to the type of lawless treatment covered in this article would help to resurrect something we seem to have lost and which we badly need to find — a spirit of respect for law and order.

In conclusion, it is obvious that the trend must be towards a more even handed approach. Canadian courts should reconsider their present position, as it is apparent that safeguards must be provided for individuals against the over zealous agents of governments.

At the pre-trial stage, due process should cover more than situations which could result in convicting an innocent person. It should also be used as a means of deterring the police from using methods that are offensive to the community's sense of fair play and decency. The lessons and excellent reasoning of *Toscanino*, even if the case involves some aspects of American constitutional law peculiar to that country, should not be ignored by Canadian courts if they are to follow Mr. Justice Martland's opinion in *Curr*[92] that the final word[93] has not yet been said

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[90] See also *Silverthorne Lumber Co.* v. *United States* (1920), 251 U.S. 385, per Holmes J., at p. 392. This case involved the Fourth Amendment to the U.S. Constitution which denounces unreasonable searches and seizures. In *Hobson* v. *Crouse* (1964), 332 F. 2d 561 (10th Cir.), the Court of Appeals was of the opinion that the *Ker-Frisbie* rule had not been overruled by *Mapp* v. *Ohio.*

[91] Scott, *op. cit.*, footnote 17, at p. 107.

[92] *Supra*, footnote 4.

[93] In the light of the majority opinion in *Hodge* v. *The Queen*, *supra*, footnote 74, this might prove to be difficult. In *Rex* v. *Bottley* (1929), 51 C.C.C. 384 (Alta C.A.), Harvey C.J.A. said at p. 387: "...the objection

as to the meaning of our due process of law.[94]

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is in reality not one to jurisdiction in the ordinary sense but rests rather on the 'disregard of the forms of legal process or by some violation of the principles of natural justice' in the words of Viscount Cave L.C., in *Rex* v. *Nadan*, [1926] 2 D.L.R. 177, at p. 184, 45 C.C.C. 221, at p. 229".

[94] Should s. 1(a) of the Bill of Rights be applicable to the type of conduct referred to in this comment, there would still remain the question whether the Bill can be given extraterritorial application to the conduct abroad of Canadian officials directed against Canadian citizens and residents. In the U.S.A. this has been answered in the affirmative. See *Balzac* v. *Puerto Rico* (1922), 258 U.S. 298, at pp. 312-313: "The Constitution of the United States is in force . . . whenever and wherever the sovereign power of that government is exerted." The constitution applies only to the conduct abroad of agents acting on behalf of the United States and not that of foreign officials in their own country. *Birdsell* v. *United States* (1965), 346 F. 2d 775, at p. 782 (5th Cir.), cert. den. 382 U.S. 963.

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