

CASE AND COMMENT

BEQUEST—UNDISCLOSED TRUST—CONSTRUCTIVE TRUST.—The solicitor for the plaintiffs, in the case of *In re Blackwell, Blackwell v. Blackwell*,¹ in appealing or even trying the cause had some temerity. £12,000 was bequeathed by a codicil to five of the testator's friends upon trust "for the purposes indicated" by him to them. On the day the codicil was executed, one of the five friends, upon the oral instructions of the testator, prepared a written memorandum of the terms of the trust. Subsequently the other four, upon receiving notice of the effect of the trust, signified their willingness to act as trustees. It was argued for the plaintiffs, the testator's widow and son, that parol evidence as to the contents of the memorandum could not be admitted in face of the express words of The Wills Act: "No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned."

Equity has long exercised a jurisdiction to enforce a constructive trust against a legatee or devisee who has secured, or prevented the revocation of, his bequest or devise, by giving an oral undertaking to hold the property received thereunder in accordance with the testator's unattested directions and who, in violation of his promise, claims the property for himself.² In so doing, equity has not sought, primarily, to carry out the intention of the testator, but rather to circumvent the unjust enrichment of the legatee or devisee. "It is not honest"³ for the legatee or devisee to break faith with his testator, who died relying upon the promise to fulfil his wishes. Undertaking by the legatee or devisee, reliance thereon by the testator, and refusal or the effect of a refusal are the elements of this species of constructive trusts and so, when the communication of the terms of the trust, undisclosed on the face of the will, is made to the legatee or devisee for the first time after the testator's death, equity will not set up a constructive trust. The testator has not died relying upon an undertaking, express or implied,⁴ of the legatee or devisee to observe the terms of the trust.

¹ (1928), 44 T.L.R. 521.

² See *Chamberlaine v. Chamberlaine* (1678), 2 Freem. Ch. 34.

³ See *Davies v. Otty* (1865), 35 Beav. 208.

⁴ See *McCormick v. Grogan* (1869), L.R. 4 H.L. 82 at p. 99; *In re Falmer, Mead v. Smith*, [1924] 1 Ch. 88.

In not obeying these directions of the testator the legatee or devisee has not imposed upon the testator.⁵ Furthermore, to enforce a trust in this case would be absolutely inconsistent with the policy of the Statute of Wills. That no person should be heard to speak after his death as to the disposition of his property is, at least, sound law.⁶

However, where the testator dies secure in the faith that his oral directions will be observed by his legatee or devisee, may it be said that the Statute of Wills is being infringed when equity decrees that the legatee or devisee shall hold the subject-matter of his bequest or devise for a cestui que trust designated by the testator? Lord Westbury in *McCormick v. Grogan*⁷ said:

The Court of Equity has, from a very early period decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills.

It was further argued for the widow and son, in the principal case, that no constructive trust in accordance with the memorandum can be made out, unless there was a fraudulent inducement held out on the part of the legatees in order to lead the testator to confide in them the duty which they undertook to perform. The Court of Appeal in following the cases of *In re Fleetwood*, *Sidgreaves v. Brewer*⁸ and *In re Huxtable*, *Huxtable v. Crawford*,⁹ decided, despite this argument, to enforce a constructive trust in favour of beneficiaries named in the memorandum. Indeed, to confine constructive trust to cases where there was an actual fraudulent inducement on the part of the legatee or devisee would greatly narrow its limits. A premium would be placed upon the feats of the scoundrel who, at the time of the communication of the oral trust, could look most sweetly and deceivingly innocent. The jurisdiction of equity is founded upon the reliance of the testator upon the undertaking of his legatee or devisee. The refusal at any time will consummate the fraud, and in order to obviate the effect of a possible refusal the Court should enforce the constructive trust.

⁵ See *In re Boyes*, *Boyes v. Carritt* (1884), 26 Ch. D. 531; *Juniper v. Batchelor* (1868), W.N. 197; *In re King's Estate* (1888), L.R. 21 Ir. Ch. 273.

⁶ See *Wallgrave v. Tebbs* (1855), 2 Kay & J. 313 at p. 327.

⁷ (1869), L.R. 4 H.L. 82 at p. 97.

⁸ (1880), 15 Ch. D. 594.

⁹ [1902] 2 Ch. 793.

An anomalous distinction has been made by the English Courts between the case where the legatee or devisee takes beneficially on the face of the will and the case where the legatee or devisee takes non-beneficially, e.g. "as trustee," in the will. In the former case, communication of the terms of the trust at any time before the death of the testator is sufficient, granted the necessary element of reliance is present, to raise a constructive trust.¹⁰ In the latter case, the communication necessary for a constructive trust must have been made to and accepted by the legatee or devisee at or before the execution of the will.¹¹ The basis, if any, for the distinction is difficult to find. Surely the legatee or devisee, in the latter case, who has assured the testator that he will see that his wishes in respect to the property shall be carried out, is breaking faith with and committing a fraud upon the testator when he refuses to fulfil his promise, quite as much when his promise has been given after the execution of the will. In the principal case the five friends took in the will as trustees. The communication of the terms of the trust, it would appear, was only made to and accepted by one of the trustees at or before the execution of the will. The Court of Appeal did not deal with the effect of the subsequent communication to the other four. In *In re Stead, Witham v. Andrew*,¹² it was decided that when a gift is made to joint tenants and the will is made on the faith of an antecedent promise by one of them, the trust binds all the joint tenants. Following this holding, one could properly say that the acceptance by one in the principal case bound the four others.

Bearing in mind the policy of The Wills Act—the prevention of fraud—we may well ask: should the Courts go on enforcing these constructive trusts? A student, after studying this line of cases, has said: "The moral is, don't forge your rich uncle's will; on his death it is easier to come into court and swear that his legatee took under an oral trust in your behalf." However, when it is remembered that the evidence to support these constructive trusts must be most cogent and unambiguous and that the undertaking and reliance thereon must be clearly made out, it may be conceded that, on the whole, fraud is prevented rather than protected.

S.E.S.

¹⁰ See *In re Boyes*, *Boyes v. Carritt*, supra; *In re Gardner*, *Huey v. Cunningham*, [1920] 2 Ch. 523.

¹¹ See *Johnson v. Ball* (1851), 5 De G. & Sm. 85; *In re Gardom*, *Le Page v. Attorney-General*, [1914] 1 Ch. 662.

¹² [1900] 1 Ch. 237. It was also laid down in this case that if a will, in favour of joint tenants, is left unrevoked upon the promise of one to carry out certain directions of the testator, the other joint tenants are not bound.

WILLS—CONSTRUCTION—BEQUEST OF "ALL MY MONEY."—Still the law reports continue to come out with page after page of cases concerning, solely, the interpretation of wills. In 1871, the case of *Lambe v. Eames*¹ marked the turning of the tide towards a disregarding of the results previously reached by the Courts in construing other wills. Since then there is a more intense investigation of what did the testator, by the words he used in the will in question, intend to express? It would appear that the editors of many of our reports have failed to sense this modern attitude of the judges.

However, a case well worthy of reporting is that of *In the Estate of Gates, Deceased*.² The operative part of the will consisted solely of the words: "I leave all my money to Alfred George Cabell." The estate of the testator consisted of cash in the house, a credit on current account at the bank, stocks and shares, £800 outstanding on mortgage, equity of redemption in certain freehold houses and furniture. What does the legatee receive under the bequest of "all my money"? Did the will only operate upon a small sum in notes and specie found among the testator's effects after his death? It was not even suggested that such a narrow meaning should be given to the clause in question. Lord Merrivale, P., in holding that all the estate, except the equity of redemption in the freehold and the furniture, passed under the bequest, said: "As everyone knows, men often speak of their 'money' when they describe all their assets or resources."³ There is not much law, strictly speaking, in this decision but there is much common sense. Despite the wide meaning given to the word "money" in this case, we find Tomlin, J., in a later case, *In re Emerson, Morrill v. Nutty*,⁴ pronouncing: "'Money,' taken in its primary sense, could not include anything more than cash and possibly money at call, but not investments or other items of personal estate, and still less real estate." However, with the aid of the context the Court in the later case was able to give something more than its primary meaning to the word. A solicitor drawing wills may take his choice of views, but one

¹ L.R. 6 Ch. 597.

² [1928] P. 128; 44 T.L.R. 353.

³ 44 T.L.R. 353 at p. 356. It should be added that the case was appealed, and upon it being shown that certain additional assets were discovered after the date of the judgment in the Court below, so much of the order directed by the President which concerned the construction of the will was discharged by consent, so that, in the event of there being no settlement, the construction of the will might be determined *de novo* in the Chancery Division. See 44 T.L.R. 634.

⁴ (1928) W.N. 245.

thing he should not do, and that is, use the word "money," unless he is convinced that the context clearly defines its meaning.

S.E.S.

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ENGLISH COURTS REFUSING TO ENFORCE FOREIGN REVENUE LAWS.—Counsel in failing to find authorities to support a proposition of law, which they seek to maintain, may obtain some comfort in the statement of Tomlin, J., in the case of *In re Visser, Queen of Holland v. Drukker*:¹ "But the absence of authority for what had been called an elementary proposition might mean merely that the proposition was so well recognized that it had never been put to the test." It was held in this case that the English Courts will not lend their aid for the collection of taxes imposed by foreign Sovereign States. Consequently an action brought to recover in England succession duty accruing under Dutch law was dismissed. The foregoing principle of law has been applied in Ontario in the case of *City of Regina v. McVey*,² where a judgment of non-suit was directed in an action brought against a person resident in Ontario for income tax due to the city corporation. Admitting the validity of the principle laid down in the English case, it seems regrettable that a provincial court in Canada should regard another province as a foreign country for, at least, the application of this particular doctrine.

S.E.S.

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SOLICITOR TAKING CASE OF POOR CLIENT—MAINTENANCE—CHAMPERTY.—Under what circumstances may a solicitor take a speculative case on behalf of a poor client? Under what terms may he do so? The Court of Appeal, in the case of *Wiggins v. Lavy*,¹ has recently made some interesting observations in this respect. An action was brought against the defendant for champerty and maintenance. It was alleged that the now defendant had wrongfully procured, maintained and upheld an action against the now plaintiff. It was further alleged that the former had taken the case against the latter upon the terms that his client should be under no liability for any costs, and in the event of success he, the solicitor, should receive one-tenth of any damages recovered. The jury

¹ (1928), 44 T.L.R. 692 at p. 693.

² (1922), 23 O.W.N. 32. See also note, 1 C. B. Rev. 293.

³ (1928), 44 T.L.R. 721.

in the action against the solicitor returned a verdict in favour of the plaintiff and thereupon judgment was entered for him. On appeal, Lord Hanworth held that the claim was really made by the appellant, who maintained the action against the now plaintiff, merely to get costs for himself. However, the appeal was allowed on the ground that the plaintiff had not shown any special damage. Lord Russell of Killowen, in *Ladd v. London Road Car Company*,² said that where a solicitor acted *bonâ fide* and took pains to discover whether there was a proper cause of action, it was permissible for him to take up the case for poor persons who had no money. In *Holden v. Thompson*³ it was held that an allegation as to maintenance could not be sustained because the assistance of a poor man was held to be charitable. However, in *Cole v. Booker*,⁴ the Court decided that if a man makes a bargain with another to assist him in bringing an action upon the terms that he is to receive part of the proceeds, that bargain amounts in law to champerty, although it is established that the person rendering assistance would not have done so to a stranger or to anyone other than a needy friend.

Charity may be indiscreet, but it must not and, indeed, cannot be mercenary. A solicitor may be liable for maintenance—that is, the offence of promoting litigation with which he has no concern of his own—unless he can plead justification. Justification may be based upon the ground of charity. In no case may a solicitor lawfully provide that he shall have some part of the proceeds in the event of success. That is champerty. Any agreement made between the solicitor and his client, the performance of which would involve maintenance or champerty, of course, is unenforceable. The mischief against which the law of maintenance and champerty is directed is the stirring up of strife and litigation and so incurring others to bring actions and make defences which they have no right to make.⁵ However, as against that, it may be urged that if a solicitor may not take up an action speculatively, it will be impossible for poor persons to obtain justice. It may be that the establishment of legal aid societies in our crowded centres will offer a solution for the problem of justice for the very poor. It is significant that the legislators for the province of British Columbia purported to legalize champertous agreements when made between

² The Times, March 24, 1900, p. 4.

³ [1907] 2 K.B. 489.

⁴ (1913), 29 T.L.R. 295.

⁵ See *Findon v. Parker* (1843), 11 M. & W. 675 at p. 682.

solicitor and client. This enactment was held to be *ultra vires* of the provincial legislature on the ground that it was a matter of criminal law⁶ and so within the jurisdiction of the Dominion.

S.E.S.

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MOTOR VEHICLE—CONDITIONAL SALE AGREEMENT—REPAIRER'S LIEN.—May a purchaser of a motor car under a conditional sale agreement subject the car to a lien in favour of a garage man who has effected repairs on it? An affirmative answer is supplied by the Court of Appeal in the case of *Albemarle Supply Company, Limited v. Hind and Company*.¹ This decision was reached notwithstanding a provision in the hire-purchase agreement which purported to prohibit the purchaser from selling, pledging or parting with possession of the cars in question, without the vendor's consent, and from creating a lien upon them in respect of any repairs. However, it should be pointed out that the purchaser undertook in the hire-purchase agreement to keep the cars in good repair. The garage man knew, when he received the cars, that his customer held them under a hire-purchase agreement. The *ratio decidendi* of the decision appears to be, that a contractual limitation of authority, not communicated to the repairer, does not limit the implied authority derived from the fact that the hire-purchaser is allowed to possess and use the car.² The vendor thereby holds the hire-purchaser out as having a certain authority and the repairer, in acting upon that holding out, is not affected by the secret limitation of the apparent authority. Interesting questions are raised by the decision. In order to maintain his lien, must the repairer know that his customer holds his car under a conditional sale agreement? Does mere possession, with the consent of the owner, amount to a holding out that the possessor has authority to subject the car to a lien? For example: the owner of a car loans it to a friend for a day, has the friend apparent authority to have the car repaired on credit and so subject it to a repairer's lien? Is strength given to the holding out argument by a provision in the conditional sale agreement to the effect that the purchaser must keep the car in good repair? Does filing of the conditional sale agreement in the proper office affect the

⁶ See *Re Legal Professions Act*, [1927] 4 D.L.R. 195; *Taylor v. Mackintosh* (1924), 33 B.C.R. 383; *Cassidy v. Stuart* (1927), 61 O.L.R. 480; 62 O.L.R. 374.

¹ [1928] 1 K.B. 307.

² See also *Singer Manufacturing Co. v. London and South Western Railway Co.*, [1894] 1 Q.B. 833.

garage man with notice of the existence and terms of the document? Once it is proved that the garage man knew, when he received the car, that his customer holds it under a conditional sale agreement, will not his knowledge of the existence of a prohibition against creating a lien thereon be inferred in most cases, because of the notoriety of such a provision in what might be called the standard conditional sale agreement in this country?

Answers to some of these questions appear to be furnished by the Ontario case of *Commercial Finance Corporation Limited v. Stratford*.³ In this case, a car was delivered to a purchaser under a conditional sale agreement which was duly filed in the proper office. The conditional sale purchaser undertook to keep the car in good repair and also that he would "keep the said motor vehicle and all its equipment free and clear of and from any and all liens and encumbrances." It was held that a garage man was entitled to exercise a lien for repairs to the car, made at the request of the conditional purchaser, as against the vendor. The filing of the conditional sale agreement in compliance with the Conditional Sales Act in no way enlarges the rights of the vendor other than to preserve his ownership. It would appear that it is not necessary in order to have a holding out, to have a distinct undertaking on the part of the conditional sale purchaser to keep the car in good repair. Seemingly, there need be no reliance, on the part of the garage man, upon the fact that his customer is a conditional sale purchaser. Where possession of a chattel is given by the owner to another under such terms as either oblige the bailee to keep it in repair, or entitle him to use it in such a way as to require it to be repaired in order that it may be so used, there is an implied authority given by the owner to the bailee to have it repaired and in so doing to subject it to the ordinary repairer's lien.⁴ It follows that mere possession without more is not sufficient to raise an implied authority. *A fortiori* possession without consent of the owner is not sufficient. There is a suggestion in the case of *Commercial Finance Corporation Limited v. Stratford* (*supra*) that the prohibition against the creation of liens does not cover the case of a repairer's lien, for such does not arise as the result of any direct act of the conditional sale purchaser as, for example, a mortgage would. The repairer's lien is only an incident of the contract made between the conditional sale purchaser and the garage man as to repairs. In view of the very wide terms

³ (1920). 47 O.L.R. 392.

⁴ Per Orde, J., *Commercial Finance Corporation, Limited v. Stratford* (1920), 47 O.L.R. 392 at p. 397.

of the provision as to keeping the car free and clear from all liens, it is difficult to follow this reasoning.

S. E. S.

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APPOINTMENT OF ONE OF THREE JOINT AND SEVERAL OBLIGORS AS EXECUTOR—EXECUTOR SUING CO-DEBTORS.—It would be interesting to have the opinion of laymen, and even of many within the Bar, concerning the problem presented in the case of *Jenkins v. Jenkins*.¹ The reasoning and result may well tickle the palate of a student steeped in legal lore, but will surely prove bewildering to many others. A testator nominated the plaintiff as his executor. Subsequently, the plaintiff and two others gave to the testator a joint and several promissory note for £100. Three years after the testator's death, the plaintiff, suing as executor, brought an action on the promissory note against his co-debtors. Nothing had been paid on the note. A Divisional Court dismissed the action on the ground that the debt, sought to be recovered, had been discharged before the action was brought. The effect of a creditor's appointment of his debtor to be his executor is, at common law, to release the debt. A debt is a right to sue and the executor cannot sue himself. As the obligation to pay was joint and several, why could not the executor sue his co-debtors? They could not plead non-joinder of their joint and several co-debtor. However, the principle that the discharge of one joint and several debtor operates to release also all his co-debtors is rooted in the Year Books.² The reason for the principle given in the older authorities is that a release is as complete a satisfaction in law as performance. To the modern mind a release of one debtor is not necessarily a release or satisfaction of the debt itself.³ One might well have expected that the Court could have found some relief, from the application of this technical principle of the common law, in equity. It is disconcerting for the lover of equity to find that fiction has replaced technicality. Generally, in equity the executor is held liable to pay the debt which he owed to his testator. But the debt due by himself is treated as assets of the estate in his hands⁴ for he, as debtor, will be deemed to have paid himself and to have in his possession the full amount of the debt. True, the executor may be declared accountable in an administration action and ordered to

¹ (1928), 44 T.L.R. 483.

² See Y. B. 21 Edw. IV. 81 b.

³ See Williston on Contracts, p. 634.

⁴ See *Re Bourne, Davey v. Bourne*, [1906] 1 Ch. 697.

pay these assets. Nevertheless, in equity the debt is considered to have been paid and the executor cannot recover in an action upon the note against his co-debtors. It is submitted that if the executor had actually paid the £100 into the estate, he could have enforced contribution, unless there was a contract between the three of them negating such relief, from his two co-debtors.

S.E.S.

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INFANTS—CONTROL OF ACTION BY NEXT FRIEND.—Can a next friend, who successfully brings an action for damages on behalf of a minor, bind the minor by an agreement to settle the judgment by reducing the amount of it and accepting payment by instalments, in consideration of the defendant "abandoning his right to any appeal from the judgment"? The Manitoba Court of Appeal unanimously answered, no, in the recent case of *Truen v. Bozynski*,¹ because although the next friend had the control of the action, the alleged settlement of the judgment was clearly not for the benefit of the infant plaintiff—and this, notwithstanding that the alleged settlement had apparently been approved by a judge of the trial Court (but not the trial judge). *Rhodes v. Swithenbank*,² and *Vano v. Canadian Coloured Cotton Mills Co.*³ referred to.

F. R.

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EXEMPTIONS FROM EXECUTION—NECESSARIES.—Is an automobile, used by a salaried manager of a building company in superintending the erection of buildings by the company which employs him, a "necessary," so as to exempt the automobile from seizure under execution by virtue of sec. 29 (f) of the (Manitoba) Executions Act?¹ The Manitoba Court of Appeal answered the question in the negative in the circumstances of the recent case of *Goldsmith v. Harris*.²

The section, referred to, exempts from seizure "the tools, agricultural implements and necessities used by the judgment debtor in the practice of his trade, profession or occupation to the value of eight hundred dollars." The value of the car in this case appears to have been considerably more than the amount of the exemption; but the appeal does not turn upon that point. *Dennistoun, J.A.*, in

¹ (1928), 37 Man. R. 363; [1928] 3 D.L.R. 484; [1928] 2 W.W.R. 340.

² (1889), 22 Q.B.D. 577; 58 L.J.Q.B. 287.

³ (1910), 21 O.L.R. 144.

⁴ R.S.M. 1913, c. 66, as amended by Man., 1925, c. 20.

⁵ (1928), 37 Man. R. 389; [1928] 3 D.L.R. 478; [1928] 2 W.W.R. 401.

his judgment³ says (in reference to certain British Columbia, Alberta and Saskatchewan cases cited on the argument) that the Manitoba statute is much wider in its application than the corresponding statutes in the other provinces referred to, and the narrow grounds upon which judgment was given in those cases are not applicable in Manitoba. In considering the facts of the case under review, his Lordship says that the determining factor as to whether or no the car might be a "necessary" is not the *size* of the business carried on but *the nature of the occupation*, that it is only after evidence is given to show special circumstances relating to a particular position which involves special duties that the judgment debtor's necessity appears, and that the exemption in the case before the Court was personal to the judgment debtor and not due to his occupation. Trueman, J.A., in his judgment⁴ says that, "the trade or occupation referred to in the section is the judgment debtor's own trade or occupation, and not that of his employer. Had it been shown that it was a term of Harris' employment that he should use an automobile in the performance of his duties, to be provided and maintained at his expense, there might be room for the contention that it was a necessary in his trade or occupation"—a view upon which his Lordship does not express an opinion.

F. R.

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JURY NOTICE—CHANCERY SUIT OR COMMON LAW ACTION—TORT—ASSIGNMENT OF RIGHT OF ACTION.—A correspondent from another Province who has been connected with the law of fire insurance for a long time and is well known, has written calling attention to the decision in the case of *Royal Exchange Assurance v. Grimshaw*,¹ and submitting that it is probably in error and that this error is of great importance. The application in that case was to strike out the jury notice on the ground that the case was one which under section 57 (4) of the Judicature Act,² must be tried without a jury as it was a case arising in equity and, therefore, before 1873 was within the exclusive jurisdiction of the Court of Chancery. The action was by three insurance companies who alleged that they were subrogated to the rights of their assured, whose property it was alleged had been destroyed by the negligent setting out of fires by the defendant. The Court took the view that the jury notice was proper because

³ 37 Man. R. at pp. 390, 391.

⁴ 37 Man. R. at p. 392.

¹ (1928), 62 O.L.R. 25.

² R.S.O. 1927, c. 88.

the action was one at common law although the right to bring such an action was an equitable right. There is, of course, some reason for this distinction although it can be argued with a great deal of force that while that may be so it is, strictly speaking, an action of subrogation which under the Judicature Act could only be tried in equity in 1873 and, therefore, under that Act must still be tried without a jury. In 1873 in no other way could an insurance company bring such an action of subrogation. It would seem to be irrelevant what kind of an action it was which the insurance company was bringing by virtue of its subrogation. Therefore, the decision of this point may be wrong.

However that may be, no appeal was taken from that finding, the insurance companies availing themselves of the suggestion of the Court that the action be brought in the name of the assured, and consequently in that case there would be no objection to a jury.

The point, however, about which our correspondent wrote is that the Court seems to have held that the plaintiff companies have no right of action in their own names and could not take a valid assignment from the assured. Our correspondent says that he does "not understand just how this discussion arose on the motion in question." As a matter of fact it did not arise on the motion and is not a binding decision as it was not necessary for the decision on the motion. The only binding decision is that the jury notice was proper in that case.

However, our correspondent calls attention to statutory condition no. 24 which provides that an insurer may require an assignment of rights of recovery against third persons. The statement of claim in *Royal Exchange v. Grimshaw* (*supra*) shows that such an assignment was taken. In dealing with this extraneous point the judgment refers to the case of *King v. Victoria Insurance Co., Ltd.*,³ which holds that an insurance company may sue under the Judicature Act in the name of the insurer and take an assignment of the insurer's rights but holds that that case did not apply because the action in *Royal Exchange v. Grimshaw* (*supra*) was one of tort which, of course, is not assignable. The attention of the Court was not called to statutory condition no. 24, (that question not arising) but the Court might well have done so when it was decided to deal with the question. In face of the statutory condition our correspondent cannot see why a tort is not capable of assignment and this suggestion warrants most careful consideration. The condition reads as follows:

³ [1896] A.C. 250.

The insurer may require from the insured an assignment of all right of recovery against any other party for loss or damage to the extent that payment therefor is made by the insurer.

Our correspondent also refers to the case of *Globe & Rutgers Fire Insurance Co. v. Trudell*,⁴ where the statutory condition was not followed. This was an application in a case where there had only been partial indemnity to the assured for his loss and a decision⁵ of Logie, J., holding that the insurance company was subrogated pro tanto was set aside, as it is settled law that, apart from statute or agreement, no subrogation arises unless the assured is fully indemnified. Only one member of the Court refers to the statutory condition in question and he points out that the policy was not put in at the trial and that no argument was based on it or on the Insurance Act,⁶ and concludes, "in consequence the judgment of this Court deals wholly with the right of subrogation and not with the right arising out of such assignment as appears to be contemplated by the statutory condition."

In the result the Court did not consider whether the settled law in regard to subrogation would be altered if the company in that case had pleaded the statute or put the policy in evidence. Another of the Judges was doubtful as to whether the condition conferred a right to an assignment pro tanto. The point of interest is that in both the *Globe & Rutgers* case (*supra*) and the *Royal Exchange Assurance* case (*supra*) the Court might well have held that it is not necessary to put the policy in evidence to give effect to the statutory condition which, of course, is part of the policy but is also part of the statute law of the Province of Ontario.

However, it was not done and so nothing new is really determined by the *Globe & Rutgers* case but it may be of interest to point out that one of the members of the Court did mention the question that was discussed in the *Royal Exchange* judgment, namely as to the validity of assignment of a tort, saying, "if the claim is in tort it (assignment) may be found to convey nothing," citing *Defries v. Milne*.⁷ It is, of course, trite law that a claim for damages in tort cannot be assigned but apparently the statutory condition authorizes the assignment of any and all claims by the assured and it would seem, therefore, that in both the cases the Court was bound and should have given effect to the statute, although in the *Globe &*

⁴ (1927), 60 O.L.R. 227, especially at p. 240.

⁵ (1926), 59 O.L.R. 444.

⁶ Ont. 1924, c. 50, s. 92, as it then was.

⁷ [1913] 1 Ch. 98.

Rutgers case it might well be that the statute did not operate as there was no full indemnity as there was in the *Royal Exchange* case. If our correspondent is right the only consolation for insurance companies is that the decision in the *Royal Exchange* decision is not binding on that point, being purely obiter, and in the *Globe & Rutgers* case the statute was not considered although mentioned by the Court. If the question arises again both cases could probably, therefore, be distinguished on the ground that the effect of the statute was not considered.

A. C. H.

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AUTOMOBILE INSURANCE—PROHIBITIVE CLAUSE—ACCIDENT—LIABILITY OF INSURANCE COMPANY—CONTROL.—Many harried husbands might have readily answered the question presented in the case of *O'Reilly v. Canada Accident and Fire Assurance Co.*¹: who operates an automobile, the driver or a person in the back seat? The answer given by the Court was a qualified one. Where the owner of an automobile carried insurance thereon but the policy contained a clause prohibiting use of the auto by T. and providing that such user avoided the policy, the insurance company was held not liable when the auto was damaged in an accident which occurred while T. was in control and was operating the auto, but was not driving, notwithstanding such control was without the authority, permission or knowledge of the owner. A person who is in control of an automobile does not divest himself of that control by turning over the act of driving to another who has neither ownership of nor interest in the car and no right to the use thereof, beyond that which he acquires as a mere passenger who drives on the invitation of the owner or person in possession who himself remains in the car. The learned judge who decided the case considered and followed the cases of *Du Cros v. Lambourne*² and *Samson v. Aitchison*.³

B. B. J.

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CONSTITUTIONAL LAW—PROVINCIAL TAXATION.—Two recent judgments of the Judicial Committee of the Privy Council on the subject of the provincial power of taxation are of special interest. The two cases were argued before the Judicial Committee in July last.

¹ (1928), 34 O.W.N. 302.

² [1907] 1 K.B. 40.

³ [1912] A.C. 844.

In both of the cases, *Attorney-General for British Columbia v. Canadian Pacific Railway Company*,¹ the judgment of the Supreme Court of Canada was confirmed, whilst in the other, *The City of v. Fairbanks*,² a majority judgment of the Supreme Court was reversed.

The problem in both these cases, as well as in many other cases that have preceded them before the Privy Council and the Canadian Courts, has of course been the same, namely: the proper interpretation of sub-section 2 of section 92 of the British North America Act, which confers upon the Provinces their power of taxation in the following language: "direct taxation within the Province in order to the raising of a revenue for provincial purposes."

The specific cases in which the problem has been presented for determination by the Judicial Committee have varied greatly in the subject matter of the tax, and also in the tests suggested or applied by the Judicial Committee for the purpose of determining the true character of the tax, i.e., direct or indirect.

It is interesting to review these tests, and to note how they have been expressed and the changes that have occurred.

One of the earliest, if not the earliest, case in which construction of section 92 (2) of the British North America Act, 1867, came before the Privy Council for decision, was in 1878, in *Attorney-General for Quebec v. Queen Insurance Company*.³ The subject matter in that case was a tax imposed by the Quebec Legislature on certain policies of insurance and receipts, by way of a stamp duty. The tax was held unconstitutional, on the ground that according to all the definitions of direct taxation known at the time of the passing of the British North America Act, stamp duties were excluded from the category of direct taxation, and, therefore, it must be taken that it was not the intention of the Imperial Parliament to include that type of taxation within section 92 (2).

In 1884 *Attorney-General for Quebec v. Reed*⁴ was decided. An Act of the Quebec Legislature had imposed a duty of ten cents upon every exhibit filed in court. The Privy Council gave the key to the meaning of "direct taxation" as it is found in section 92, thus:

Now it seems to their Lordships that those words must be understood *with some reference to* the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before

¹ [1927] A.C. 934.

² [1928] A.C. 117.

³ 3 A.C. 1090.

⁴ 10 A.C. 141.

the Act was passed. Among those writers we find some divergences. The view of Mill, and those who agree with him, is less unfavourable to Appellant's arguments than the other view, that of Mr. McCulloch and Littré. It is, that you are to look to the ultimate incidence of the tax compared with the moment of time at which it is to be paid; that a tax is—in the words which are printed here from Mr. Mill's book on political economy—"one which is demanded from the very persons who it is intended or desired should pay it." And then the converse definition of indirect taxes is "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

Further:

The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd section of the 92nd clause of the Act in question.⁵

In the two cases, just referred to, the Privy Council treated the opinions of writers on political economy as the test. True the door is left open somewhat by the expression "with some reference to" in the first of the above quotations.

*Bank of Toronto v. Lambe*⁶ was decided in 1887. The tax involved in that case was one imposed on certain commercial corporations including banks, varying in amount with the paid-up capital and number of offices. Counsel who attacked the validity of the legislation, relying upon the test applied in the *Queen Insurance Company* and the *Reed* cases (*supra*), made liberal reference to works of writers on political economy, and contended that, having regard to the opinions of such writers, the tax in question was indirect. One principal characteristic of a direct tax relied on according to the works cited was its generality—falling upon all persons alike.

Lord Hobhouse, in delivering the judgment of the Court, stated:

First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words "direct," and "indirect," according as they find that the burden of a tax abides more or less

⁵ (1884), 10 A.C. 141 at pp. 143-4.

⁶ 12 A.C. 575.

with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

Further:

It is said that Mill adds a term—that to be strictly direct a tax must be general; and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.⁷

The Court then adopts Mill's definition because it embodies "with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present in the minds of those who passed the Federation Act." The tax was found to be direct. While the Court in the *Lambe* case (*supra*) adopts Mill's definition generally, it declined to follow the writer's views expressed in the text in at least one respect. The *Lambe* case (*supra*) further emphasized the idea that the question of the meaning of the expression "direct taxation" in section 92 of the British North America Act was one of law and not of political economy.

*Brewers and Malsters' Association of Ontario v. Attorney-General for Ontario*⁸ followed the *Lambe* case (*supra*).

The next case of importance was *Cotton v. The King*.⁹ The tax was a succession duty tax. The judgment, which was delivered by

⁷ (1887), 12 A.C. 575 at pp. 581-2.

⁸ [1897] A.C. 231.

⁹ [1914] A.C. 176.

Lord Moulton, made extended reference to the cases already dealt with in this article, and concluded:

Their Lordships are of the opinion that these decisions have established that the meaning to be attributed to the phrase "direct taxation" in s. 92 of the British North America Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill. and that this question is no longer open to discussion.¹⁰

The judgment then proceeds to deal specifically with the statute under consideration and points out that the liability to pay the duty is imposed upon the notary, who was not intended himself to bear the burden, but to recoup himself. The tax though a succession duty tax—normally a direct tax—was held to be indirect.

The *Cotton* case (*supra*) probably went further than any of its predecessors in the literal adoption of Mill's definition of indirect taxation as a guide to the meaning of that expression in section 92.

Two succession duty cases from Quebec were heard and decided together in 1921: *Burland v. The King* and *Alleyn v. Barthe*.¹¹

The *Burland* case (*supra*) followed the *Cotton* case (*supra*). In the *Alleyn* case (*supra*) a statute had been passed which was applicable to the latter but not to the former case. It in effect stated that no notary, executor, trustee or administrator should be personally liable for the duty imposed by the statute. The Court held that this met the *Cotton* case (*supra*) with the result that the tax was held to be direct taxation.

The next case is that of *Attorney-General for Manitoba v. Attorney-General for Canada*.¹² The Manitoba Legislature had passed an Act providing that upon every contract for the sale of grain for future delivery made on any exchange in Manitoba (subject to certain exceptions) the seller or his broker or agent should pay a tax computed upon the gross quantities of grain sold or agreed to be sold. The tax was held *ultra vires* because agents and brokers made liable for its payment would naturally be recouped by their customers. It may be inferred from some portions of the judgment in the Manitoba case that had not agents and brokers been included in the Act, the statute would have been held *intra vires*, because of the price of wheat being a world price fixed beyond any possible control of the producers of the grain.

However, on the argument in the case of *Attorney-General for*

¹⁰ [1914] A.C. 176 at p. 193.

¹¹ [1922] 1 A.C. 215.

¹² [1925] A.C. 561.

*British Columbia v. Canadian Pacific Railway Company*¹³ the Judicial Committee explained that the Manitoba case was a reference to the Supreme Court by the Governor-General upon an agreed statement of facts not pending litigation, and the Court was invited to assume that the agreed facts were permanent, one of which was that there was a fixed world price. The Judicial Committee made it quite clear that the decision was based upon that agreed hypothesis of fact, and can only be treated as an authority in an exactly parallel situation.

To come to the two recent cases referred to. In the case of *Attorney-General for British Columbia v. The Canadian Pacific Railway Company* (*supra*), the validity of an Act of the Legislature of British Columbia was disputed. The Provincial Legislature imposed a tax of one-half cent per gallon on fuel-oil to be paid by the first purchaser after manufacture in, or importation into the Province. The Crown contended that inasmuch as at the time the Act was passed there were no middlemen between the importer or manufacturer and the consumer, in other words, since the first purchasers were the consumers, the tax was direct. The Privy Council judgment,¹⁴ after referring to the language of Lord Hobhouse in the *Lambe* case, and drawing attention to the fact that the question is a legal one, says that validity must be tested by general tendencies, not according to results in particular instances, and goes on: "fuel-oil is a marketable commodity, and those who purchase it, even for their own use, acquire the right to take it into the market. It therefore comes within the general principle which determines that the tax is an indirect one."

What differentiates this case from its predecessors is that it treats a species or classification of taxation, that is, a tax on a marketable commodity, as being, owing to its inherent or general tendencies, an indirect tax regardless of whether the tax in its actual operation operates as an indirect tax. The validity or invalidity of a Provincial tax is to be determined at the moment of passage, upon its nature and general tendencies.

In *The City of Halifax v. Fairbanks*,¹⁵ the classification principle was even more expressly laid down. The charter of the City of Halifax imposed a business tax on real property based upon the value of the premises, payable by the occupier. There was a provision to the effect that if the occupant were exempt from taxation, the property

¹³ [1927] A.C. 934.

¹⁴ [1927] A.C. 934 at pp. 937-8.

¹⁵ [1928] A.C. 117.

should be deemed to be in the occupation of the owner. The property in question was leased to the Crown.

The majority judgment of the Supreme Court of Canada (reversed in the Privy Council) delivered by Mr. Justice Newcombe, reviewed very fully previous Privy Council decisions on the question and held the tax to be indirect within the meaning of Mill's definition of direct and indirect taxation.

The Lord Chancellor in delivering judgment states that:

The problem to be solved is one of law, the answer to which depends upon a true understanding of the meaning of the expression "direct taxation within the Province" as used in the British North America Act.

Again:

The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories—namely, those that are direct and those which cannot be so described, and it is to taxation of the former character only that the powers of a Provincial government are made to extend. From this it is to be inferred that the distinction between direct and indirect taxes was well known before the passing of the Act; and it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category.¹⁶

The judgment proceeds to state that taxes on property (meaning real property) or income were everywhere treated as direct taxes, while customs and excise were the typical examples of indirect taxation.

When, therefore, the Act of Union allocated the power of direct taxation for Provincial purposes to the Province, it must surely have intended that the taxation, for those purposes, of property and income should belong exclusively to the Provincial legislatures, and that without regard to any theory as to the ultimate incidence of such taxation. To hold otherwise would be to suppose that the framers of the Act intended to impose on a Provincial legislature the task of speculating as to the probable ultimate incidence of each particular tax which it might desire to impose, at the risk of having such tax held invalid if the conclusion reached should afterwards be held to be wrong.¹⁷

The judgment then proceeds to discuss the effect to be given to Mill's definition and states that it may be a guide for determining whether any new or unfamiliar tax is direct or indirect, but it cannot have the effect of disturbing the established classification of the old and well known species of taxation.

¹⁶ [1928] A.C. 117 at pp. 123-4.

¹⁷ [1928] A.C. 117 at p. 125.

The Privy Council do not disagree with the judgment of the Supreme Court of Canada that the tax in question was one which might be passed on, as in the *Cotton* case, nevertheless it was a tax on property and remained in the general class. "It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity."

The substance of the judgments of the Privy Council in these two recent cases seems to be shortly this: A tax that is within a class of taxes that was in 1867 commonly understood not only by writers upon political economy, but by statesmen as well, as being either direct or indirect, is, for the purpose of interpreting the British North America Act, and therefore as a matter of law, to be taken *en bloc* to be direct or indirect accordingly. Land taxes, succession duty or income taxes were in 1867 commonly understood to be direct taxation, while amongst others, customs, excise, and the taxes on commodities that may enter into the price, were deemed to be indirect taxation.

These broad blocks of direct or indirect taxation are not to be chipped in special cases in which apparently the tax has a result contrary to the common result of the broad class.

How far, since these recent decisions, a Provincial Legislature can affect the validity of a tax that is in substance within one of the broad blocks of direct taxation, by the mere form of the statute imposing it, or manner of imposition, may again arise, but these decisions certainly make it difficult to rely either upon the method of imposition of the tax or upon the fact that it may in actual operation work contrary to type.

The *Cotton* case is now in that category of cases which "seem to have turned upon their own facts."

J. E. McMULLEN.

Vancouver.