CASE AND COMMENT

TRUST—DISCRETIONARY—AS TO METHOD OF APPLYING FUND—NO DISCRETION AS TO AMOUNT.—"There is no knowledge, case, or point in law, seeme it of never so little account, but will stand our student in stead at one time or other, and therefore in reading, nothing to be pretermitted."[1] This caution, so quaintly expressed, is justified by the recent case of *In re Smith, Public Trustee* v. *Aspinall*,[2] where the doctrine of two cases[3] decided in 1830 and 1844, respectively, was invoked. The fallibility of the most careful law reporters is also shown in this recent case for the very point before the Court had been decided by the Court of Appeal in 1918 in the case of *In re Nelson, Norris* v. *Nelson*[4] which evidently was considered unworthy of reporting.

In the *Smith* case (*supra*) a fund was left by will to trustees, who were directed to apply at their absolute discretion the whole or any part of it for the benefit of A. and to apply the rest of it in so far as it is not applied for the benefit of A., to or for the benefit of B. A. and B. subsequently assigned, by way of mortgage, their interests in this fund. The Public Trustee, who was the sole trustee of the will, took out a summons for a determination of the question whether he was bound to pay off the mortgage out of the fund or whether he was at liberty, in his discretion, to apply all or any part of it for the maintenance or personal support or benefit of A.

Where trustees are given a discretion to apply the whole or any part of a fund to or for the benefit of A., A. may not come to the trustees and successfully demand the fund. The fund has not been given to A. A. has no interest therein until the trustees, from time to time in the exercise of their discretion, pay some of it to him. Anyone claiming under A. who has not a vested interest in the fund, will be in no better position than A. would be. A fortiori a creditor of A. will receive nothing if A. has nothing. This is just as sound in law as it is in economics[5].

[1] Co. Litt. 9*a*.

[2] [1928] Ch. 915.

[3] *Green* v. *Spicer*, 1 Russ. & My. 395; *Younghusband* v. *Gisborne*, 1 Coll. C.C. 400.

[4] Now reported as a note to *In re Smith, Public Trustee* v. *Aspinall*, [1928] Ch. at p. 920.

[5] See *Brandon* v. *Robinson* (1811), 18 Ves. 429; *In re Coleman, Henry* v. *Strong* (1888), 39 Ch. D. 443; *In re Bullock, Good* v. *Lickorish* (1891), 60

Particular regard should be given to the second class of cases where the trustees have a discretion as to the method in which the fund shall be applied for the benefit of A., but where they have no discretion as to the amount of the fund to be applied. Here A., the beneficiary, may properly demand that the trustees hand over the whole fund to him. By virtue of his vested interest in the whole fund, A. may call for the fund and terminate the trust. The rationale of this result is to be found in the principle of law that where there is what amounts to an absolute gift, that gift cannot be fettered by prescribing a mode of enjoyment[6].

In the case under discussion, the trustees were given a discretion as to the amount which they might pay to or apply for A., and as to the unapplied residue they were directed to apply it to or for the benefit of B. Surely A. has not a vested interest because the trustees may properly, in the exercise of their discretion, decide that he shall not receive directly or indirectly—by payment or application for his benefit—one penny. B., while A. is alive, has no power to demand that the trustees hand over the fund or any part thereof to him, for *non constat* that the trustees will not apply the whole of it for A.'s benefit. May the two of them acting together ask for the whole fund or direct its application? The answer given by Romer, J., in the *Smith* case is: "The two people together are the sole objects of the discretionary trust and between them are entitled to have the whole fund applied to them or for their benefit."[7] May it not be seriously asked: does not the foregoing quotation amount to an affirmation of the mathematical fallacy that nothing plus nothing equals one? As against this, the decision in the *Smith* case (*supra*) surely can be supported on the ground that A., in joining in the mortgage of the whole interest in the fund, virtually

L.J. Ch. 341 (the clause in the will in this case providing for a discretionary trust may well be taken as a precedent); *Godden* v. *Crowhurst* (1842), 10 Sim. 642; *Train* v. *Clapperton*, [1908] A.C. 342; *Re Black* (1918), 15 O.W.N. 290, 16 O.W.N. 75; article: Discretionary Trusts, (1923), 156 L.T. Jour. 22.

[6] See *Saunders* v. *Vautier* (1841), 4 Beav. 115; *Crawford* v. *Lundy* (1876), 23 Gr. 244; *Farrell* v. *Cameron* (1881), 29 Gr. 313; *Lewis* v. *Moore* (1896), 24 O.A.R. 393; *Re Hanmer* (1904), 9 O.L.R. 348; *In re Canadian Home Circles* (1907), 14 O.L.R. 322; *Re Nelson* (1908), 12 O.W.R. 760; *McFarlane* v. *Henderson* (1908), 16 O.L.R. 172; *Re Rispin* (1912), 46 Can. S.C.R. 649; *Re Hamilton* (1912), 28 O.L.R. 534; *Re McGill* (1913), 4 O.W.N. 565; *Re McKeon* (1913), 5 O.W.N. 190; *Re Karch* (1922), 53 O.L.R. 112; *Re Ronan* (1926), 31 O.W.N. 178.

[7] [1928] Ch. at p. 919. As to where two or more beneficiaries *sui juris* have a vested interest in the whole fund and the right, if any, of less than all of them to call for the fund, see *Betchel* v. *Zinkann* (1907), 16 O.L.R. 72; *Re Harris* (1914), 33 O.L.R. 83.

refused to accept any further application of the fund for his benefit until, at any rate, the mortgage was paid off. Until such time, B. has a vested interest in the whole fund which he may assign to the mortgagees who, in turn, claiming under B., may require the trustees to apply it towards the satisfaction of the mortgage debt.

S. E. S.

* * *

HIGHWAY TRAFFIC ACT—LIABILITY OF OWNER OF MOTOR VEHICLE IN RESPECT OF LIGHTS UNDER SECTIONS 9(1) AND 41(1) OF ONTARIO HIGHWAY TRAFFIC ACT—SCOPE OF SECTIONS.—The judgment of the Supreme Court of Canada in *Hall* v. *Toronto Guelph Express Co.*[1] is of great importance to motorists in that it strictly interprets sections 9(1) and 41(1) of the Highway Traffic Act of Ontario[2] and holds that the liability imposed by these sections exists even in absence of negligence. The action arose out of a motor accident in which the plaintiff, H, who was the owner of the car, and three others were riding. All the occupants were injured and all joined in the action. The plaintiff, J, was driving. The defendant company were the owners of a truck which was driven by one of their employees and which was proceeding along the highway when the plaintiff's car crashed into it.

The accident occurred about six o'clock on a dark wet evening in November and the plaintiffs alleged that the truck displayed no rear red light as required by section nine of the Act. The defendants alleged that the truck was equipped with lights as required by law; that the lights were lit at the time of the accident and denied any breach of duty on their part and further alleged that the accident was caused by the negligence of the plaintiff J. in driving at an excessive rate of speed and failing to keep a proper look-out and that the other plaintiffs assumed the risk of their driver's negligence. The learned trial judge submitted questions to the jury. Three of these are of special interest: no. 1, "Were the defendants guilty of any negligence causing the accident"?; no. 3, "Was the plaintiff Justin guilty of any negligence contributing to the accident"?; no. 4, "If so what was his negligence"? After deliberating for some hours, the jury requested the judge to advise them whether the defendants would be guilty of negligence directly causing the accident if the tail light had by chance gone out immediately prior to the accident, considering that in such a case the matter would be out of

[1] [1929] S.C.R. 92; [1929] 1 D.L.R. 375.
[2] R.S.O., 1927, c. 251.

the direct control of the driver. After discussion with counsel the learned judge, with diffidence, instructed the jury that "if you find the circumstances such as you suggest, namely, that the driver was not aware of the light being out because it had gone out suddenly before the impact, then, in my judgment, the defendants would not be liable." The jury then brought in a verdict by answering question no. 1 in the negative. As this verdict was not entirely satisfactory the jury later added a memorandum as follows: "We the jury find that the plaintiff was negligent to the extent of not using necessary precautions as demanded by such adverse weather conditions, and was the cause of the accident." The action was then dismissed with costs. The Appellate Division of the Supreme Court of Ontario in affirming this judgment[3] apparently considered the memorandum as an answer to questions 3 and 4 and held that "the plaintiff did not succeed in getting any finding that the red light was not carried or was not burning and visible at a distance of 200 feet. Such a finding is necessary to establish the fact that the Act has been violated."

The judgment of the Supreme Court of Canada reviews with care the relevant portions of the charge to the jury; the questions submitted, and the answers; discusses the case of *Great Western Railway Co.* v. *Owners of S. S. Mostyn*[4] and *River Wear Commissioners* v. *Adamson*;[5] and holds that, under the decision in the former case, the direction to the jury was erroneous as to the scope and effect of sections 9(1) and 41(1) of the Act and "affected their findings to such an extent that they cannot stand."

The judgment also deals with the argument advanced by counsel for the respondents that the responsibility imposed by section 41(1) "is vicarious and must be confined to cases in which the person in charge of such motor vehicle would be responsible at common law," and states that the Court finds "nothing in the Statute to justify so restricting its application. On the contrary the imposition by section 41(1) of liability on the driver as well as the owner and the provisions of subsec. (3) seem to make clear that the purpose of the section is not only to impose direct civil liability, but also that that liability should be unrestricted, save as explicitly otherwise declared in the section itself."[6]

Subsection (3) of section 41 reads as follows: "This section shall not apply to any action brought by a passenger in a motor vehicle

[3] (1928), 34 O.W.N. 216.
[4] [1928] A.C. 57.
[5] (1877), 2 App. Cas. 743.
[6] [1929] S.C.R. 92 at p. 107; [1929] 1 D.L.R. 375 at p. 390.

against the owner or driver of the vehicle in respect of any injuries sustained by him while a passenger."

The case of *Great Western Railway Co.* v. *Owners of S.S. Mostyn*[7] deals with the liability of the owner of a vessel for damage done to a harbour, dock or pier or works connected therewith whether the damage was occasioned by negligence or not, where the vessel is at the time of the damage under the control of the owner or his agents. Lord Haldane stated that the Court was agreed that negligence had neither been shown nor proved and said that "the question which we have to answer is whether, in a case in which neither negligence nor any other act of an unlawful nature has been established against the owners of the Mostyn or those in charge of her, s. 74 (of the Harbours, Docks and Piers Clauses Act, 1847) makes the owners answerable for the damage done in this case to the dock." The Court held that the section applied "when the damage complained of has been brought about by a vessel under the direction of the owner or his agents, whether negligent or not."

The Supreme Court of Canada considered that the findings in the *Mostyn* case were applicable to this case with the result that in certain instances motorists may be liable for damage even although no negligence be shown or proven.

B. B. JORDAN.

* * *

NEGLIGENCE—AUTOMOBILE—SKIDDING.—The Louisiana Supreme Court has held that the mere fact that an automobile skids and causes injury is not evidence of negligence.[1]

That conclusion is consistent with established principles of the law of negligence. Skidding may occur without fault and when it does occur it may likewise continue without fault for a considerable space and time.

In *Wing* v. *London General Omnibus Co.*,[2] the plaintiff, a passenger in a motor bus, was injured when the bus skidded owing to the roads having been rendered greasy by rain. The trial judge held that there was no evidence of negligent management in driving the bus, and the plaintiff's case on that claim was withdrawn from the jury. The trial judge had, however, allowed the plaintiff's case to go to the jury on the question whether the defendants in placing on a greasy road to ply for passengers a motor omnibus which was liable

[7] *Supra.*
[1] See American Law Notes, vol. 32, p. 212.
[2] (1909), 78 L.J. K.B. 1063.

to become and did in fact become uncontrollable through skidding, had been guilty of negligence or committed a nuisance. The jury found that they had committed a nuisance.

In allowing the defendant's appeal from this judgment Vaughan Williams, L.J., said: "I do not think that an accident resulting from the tendency of motor cars, however well constructed or designed, to skid, is any evidence of negligence or nuisance."[3] And Fletcher Moulton, L.J., said: "In my opinion the mere occurrence of such an accident is not in itself evidence of negligence."[4]

In the Canadian case of *Pacific Stages Limited* v. *Jones*,[5] the appellant's motor bus was being driven down an incline on a frosty, foggy morning. When the driver saw a street car ahead stopped in front of him, he tried to stop the bus but failed. The bus skidded, struck a telephone pole and passengers were injured. At the trial the defendants were held liable on the ground that having regard to the condition of the pavement which "ought to have been known to the driver" the bus ought to have been under better control. The Supreme Court of Canada allowed the defendants' appeal. Anglin, C.J., said: "The case really turns upon the question whether or not the icy condition was, or ought to have been, known to the driver. The driver of the bus realized the existence of that icy condition only when he came to apply his brakes." As the driver was faced with an unexpected situation he was guilty of no negligence.[6]

In *Brown* v. *Yellow Cab Ltd.*,[7] the trial judge found that the driver of a taxi turned into a certain street with undue haste and negligence, and into a hole in the ice in that street which he ought to have seen, and injured a passenger. The appellate tribunal, in directing a new trial, said that the turning into this street did not cause the damage, and it was doubtful whether the driver was negligent in not realizing the character of the hole and the result of driving into it.

The conclusion to be drawn from these authorities is this: the mere fact of skidding is not primâ facie evidence of negligence, but if the cause of the skidding be shown, this may or may not be evidence of negligence according to its nature.

T. N. PHELAN.

[3] (1909), 78 L.J.K.B. 1063 at p. 1068.
[4] (1909), 78 L.J.K.B. 1063 at p. 1069.
[5] [1928] S.C.R. 92.
[6] [1928] S.C.R. 92 at p. 94.
[7] (1926), 29 O.W.N. 405.

BOARD CONSTITUTED BY STATUTE—POWER TO SUE AND BE SUED.—The general rule that, in the absence of a statute so authorizing, a servant of the Crown cannot be sued in his official capacity, has been thought by some to have been altered by the decision of the Supreme Court of Canada in *Rattenbury* v. *Land Settlement Board*,[1] and that, where such servant has a corporate existence, the mere fact of incorporation gives to it the power to sue and be sued. It is submitted, however, that the general rule has not been so altered.

The defendant, the Land Settlement Board, was created a body politic and corporate by a statute of the Province of British Columbia, and, in this action, the plaintiff asked for a declaration that certain parts of the Act, from which the Board derived its powers, were *ultra vires*, for damages, and for an injunction.

In its defence, the defendant raised the question of its capacity to be sued, and this, among other questions, was ordered to be set down for a hearing before trial. Morrison, J., held that the defendant had such capacity; but on appeal, his decision as to this point was reversed by the Court of Appeal for British Columbia. The plaintiff then appealed to the Supreme Court of Canada, where Anglin, C.J.C., with whom Lamont, J., concurred, expressly refrained from dealing with this phase of the action; but Newcombe, J., held that the defendant Board could be sued, and Mignault and Rinfret, JJ., agreed.

In coming to this decision, Newcombe, J., does not appear to rely on the mere fact of incorporation, but he points to the powers given to the Board and the functions it is to perform, and holds that when the legislature gave to the Board these powers and directed it to perform these functions, it must have intended that the Board should have the capacity to sue and be sued. The Board was empowered, *inter alia*, to collect money, to take mortgages for payment, to insure and to sell merchandise. Newcombe, J., said: "It is not expressly enacted by the Land Settlement and Development Act (the Act incorporating the defendant) that the Board may sue and be sued; but by reference to its powers and duties, and the business in which it is directed or empowered to engage . . . there is, I think, ample evidence of the convenience and necessity of such a power. . . . . A power to sue and be sued may, I have no doubt, be inferred or implied, like any other power which is necessary or incidental to the due execution of the powers expressed."[2]

[1] [1929] S.C.R. 52; [1929] 1 D.L.R. 242.
[2] [1929] S.C.R. 52 at p. 61; [1929] 1 D.L.R. 242 at p. 247.

This judgment appears, therefore, to be based solely on the construction of the statute. The power to be sued is inferred, because it is necessary to carry out the duties assigned to it. Had the Act assigned the same duties to the Board, without constituting it a corporate body, it is quite conceivable that Newcombe, J., would have held that the same capacity existed by necessary inference.

The headnote of this case, as reported in the Dominion Law Reports, reads: "A Board constituted by statute a body politic and corporate may unless its special act otherwise provides sue and be sued as such." There appears to be nothing in the report to support such a proposition. It is true that Newcombe, J., quotes Phillimore, J., in *Graham* v. *Public Works Commissioners*,[3] where he said: "The mere fact of their (the Public Works Commissioners) being incorporated without reservation confers, it seems to me, the privilege of suing and the liability to be sued." But Newcombe, J., did not base his judgment on the mere fact that the defendant is a corporate body; in fact he definitely stated that, "as a statutory body it has no capacity other than that which it derives from its constituting Act."[4]

In the *Graham case*, the Court was asked whether the defendant corporation, being a servant of the Crown, could be sued when no express power had been given in the constituting Act. The two judges, before whom the question came, although they held that the Commissioners could be sued, took different views. Ridley, J., held that the defendant contracted for itself in its corporate capacity, and not as a servant of the Crown. Phillimore, J., inferred that it could be sued, from the convenience and desirability of having servants who could sue and be sued, coupled with the mere fact of incorporation. The view of Ridley, J., was referred to in the Ontario Courts by Orde, J., in *Flexlume Sign Co.* v. *Macey Sign Co.*,[5] and was propounded in an *obiter dictum*, by Atkin, L.J., in *MacKenzie-Kennedy* v. *Air Council*.[6]

The chief reason for the general rule forbidding actions against a servant of the Crown in his official capacity is that the servant holds no assets in his official capacity which can be seized in satisfaction of a judgment. He holds only on behalf of the Crown. "The revenue of the country cannot be reached by an action against an

[3] [1901] 2 K.B. 781 at 791.
[4] [1929] S.C.R. 52 at 62; [1929] 1 D.L.R. at pp. 248-9.
[5] (1922), 51 O.L.R. 595 at p. 601.
[6] [1927] 2 K.B. 517 at pp. 532-3.

official, unless there is some provision to be found in the legislature to enable this to be done": Collins, M.R., in *Bainbridge* v. *Postmaster-General.*[7]

To bring an action against a servant in his official capacity, whether incorporated or not, is, in substance, to bring an action against the Crown, and it is submitted: that the rule is that the Court has no jurisdiction to hear such an action unless authorized so to do by express words or necessary implication of a statute.

HAROLD KEMP.

* * *

EXECUTIONS AGAINST LANDS IN ONTARIO.—Recently a case came to the attention of the writer in which a solicitor decided that he was forced to admit that an execution on a judgment over ten years old was binding on his client's lands and which his search had not disclosed. This is a point which is of interest to the profession as it may happen that the name has not appeared on the abstract for over twenty years or more and so a solicitor might easily fail to search so far back. In the case in question the lands had passed through several subsequent purchasers but the execution against the former owner had been kept renewed, the last renewal being more than ten years after the date of the judgment.

No settled practice seems to have been adopted by solicitors as to how far back searches are to be made for executions. Some solicitors contend six years are enough, on the ground that a *fi. fa.* cannot be issued (except by leave) after six years from the judgment; others say that it is necessary to go back twenty years on the ground that judgments are only good for twenty years at common law[1] and that the Statute of Limitations is to the same effect.

There does not seem to be any case deciding that either period is sufficient; in fact there is a decision to the contrary: *Poucher* v. *Wilkins.*[2] It was there held that an execution which had been duly renewed and was still in the sheriff's hands was binding on the lands of the judgment debtor, although the last renewal had been effected more than twenty years after the date of the judgment.

In that case it was argued that the judgment was invalid for any purpose after twenty years under section 232 of the Statute of Limitations,[3] which says that an action upon a bond, or other

[7] [1906] 1 K.B. 178 at p. 190.
[1] See Coke, 2 Inst. 470; *Mortimer* v. *Piggott* (1834), 2 Dowl. 615.
[2] (1915), 33 O.L.R. 125.
[3] Now R.S.O., 1927, c. 106, s. 48.

specialty, must be brought within twenty years, but the Court held, notwithstanding the definition of the word "action" in that Act, that "'action' shall include an information on behalf of the Crown and any civil proceedings," and that the Act did not prevent the renewal of a *fi. fa.* more than twenty years after the judgment when the execution had properly issued, and had been regularly renewed. The ground for the decision was that a renewal was merely a ministerial act of an officer of the court and not the institution of an action or any civil proceeding.

If, however, after the expiry of twenty years, leave to issue execution is asked for it cannot be given as the granting of such leave is a judicial, not a ministerial act and is, therefore, an action or civil proceeding within the above mentioned Act.[4]

Section 23(2) of the Limitations Act,[5] is not mentioned in *Poucher* v. *Wilkins* and presumably was not cited to the Court but seems to settle the matter. It is as follows:

> Notwithstanding the provisions of subsection 1, a lien or charge created by the placing of an execution or other process against land in the hands of the sheriff, or other officer to whom it is directed, shall remain in force so long as such execution or other process remains in the hands of such sheriff or other officer for execution and is kept alive by renewal or otherwise.

Sub-section (1) of section 23, above referred to, limits the enforcement by action of any claim for the recovery "out of any land or rent any sum of money secured by mortgage or lien, or otherwise charged upon or payable out of any such land for rent" to ten years "after a present right to receive same accrued, etc." This was first enacted as 10 Edward VII, c. 34, sec. 24, in 1910 and was passed no doubt in consequence of the decisions in *Neil* v. *Almond*,[6] and in *Re Woodall*,[7] where it had been held that an execution against lands, though kept renewed, must be enforced by sale within ten years from delivery to the sheriff, otherwise the lien created thereby would be barred under the Limitations Act. But even without the assistance of section 23(2), the case of *Poucher* v. *Wilkins* settles the law.

On the authority of *Poucher* v. *Wilkins* it would seem that a search must be made on the date of closing to see if there is an execution then in the sheriff's hands against the owner or any former

[4] *Doel* v. *Kerr* (1915), 34 O.L.R. 251.
[5] R.S.O., 1914, c. 75, s. 24, as it then was.
[6] (1897), 29 O.R. 63.
[7] (1904), 8 O.L.R. 288.

owner and such execution may be there on a judgment over twenty years old.

What then is the date to which one must search? One might think the answer is found in the precursor of the present rule 571, which limits the valid existence of a *fi. fa.* to three years from date of issue. The reason for this assumption is that if one can find a time at which a definite limit of validity was first placed upon existing executions it can then be ascertained when that period would expire and after that such execution would be invalid and could not be renewed (except, of course, by special leave of the court). Thus when one sees that by the Act respecting limits of execution,[8] it was enacted that no longer should it be necessary to renew writs of execution every year, but that all writs "now in the hands of a Sheriff or hereafter issued . . . . shall remain in force for a period of three years or until satisfied . . . . or withdrawn," it is clear that the earliest date of a valid *fi. fa.* is the 5th of May, 1897. Some solicitors have adopted the practice of searching back to this date.

Unfortunately for this assumption even a search against all owners back to the 5th of May, 1897, does not afford absolute protection because an execution validly in the sheriff's hands on the 5th of May, 1897, against an owner prior to that date, might have been renewed regularly ever since the issue and thus on the authority of *Poucher* v. *Wilkins* would still bind the lands.

Furthermore, as to judgments up to twenty years old, there seems no way of overcoming the difficulty created by the power of the court to grant special leave to issue execution after the expiry of the *fi. fa.* This may be done at any time and may revive an execution on a judgment as old as twenty years but not older, because the Limitations Act prevents any new action or civil proceeding thereon.[9]

So the conclusion must be that twenty years is the minimum period of search and there must in addition be a search as to all those executions validly in the sheriff's hands on the 5th of May, 1897, as some one or more of them may have been kept renewed ever since. As to these latter the search of the names of those formerly owning the land will have to go back to the Crown because prior to May 5th, 1897, executions against a former owner may have been validly renewed from year to year (as the law

[8] (Ont.) 57 Vict., c. 26, s. 2, assented to May 5th, 1894.

[9] See *Price* v. *Wade* (1891), 14 P.R. 351; *McMahon* v. *Spencer* (1886), 13 O.A.R. 430.

was then) and if thus renewed and if kept renewed would still be valid in the sheriff's hands on the 5th of May, 1897. Possibly the easiest way would be to make a search, once for all, of all those executions in the sheriff's hands on the 5th of May, 1897, irrespective of whether such names appeared on the abstract in question; then arrange them alphabetically and consult this list every time before closing. The difficulty, of course, could be overcome by legislation and this might well be done without hardship after this length of time.

A. C. HEIGHINGTON.

* * *

SUCCESSION DUTIES—DOUBLE EXEMPTION ON CHARITABLE BEQUESTS.—The Appellate Division of the Supreme Court of Ontario in the case of *Re Aikins*[1] has given an interesting decision which appears, for the first time, to have definitely determined the right of an estate to secure what was claimed by the Succession Duty Department of Ontario to be "a double exemption" from succession duty.

The testator after making certain specific bequests gave the whole of the residue of his estate to his executors and trustees on trust to convert the same into money and to pay thereout certain legacies, the succession duty, and to divide the balance in equal parts among four charitable and educational institutions in the City of Toronto. Part of the estate consisted of bonds of the Province of Ontario valued at $142,000 which by the provisions of the Provincial Loans Act[2] are free from succession duty. The residue of the estate is also exempt from succession duty under the provisions of section 6 of the Succession Duty Act which provides that "no duty shall be leviable on property devised or bequeathed for religious, charitable or educational purposes to be carried out in Ontario."

The executors of the estate claimed the right to apply the proceeds of the duty free bonds in payment of the specific legacies in respect of which succession duty would otherwise be payable, leaving the other assets to be applied in payment of the bequests to the charitable institutions. The effect of this application of the estate would, of course, be to gain the full benefit of both sets of exemptions.

The Crown claimed that the estate must be considered as a blended fund and that the executors could not allocate the duty

[1] (1928), 62 O.L.R. 33.
[2] R.S.O. 1927, c. 23.

free bonds or other proceeds to the payment of other legacies but that each legatee including the four charitable institutions must be deemed to be sharing in an aliquot part of each part of the estate including the duty free bonds. This contention, if given effect to, would result in an allocation of part of the estate, which by law was already free from succession duty, toward payment of the charitable legacies, which were already exempt from duty. Then there would be a proportionate increase in the amount of the dutiable value of the assets. The succession duty being payable out of the residue, the amount of the bequest to the four charities would thereby be correspondingly reduced.

The Court held that the Crown's contention was not tenable but that, on the contrary, the residuary legatees had the right to require the executors to deal with the estate in such a manner as to give them the full benefit of both the exemptions from the succession duty. The Court further pointed out that "the Crown has no right to get away from the exemptions which have been granted, the one for valuable consideration and the other as a matter of public policy, and to insist that the two exemptions should be made to overlap so that full effect will not be given to both."

This decision resulted in a saving to the four charities of $17,000 on the amount claimed by the Province for succession duties.

H. A. HALL.

* * *

STATUTES—INTERPRETATION—WORKMEN'S COMPENSATION.—Workmen's Compensation legislation generally provides for the determination of controversies arising thereunder by special boards constituted by the new Acts. These boards were set up largely because the courts following English precedents had become enmeshed in technical construction of liberal statutes and practical justice could not be realized. There are a few jurisdictions left in Canada in which the Acts are administered by the judges and it is very interesting to watch the trend of their decisions. The Acts are passed primarily to benefit the workmen and should be given a liberal interpretation to favour them. It is this question of policy which will explain the troubles of the Saskatchewan Court of Appeal in the recent case of *Reader* v. *Moose Jaw Cartage Co.*[1] The question arose whether a motor truck could properly be considered a "factory" within the meaning of the Act to enable an injured workman to obtain compensation. The Court struggled to find some interpre-

[1] [1928] 3 D.L.R. 532.

tation favourable to the workman but although the definition of "factory" was most eclectic there seemed no possible way to make it include the motor truck. The section is as follows:—" 'Factory' means a building, workshop or place where machinery driven by steam, water or other mechanical power is used, and includes mills where manufactures of wood, flour, meal, pulp or other substances are being carried on; smelters where metals are sorted, extracted or operated on; laundries worked by steam, water or other mechanical power and *docks, wharves, quays, warehouses and ship-building yards where goods or materials are stored, handled, transported or manufactured.*"[2] Blackstone felt that Parliament could not make black white, nor make a man a woman, but in this section the Saskatchewan legislature provided some material to challenge the correctness of the great commentator's opinion. The Court was composed by Haultain, C.J.S., Turgeon, McKay, Martin and Mackenzie, JJ.A. There were no dissenting opinions. Mr. Justice Martin presents the most interesting judgment for the purpose of considering the meaning of the word "factory."

At p. 536. "Does this definition include a truck which is driven by mechanical power? A truck cannot be called a 'building' or 'workshop.' Is it a 'place'? I do not think that a 'place' requires to be fixed in order to be a 'factory'; I think it quite possible for a building, workshop or place, which is of such a character as to be a 'factory' to be moved from place to place and still remain a factory. But I do not think that the mere fact that a 'place' is so constituted that it is moved by mechanical power, contained within itself, constitutes that place a 'factory' within the meaning of the term in the Workmen's Compensation Act."

At p. 537. "If it was the intention to include vehicles in the definition of the word 'factory' it should have been so stated in unmistakable language. The natural meaning of the words used does not include vehicles, and while the legislation in question is remedial, the words should not be strained so as to include cases omitted unless some intention to include them can be gathered from the statute. No intention to include motor vehicles can be gathered from the provisions of the Act."

Whether Mr. Justice Martin is correct in his interpretation of "the natural meaning of the words used" or not, one can readily sympathize with his intention and with the result of his decision. It is a very common method of legislating in Common Law countries to make words comprehend for the purposes of some statute all

[2] R.S.S. 1920, c. 210, s. 3(5).

sorts of inconsistent things. But it is not a good method, and not only does it annoy and perplex courts; it brings the law and the legislature into contempt. The layman points to the provision as one more of the vexatious obscurities in which lawyers delight, and says not inappositely that the best thing of all would be to dispense with lawyers and their archaic refinements, the laws.

J. FORRESTER DAVISON.

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SALE OF GOODS—PASSING OF PROPERTY—DELIVERY—GARNISHING ORDER.—The position of a garnishee is generally a comfortable one in court. He can sit by while others labour for the stake he holds. However in *Coupland* v. *Elmore*[1] the garnishee was not so fortunate. Elmore, the judgment debtor, called one morning at the garnishee's shop with a delivery of beef. He had done so before from time to time, getting cash on delivery. On this occasion the manager of the shop was busy at the time and asked Elmore to call back for payment. But before Elmore returned to the shop, the manager was served with a garnishee order and directly paid into court the price of the beef delivered that day by Elmore. When the latter returned to the shop and his pay was not forthcoming he reloaded the beef on his truck and took it away.

The garnishee was thus for the time deprived of both beef and the money and the Court held that the property in the beef had passed to the garnishee and accordingly the money was payable to the judgment creditor. It might be argued that the beef was brought into the shop, weight and price agreed on, but nothing more, and then Elmore was to wait a short while until his cheque was made out. He might have stayed by the beef until the cheque was delivered, and if he did so it does not seem as if the property would pass to the purchaser until he was paid. Instead of waiting in the shop, Elmore went down town as he could not conveniently wait until the manager was ready to pay him, or easily carry the beef along with him, and it may be contended that the situation would remain as if he stood by the beef. Anyway the Court decided that the facts of the case—all the details of which are not possibly referred to in the judgment—brought it within the exception, "Unless otherwise agreed" of section 34 of The Sale of Goods Act.[2]

[1] [1928] 2 D.L.R. 308.
[2] R.S.B.C. 1924, c. 225.

As it may be contended that Elmore did not intend the property to pass until he was paid for the goods, then payment by the purchaser of the purchase price of the goods into court under the garnishee order could not operate to vest the property of such goods in the purchaser but the latter might be thus estopped[3] from denying indebtedness for such amount to the judgment debtor regardless as to whether or not the property in any particular goods had passed to the garnishee. It seems as if the judgment might have gone on this ground rather than the other which may be satisfactory on all the facts known to the Court. This case, besides showing an interpretation of a legal phrase as applied to certain facts, may also be used to point out a moral: "See your lawyer first."

R. E. INGLIS.

[3] *Cf. Randall* v. *Lithgow* (1884), 12 Q.B.D. 525.