CASE AND COMMENT.

INNKEEPER—LIABILITY—INJURY TO GUEST'S GOODS—INSURER—NEGLIGENCE.—The case of *Winkworth* v. *Raven*,[1] limits the liability of an innkeeper for the safety of the goods of a guest which are *infra hospitium* in a manner which is not suggested by earlier authorities, with one exception,[2] or by text-books. Goodeve[3] states that "at common law innkeepers, like carriers, are liable for all loss of or *damage* to goods entrusted to them, unless arising from the act of God or the Kings (*i.e.*, public) enemies, or the negligence of the guest: *Calye's* case."[4] Jones[5] states that "it has long been holden. that an innkeeper is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through one of his servants be *damaged* in his inn, or stolen out of it, by any person whatever." Jelf and Hurst[6] say that "by the custom of the realm the innkeeper is bound to keep the goods and chattels of his guests safe."[7]

In *Winkworth* v. *Raven*[8] the plaintiff, a guest at the defendant's inn, put his motor-car in the inn garage, which garage was open on one side. In consequence of an unusually severe frost the water in the engine froze and injured it. It was held by Swift and Macnaghten, JJ., sitting as a Divisional Court, that the defendant was not liable as he was not negligent. Swift, J., said: "What duty then does an innkeeper owe to the guest who brings to his inn and garages there his motor-car? I think it is clear that he insures that the car shall not be stolen, but I think he does not insure that the car shall not be damaged and, if damage is in fact sustained by the car, *the guest must prove* that such damage was caused by the failure of the innkeeper by himself or his servants to observe some duty which he owed to the guest."[9]

The object of the principle, on which the liability of an innkeeper for the loss of the goods of his guest is founded, is to compel the

[1] [1931] 1 K.B. 652.

[2] See *Dawson* v. *Chamney* (1843), 5 Q.B. 164, which was unfavourably commented on in *Morgan* v. *Ravey* (1861), 6 H. & N. 265. Cf. *Day* v. *Bather* (1863), 2 H. & C. 14.

[3] Personal Property, 7th ed., pp. 37-8.

[4] (1584), 8 Co. Rep. 32*a*. It should be noted that the Court in *Calye's* case considered only loss of goods by theft. See note: (1931), 80 U. of Pa. L. Rev. 122.

[5] Law of Bailments, p. 94.

[6] Law of Innkeepers, p. 59.

[7] See also Story on Bailments, s. 470; Beal: Law of Bailments, p. 302; Williams: Personal Property, 18th ed., p. 62.

[8] *Supra*.

[9] [1931] 1 K.B. 652 at p. 660. Italics inserted by the annotator.

innkeeper to take care that no improper person be admitted into his house, and to prevent collusion between him and thieves.[10] This rationale of the absolute liability subject to the defences with respect to acts of God or the King's enemies does not support an extension of the liability for mere injury to the goods, and upon this ground the decision in the *Winkworth* case appears to be sound. The statements in the text-books quoted above must be modified so as to limit the liability of an innkeeper, irrespective of his negligence, to losses by theft.[11]

The statement of Swift, J., that in order to succeed "the guest must prove" negligence on the part of the innkeeper would appear to have been uttered *per incuriam*. In *Medawar* v. *Grant Hotel Co.*,[12] A. L. Smith, J., said: "An innkeeper is *primâ facie* liable for his guest's goods and the proof of loss of such goods is *primâ facie* evidence of negligence on the part of his servants." It is well settled that the general rule applicable to bailees is that they are bound to restore the subject of the bailment in the condition in which they received it, and it is for the bailees to furnish a satisfactory explanation for not having done so. They must shew that reasonable care has been exercised.[13] There appears to be no reason for casting the burden of proving negligence upon the guest in an action against the innkeeper for injury to his goods rather than upon the innkeeper to shew that the injury was not the result of his negligence. The facts with respect to the happening of the injury will usually be peculiarly within the knowledge of the innkeeper.

S. E. S.

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INNKEEPER—HOTEL PROPRIETOR—LIABILITY FOR LOSS OF GUEST'S GOODS — NEGLIGENCE OF GUEST — LIMITATION OF LIABILITY — INNKEEPERS' LIABILITY ACTS.—Another case significant to the law concerning inn or hotel keepers' liability in which Swift, J., also delivered the principal judgment was recently decided by the Divisional Court. In *Carpenter* v. *Haymarket Hotel, Limited*,[1] the plain-

[10] See Lord Tenterden, C.J., in *Kent* v. *Shuckard* (1831), 2 B. & Ad. 803 at p. 804; *Fraser* v. *McGibbon* (1907), 10 O.W.R. 54 at p. 56; *Aria* v. *Bridge House Hotel (Staines) Ltd.* (1927), 137 L.T. 299.

[11] See article: Bailment, (1925), 41 Law Q. Rev. 433, partic. at p. 438.

[12] [1891] 2 Q.B. 11 at p. 14. See also *Burgess* v. *Clements* (1815), 4 M. & S. 306; *Cashill* v. *Wright* (1856) 6 E. & B. 891; *Morgan* v. *Ravey, supra*; *Oppenheim* v. *White Lion Hotel Co.* (1871), L.R. 6 C.P. 515; *Jones* v. *Jackson* (1873), 29 L.T. 399; *Herbert* v. *Markwell* (1881), 45 L.T. 649; *Macdonell* v. *Woods* (1914), 32 O.L.R. 283.

[13] See *Porter & Sons* v. *Muir Bros. Dry Dock Co., Ltd.* (1929), 63 O.L.R. 437 at p. 456 and the authorities there cited. Cf. Beven on Negligence, 4th ed., p. 929, *et seq.*

[1] [1931] 1 K.B. 364; 144 L.T. 119.

tiff, a guest with her husband at the defendants' hotel, while dressing for a dance put a diamond ring into a jewel-case and the jewel-case into a suitcase which she latched but did not lock. On leaving their bedroom to go down to dinner, the plaintiff's husband locked the door and took the key with him. After dinner they returned to their room, and on leaving for the dance the husband again locked the door, and handed in the key at the hotel office. Next morning the plaintiff discovered that the ring was missing, and search for it was unavailing. In compliance with section 3 of the English *Innkeepers' Liability Act, 1863,* a copy of section 1 of that Act had been exhibited by the defendants in the "public hall or entrance" of the hotel.[2] Wholly apart from the requirements of that Act, the defendants had also posted in each of the bedrooms, including the plaintiff's, a special notice that, "The company will not be responsible for anything lost through visitors not locking their doors. All articles of value should be deposited at the office and a receipt obtained for the same. All instructions as to safe custody of luggage should be given to the hall porter." The action was for the loss of the ring, the claim being restricted to £30 under the *Innkeepers' Liability Act, 1863.*[3] In the County Court the judge was satisfied that the plaintiff had taken reasonable care of the ring, but gave judgment for the defendants due to the special notice posted in the bedroom, as quoted above.[4] The judgment of the County Court was reversed by the Divisional Court, Swift, J., holding that the plaintiff had not been guilty of negligence in caring for her ring by failing to comply with the terms of the special notice, and that her disregard of that notice did not under the circumstances amount to a retention of her property by the plaintiff so as to relieve the defendants of liability for its loss. Therefore the defendants were liable at common law as insurers of the guest's goods up to the amount limited by the Act.[5]

[2] Innkeepers' Liability Act, 1863:—Sect. 1: "No innkeeper shall . . be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of thirty pounds, except in the following cases (that is to say), (1) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default or neglect of such innkeeper or any servant in his employ; (2) where such goods or property shall have been deposited expressly for safe custody with such innkeeper . . ." Sect. 3: Every innkeeper shall cause at least one copy of the first section of this Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn . . ."

[3] Sect. 1.

[4] [1931] 1 K.B. at p. 367.

[5] [1931] 1 K.B. at pp. 370-371.

In view of the decision in *Winkworth* v. *Raven*,[6] in which the principal judgment was delivered by the same judge, this case serves to throw into bold relief the undoubted nature and extent of an innkeeper's basic liability for the loss of his guests' goods at common law, as it has been consistently enunciated from the year 1584 to the present day,[7]—"An innkeeper is at common law an insurer of the goods of the guest which are brought to the inn."[8]

In *Carpenter* v. *Haymarket Hotel, Limited,* Swift, J., also reaffirms the common law rule that an innkeeper is "relieved from the liability attaching to his position as an insurer if the loss of the goods has been occasioned by the negligence of the guest himself,"[9] and his decision that the failure of the plaintiff to comply with the terms of the special notice did not as such amount to such negligence on her part is in accord with previous authorities.[10] Also, his decision that on the evidence before him there was nothing to justify him in finding that the plaintiff was otherwise guilty of such negligence is consistent with the findings in previous cases; the bedroom door was locked,[11] and there was no evidence that she had unduly flaunted the diamond ring in a public place so as to induce the theft,[12] or that she had in any other way failed to take due care of the ring.

Another practical question concerns the defendants' attempt in *Carpenter* v. *Haymarket Hotel, Limited,* to limit their common law liability below the limitation set by the *Innkeepers' Liability Act, 1863*. An innkeeper can restrict his common law liability in some measure at least by contract with his guest.[13] But as the innkeeper pursues a public calling, and as his liability for loss of goods *infra*

[6] [1931] 1 K.B. 652.

[7] *Calye's* case (1584), 8 Co. Rep. 32(a). See also *Aria* v. *Bridge House Hotel (Staines) Ltd.* (1927), 137 L.T. 299.

[8] Swift, J., in [1931] 1 K.B. at p. 370.

[9] [1931] 1 K.B. at p. 370. See *Cashill* v. *Wright* (1856), 6 E. & B. 893. The onus of proving negligence on the part of the guest rests upon the innkeeper: *Vicars* v. *Arnold* (1914), 7 S.L.R. 298; 20 D.L.R. 838. The onus is the same as to negligence under s. 1 of the Innkeepers' Liability Act, 1863: *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q.B. 11.

[10] See *Morgan* v. *Ravey et al.* (1861), 30 L.J. Ex. 131; *Sherrill* v. *King Edward Hotel Co.* (1929), 63 O.L.R. 528, where it was found as a fact that the guest had actual notice that a safety deposit vault was available for his use on request: see 63 O.L.R. at p. 533. Cf. *Jones* v. *Jackson* (1861), 29 L.T. 399.

[11] Failure to have locked the door would not *per se* necessarily have amounted to negligence: see *Filipowski* v. *Merryweather* (1860), 2 F. & F. 285; *Morgan* v. *Ravey et al., supra; Mitchell* v. *Woods* (1867), 16 L.T. 676. Cf. *Oppenheim* v. *White Lion Hotel Co.* (1871), L.R. 6 C.P. 515; *Herbert* v. *Markwell* (1881), 45 L.T. 649. Cf. the situation where no key is provided: *Vicars* v. *Arnold, supra.*

[12] See *Sherrill* v. *King Edward Hotel Co.*, 63 O.L.R. at pp. 533-534. Cf. *Oppenheim* v. *White Lion Hotel Co., supra.*

[13] *Sanders* v. *Spencer* (1566), 3 Dyer 266 b; *Calye's* case, *supra.*

hospitium is founded on public policy and the custom of the realm, not on bailment,[14] the ease with which, (and the degree to which), he may contract himself out of his liability may be considerably less than that with which a bailee as such can limit whatever liability he may have to take due care of bailed goods.[15] For example, the decision in this case, although Swift, J., does not *expressly* so hold, implies that an innkeeper cannot limit his liability as an insurer, on the doctrine of implied contract, by merely posting a special notice in a guest's room, even though the guest occupies the room and has "knowledge" of the notice. Swift, J., said that, "in the circumstances of this case . . . To say that the fact that a guest at an inn leaves some property of value in his bedroom manifests an intention on his part to relieve the innkeeper of his common law liability to insure it against loss is to make an assertion which seems to me quite unarguable."[16] Whether the trial judge's finding that the plaintiff "had knowledge" of the special notice meant that she had read it, or merely that she knew that it was posted in the room as in the case of *Morgan* v. *Ravey et al*,[17] is nowhere indicated in the report. If the former, the decision tends to make it more difficult for the innkeeper to limit his liability than several previous decisions have implied, the inference from them being that if the guest had actual notice, that is, if the special notice were read by or "brought home to the guest,"[18] the innkeeper would succeed in limiting his common law liability.[19] It is submitted that if the Court in *Carpenter* v. *Haymarket Hotel, Limited,* found that the plaintiff had read the notice before leaving her ring in the room, the effect of the decision is to require express acceptance by the guest of the terms of the special notice in order to render it effective.[20]

On reading section 3 of the English *Innkeepers' Liability Act, 1863*,[21] one is reminded of recent enactments by the legislatures of two of the Canadian provinces. In the new Ontario *Hotels Act* the English requirement is adopted concerning the part of the hotel in

[14] See *Kent* v. *Shuckard* (1831), 2 B. & Ad. 803 at p. 804; *Robins and Co.* v. *Gray*, [1895] 2 Q.B. 501 at p. 504; *Orchard* v. *Bush*, [1898] 2 Q.B. 285; *Fraser* v. *McGibbon* (1907), 10 O.W.R. 54.

[15] There are few cases on this point. Cf. the position of the common carrier in this respect.

[16] [1931] 1 K.B. at p. 371.

[17] *Supra.*

[18] See *Fraser* v. *McGibbon*, 10 O.W.R. at p. 62 *et seq.*

[19] See *Morgan* v. *Ravey et al., supra; Fraser* v. *McGibbon, supra.*, and cases cited therein. It has been held in South Africa that in order to limit his liability by means of a notice the innkeeper must prove that the guest had actual notice: *Davis* v. *Lockstone*, [1921] App. D. 153.

[20] See also argument for plaintiff in *Morgan* v. *Ravey et al.*, 30 L.J. Ex at p. 132; Jelf and Hurst: *The Law of Innkeepers*, (1904), at pp. 91 to 95.

[21] Quoted in foot-note (2) *supra.*

which the notice, quoting the hotel keeper's limitation of liability under the Act, shall be exhibited. In Ontario it is now sufficient to exhibit it "in a conspicuous part of the hall or entrance" of the hotel,[22] whereas under the old Ontario *Innkeepers' Act* it was required to be posted "conspicuously . . . in the office and public rooms *and in every bedroom.*"[23] This change in the Ontario statute was presumably a consequence of the decision in *Sherrill* v. *King Edward Hotel Co.*[24] in which it was held that the hotel keeper could not avail himself of the provisions of the *Innkeepers' Act* to limit his liability when at the time that the loss of the guest's goods occured the statutory notice was not posted in the guest's room, it having apparently been removed while the room was being re-decorated and inadvertently not replaced. As these statutes, being in derogation of the common law, must be strictly construed, and as the onus is upon the hotel keeper to prove his compliance with the statutory requirements,[25] to require him *to keep* the statutory notice posted in every bedroom seems to place an unduly heavy burden upon him. It is therefore surprising that when, at the last session, the Nova Scotia legislature provided that province with an *Innkeepers' Act,*[26] it should have copied, along with the rest of the defunct Ontario *Innkeepers' Act,*[27] the provision requiring the statutory notice to be kept posted in every guest room.[28]

Also, on comparing the provisions of the English Act with the corresponding Acts now in force in Ontario and Nova Scotia,[29] one is impressed with the comparatively low figure, forty dollars, to which the innkeepers' liability is reduced by the latter Acts. In so far as protection of the guests' property on the basis of direct financial risk borne by the innkeeper due to his liability for the loss of guests' goods is concerned, he might as well dispense with the services of the hotel detectives. It may perhaps be fortunate for those functionaries that prohibition legislation in the United States and

[22] 1929, Ont., c. 75, s. 29(3). It should be noted that the whole of s. 29 must be quoted in the notice, not merely the operative part as in the English Act. As to effect of not complying strictly with the provision as to the part to be quoted, see *Spice* v. *Bacon* (1877), L.R. 2 Ex. D. 463.

[23] R.S.O. 1927, c. 210, s. 5.

[24] *Supra.*

[25] See *Macdonell* v. *Woods* (1914), 32 O.L.R. 283.

[26] 1931, N.S., c. 7.

[27] R.S.O. 1927, c. 210, was repealed by the *Hotels Act,* 1929, Ont., c. 75, s. 3.

[28] 1931, N.S., c. 7, s. 6.

[29] See 1929, Ont., c. 75, s. 29(1); 1931, N.S., c. 7, s. 4(1). Cf. footnote (2) *supra.*

the increased tourist trade have augmented their duties *per se* as maintainers of peace and good order in Canadian hostels.

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THE MONTREAL SEDITION CASES.—The present economic depression has intensified the activities of the more radical labour groups in Canada, and the sections of the *Criminal Code* dealing with sedition and unlawful assembly are being frequently invoked by the police in their endeavour to prevent the spread of undesired propaganda. Canadian Courts are being asked to define the limits within which the individual in this country may exercise his rights of free speech and assembly. Every decision of this nature becomes a precedent tending to increase or diminish the area of liberty according as to whether there is an acquittal or a conviction. Montreal, for the first time in living memory, has recently witnessed two sedition trials, both before Wilson, J., of the Court of King's Bench, and as these will probably not be officially reported the following notes about them may be of interest.

Rex v. *Engdahl et al.*

The first trial was that of Louis J. Engdahl and Bella Gordon. The two accused had been arrested at a public meeting held in the Prince Arthur Hall, Montreal, on the evening of January 30th, 1931. The purpose of the meeting was to organize public protest against the manner in which the police had broken up two previous meetings called to formulate demands for unemployment relief. Miss Gordon was in the chair, and Mr. Engdahl, secretary of the International Labour Defence League of New York, was the principal speaker. Miss Gordon opened the proceedings with a short introductory speech. Mr. Engdahl then began to speak, but had only started when the police marched up to the platform and arrested him and Miss Gordon on charges of sedition and unlawful assembly. The crowd, numbering about 1,200, was quiet, and no other arrests were made. None of these facts was challenged at the trial.

It will be convenient to consider the evidence against each of the accused separately. The Crown produced two witnesses, both constables, to testify as to the words uttered. The following extracts from the evidence taken at the preliminary hearing contain all the sedition that was attributed to Miss Gordon:

Mr. Berthiaume (for the Crown). Qu'est-ce qu'elle a dit, Bella Gordon?

Constable J. Caron. Elle a dit: "Protest against arrest, deportation, fake justice, perquisitions (sic)—outrageous the way the police, tool of Govern-

ment, treat us workers. Outrageous the way justice and fake judges persecute workers. Outrageous the way those stool pigeons render false and lying evidence. We must do something to have liberty of speech, assembly, parade in Montreal. Organise demonstration: force the councilmen to give those things."

Constable Caron claimed to have taken down these remarks in longhand during the speech. He admitted on cross-examination that he had only written down ocasional phrases: "Je prenais ce qui m'interessait, ce qui me frappait le plus."

Constable Marion was the only other Crown witness who attempted to report Miss Gordon. His account of what she said at the meeting is this:

Je n'ai pas pris de notes. Je ne suis pas arrivé à temps. J'ai compris la question de "fake judge—organise monster demonstration." Elle a parlé de déportation. C'est le résumé de son discours.

In addition to these two pieces of testimony, certain pamphlets dealing with the work of the Labour Defence League were placed on record by the police as being seditious. On the strength of this total evidence Miss Gordon was sent up for trial.

At the trial, counsel for the defence produced a stenographic report of Miss Gordon's speech, taken by a stenographer who had been engaged for the purpose in the anticipation that the police might interfere with the meeting. This report shows the speech to have been as follows:

Miss Gordon: Comrades, before calling upon our speaker to address you, I wish to make a few remarks, to point out to you the purpose for which this meeting was called. This meeting has been called under the auspices of the Canadian Labour Defence League, to protest against the persecution of militant workers. This persecution is taking on various forms. It is taking on the form of smashing up workers' meetings; it is taking on the form of arresting speakers who dare to speak in the interest of the working class, it is taking on the form of deporting and persecuting foreign-born militant workers. In Montreal, in the last two weeks, we have had occasion to see how this persecution has been expressed in this city. Over a period of two weeks, we have had twenty-seven arrests of militant workers, and two or three workers' meetings have been smashed up. On the afternoon of Jan. 19th, when two or three hundred unemployed workers gathered together at the Labour Temple to discuss their problems on the basis of a programme of immediate demands, which was drawn up by the Unemployed Council of Montreal, this meeting was broken up, the unemployed workers dispersed, and eight arrests took place. The charges under which these workers were arrested are outrageous, and the evidence used against them is absolutely baseless. Five of the workers who spoke at this meeting are charged with sedition, inciting to riot, and being members of an unlawful assembly, just because these five workers addressed a meeting of unemployed, just because

they tried to help formulate demands for the unemployed, these five speakers are charged with sedition. Already two of the workers who came up for trial for speaking to unemployed workers about their problems have been sent to prison for three months and fifteen days respectively. They themselves were unemployed and participated in an unemployed meeting. Following this, twelve hundred workers in this city gathered to commemorate the death of Lenin. During this meeting a review was made of the present economic conditions in Canada. This meeting was broken up and eighteen arrests took place. Two of the workers arrested at this meeting are charged with sedition, and in the Courts, when the hearing took place, the evidence brought up against them was absolutely outrageous. It was claimed in Court by the police officers that they made statements which they never made, statements which are never in the mouths of workers. And on these framed-up charges they are trying to railroad these workers to jail on charges of sedition. The reason the workers wish to gather together to discuss their problems is due to the fact of the present economic conditions of this country. The workers are not responsible for the unemployment which is taking place, nor for the standard of living being reduced. They wish to protest against the present economic situation, and they have the right to get together and discuss their problems, and they are going to defend these rights. The Canadian Labour Defence League has secured twelve thousand dollars worth of bonds to bring them out of jail over a period of the last two weeks. The Defence League intends to actively defend the rights of those workers, the rights of those workers to be able to get together, the rights of free speech, rights of assembly, and the rights of these workers to organise, and we are going, I hope, to vindicate those rights.

Before calling upon our guest speaker, we have some literature here which deals with Labour Defence throughout the North American continent. (Here followed a list of pamphlets on sale). Comrades are in the aisles selling this literature.

I will now call upon Comrade Engdahl, secretary of the International Labour Defence League of the United States to address us.

The evidence against Louis Engdahl was less seriously conflicting, for the reason that the police took no notes themselves of his speech, being content to put in evidence stenographic notes of it made by Miss Gordon and removed from her person after her arrest. This report, which agrees almost word for word with that taken by the special stenographer who was brought to the meeting, is as follows:

Mr. Engdahl: Comrade Chairman and comrades and friends of Montreal, I want to bring to you special greetings here to-night and I think it is a pleasure and a privilege to bring this greeting to you, a greeting from the workers of the other side of the line who are fighting to-day just as you are fighting here in Canada to build a revolutionary movement of the working class, to build a proletarian movement of labour, so that we can become a universal international army of struggle. I want to bring to you to-night a message of greeting, of struggle, of a revolutionary battle from the workers of the United States of America to the workers here in Canada.

I do not come here to-night as a citizen of the United States coming to bring a greeting to you here as citizens of Canada, but I want to bring to you a greeting coming as a worker speaking for the workers of the United States, to complete the solidarity of the workers of Canada and the U.S.A.

The police, while accepting this report, contended that after his arrest Mr. Engdahl called out, "I am here to start a revolution with you fellow workers, and help you down the capitalists. Start the revolution! Long live the revolution!" Neither of the two stenographic reports contained these words, and the stenographer in attendance denied that they had been used.

The charge of unlawful assembly was dropped by the Crown after Inspector Bilodeau had testified that the meeting was perfectly orderly. The jury deliberated on the charge of sedition only, and returned a verdict of not guilty against both the accused.

Rex v. *Chalmers et al.*

David Chalmers, Phillip Richard, Dave Kaston, Thomas Miller and Fred Rose were the speakers at the meeting called on January 19th, 1931, in the Labor Temple, by the Unemployed Council of Montreal to discuss unemployment relief. They were each permitted to talk for fifteen or twenty minutes; the police then arrested them together and dispersed the audience. Several other arrests were made on minor charges. The indictment against the accused was worded thus:

Chalmers *et al.* at the City of Montreal, District of Montreal, on the 19th day of January, 1931, did, being members of an unlawful assembly speak seditious words and were parties to a seditious conspiracy in such a manner as to cause other persons in the neighbourhood of such assembly to fear on reasonable grounds that such persons so assembled will disturb the peace tumultuously.

A motion to quash the indictment on the ground that it did not set out the words claimed to be seditious was dismissed. At the trial the charge of being parties to a seditious conspiracy was abandoned, but the words "being members of an unlawful assembly" were not struck out, and the accused were tried on the rather curious charge of "uttering seditious words while being members of an unlawful assembly."

In this case, as in the preceding one, the Crown relied upon the notes of speeches taken by Constables Marion and Caron. These notes were again admitted to be phrases only selected from the body of each speech. Neither constable could write shorthand. The following two extracts from the evidence contain everything attributed

to David Chalmers and Fred Rose, and serve to illustrate the nature of the police reports.

Constable Marion: This is David Chalmers—Meeting called to adopt resolutions of out of workers (sic). Do not be afraid for police in the hall. If beat us they teach us the way to beat them. Stool pigeon in the hall working for the robbers of the City Hall. There is ninety-nine outside to protect him. Organise demonstration, parade in street. If police stop us, fight them. The time has come to strike. Speaking of the police, city council, Bennett, show them we are not afraid of them.

Later in the meeting, Chalmers spoke again, and is reported by Constable Marion thus:

Join the Young Communist League. Organise militant force. When comrade speakers say fight, not only with heart but with body. We can beat them any time. We are sixty to one. Must organise and mobilise militant force to destroy this capitalist class and other tools, federal and provincial government and city councils. They are only a bunch of crooks.

Fred Rose is reported to have delivered himself of the following:

Say something about winning the police. Says it is no use. Why not down Bennett and bunch of robbers? Do not let them have twenty millions in their pockets. Use force to get it. Not wait any longer; time has come for last blow. Who is capitalist class? In front Bennett, Taschereau and Houde's government. At the back millionaires. Down with bunch of crooks. Start with this town. Only way to get anything is demonstration in spite of police. If police stop us keep going on demonstrating. We are sure to succeed. Demonstrate and fight and struggle against this government and capitalists. They are worker fakirs and worse robbers. Speculating on sweat of us fellow workers.

The organizers of this meeting had not taken the precaution of engaging a stenographer, and consequently there was only oral testimony to set against the "notes" of the police. Five witnesses, all members of the Canada Labour Defence League, testified that these particular phrases had not been used by the accused. The jury accepted the police evidence, and found all five of the accused guilty. Later Wilson, J., sentenced them to one year each with hard labour. The case is being taken on appeal, one important ground being that in his charge to the jury the judge omitted to read section 133*a*, which was added to the *Criminal Code* by 20-21 Geo. V, c. 11, and which very considerably mitigates the rigour of the older definitions of sedition.

These two trials suggest that if the law of sedition is not to degenerate into an instrument for police tyranny the courts should be careful to exact full and correct reports of speeches. The advice of Cave, J., in *R.* v. *Burns*,[1] is still sound, namely that the jury should

[1] (1886), 16 Cox C.C. 355.

not look to isolated phrases, to a strong word here or an objectionable sentence there, but should judge upon the whole gist of the speech. This is impossible with such reporting as these cases indicate. The net result of Montreal's enforcement of the law of sedition is that men and women are being arrested, tried and sentenced solely on the evidence of semi-literate police constables who take down in longhand isolated remarks from speeches delivered in a language with which they are very imperfectly familiar.

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Criminal Code—Trafficking in and Using Empty Bottles—Liability of User for Tort.—In a comment on the case of *Leitch & Co., Ltd.* v. *Leydon*[1] in the October issue of the Review[2] the annotator said: "It is important from the viewpoint of an owner of bottles, a milkman, for instance, who delivers milk in bottles stamped with his name which a customer subsequently hands over to another milk-dealer for milk received by him. The question arises, is the milk-dealer who receives these bottles responsible to the owner if he fills those bottles with milk? It would seem that he would be liable in damages for using the property of another person, and yet if there was no contractual relationship between them, in the light of the present judgment he would hardly seem to be liable unless he kept the named bottles and used them as his own."

Two learned correspondents have pointed out that section 490 of the *Criminal Code* provides that "Every one is guilty of an indictable offence who . . . (b) being a manufacturer, dealer or trader, or bottler, trades or traffics in any bottle or siphon which has upon it the trade mark duly registered or name of another person, without the written consent of such other person, or without such consent fills such bottle or siphon with any beverage for the purpose of sale or traffic." Section 491 states, *inter alia*, that every one guilty of an offence defined in section 490 is liable to imprisonment, with or without hard labour, or to a fine, and that the chattel, article, instrument or thing by means of, or in relation to which, the offence has been committed shall be forfeited. It has been held that *mens rea* or guilty knowledge is not an essential ingredient of the offence with respect to the user of bottles.[3]

[1] [1931] A.C. 90; 47 T.L.R. 81.
[2] (1931), 9 C.B. Rev. 589.
[3] See *R.* v. *Coulombe* (1912), 20 Can. C.C. 31; 6 O.L.R. 99; *R.* v. *Newcombe* (1918), 29 Can. C.C. 249 (N.S.).

One correspondent is of the opinion that "no doubt the person prosecuting under section 490 would be entitled to one-half of the fine," and in this manner he would, in Canada, despite the decision in the case of *Leitch & Co., Ltd.* v. *Leydon,* receive some compensation for the criminal user of his bottles.[4] It is difficult, after a perusal of the relevant sections of the *Criminal Code,* to believe that the informer under section 490 is entitled to any portion of a fine which has been imposed upon a person convicted of the defined offence.

The other correspondent remarks that, "if the same facts as in the *Leitch* case arose in Canada, the *Leitch* case might not be an authority here because section 490 of the *Criminal Code* imposes in Canada the duty which the House of Lords held did not arise in the case before them." If the learned correspondent, in making the foregoing remark, contemplated that the *Criminal Code* abrogates directly the effect of the judgment in the *Leitch* case which sounded in tort, it must be pointed out that it is trite law that the Dominion Parliament in legislating in relation to criminal law[5] has no jurisdiction to create a new civil liability, a subject-matter committed exclusively to the provincial legislatures.

[4] See Criminal Code, sections 1036 (2), 1038.
[5] See B.N.A. Act, 1867, section 91, subsection 27.