CASE AND COMMENT.

HOMICIDE — SLAYER TAKING DISTRIBUTIVE SHARE IN VICTIM'S ESTATE.—A commentator in the *Law Quarterly Review*[1] has remarked that it is rare to find a headnote in the Law Reports commencing with the word *semble*. The headnote to *In re Pitts, Cox* v. *Kilsby*,[2] however, is framed in that manner. Farwell, J., raised, without deciding, the question: Can a sane murderer take a distributive share under his victim's intestacy? It is well settled in England that a murderer cannot succeed to the title to property which was devised or bequeathed to him by his victim.[3] The representatives claiming under the murderer cannot, any more than he could, enforce any claims resulting to him from his own crime.[4]

The Supreme Court of Canada in *Lundy* v. *Lundy*[5] held that a devisee cannot take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself, and that, in applying this principle, no distinction can be made between a death caused by murder and one caused by manslaughter, both offences having being formerly felonies. This principle is based upon public policy, for a man cannot take advantage of his own wrong.[6] The courts appear to have considered that the motive of the killing is immaterial. It is not necessary to find, in order to disinherit the devisee, that he killed his testator in order to acquire the property.[7] Conviction for the crime, it would appear, is not necesary, although in the English and Canadian cases the wrongdoers were actually convicted. The question for the court is whether murder or manslaughter has taken place and not whether a conviction has ensued.[8] Otherwise, in the case of a murder and the immediate suicide of the murderer the principle would not apply. If the will is made by the victim in the interval between the wound or the poisoning and death the slayer may share as a beneficiary.[9]

[1] (1931), 47 Law Q. Rev. 320.
[2] [1931] 1 Ch. 546.
[3] See *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; article: A Testator's Bounty to his Slayer, (1914), 30 Law Q. Rev. 211.
[4] See *Prince of Wales, etc., Association Co.* v. *Palmer* (1858), 25 Beav. 605; *In the Estate of Crippen*, [1911] P. 108.
[5] (1895), 24 Can. S.C.R. 650. See also, *In re Hall, Hall* v. *Knight and Baxter*, [1914] P. 1.
[6] See *Amicable Society* v. *Bolland* (1830), 4 Bligh, N.S. 194.
[7] See *In re Hall, Hall* v. *Knight and Baxter*, [1914] P. 1 at pp. 7, 8.
[8] See *In re Hall, Hall* v. *Knight and Baxter*, [1914] P. 1 at p. 4.
[9] See Taschereau, J., in *Lundy* v. *Lundy* (1895), 24 Can. S.C.R. 650 at p. 654.

The English and Canadian Courts have decided that no title to the property, legal or beneficial, passes to the wrongdoer. The late Dean Ames propounded a theory by which the legal title would pass to the slayer but that a constructive trust should be imposed upon the property.[10] The application of this theory by the courts would have obviated a difficulty which is presented to a court which holds that no title passes to the wrongdoer. A devisee or legatee takes by virtue of the *Wills Act* wherein there is not to be found that any incapacity is imposed upon the wrongdoer. Likewise, statutes governing the devolution of property designate, in the plainest words, the persons who shall succeed to the estates of intestates. The statutes provide, without any qualification, that if there is a son he shall take the estate. How is it possible for a court to designate a different person as a beneficiary? How can there be a public policy leading to one conclusion when there is a positive statute directing a precisely opposite conclusion?[11]

Farwell, J., in the *Pitts* case, was not obliged to decide that a sane murderer cannot take any benefit from his victim's intestacy because he was of the opinion that the murderer was so mentally unbalanced at the time of the murder that he was not responsible for his acts. The murderer had committed no crime and therefore neither he nor his estate could be deprived of any benefit arising from the intestacy of the person whom he had killed.[12] The *obiter dictum* of Farwell, J., to the effect that a sane murderer could not take a distributive share under his victim's intestacy is, however, of interest.

Murphy, J., of the British Columbia Supreme Court decided the point in *Re Medaini*,[13] and held that a murderer is not entitled to rank as a beneficiary of the estate of his victim whether under a will or upon an intestacy. To the objection that such a decision would be in contravention of the Statute of Distributions, he answered:

> The English Courts have decided that a murderer can take nothing under the will of his victim. The decisions are based upon public policy. I can see no reason why the principle is not applicable to cases of intestacy. The reason assigned in some American decisions for refusing to deprive a murderer of benefits accruing to him under the intestacy of his victim, is

[10] See article: Can a Murderer Acquire Title by his Crime and Keep it? (1913), Ames: Lectures on Legal History, 310. See also note: (1914), 27 Harv. L. Rev. 280; note: (1915), 28 Harv. L. Rev. 426; note: (1931), 29 Mich. L. Rev. 745.

[11] See *In re Houghton, Houghton* v. *Houghton*, [1915] 2 Ch. 173.

[12] See *Felstead* v. *The King*, [1914] A.C. 534; *Re Estate of Maude Mason* (1916), 31 D.L.R. 305; *In re Houghton, Houghton* v. *Houghton, supra.*

[13] [1927] 4 D.L.R. 1137.

that to do so would be to contravene the express provisions of the Statutes of Distribution. This reason would be equally valid in the case of a will which also depends upon a statute for its validity. . . . There is nothing which makes the Statutes of Distribution more sacrosanct than the Wills Act. If public policy is a good ground for over-riding the latter, it is equally so for acting likewise in regard to the former.

Farwell, J., in the *Pitts* case, was prepared to hold that a statute "however peremptory, would be read and construed subject to the public policy rule." Such a doctrine concerning the interpretation of statutes is fraught with dangerous possibilities of courts over-ruling the legislatures.[14]

S. E. S.

* * *

CONSTITUTIONAL LAW—BRITISH NORTH AMERICA ACT—SECTION 132—LEGISLATIVE JURISDICTION. In conformity with section 55 of the *Supreme Court Act*[1] the Governor in Council referred a number of questions as to the validity of the *Air Board Act*[2] and of the Air Regulations approved thereunder to the Supreme Court of Canada for its decision.[3]

The answer to these questions depended on the distribution of legislative powers between the Provinces and the Dominion as provided in sections 91 and 92 of the *British North America Act*,[4] and upon the interpretation given to section 132 of that Act which is as follows: "The Parliament and Government of Canada shall have all the Powers necessary or proper for performing the obligations of Canada toward Foreign Countries arising under Treaties between the Empire and such Foreign Countries."

As the first of these—the distribution of legislative powers—has been dealt with so often and at such length by both the Supreme Court of Canada and the Judicial Committee of the Privy Council, there is no particular point in discussing it further here. Cannon, J., summarized the issue very concisely as follows:

> Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:—
>
> (1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is

[14] See, however, Maxwell: Interpretation of Statutes, 7th ed., 180.

[1] R.S.C. 1927, c. 35.
[2] R.S.C. 1927, c. 3.
[3] *Re Aerial Navigation*, [1931] 1 D.L.R. 13.
[4] (1867), 30 Vict. c. 3 (Imp.).

of paramount authority, even though it trenches upon matters assigned to the provincial legislature by s. 92.[5]

(2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation unless these matters have attained such dimensions as to affect the body politic of the Dominion.[6]

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91.[7]

(4) There can be a domain in which provincial and Dominion legislation may overlap in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.[8]

Applying these four tests, I find (1) that aviation, even if designated as aerial navigation, is not a subject enumerated in s. 91, or in s. 92 (10). The works and undertakings connecting a Province with another Province or extending beyond the limits of the Province are "physical things, not services," as pointed out by Lord Atkinson in *Montreal* v. *Montreal Street R. Co.*[9] The air lines cannot be assimilated to railways as physical things and this authority applies with singular force to exclude federal control of aviation, unless the latter is assimilated to inter-provincial lines of navigation.

(2) Nothing before us shows conclusively that it is unquestionably a matter of national interest and importance and that it does not trench on any of the subjects enumerated in s. 92 or that it has attained such dimensions as to affect the whole body politic of the Dominion.

(3) My first finding disposes of the third test; this legislation is not necessarily incidental to effective legislation by Parliament upon a subject of legislation expressly enumerated in s. 91, amongst others "navigation and shipping, militia, military and naval service and defence," regulation of trade and commerce. Perhaps an all powerful national air board and an all-inclusive national air code would be the desideratum if we were drafting *de novo* s. 91, but under our peculiar dual form of government, it is difficult to see how such results can be accomplished without ignoring the federal constitution. Such legislation might be required in case of war, in time of extraordinary peril to the national life of the Dominion, but this Act was not passed for such an emergency, and it cannot be justified as an exception to the exclusive right of the Provinces to legislate concerning property and civil rights.

(4) This legislation, so far as property and civil rights are concerned, does not touch a domain where provincial and Dominion legislation may

[5] See *Tennant* v. *Union Bk.*, [1894] A.C. 31.
[6] See *A.-G. Ont.* v. *A.-G. Dom.*, [1896] A.C. 348.
[7] See *A.-G. Ont.* v. *A.-G. Can.* (the Assignments & Preferences Case), [1894] A.C. 189, and *A.-G. Ont.* v. *A.-G. Dom.*, [1896] A.C. 348.
[8] See *G.T.R.* v. *A.-G.*, [1907] A.C. 65.
[9] [1912] A.C. 333.

overlap. The ownership of the air space is *prima facie* a subject within the exclusive jurisdiction of the Provinces; and they alone can impose restrictions to the rights of the owners of land and to those of the owners of aircraft. Almost every federal power could be somewhat more conveniently exercised if some portion of provincial sovereignty were added to it. This rule for the extension of the federal power should require a strict necessity for its application. If mere convenience is to be a sufficient cause, then assuredly the reservation to the Provinces of the control of property and civil rights is meaningless and futile. As pointed out by my brother Duff, in *Montreal* v. *Montreal Street R. Co.*,[10] "division of legislative authority is the principle of the 'British North America Act,' and if the doctrine of necessarily incidental powers is to be extended to all cases in which inconvenience arises from such a division, that is the end of the federal character of the Union," and paraphrasing Lord Atkinson's statement in the same case:[11] "It cannot be assumed that the legislatures will decline to co-operate in a reasonable way to effect an object so much in the interest of both the Dominion and the province as the regulation of air traffic.

The other matter, however, having to do with the practical effect of section 132 of the Act, is rarely before the courts, but in view of the growing importance of Canada as a world power it seems inevitable that it will have to be interpreted much more often in the future. For this reason, it is extremely interesting to study the opinions expressed by the members of the Supreme Court in this case, and to compare them with decisions handed down in other earlier cases that turned upon the Dominion's powers to pass legislation implementing international treaties, conventions and agreements.

In the present case there was general agreement that the convention relating to the regulating of aerial navigation is a treaty between the Empire and foreign countries within the meaning of section 132 of the *British North America Act.* Newcombe and Cannon, JJ., were ready to recognize the power of the Dominion Parliament, under section 132, to legislate, but they were not prepared to admit that this power involved or implied the supersession of provincial legislation by Dominion legislation; while Smith, J., with whom Anglin, C.J., agreed, although of the opinion that the Dominion power is not exclusive but merely paramount, contended that the Dominion could exercise this power regardless of any provincial legislation existing, proposed or possible. Smith, J., said:

It is argued here, on behalf of the Provinces, that where there is a stipulation in a treaty that something shall be done that the Provinces have jurisdiction to do, it is only on failure of the Provinces to discharge the

[10] (1910), 11 C.R.C. 203 at p. 234.
[11] See [1912] A.C. 333 at p. 346; 1 D.L.R. at p. 688.

provincial obligations that the Dominion has jurisdiction to intervene. This contention seems to be totally at variance with the decision of the Privy Council in the case just referred to, which holds that, apart from the question of jurisdiction over aliens, the Dominion Parliament had jurisdiction to implement the treaty by legislation, and that the Province could not validly enact legislation inconsistent with the principle of the Dominion legislation.

It follows, in our opinion, that the Dominion Parliament has paramount jurisdiction to legislate for the performance of all treaty obligations, and that, while a Province may effectively legislate for that purpose in regard to any matter falling within s. 92 of the B.N.A. Act while the field is unoccupied by the Dominion (but not otherwise), Dominion legislation, being paramount, will, when enacted, supersede that of the Provinces about such matters. The answer to the first question, therefore, substituting the word "paramount" for the word "exclusive," is in the affirmative.[12]

Duff, J., too, considered that the Dominion under section 132 might exercise all the powers necessary for giving effect to the 1919 convention and might legislate accordingly. Because these views are on the whole more in accord with the decision of the Privy Council in the *Japanese Treaty Case*[13] and of the Manitoba Court of Appeal in the *Migratory Birds Convention Case*,[14] and because they are the more generally accepted views, it is desirable to examine in greater detail the ideas of Newcombe and Cannon, JJ., for they are unusual (particularly those of Newcombe, J.), and if adopted would seem likely to increase the intricacies of Canada's foreign relations, and would preserve and even enlarge existing provincial powers. This can best be done by quoting a few passages from the opinions in which the matter is discussed. Newcombe, J., stated:

It is not denied, and no reason has been suggested to doubt, that the convention is a treaty; but the language of s. 132 does not require, either expressly or by necessary implication, nor, I think, does it suggest, that a Province should thereby suffer a diminution of the powers expressed in its enumerations or otherwise conferred, except to admit capacity on the part of the Dominion, which, in relation to provincial obligations, is no more than concurrent, so long as these are not performed by the Province. The case of obligations to be performed for which a Province has become bound by treaty to a foreign country, though perhaps difficult to realize, is expressly provided for by s. 132; and, while, pending provincial non-performance, power is, by that section, conferred upon the Parliament and Government of Canada, I am unable to interpret the Dominion power as meant to deprive the province of authority to implement its obligations. If that had been the intention, I think it would have been expressed. For example, to put a simple case, which perhaps conceivably may be imagined,

[12] [1931] 1 D.L.R. 13 at p. 42.
[13] [1923] 4 D.L.R. 698; [1924] A.C. 203.
[14] [1925] 1 D.L.R. 12.

if a Province were bound by treaty between the Empire and a foreign country to pay a sum of money borrowed on the sole credit of the Province, and if the Province, by direction of its Legislature, were in due course to cause the money to be paid, I do not doubt that the obligation would thereby lawfully and constitutionally be discharged, even without any action on the part of the Parliament or Government of Canada.

. . . Granted that under s. 132 the Parliament has authority, in excess of its powers elsewhere defined, to authorize the performance of treaties, the language of the section is not the less restricted to treaty obligations towards foreign countries, and it is to such obligations that the question addresses itself. When, therefore, it is considered that the Court has no jurisdiction over a foreign sovereign, except by submission, and that the foreign States, party to the convention, have made no submission, it results, as I am disposed to think, that this Court ought not to determine, under the present procedure, a question which involves the definition of the treaty obligations; and, especially so, seeing that the interpretation of the convention is, by art. 37, to be determined by the Permanent Court of International Justice, or, previously to the establishment of that Court, by arbitration.[15]

Cannon, J., stated:

As already stated, the treaty was signed on behalf of the Empire on October 13, 1919, and ratifications deposited in Paris on June 1, 1922.

The Air Board Act was assented to on June 6, 1919, before the Parliament of Canada could invoke s. 132 to secure the power of performing the obligations of Canada under a treaty which was not then in existence. It requires an existing treaty to give validity to legislation, not merely a prospective convention.

But the Act has been re-enacted as R.S.C. 1927, c. 3, which, under proclamation, came into force and had effect as law on, from and after February 1, 1928, pursuant to the Act respecting the Revised Statutes of Canada, assented to on July 19, 1924. At both the latter dates, the convention was in force. But at no time has the Parliament of Canada, as they had done for the Japanese Treaty, passed an Act providing that the treaty should be thereby sanctioned and declared to have the force of law in Canada.

I would therefore answer the first question as drafted in the negative. The Parliament and Government of Canada may have paramount, though not exclusive, legislative and executive authority for performing the obligations of Canada, or any Province thereof, under the convention, but have not yet found it necessary or proper to exercise such legislative power.

By inserting the words "or of any province thereof" in s. 132, the Fathers of Confederation seem to imply that some of the Treaty obligations might, as an internal matter, be considered as within the jurisdiction of Canada as a whole, and others as within the provincial competence.

If the Provinces, or any of them, refuse or neglect to do their share within their legislative ambit with sufficient uniformity to honour the signature of the Dominion, then the question may come before Parliament which might, in a preamble explain why it had become either necessary or

[15] [1931] 1 D.L.R. 13 at p. 32 *et seq.*

proper, to legislate and make regulations under the special powers given by s. 132. This has not yet been done and, with the data submitted, I cannot answer the question in the affirmative. Moreover, if the word "generally" in the question is equivalent to "in every respect," the answer is in the negative.[16]

These views are extremely interesting, but, they would appear to be incorrect, because they seem to assume that it is the duty of other nations to go to the trouble, delay and expense of having an international tribunal determine, in every respect, the exact obligations of all the interested parties arising out of a treaty before the Dominion is bound or even permitted to give effect to such international agreements by legislation. If the Supreme Court of Canada, and Newcombe, J., in particular, are so reluctant (as he appears to be on page 33 *et seq.* of his judgment) to answer certain questions properly put to them, why should he expect an international court to be any more ready to answer even more difficult general questions in respect of the interpretation of a whole treaty? Nor can it be considered that the views that the Dominion may not implement a treaty unless the Provinces have failed to carry out their obligations thereunder as suggested on pp. 32 and 53 are correct, for that would give to the Provinces a place in international law which is quite unwarranted. The obligations arising under international treaties and conventions are the obligations of one state toward another state, and are binding, if properly entered into, regardless of domestic constitutional difficulties. It seems much more probable that section 132 was inserted for the express purpose of preventing any provincial complications arising, than that it was a recognition that there were certain international rights within provincial competence.

Here it is interesting to note the view of Holmes, J., of the United States Supreme Court in the case of *Missouri* v. *Holland*[17] in dealing with the same conflict of powers in the United States. He said:

> We do not mean to imply that there are no qualifications to the treaty making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but a treaty followed by such an act could, and it is not lightly to be assumed that in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.

In this connection one should consider the views of the Supreme Court of Canada in the case *Re Treaty of Versailles, Re Hours of*

[16] [1931] 1 D.L.R. 13 at p. 52.
[17] 252 U.S. 416.

Labour;[18] *In the Matter of Legislative Jurisdiction over Hours of Labour*.[19] There the question before the Court was not the obligations of the Dominion arising out of a convention already in existence, but rather whether certain matters which might be embodied in an international convention binding on Canada were within provincial or Dominion competence, and the Court found, as it seems it was bound to find, in the absence of an Empire treaty, that certain of the matters were within the provincial competence. It has not been doubted that the Dominion had the power and rightly exercised it, in giving effect to the Treaty of Versailles and the other Treaties of Peace by appropriate Dominion legislation. For these and other reasons[20] it is submitted that the Dominion Parliament has the power and is the proper body to pass legislation implementing "Empire Treaties," even where these treaties deal with matters that ordinarily are within the legislative jurisdiction of the Provinces.

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Constitutional Law — Military Officers—Provincial Traffic Act—Legislation Binding the Crown.—In the annotation on the case of *Rex* v. *Anderson*[1] the learned annotator suggested that military officers of the Crown driving motor-cars might reasonably be brought under provincial laws in the matter of speed-limits.[2] I have suggested that this might be possible if the soldier was exceeding the speed-limit outside military necessity.[3] Since I wrote I have found some further information which it may be well to put on record, as the case as a whole raises some important points. In *Cooper* v. *Hawkins*,[4] the question arose as to the exemption of the Crown from the *Locomotives Act, 1865*, under which power is given to the local authorities to regulate speed-limits in places subject to their jurisdiction. The appellant was employed by the Secretary of State for War; and during the course of his employment, and under orders from his superior officer, he exceeded the speed-limits on a street in Aldershot. It was contended that the particular regula-

[18] [1925] 3 D.L.R. 1114.
[19] [1923] S.C.R. 505.
[20] See an excellent discussion of this question by A. W. Rogers: (1926), 4 C.B. Rev. 40.

[1] (1930), 39 Man. R. 84; [1930] 2 W.W.R. 595.
[2] (1930), 8 C.B. Rev., pp. 747-9.
[3] Kennedy and Wells: *The Law of the Taxing Power in Canada* (Toronto, 1931), pp. 146-7.
[4] [1904] 2 K.B. 164.

tions laid down in the Act were for the benefit and safety of the public and that therefore the Crown was bound without being specially mentioned in the Act.[5] Lord Alverstone, C.J., said that looking at the language and objects of the Act, and at the power given to the local authorities to vary it, it could not be a general enactment which would bind the Crown by necessary implication. Wills, J., concurred, adding, however, that "if the man were drunk, or under circumstances in which he was not performing a public duty, and was not acting in accordance with superior orders, he would be liable, although driving an engine belonging to the Crown." At any rate the case was sufficient authority to exempt officers of the Crown from penalties for exceeding the speed-limit when acting in the course of their duty; and it has been necessary, under the recent motor-legislation of 1930 in England, to make clear its application as to speed-limits, etc., to the agents of the Crown.

In an Australian case[6] the facts were somewhat similar to those in *Rex* v. *Anderson.* A motor-driver in the Air Force, acting under the instructions of his superior officer, drove a car in Melbourne without being in possession of a licence as required under the Victoria *Motor Car Act, 1915.* The High Court of Australia, following its reinterpretation of the rule in *D'Emden* v. *Peddar,*[7] dealt with the Victorian statute by asking the question, was it in conflict with the federal law on the matter? In other words: did the Australian *Defence Act* give immunity from the Victoria *Motor Car Act, 1915*? If so, the federal law must prevail under the immunity established under section 109 of the *Commonwealth of Australia Constitution Act, 1900,*[8] as interpreted in the *Engineers'* case.[9] The Court found that the immunity could have been given under the Australian Military Regulations issued under the authority of the *Defence Act* with the force of law; but that, since no such regulation had in fact been made, the Victorian statute consequently prevailed. It was, however, open to the executive authorities of the Commonwealth by issuing an appropriate regulation, to annul the operation of the statute in question in relation to drivers' licences for the operation of military cars.

Doubtless, *Pirrie* v. *MacFarlane* does not throw much light on our Canadian problem, as the decision went off on a point in Australian

[5] Cf. *Cayzer, Irvine & Co. Ltd.* v. *Board of Trade,* [1927] 1 K.B. 269. See especially Sir John Simon (*arguendo*).
[6] *Pirrie* v. *MacFarlane,* [1928] 36 C.L.R. 140.
[7] 1 C.L.R. 91.
[8] 63 and 64 Vict. c. 12.
[9] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.,* [1920] 28 C.L.R. 129.

constitutional law; and I respectfully submit that a province cannot compel a military motor-driver, driving in the course of his duty, to possess a provincial licence any more than a province could compel a soldier to carry a licence for his rifle. The speed-limit, however, raises another problem: Can a province bind the servants of the Crown to observe speed-limits without express legislation? Here *Cooper* v. *Hawkins* is in point. A further question arises: Would such provincial legislation be legitimate interference with a capacity lawfully created by the Dominion? In other words, and apart from the exceptions noted by Wills, J., can a province control the speed-limits of military cars operated in the course of military duties as seen by a superior officer; and, if so, can it do so by legislation which does not expressly bind the Crown?

In conclusion it is of interest to the present discussion to note that the Supreme Court of Nova Scotia has held that the Crown is bound by an Act made for the public good and for the prevention of injury to the public, although not expressly named in the Act, and that therefore an officer of the Crown is liable for driving a motor-vehicle recklessly and without due regard for the traffic, even though, at the time, he was proceeding in the execution of his duties. The officer in question was a customs preventive officer; and Harris, C.J., and Chisholm, J., were careful to point out that the circumstances of the case and the unreasonableness of the driving must be taken into consideration.[10] In other words, necessity is a good defence; but the officer of the Crown must prove that the carrying out of his duty necessarily justified his action. This is a reasonable deduction from the report on the Featherstone Riots[11] and from *Regina* v. *Smith*.[12]

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CONTRACT—TORT—REMOTENESS OF DAMAGE. A recent decision of the Supreme Court of Nova Scotia, *Humphries* v. *Pictou County Power Board*,[1] has brought into prominence the question as to whether or not the rules as to remoteness of damage are the same in actions of tort and of contract. More specifically the problem is as to the relation between the rules laid down in

[10] *Rex* v. *McLeod*, [1930] 4 D.L.R. 226.
[11] C. 7234.
[12] [1900] 17 Cape of Good Hope S.C.R. 561.

[1] [1931] 2 D.L.R. 571.

Hadley v. *Baxendale*[2] in 1854 and applied ever since as the rules governing remoteness of damage for breach of contract and the rule laid down by the Court of Appeal in 1921 in the much discussed case of *In re Polemis and Furness Withy & Company*[3] which is generally considered as having established a new test of remoteness, not only applicable to negligence but to all torts. The problem may be suggestively put in this form. Is the test of remoteness of damage the same in actions of contract and of tort? Has the rule in *Hadley* v. *Baxendale* been superseded by that in the *Polemis* case?

For present purposes the rules in *Hadley* v. *Baxendale* may be thus stated. Damages for breach of contract are such as:

(1) May fairly and reasonably be considered as naturally arising from the breach of contract according to the usual course of things.

(2) May reasonably be supposed to have been in the contemplation of both parties when making the contract as a probable result of a breach of it.

With this may be contrasted the rule obtaining in cases of tort before the *Polemis* case. It was thus stated by Salmond in 1920.[4]

A wrongdoer is liable for "(a) damage which he intended; and (b) damage which is the natural and probable consequence of the wrongful act. . . . Damage is too remote if it is neither the *intended* nor the *natural and probable* result of the wrongful act. Every man is responsible for damage which he intended to result and which did result from his wrongful act, however improbable it may have been. Every man is also liable for the natural and probable results of his wrongful act, even though not intended by him. But no man is liable for consequences neither intended nor probable. Damage is said to be natural and probable when it is so likely to result from the defendant's act that a reasonable man in the circumstances of the defendant and with the defendant's knowledge and means of knowledge, would have foreseen and avoided it."

"In other words, the test of remoteness of damage was treated as identical with the test of negligence. The foresight of a reasonable man was used as a test to determine not merely whether the defendant had been guilty of negligence, but also the extent of his liability for the consequences of such negligence."[5] That is to say, foreseeability was the test both as to the existence of negligence and of liability for the particular consequences of it.

[2] (1854), 9 Ex. 341.
[3] [1921] 3 K.B. 560.
[4] Salmond on Torts, 5th ed., pp. 131-3.
[5] Salmond, 7th ed., pp. 152-3.

In the *Polemis* case "foreseeability" as a test of remoteness was definitely rejected and it was held that negligence being proved, or admitted, liability for the particular consequences of that negligence depends solely upon whether or not they are the direct consequences of the negligent act or omission. Foreseeability determines the existence of negligence but it has nothing to do with the question as to liability for the consequences which in fact ensued; for such consequences directly resulting from the negligence liability attaches whether the defendant could have foreseen them or not.

Warrington, L.J., said (p. 574): "The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act." So also Scrutton, L.J. (p. 576): "I cannot think it useful to say the damage must be the natural and probable result. . . . To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage that it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial."

The decision in the *Polemis* case has been much criticised by learned writers,[6] but it has been said that it is the law in England, subject to review only in the House of Lords.[7] It has, moreover, been applied in England and in Canada in cases of tort.[8] The judgment has nullified many old authorities and has rendered the difficult subjects of remoteness of damage and of proximity of causation even more difficult. No discussion of these wider aspects of the decision can be here attempted, though for the convenience of the

[6] Goodhart: Liability for the Consequences of a Negligent Act, Essays in Jurisprudence, (1931), pp. 110-28; Cf. also "The Palsgraf Case" *ibid.* pp. 129-50, wherein the views of various writers on the subject are analyzed; Sir Frederick Pollock: Liability for Consequences, (1922), 38 Law Q. Rev. 165.

[7] Cf. Pollock on Torts, 12th ed., p. 31.

[8] *Harding* v. *Edwards & Tatisich* (1929), 64 O.L.R. 98. *Jeffrey & Sons, Ltd.* v. *Copeland Flour Mills Limited* (1922), 52 O.L.R. 617; Cf. *Regent Taxi & Transport Company* v. *La Congregation etc.*, [1929] S.C.R. at p. 660.

profession references are given below[9] to various scholarly essays on those subjects.

There is authority—antecedent to the *Polemis* case—for saying that upon the question of remoteness of damage there is no distinction between actions of contract and of tort.[10] Thus as late as 1920 Lord Sumner said:[11] "The damage must be such as would flow from the breach of duty in the ordinary and usual course of things. That is the general rule, *both in contract and in tort*, except that in contract the law does not consider as too remote such damages as were in the contemplation of the parties at the time when the contract was made. Subject to that, only such damages can be recovered as were immediately and naturally caused by the breach."

It may be doubted whether it can be said that there is any identity to-day between the rules as to consequential damages in contract and in tort as exemplified in *Hadley* v. *Baxendale* and the *Polemis* case, treating the latter for the moment as a decision in tort. It is submitted that opposed conclusions may be arrived at in a given case accordingly as it is treated as sounding in contract or in tort; for the criteria as to proximity of causation and remoteness of damage are, it is submitted, sufficiently different to prevent any uniformity of result.

Such a situation was presented in the Nova Scotia decision, above referred to, and in which the facts were as follows:

The defendant supplied power to the plaintiff to operate a motor in his barn and also supplied electric energy to the plaintiff to light his residence. The plaintiff failed to pay for the power supplied to the barn and the defendant in March, 1928, cut off that power, there then being a small balance owing. On March 29, the defendant advised the plaintiff that unless the power account was paid it would be necessary for it to disconnect his house light service for the protection of the power account. The light service was not, however, cut off. On August 20, a further notice of pending disconnection

[9] See Smith: Legal Cause in Actions of Tort, (1911), 25 Harv. L. Rev. 103, 223, 303; Harvard Essays, 649; Terry: Proximate Consequences in the Law of Torts, (1915), 28 Harv. L. Rev. 10; Beale: The Proximate Consequences of an Act, (1920), 33 Harv. L. Rev. 633; Harvard Essays, 730; Bohlen, Studies in Torts, 1; McLaughlin: Proximate Cause, (1926), 40 Harv. L. Rev. 149; Salmond, 7th ed., pp. 147-165; Pollock on Torts, 13th ed., pp. 32-42; Holdsworth, H.E.L. vol. viii, p. 449; 8 C.E.D. 18 (Ont.), 28-36.

[10] Mayne on Damages, 10th ed., p. 95, citing *The Notting Hill* (1884), 9 P.D. 105 at p. 114, and *Cobb* v. *G.W. Ry. Co.*, [1893] 1 Q.B. 459 at p. 464; Pollock on Torts, 13th ed., p. 38; *H.M.S. London*, [1914] P. 72 at p. 77; 10 Halsbury, p. 310; Cf. *Admiralty Commrs.* v. *S.S. Susquehanna*, [1926] A.C. 655 at p. 661, for a similar suggestion made subsequent to the *Polemis* case. See also as to the tests applied: *Great Lakes S.S. Co.* v. *Maple Leaf Milling Co. Ltd.* (1923), 54 O.L.R. 174; 41 T.L.R. 21 (P.C.). Cf. *Admiralty Commrs.* v. *S.S. Amerika*, [1917] A.C. 38 at p. 61.

[11] *Weld-Blundell* v. *Stephens*, [1920] A.C. 956 at p. 979. Cf. Clerk & Lindsell on Torts, 8th ed., p. 125.

was given and on August 23 the light service was cut off. At no time was the plaintiff in default with respect to the account for lighting. The plaintiff about 7.00 p.m. discovered that the lights had been disconnected, and borrowed a lamp. He and his son later went out and the plaintiff on returning left the lamp downstairs for the son. Later having occasion to go downstairs he lighted a match which apparently went out and owing to the darkness he fell down stairs and received the injuries for which he claimed in an action for breach of contract. The jury found that he had sustained damages to the extent of $6,000.00 "by reason of the defendant cutting off his light." Judgment having been entered for that amount and costs, the defendant appealed. The appeal was allowed, Graham and Carroll, JJ., dissenting.

CHISHOLM, J. (now C.J.), said that the plaintiff had had sufficient notice of the intended disconnection to have been prepared for it. The learned judge could not accept the contention that the defendant was bound to furnish light so long as the bill therefor was paid, notwithstanding the plaintiff's failure to pay the power account. He applied *Hadley* v. *Baxendale*, as the leading authority on the measure of damages in contract and held the damage did not fall within either of the two rules there laid down and was therefore too remote. He disposed of the *Polemis* case by saying that there the damage was directly caused while that could not be said of the case at bar.

PATON, J., held the damages too remote. The accident was caused by the plaintiff's own negligence, and his injuries were neither the natural nor direct consequence of the cutting off of the current.

ROSS, J., agreed with CHISHOLM, J., on the question of remoteness and adopted the rule in *Hadley* v. *Baxendale*, and held that the damages did not arise naturally from the alleged breach of contract nor could they be supposed to have been within the contemplation of the parties at the time they made the contract. The facts differed from those in the *Polemis* case but even if that case could be invoked he thought that the damages were not the direct result of the alleged breach; for assuming that thereby a dangerous condition was created, there had intervened between the breach and the damage an act of negligence on the part of the plaintiff (e.g. proceeding about the house in the dark) which precluded recovery.

GRAHAM, J., dissenting, pointed out that the defendant's act was a tort, as well as a breach of contract, and though the action had been framed both in tort and in contract and had been tried as one of tort the tortious quality of the act and its legal consequences were not thereby affected. At any rate there could be no distinction so far as remoteness of damage was concerned between actions in contract and in tort particularly where, as in the case in hand, the breach of contract was also tortious. Considering the action merely as one of breach of contract, it was plain that the fact that an inmate might fall if the light were cut off was a consequence which the defendant should have contemplated at the time the contract was made and therefore the damage was not too remote. Applying the principle of the *Polemis* case the same result followed, for the defendant's wrongful act had created a source of danger, i.e., darkness, which was a continuing, and the direct, cause of the injury.

CARROLL, J., dissenting, held that the defendant's act in disconnecting the light service because of failure to pay for the power service was a breach of

contract. He applied the principle of the *Polemis* case and held that the defendant by its wrongful act created a source of danger and was liable for all the damage which in fact ensued as the result thereof and that it was immaterial that the damage came about in a way so abnormal and unlikely that the defendant had no reason to anticipate it. The damages were therefore not too remote.

The difficulties presented in the above case lead to the inquiry: Did the *Polemis* case lay down a rule of remoteness applicable to cases of contract or to cases of tort?

In 1927 Dr. Winfield[12] took a point which seemingly had escaped notice. Inquiring as to how far the rule in the *Polemis* case applies to damages arising from breach of contract, he said:

> The case itself arose on a clause in a charter-party which, of course, is a contract, and one would have no hesitation in regarding it as of general application to contracts but for the curious fact that while writers on the law of contract ignore *Polemis, In re,* books on the law of torts claim it as within their province, and hold it to extend to all torts and not simply to negligence, a view which seems to be correct. It is, however, perhaps safe to infer from *Weld-Blundell* v. *Stephens* that the principle of the *Polemis Case* includes all contracts, subject to a qualification shortly to be stated.

Sir F. Pollock is impressed with the difficulties arising from the point made by Dr. Winfield.[13] He points out that in the *Polemis* case no reference was made to *Hadley* v. *Baxendale.*[14] Clearly, he says, the Court could not and did not intend to over-rule that decision and even the House of Lords would hardly do so. But the Court of Appeal did positively repudiate for tort the very test, that of a reasonable man's foresight, which the Court of Exchequer had positively adopted for contract. He seems quite at a loss as to how the rule in the *Polemis* case can be applied to cases of breach of contract without radically limiting the rules in *Hadley* v. *Baxendale* or nullifying them entirely.

It would, of course, be possible to escape any conflict by treating the *Polemis* case as applying exclusively in tort and *Hadley* v. *Baxendale* exclusively to breaches of contract. But the fact still remains that the rule in the *Polemis* case was enunciated in a case of breach of contract. What then is the authority of the judicial opinions upon liability in tort which were thus accidentally delivered in a

[12] Salmond and Winfield on Contracts, p. 506; See discussion of this point in article: Remoteness of Damage, 65 Law Journal at pp. 313-4.

[13] See Book review: (1928), 44 Law Q. Rev. at p. 101; Pollock on Torts, 13th ed., pp. 37-9.

[14] Dr. Winfield in his Province of the Law of Tort, (1931), p. 42, regards it as a possible conclusion that *Hadley* v. *Baxendale* was not affected and thinks that if the *Polemis* case does apply to contract it does so only subject to the qualification set up by the rule in the earlier decision. Dr. McNair would confine the *Polemis* rule to tort: *vide* article, (1931), Camb. L. Jour.

case of contract? Sir Frederick's conclusion is that "the result, surprising as it may seem, appears to be that the judgments in the *Polemis* case were delivered *per incuriam* as regards the nature of the cause of action, and the reasons given are only extra-judicial opinions fully open to reconsideration, and perhaps not binding even in courts of first instance."[15]

The learned editor of Salmond on Torts notices,[16] the fact that Sargant, L.J., in *Hambrook* v. *Stokes*[17] distinguished *In re Polemis* on the ground that in it the liability was based on a duty under contract, but he points out that the *ratio decidendi* did not distinguish between contract and tort, and that *Smith* v. *London & S.W. Ry.*[18] which was there quoted and applied was a case of pure tort. Mr. Goodhart[19] takes somewhat the same point and submits "that the rule in the *Polemis* case cannot be limited to duties by contract and that the fact that there was a contract in that case cannot affect the *ratio decidendi* which does not distinguish between contract and tort."

The decision[20] of Branson, J., in *Kasler & Cohen* v. *Slavouski*[21] has been cited as evidence "that both the Bench and Bar are hesitant in citing and applying the *Polemis* case," adverting to the fact that in the *Kasler* case the question was one as to remoteness of damage in contract but that "neither in the argument of counsel nor in the decision of the learned judge was *Re Polemis* cited."

In view of the foregoing considerations it is to be hoped that some enterprising barrister will take the point that the rule in the *Polemis* case applies in the case of a breach of contract and thus afford the opportunity for a clearer determination of the extent of its application. It would be a more hazardous venture to raise the contention that the rule is not binding authority in cases of tort, however much it may be respected as embodying the *dicta* of eminent judges.

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[15] Pollock on Torts, 13th ed., p. 39.
[16] 7th ed., p. 156.
[17] [1925] 1 K.B. 141 at p. 156.
[18] (1871), L.R. 6 C.P. 14.
[19] Essays on Jurisprudence, p. 128.
[20] See note: (1928), 44 Law Q. Rev. 142.
[21] [1928] 1 K.B. 78. Cf. *G. & A. Slavonski* v. *La Pelleterie etc.* (1927), 137 L.T. 645.