THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editorial Board, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

COUNCIL MEETING OF THE CANADIAN BAR ASSOCIATION

The Mid-Winter Council Meeting of The Canadian Bar Association will be held at the Seigniory Club, Montebello, P.Q., on Saturday, February 5th, 1938, at 11.30 A.M.

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CASE AND COMMENT

CONFLICT OF LAWS—FOREIGN DIVORCE—RIGHT OF PARTY WHO HAS INVOKED FOREIGN JURISDICTION TO QUESTION THAT JURISDICTION AND DENY VALIDITY OF DECREE.—The recent case of *In re Graham Estate*[1] dealt with the right of a party to deny the validity of a divorce decree for lack of jurisdiction, the decree having been obtained at her suit in a foreign country. The facts were that G, the intestate, had married the claimant, Mary G, in 1887; that in 1910, when G was domiciled in the Province of British Columbia, Mary G petitioned for and obtained a decree of divorce in the State of Washington; that both G and Mary G subsequently remarried other persons and on G's death intestate Mary G claimed a share of the estate as his wife, on the ground that the divorce of 1910, being granted by a court which was not the court of the domicile, was granted without jurisdiction and was therefore incapable of dissolving the marriage.

Manson J. disallowed the claim of Mary G. on the ground that, although the 1910 decree was invalid for the reason given

[1] [1937] 3 W.W.R. 413.

above, "the Washington proceedings were taken by the wife and she cannot now be heard to question the validity of the decree of the court whose jurisdiction she invoked".[2]

It is interesting to examine the basis of the principle applied in this case and to note the extent of its acceptance in Canadian courts, in view of the number and variety of cases in which it may be applied.[3] Such a rule may be based either upon estoppel,[4] in which case it must be shown that the other party has acted upon the invalid decree believing it to be valid, or upon the ground that a person who has invoked the jurisdiction of a foreign court cannot be heard to question the existence of that jurisdiction.[5]

The earliest Canadian case is that of *Stevens* v. *Fisk*,[6] in which W, who had obtained a divorce in the State of New York, sued H in Quebec for an accounting of the administration of her property. H denied the validity of the divorce on the ground that he was domiciled at the time in Quebec but this defence was rejected, one of the grounds of the decision being that "independent of any question of domicile, he having appeared and submitted to and not questioned the jurisdiction is bound by the decree and cannot now be allowed to affirm that the court had no jurisdiction to pronounce it and claim that the marriage dissolved in New York in a proceeding to which he was an unobjecting party and which he does not appear even till now to have questioned, is subsisting in Quebec".[7] Gwynne

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[2] [1937] 3 W.W.R. at p. 415.

[3] For a full discussion of the American authorities see Jacobs, *Attack on Decrees of Divorce* (1936), 34 Mich. L. Rev. 749 - 808; 959 - 978; also (1937), 21 Minn. L. Rev. 599 - 600. The principle has been accepted in the RESTATEMENT OF CONFLICT OF LAWS: Paras. 112 and caveat, 451 and caveat.

[4] *Cf. Toronto Railway* v. *Toronto Corporation*, [1904] A.C. 809 at p. 815. "The order . . . . . was not therefore the decision of a court having competent jurisdiction to decide the question in issue in this action and it cannot be pleaded as an estoppel." The order referred to was being attacked in the jurisdiction in which it had been given and was a nullity even there. It may be distinguished from a divorce decree which is valid in the country in which it is granted but which may be treated as invalid outside that country.

[5] *Starbuck* v. *Starbuck* (1903), 173 N.Y. 503; 66 N.E. 193, Haight J. at p. 194: "We do not determine that question (*i.e.*, of estoppel) at this time. We prefer to rest our decision upon the principle that the plaintiff, having invoked the jurisdiction of the Massachusetts court and submitted herself thereto, cannot now be heard to question the validity of its decree." *Burnfiel* v. *Burnfiel*, [1925] 3 D.L.R. 935; Mackenzie J. at p. 939; reversed on another ground [1926] 2 D.L.R. 129; 20 Sask. L.R. 107. Simmons J. in *Detro* v. *Detro*, *infra*, note 22.

[6] (1885), Cameron S.C. 392.

[7] Ritchie C.J., Cameron S.C. at p. 416; see also Henry J. at p. 424; Gwynne J. at p. 434.

J. relied upon *Zycklinski* v. *Zycklinski*[8] and *Callwell* v. *Callwell*[9] which were cases, not of the recognition of the jurisdiction of a foreign court, but of the exercise of jurisdiction by the English Court itself. In those cases the domicile of the married pair was not in England, but it was held that as the respondent had appeared absolutely to the petition he could not afterwards object to the jurisdiction of the court.

The three preceding cases have been criticized and the English cases may be considered as overruled,[10] but it is suggested that the case of *Stevens* v. *Fisk*[11] does not fall with the English cases cited above. While it is now clear that an English court will not act on the consent to the jurisdiction of the parties if they are not domiciled in England,[12] what was said in *Stevens* v. *Fisk*[11] is not contrary to this principle. The effect of the statement of Ritchie C.J. quoted above, is that, although the foreign court may have acted without jurisdiction and the resulting divorce decree is therefore invalid here according to the rules of English conflict of laws, a party who has submitted to the foreign jurisdiction may be prevented from setting up that invalidity. As against him the divorce decree will be effective, but it will not be valid and effective as against third parties who are not so prevented from setting up its invalidity, *e.g.*, the Crown in a prosecution for bigamy,[13] or a second wife who has married in ignorance of the invalid divorce.[14]

Stevens v. *Fisk*[15] is distinguishable from the case of *In re Graham*[16] since in the former case the person alleging the invalidity was the *defendant* in the foreign suit, while in the latter it was the foreign *plaintiff* who denied that the foreign court had jurisdiction. In such a case it seems reasonable to deny to the plaintiff in the foreign suit the right to impugn the validity of the decree, obtained on his own motion, in order to gain some advantage here. In *Swaizie* v. *Swaizie*[17] H had

[8] (1862), 2 Sw. & Tr. 420.
[9] (1860), 3 Sw. & Tr. 259.
[10] JOHNSON, THE CONFLICT OF LAWS, Vol. II, p. 139. DICEY, THE CONFLICT OF LAWS, 5th ed. 222, note (r); 277, note (n).
[11] *Supra.*
[12] *Armitage* v. *Atty.-Gen.*, [1906] P. 135 at p. 140.
[13] *R.* v. *Woods* (1903), 6 O.L.R. 41; 23 C.L.T. 220; 7 C.C.C. 226 (C.A.). W. & H. obtained a collusive divorce in Michigan which was invalid since they were domiciled in Ontario. W. was convicted of bigamy. *Cf.* if W. had claimed dower on the death of H. *In re Hodgins* (1920), 18 O.W.N. 231.
[14] *Drake* v. *MacLaren*, [1929] 3 D.L.R. 159, Mitchell J.A. (Alta.).
[15] *Supra.*
[16] *Supra.*
[17] (1899), 31 O.R. 324. See also *Burpee* v. *Burpee*, [1929] 2 W.W.R. 128 at p. 129; 41 B.C.R. 201 at p. 202.

petitioned in Wisconsin for a divorce and the court in granting it had awarded W a sum of money in lieu of alimony. In an action by W on the judgment in Ontario, Meridith C.J. said, *obiter*, "a plaintiff who has instituted the proceedings in a foreign court must be taken to have submitted to its jurisdiction ad to have precluded himself from setting up the want of jurisdiction of that court".[18] In 1907, Anglin J. (as he then was) followed this *dictum* in rejecting a wife's claim to insurance money on the death of her husband, she having obtained a divorce in Massachusetts:[19] in such a case it has also been held that the wife is not entitled to dower in the lands of her husband,[20] or to a share in his property on his death intestate,[21] but although the wife has obtained an invalid divorce it has been decided in Alberta[22] that this will not bar her right to sue in the court of the domicile for alimony or maintenance in respect

[18] 31 O.R. at p. 330. See also *Bater* v. *Bater* [1906] P. 209. Gorell Barnes, P. at p. 220.

[19] *In re Williams and Ancient Order of United Workmen* (1907), 14 O.L.R. 482 at p. 485. This decision is based upon the "invoking of jurisdiction" by the wife, but it would seem that the doctrine of estoppel would also apply here, as the husband had remarried five years after the date of the decree relying upon its validity. See also *Re Banks* (1918), 13 O.W.N. 407, Middleton J. *Cf.* now the *Uniform Life Insurance Act* e.g., Acts of N.S. 1925, c. 2, s. 32. Where divorce granted on application of the beneficiary he or she is estopped from denying its validity.

[20] *Re Hodgins* (1920), 18 O.W.N. 231, Middleton J. It is not necessary therefore to join in a conveyance of land the wife who has obtained a divorce abroad on her own application.

[21] *Carter* v. *Patrick*, [1935] 1 W.W.R. 383; 49 B.C.R. 411. See also *Burnfiel* v. *Burnfiel*, [1925] 3 D.L.R. 935; on appeal, [1926] 1 W.W.R. 657; 20 Sask. L.R. 407; [1926] 2 D.L.R. 129. Mackenzie J. decided at the trial that as W. had invoked the jurisdiction she could not deny the validity of the decree. The true principle is set out in [1925] 3 D.L.R. at p. 939, but is followed by the citation of *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155 at p. 161 and DICEY *op. cit*, 3rd ed. pp. 44; 402, which deal with jurisdiction in actions *in personam*, not suits involving status. On appeal this decision was reversed on other grounds. Lamont J.A., who alone dealt with this point on appeal, refused to follow *Starbuck* v. *Starbuck* (*supra*, note 5) and said at [1926] 2 D.L.R. 138: "If notwithstanding the divorce Burnfiel and his wife in the eyes of Saskatchewan law were man and wife, I fail to see how that relationship could be altered, or any right created by it could be affected by the fact that the defendant applied to the Iowa Courts for the divorce." It is suggested, with respect, that this reasoning confuses the questions of recognition of the Iowa decree and of permitting W. to set up the invalidity of the decree in order to gain an advantage. The rule applied in *Starbuck* v. *Starbuck* does not alter the relationship of man and wife—it merely prevents one of the parties from denying that the relationship has been terminated.

[22] *Ackerman* v. *Ackerman*, [1918] 2 W.W.R. 759 (Alta.), Simmons J., distinguishing *Swaizie* v. *Swaizie*, *supra*, and *In re Williams and Ancient Order of United Workmen*, *supra*. See also *Detro* v. *Detro*, (1922] 3 W.W.R. 690; 70 D.L.R. 61 (Alta.), Simmons J., at p. 64: "It is quite obvious that it would be a scandalous proceeding for a party to obtain a decree of divorce in one jurisdiction and attempt to renounce or escape from the effects of the same in a proceeding in another jurisdiction; but I am not able to apply the same reasoning to a decree which goes no further than judicial separation and an allowance for support."

of the period prior to the date of the divorce, for such alimony could be granted even if the divorce were valid.

Where the party alleging the invalidity of the decree was the defendant in the foreign suit the rule is not clear. Although in *Stevens* v. *Fisk*[23] the husband who appeared was barred from denying the jurisdiction of the New York Court, that decision has been criticized, as we have seen, and the result seems unfair if he merely appears and contests the suit.[24] To adopt such a rule would be to place him in an unenviable position. If he appears he thereby makes the otherwise invalid decree effective as against him at his domicile;[25] if he does not appear it may be said of him that he did not defend the suit because there was no possible defence. If however the defendant in the foreign suit later acts upon the invalid decree it does seem that he should be prevented from setting up its invalidity against a person who has, for example, married him believing the decree to be valid.[26]

One who was not a party to the divorce suit may attack the invalidity of the decree by showing that the foreign court had no jurisdiction.[27]

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[23] *Supra.*

[24] *Little* v. *Little*, [1931] 1 D.L.R. 823; Man. Court of Appeal. In this case W had petitioned for a divorce in California. H appeared and filed a cross-complaint upon which the final decree was granted on the application of the wife. H was granted a decree of divorce 13 years later in Manitoba. It would seem however that by filing the cross-complaint H had invoked the jurisdiction of the California court and should not have been allowed to deny the validity of its decree in order to petition in Manitoba.

[25] Even if he objected to the jurisdiction the foreign court would not refuse to hear the case if its statutory requirements of residence were satisfied, but such protest would undoubtedly have the effect, in a Canadian Court, of preventing the application of the principle of *Stevens* v. *Fisk*. If he does not appear he may of course treat the foreign decree as invalid. *Campbell* v. *Campbell* (1921), 61 D.L.R. 409 (Alta.).

[26] *Gilbert* v. *Standard Trusts Co.*, [1928] 4 D.L.R. 371 at p. 375; [1928] 3 W.W.R. 111 (Alta.).

[27] *Thompson* v. *Crawford*, [1932] O.R. 281; [1932] 2 D.L.R. 466; affirmed [1932] 4 D.L.R. 206; *Drake* v. *MacLaren*, [1929] 3 D.L.R. 159; [1929] 2 W.W.R. 87 (Man.); *Potratz* v. *Potratz* [1926] 1 D.L.R. 147 (Sask.). *Cf. Cromarty* v. *Cromatry* (1917), 38 O.L.R. 481, Middleton J. at p. 484; *sub nom. C.* v. *C.*, 33 D.L.R. 151; see note at pp. 157 - 158; *Bates* v. *Bates*, [1906] P. 209, relied on by Middleton J., indicates merely that fraud which does *not* go to the jurisdiction of the foreign court, will not invalidate its decree; see Gorell Barnes P., at pp. 218 - 220. In *C.* v. *C.* (1917), 39 O. L.R. at p. 573 (an appeal from Middleton J., *supra*) where in an action of alimony, H denied the validity of W's divorce from her former husband, Riddell J. said: "Nor is he estopped, by the fact of having in a sense procured the divorce, from saying that the divorce was and is invalid — the relationship of husband and wife is of such great public importance that the doctrine of estoppel cannot here apply." See also *Leigh* v, *Leigh*, [1937] O.R. 239. [1937] 1 D.L.R. 773.

There are two cases suggesting a somewhat similar problem, in which a divorce decree has been made and the court in granting incidental relief to one of the parties has purported to deal with land outside its territorial jurisdiction. In *Burchell* v. *Burchell*[28] both parties had petitioned for a divorce and the Ohio Court had declared that the husband, H, was entitled to a half interest in certain land in Ontario and had ordered the wife, W, to convey such interest to H or to pay to him a sum of money. In an action by H to enforce the conveyance or the payment of the money Grant J. decided that W could not deny that the Ohio Court had jurisdiction to make the order sued on, since she had as plaintiff invoked that jurisdiction in asking that H be enjoined from asserting any title to the land in question. It was held that the declaration of H's right "does not, in this portion of it at least, attempt to deal with the title to an immovable in a state foreign to it".[29] In *Haspel* v. *Haspel*[30] the decree had been obtained in Washington on the petition of the wife alone, the husband apparently not appearing, and the wife was awarded a half interest in certain real estate in Alberta. Ewing J. held[31] that the Washington Court had no jurisdiction to deal with the title to real property in Alberta and that the decree was ineffective for that purpose. It is suggested that the two cases are distinguishable in that in *Haspel* v. *Haspel*[30] the husband did not invoke, and does not appear even to have submitted to the jurisdiction of the Washington Court. Invoking the jurisdiction would not make a resulting decree valid in another country but it might well prevent the husband from denying its validity and so make it effective as against him. Third parties would not, of course, be barred from setting up the lack of jurisdiction and the

[28] (1926), 58 O.L.R. 515; [1926] 2 D.L.R. 595. *Cf. Swaizie* v. *Swaizie*, *supra*, in which the foreign decree was for a sum of money only. Meredith C.J. went on, *obiter*, to say that even if the decree had contained a provision for the division in specie of the husband's Ontario land, the decree having been made on his motion, he would not be entitled to say that the Ohio Court had no power to deal with such land. See JOHNSON, *op. cit.*, Vol. II, pp. 176-177 for criticism. "That by invoking and submitting to a foreign court a person could override a fundamental conflict [*sic*], of sovereignty is an untenable proposition." The same distinction may be suggested here as is set out above, i.e., that it is one thing to say that the foreign court had jurisdiction and that its decrees are to be enforced, but quite different to say merely that a certain person is prevented by his conduct from denying that such jurisdiction existed. Such a distinction is not contrary to the case of *Duke* v. *Andler*, [1932] S.C.R. 734.

[29] 58 O.L.R. at p. 524. *Sed quaere.*

[30] [1934] 2 W.W.R. 412 (Alta.). The defendant admitted that the marriage was legally dissolved.

[31] Following *Duke* v. *Andler*, [1932] S.C.R. 734. See *The Converse of Penn* v. *Lord Baltimore*, 49 L.Q.R. 547.

decree would be ineffective as against them. If the principle applied in the cases dealing with invalid divorce decrees is a correct one it would seem to apply with equal reason to decrees which are invalid because they attempt to deal with the title to foreign land.

GORDON S. COWAN.

Dalhousie Law School.

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DEFAMATION—PRIVILEGE.—The tendency of the courts has been to extend the benefit of qualified privilege in defamation cases. "The tendency has been to expand the limits of the moral duty or reasonable exigency which authorizes the publication of defamatory matter."[1]

"Every wilful and unauthorized publication, to the injury of the character of another is a libel; but where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of another, that which he writes under such circumstances is a privileged communication."[2]

"The law considers such publication (*i.e.*, of defamatory matter) as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."[3]

The underlying principle is "the common convenience and welfare of society"—not the convenience of individuals or the convenience of a class, but "the general interest of society".[4]

There must be reciprocity of interest between the person uttering the communication and the person to whom it is uttered.[5] "An occasion is privileged when the person who

[1] *Cowles* v. *Potts* (1865), 13 W.R. 858. See also *Whitely* v. *Adams* (1863), 12 W.R. 153; *C.* v. *D.* (1924), 56 O.L.R. 209.

[2] Parke J. in *Cockayne* v. *Hodgkisson* (1833), 5 C. & P. 543,548.

[3] *Toogood* v. *Spyring* (1834), 1 C.M. & R. 181 at p. 193, approved in *Macintosh* v. *Dun*, [1908] A.C. 390 at pp. 398-9.

[4] *Macintosh* v. *Dun*, *supra*; *Whitely* v. *Adams*, *supra*; *Halls* v. *Mitchell*, [1928] S.C.R. 125 at p. 132.

[5] *Adams* v. *Ward*, [1917] A.C. 309 at p. 334.

makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged. An ordinary instance of a privileged occasion is in the giving a character of a servant. It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so; and the person who receives the character has an interest in having it. Therefore, the occasion is privileged, because the one person has a duty and the other has an interest. The privilege exists as against the person who is libelled; it is not a question of privilege as between the person who makes and the person who receives the communication; the privilege is as against the person who is libelled."[6]

The decisions defining the nature and limits of the defence of qualified privilege are reviewed by Scrutton L.J. in *Watt* v. *Longsdon*.[7] As was said by Lord Macnaghten in *Macintosh* v. *Dun*,[8] "the law with regard to the publication of information injurious to the character of another is well settled. The difficulty lies in applying the law to the circumstances of the particular case under consideration."

The recent case of *Rex* v. *Rule*[9] arose by way of appeal against a conviction for criminal libel contained in two letters written by the appellant, an inhabitant and elector of the county borough of Southampton to the Member of Parliament for that borough. The appellant had been in communication by letter with the Member with the object of inducing the latter to assist the appellant to bring certain matters, at first unspecified, to the attention of one of His Majesty's Ministers. The Member in his letter of reply pointed out that it was quite impossible for him to ask the Secretary of State for Home Affairs to give an appointment unless the purpose of the appointment were indicated, and suggested that if a full statement of the case accompanied the documents which the appellant claimed to have in his possession, the Member would take steps to meet the appellant's wishes. In response to this letter, the appellant wrote two letters containing serious and defamatory allegations against a detective-sergeant of police of the Southampton police force and the Chairman of the Harbour Board, who was also a

[6] Per Lord Esher M.R. in *Pullman* v. *Hill*, [1891] 1 Q.B. 524 at p. 528.
[7] [1930] 1 K.B. 130 at pp. 142 - 8. See also *Osborn* v. *Boulter*, [1930] 2 K.B. 226 at p. 233.
[8] [1908] A.C. at pp. 398 - 9.
[9] [1937] 2 K.B. 375.

justice of the peace. The Court of Criminal Appeals allowed the appeal and quashed the conviction. The view of the Court is summed up in the following sentence:[10] "It is sufficient for the purpose of this case to say that in our judgment a Member of Parliament to whom a written communication is addressed by one of his constituents asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct on the part of some public official acting in that constituency in relation to his office, has sufficient interest in the subject-matter of the complaint to render the occasion of such publication a privileged occasion."

The Court approved the passage in *Fraser's Law of Libel and Slander*,[11] defining the word "interest" in the following terms: "This common interest may be in respect of very varied and different matters; indeed, the only limitation appears to be that it should be something legitimate and proper, something which the Courts will take cognizance of, and not merely an interest which is due to idle curiosity or a desire for gossip."

In *Rex* v. *Rule* it is to be observed that it was not disputed that the Secretary of State for Home Affairs was the Minister or one of the Ministers to whose attention it was proper in the public interest to bring complaints such as the plaintiff was making. This alone would appear sufficient to distinguish the case of *Standen* v. *South Essex Recorders Limited and Another*.[12] In the latter case the defendants, who were the proprietors and editor respectively of a newspaper, published verbatim a letter signed "A Hornchurch Ratepayer", imputing to the plaintiff, a member of the Hornchurch Urban District Council, the abuse of his position as a member of the Council to further his private interests. At the conclusion of the evidence the defendants asked for a ruling that the case was one of qualified privilege. Swift J. held, following *Chapman* v. *Ellesmere*,[13] there being no reciprocal interest berween the defendants and the readers of their newspaper, that there was no privilege attaching to the publication of the letter. "Could it be held that there was a common interest between the proprietors and editor of the newspaper and any stranger who happened to be passing through Hornchurch Station and bought a copy of the newspaper, or any member of the public of Hornchurch who bought one?"

[10] At p. 380.
[11] 7th ed., at p. 152.
[12] (1934), 50 T.L.R. 365.
[13] [1932] 2 K.B. 431.

The case then proceeded on other defences raised, including that of fair comment, and the jury eventually returned a verdict for the defendants. The case illustrates the essential difference between the defence of privileged communication and the defence of fair comment in an action against a newspaper.[14]

The defence of absolute privilege is, of course, different and much more restricted in its application. No action for libel or slander will lie, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law.[15]

The question in *O'Connor* v. *Waldron*[16] was whether a commissioner appointed under the Canadian Combines Investigation Act,[17] was entitled to absolute privilege in respect to statements made by him in the course of his duties as commissioner concerning a barrister appearing before the commission.

The Privy Council discussed the law in the following terms:

"The law as to judicial privilege has in process of time developed. Originally it was intended for the protection of judges sitting in recognized courts of justice established as such. The object no doubt was that judges might exercise their functions free from any danger that they might be called to account for any words spoken as judges. The doctrine has been extended to tribunals exercising functions equivalent to those of an established court of justice. In their Lordships' opinion the law on the subject was accurately stated by Lord Esher in *Royal Aquarium, etc., Ld.* v. *Parkinson*, [1892] 1 Q.B. 431, 442, where he says that the privilege applies wherever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes. . . . This doctrine has never been extended further than to courts of justice and tribunals acting in a manner similar to that in which such Courts act'."

Applying this principle, the Judicial Committee reached the conclusion that a commissioner appointed under the above statute does not possess attributes similar to those of a Court of justice, nor does he act in a manner similar to that in which such Courts act, and that his function is essentially administrative. The defendant accordingly was denied the benefit of privilege.

DONALD M. FLEMING.

Toronto.

[14] See also *Augustine Automatic Rotary Engine Co.* v. *Saturday Night Limited* (1917), 38 O.L.R. 609.

[15] *Dawkins* v. *Lord Rokeby* (1873), L.R. 7 H.L. 744; *Cowan* v. *Londell* (1886), 130. R. 13.

[16] [1935] A.C. 76, reversing [1932] S.C.R. 183; [1931] O.R. 608; 65 O.L.R. 407.

[17] R.S.C. 1927, c. 26.

DAMAGES—SHORTENED EXPECTATION OF LIFE.—The decision of the Court of Appeal of Ontario in the case of *Major* v. *Bruer*[1] deserves earnest consideration. In that case the Court unequivocally decided that damages of a substantial nature can be awarded for the shortened expectation of life, and that such damages can be claimed by a personal representative under the Ontario Trustee Act.[2] The facts of the case are not involved. Major had been injured in a motor accident by the defendant. An action was commenced by him four days after the accident occurred. The day following the institution of the action the plaintiff died and an order of revivor was obtained by the administratrix of his estate, who continued the action in her name. The learned trial Judge decided that the plaintiff was entitled to out-of-pocket expenses and damages for pain and suffering. However, he refused to award damages for the shortened expectation of life. The Court of Appeal, following three recent English decisions, unanimously held that the learned trial Judge had erred in his last finding.

The case of *Flint* v. *Lovell*[3] illustrated the possibility of recovering substantial damages for shortened expectation of life. In that case, the injured party had not died as a result of the accident, although his expectation of life had been diminished. The Court of Appeal held that damages for pain and suffering must be kept distinct and separate from damages for the shortened expectation of life, and that damages under both heads could be awarded by the court.

In *Roach* v. *Yates*[4] the plaintiff had been permanently incapacitated by the negligence of the defendant and his expectation of life had been shortened. The trial Judge held that the attitude of mind of the plaintiff as a result of the accident should be considered in assessing damages for shortened expectation of life. However, the Court of Appeal decided that this was an improper consideration and that the trial Judge should merely determine whether the plaintiff's expectation of life had been diminished and not whether, as a result of the accident, the plaintiff was content to have his life shortened. In this respect the law applied in *Flint* v. *Lovell* is amplified.

The principle enunciated in *Flint* v. *Lovell* and *Roach* v. *Yates* is carried to its logical conclusion in the case of *Rose* v.

[1] [1937] O.W.N. 668.
[2] R.S.O. 1927 c. 150, s. 37.
[3] [1935] 1 K.B. 354.
[4] [1937] 3 All.E.R. 442.

Ford[5] where the injured person died two days after the accident and the action was brought by the administrator of her estate. In this case two members of the Court of Appeal were of the opinion that damages could not be awarded for shortened expectation of life if the injured person died as a result of the accident before the institution of the action. Greene L.J. stated: "The principle laid down in *Flint* v. *Lovell* is to be confined to cases where the injured person is still alive at the date of the action."[6] The House of Lords was unanimous in its disagreement with this view. Lord Atkin stated: "I am of the opinion, therefore, that a living person can claim damages for loss of expectation of life. If he can, I think the right is vested in him in life, and on his death, under the Act of 1934, passes to his personal representative. I do not see any reason why the fact that the expectation is realized, i.e., that death comes at the time anticipated, or sooner, should make any difference."[7]

These cases demand a reconsideration of the principle enunciated by Lord Ellenborough in *Baker* v. *Bolton*[8] that "in a civil court the death of a human being could not be complained of as an injury." It is submitted that the "sanctity and universality of application" of this principle have been extremely modified in the considered cases. The Court attempted to show that the rule in *Baker* v. *Bolton* had not been violated. A narrow distinction is drawn between a living person suing another living person for damages caused by the death of a third person, and a dead person suing through his personal representative for his own death.[9] The courts state that the personal representative is not suing for damages for the death of the person whose estate is being administered, but for the shortened expectation of life of the deceased. However, it is respectfully submitted that this result is arrived at by a twist of words, and that in reality, the courts are allowing death to be considered the civil injury. If the recent decisions of the courts are construed literally, they would give rise to "an extreme in lack of logic if, while the death of a human being does not, apart from statute, give a right of action, and does not, where a cause of action exists, found or constitute an independent right or head of damage, yet the shortening of

[5] [1937] 3 All.E.R. 359.
[6] [1936] 1 K.B. 110.
[7] [1937] 3 All.E.R. 362 - 363.
[8] (1808), 1 Camp 493.
[9] [1937] 3 All.E.R. 362.

life can give such right of action, and can found or constitute an independent right or head of damage. There would thus, as it seems to me, be allowed to the shortening of life an efficacy which is denied to its extinction, and to death in the future an efficacy which is denied to death on the instant."[10]

The question of the quantum of damages for shortened expectation of life involves "inquiries and speculations inappropriate to and difficult for a court of law, as for example the disposition and outlook on life as well as the material circumstances of a plaintiff."[11] It is difficult to conceive any scientific rule to guide the court in assessing damages for shortened expectation of life. In *Rose* v. *Ford*, Lord Wright stated, "In one sense, it is true that no money can be compensation for life, or the enjoyment of life, and, in that sense, it is impossible to fix compensation for the shortening of life." However, His Lordship continued, "It would be paradoxical if the law refused to give any compensation at all, because none could be adequate."[12] In the same case Lord Roche contented himself with the course followed in the Scottish cases to give the jury full discretion to assess damages for the shortened expectation of life subject to the caution that such damages should be moderate.[13] The whole problem is obscure and uncertain. There is room for unreasonable variance in the amount of damages awarded in different cases. In the case of *Major* v. *Bruer* the injured person was 70 years of age when the accident happened, and it was estimated that he would have lived another ten years but for the accident. The administratrix was awarded $1,000 for shortening of life. In *Flint* v. *Lovell* the plaintiff was 69 years of age at the time of the accident and the medical testimony was to the effect that his normal life had been diminished by eight years. He was awarded £4,000 for shortened expectation of life.

There is no doubt that these cases will give the profession a new outlook on fatal accidents cases. In such cases it will doubtless become the established practice to sue under the Fatal Accidents Act,[14] and the Trustee Act[15]. The Court will then be confronted by the problem of avoiding duplication of damages.[16] The caution of Lord Roche serves as a fitting

[10] [1935] 1 K.B. 367.
[11] [1935] 1 K.B. 368.
[12] [1937] 3 All.E.R. 372.
[13] [1937] 3 All.E.R. 380.
[14] R.S.O. 1927, c. 183.
[15] R.S.O. 1927, c. 150, s. 37.
[16] [1937] 3 All.E.R. 375.

conclusion, "I would add that I confess to some apprehension lest this element of damage may now assume a frequency and a prominence in litigation far greater than is warranted in fact, and, by becoming common form, may result in the inflation of damages in undeserving cases, or, more probably, perhaps, may become stale and ridiculous, to the detriment of real and deserving cases, such as the present."[17]

ABRAHAM ACKER.

Guelph, Ontario.

[17] [1937] 3 All.E.R. 381.