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.

CASE AND COMMENT

HOSPITALS—MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF NURSES.—The Supreme Court of Canada, in *Sisters of St. Joseph* v. *Fleming*,[1] dealt once more with the troublesome question of delimiting the liability of hospitals for negligent acts of nurses in their employ. In an exhaustive survey of the authorities, Davis J. came to the conclusion that the frequently quoted test of Kennedy L.J. in *Hillyer* v. *Governors of St. Bartholomew's Hospital*,[2] to the effect that liability depended on categorizing the specific act causing damage as one done either in a ministerial or administrative capacity, could not be safely relied on as a practical working rule in the solution of these cases.[3] The facts before him disclosed that the plaintiff had been severely burned during a diathermic treatment being given at the defendants' hospital by one of the nurses on their staff. The attending physician of the plaintiff had left orders that such treatment be given, but he had in no way participated in the treatment. The possibility of arguing that this was a matter of professional skill for which the hospital was under no liability is apparent. The Supreme Court of Canada took the view that liability was properly imposed on the hospital for the negligence of its servant, the nurse. Davis J. seems to have been considerably influenced by the dissenting judgment of Lord Alness in *Anderson or Lavelle* v. *Glasgow Royal Infirmary*,[4] in which he stated that there was no binding author-

[1] [1938] 2 D.L.R. 417.
[2] [1909] 2 K.B. 820.
[3] See [1938] 2 D.L.R. at p. 433.
[4] [1932] S.C. 245.

ity in England to the effect that a hospital was not liable for the negligence of a nurse in the discharge of her professional duties.

The unsatisfactory state of the English case law was discussed by the present writer in a previous comment in this REVIEW[5] in considering the decision of the New Zealand Court of Appeal in *Logan* v. *Waitaki Hospital Board.*[6] Although the New Zealand case was not considered by the Supreme Court of Canada, many of the views put forward in that decision seem to be similar to those expressed by Davis J. The question seems to be not one of the skill required in the performance of a given act, but rather of the nature of the hospital's duty towards a patient. If the duty be merely one to supply competent nurses the hospital is free from liability. If on the other hand the hospital undertakes to provide certain treatments, there seems no reason to exonerate the hospital for negligent acts by persons who are in their employ and subject to their control. Such was the situation in the *Sisters of St. Joseph* v. *Fleming.* A strict adherence to the "professional" test would seem to lead in the opposite direction.

It is interesting to compare a recent decision of the Court of Appeal in England, *Wardell* v. *Kent County Council,*[7] with the Canadian decision and the other authorities collected earlier in this REVIEW.[8] In the *Wardell Case* the problem was not one of the liability of a hospital for the negligence of a nurse. It arose under the English Workman's Compensation Act, the question being whether a nurse employed by the defendant Council came within the definition of a workman in the Act as "any person who has entered into or works under a contract of service", so as to be entitled to compensation for injury sustained in an explosion which took place while the nurse was heating a tin of antiphligistine for a poultice. Members of the English Court of Appeal diverged in their conclusions. Greer L.J. purported to adopt the test laid down in *Hillyer* v. *Bartholomew's Hospital* and came to the conclusion that if a nurse is engaged in performing some professional function she does not render the hospital liable for her negligence because she is not in their service, that is, presumably, subject to their control, in the performance of such acts. If that be so, he held that the nurse had no claim for compensation for injuries

[5] (1936), 14 Can Bar Rev. 699.
[6] [1935] N.Z.L.R. 385.
[7] ['1938] 3 All E.R. 473.
[8] 14 Can. Bar Rev. 699.

sustained in performing professional functions, because she could not be considered as being in the hospital's service in the sense of being subject to control and direction. It will be seen that this view, particularly on the facts, is directly contrary to that of the Supreme Court of Canada in *Sisters of St. Joseph* v. *Fleming*.

The majority of the English Court, Slesser and MacKinnon L.JJ., took the view that cases involving the application of *respondeat superior* were not relevant to the solution of the present problem, but their judgments seem consonant with the broader principle adopted in the Supreme Court of Canada. Both took the view that a nurse employed by a hospital was generally under the control and in the service of the hospital authorities, and acted under their directions. True, both the majority judges admitted that there might be a transfer of service, in the sense that a nurse might come under the control of a physician, but that was not the situation in the *Wardell Case*, even as it was not the case in *Sisters of St. Joseph* v. *Fleming*. To determine liability of the hospital to a third person as MacKinnon L.J. pointed out, depends on considering "What is the contract between the governors or proprietors of the hospital and the patients", but that "as between the hospital and nurses, the nurses are so manifestly in the service of the hospital, that for that very reason it becomes necessary to inquire whether, as between the hospital and the patients, the hospital is liable for the negligence of those who are in their service". The view of the majority in the English Court seems to coincide with the view of the Supreme Court of Canada that, as a general rule, the hospital must respond for acts of nurses in their employ unless it be clearly shown that the nurse has passed under the orders and control of some third person and this regardless of the fact that the act of a nurse is one requiring peculiar skill, or in the language of the cases, is of a "professional" as opposed to an "administrative" nature. The divergence of opinion in the English Court of Appeal in the *Wardell Case* typifies the uncertainty which surrounds the whole subject in the English authorities and it is of interest to note that leave to appeal to the House of Lords from the decision of the Court of Appeal has been granted.

C. A. W.

WILLS—GIFT OF INCOME ENTITLING DONEE TO THE CORPUS —APPLICATION TO CHARITABLE CORPORATION.—About a year ago[1] we had occasion to comment on the decision of the Supreme Court of Canada in *Halifax School for the Blind* v. *Chipman*,[2] dealing with the problem of passing the corpus to a charitable beneficiary to whom an unlimited gift of income had been made. The present writer there expressed the view that the decision of the Supreme Court of Canada would give rise to further litigation in view of the fact that the *ratio decidendi* was not clear. When the problems raised by the *Halifax School Case* were previously discussed, the writer was under the impression that the Supreme Court of Canada's decision was unsupported by the case law. Since then we have received a letter from Mr. E. H. Coghill, Librarian of the Supreme Court Library, Melbourne, Australia, drawing our attention to the decision of the full court of the Supreme Court of Victoria in *In re Wright, Westley* v. *The Melbourne Hospital*,[3] in which the identical problem considered by the Supreme Court of Canada was fully dealt with. In view of the fact that, in the writer's opinion, the questions raised in these cases will ultimately go further, it may be of interest to set forth the views expressed by the Victorian Court.

In *In re Wright* T had appointed trustees with powers of sale and conversion and had then directed that the trustees "set aside and invest . . . . . £3000 and shall pay the annual income thereof to or permit the same to be received by the treasurer for the time being of the institution now known as the Melbourne Hospital for the benefit of that institution". Similar provision was made for six other charitable institutions, all of whom were incorporated charities, with the exception of one hospital which was not incorporated. The question before the court was whether these charitable institutions could obtain the corpus or whether they had to be content with income as stipulated in the will. The majority of the Victorian Court, a'Beckett and Hood JJ., reached the conclusion that the charities were not entitled to demand the corpus. Madden C. J. dissented and held that the ordinary rule of an unlimited gift of income passing corpus applied, so that the charities became entitled to the corpus itself.[4] In the result, therefore,

[1] (1937), 15 Can. Bar Rev. 651.
[2] [1937] S.C.R. 196.
[3] [1917] V.L.R. 127.
[4] Madden C. J. was of opinion that no difference could be drawn between the incorporated and the unincorporated institutions. It is submitted that this is erroneous. A trust for a fluctuating group of individuals

the decision of the Victorian court is in accord with that of the Supreme Court of Canada. The decisions of the majority, while making clear one of the problems which, it is submitted with respect, became confused in the Canadian case, also raised a fundamental problem which was mooted in the Supreme Court of Canada.

Both the majority judges make it clear that decisions such as *Saunders* v. *Vautier*[5] and *Wharton* v. *Masterman*[6] are not relevant to the present discussion, because in both cases the court started with the assumption that there was a present vested interested in the corpus, with payment merely postponed by a direction to accumulate or withhold corpus for the benefit of the beneficiary. It is clear that in such cases the beneficiary *by rule of law* can demand the corpus immediately. As considerable discussion took place in the Supreme Court of Canada regarding these two decisions, the Victorian case is useful in clearing up this debatable point and concentrating attention on the main problem, namely, whether an unlimited gift of income will always pass the corpus either to a charitable corporation or an individual.

Both the majority judges in Victoria seem to admit that if the beneficiary of the income had been an individual he would have been entitled to the corpus, but they refused to apply this rule to the case of a charitable corporation. The view seems to be that the rule passing corpus is, as has been stated in many cases, a rule of construction designed to effectuate the testator's intention, rather than to defeat it, and as both judges pointed out, to pass the corpus to a charitable institution when only income had been given would be to frustrate the intention of the testator rather than to effectuate it. This point was also made in the Supreme Court of Canada. But if, as the present writer pointed out previously, it be correct to call the rule one of construction, it would seem impossible to apply it to any case where a testator had set up a trust and directed the trustees to pay income to a beneficiary, whether he be an individual or not, because the machinery of the trust itself is a plain indication that the testator did not wish the beneficiary to have the corpus. It is this fundamental problem of the extent to which the rule may be said to have

can not vest beneficially in any specific entity nor any specific group and hense will fail altogether unless the association is for charitable purposes. *Carne* v. *Long* (1860), 2 De G. F. & J. 75; *Re Drummond*, [1914] 2 Ch. 90.

[5] (1841), 4 Beav. 115.

[6] [1895] A.C. 186.

solidified into a rule of law rather than a rule of construction that must await further elucidation.

One of the difficulties which the present writer suggested followed from the decision in the *Halifax School Case*, was indirectly adverted to in the judgment of Hood J. when he stated :

> If there were a binding authority showing that in the case of a gift to a [trading] corporation, similar to the present gift, that corporation could claim the corpus, it might afford some assistance. There appears to be no such authority.

In other words, from this obiter, the learned judge seems to indicate that a gift of income to a non-charitable corporation might fail altogether.[7] This is directly contrary to the Ontario decision of *Re Knight*.[8]

Both the Canadian Court and the Victoria Court seem to consider that the real beneficiaries of the trusts were not the charitable corporations themselves but the persons or objects to be served by the charitable corporation. If this be true it naturally follows that there can be no termination of a trust in the case of a charitable corporation, and the gift would fail in the case of a gift of income for the purposes of a non-charitable company. It will be noted however, that in the will of *In re Wright*, the income was to be paid to the charitable corporation "for the benefit of that institution". On such language it seems difficult to agree with the following statement of Hood J. :

> The applicants are not beneficiaries themselves, and only represent the sick of the present day. It was urged that some entity, such as the Melbourne Hospital, is the beneficiary. This does not appear to me to be correct. No man gives a charitable bequest to a mere legal entity. The gift is for those who are the objects of the charity represented by that entity, and such persons, if they can be ascertained, would be the real beneficiaries.

As indicated in the previous discussion on this problem,[9] the reasoning of Lord Parker in *Bowman* v. *Secular Society Limited*[10] and of Rose C.J.H.C. in *Re Knight*,[11] seems contrary to such a conclusion for it involves of necessity holding that any gift to a corporation for corporate purposes would be held on trust by the corporation.

[7] This, as infringing the rule against perpetuities. See 15 Can. Bar Rev. 651.
[8] [1937] O.R. 462.
[9] 15 Can. Bar Rev. 651.
[10] [1917] A.C. 406 at p. 440.
[11] *Supra*.

It is perhaps permissible to agreee with the view expressed by Mr. Coghill in his letter to the REVIEW, "that it is socially expedient that hospitals and other institutions should be permitted to enjoy the income of endowment funds in perpetuity, and yet not be entitled to touch the corpus". It is a little more difficult, however, to discover why a testator's intention should be defeated in the case of a gift to an individual and supported in the case of a charity. The reason given by the Victoria Court, that in applying the rule courts use it to avoid the harsh consequences of the rule against perpetuities, would seem to have no application to a private individual but would create a vested interest in a non-charitable corporation. Presumably, a gift of income by way of trust to an individual, although clearly showing the testator's intention to give only a life interest, may be held to pass the corpus merely to avoid an intestacy. While the Victoria Court suggests this, it has not been the basis of many decisions.[12] It seems clear that the decisions of the Canadian and Australian Courts, taken in conjunction, afford a basis for the clarification of some of the unsolved problems raised in each.

C. A. W.

* * *

CRIMINAL LAW—UNCORROBORATED EVIDENCE OF ACCOMPLICE — INSTRUCTION TO JURY — TRIAL WITHOUT A JURY. —Generally speaking, there can be little disposition to argue against the propriety of the view that "in a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law."[1] But in the particular relation of this view to the law of evidence, regard must be had to the fact that many of the rules of evidence have been accommodated to the jury system. Precautions deemed necessary to prevent prejudice against an accused person from arising in the untutored minds of jurors may be safely dispensed with where the accused is tried by an experienced Judge sitting alone. The defence derives an advantage too from "our sporting theory of justice",[2] and it seems gratuitous to impose strictures on the conduct of a criminal trial before a Judge alone, which were developed for trials before Judge and jury.

[12] See *Re Macdonald*, [1931] O.R. 659; *Re Jones* (1927), 60 O.L.R. 136.

[1] *Martin* v. *MacKonochie*, (1878) 3 Q.B.D. 730, per Cockburn C.J., at 775.

[2] Warner and Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years.* (1937) 50 Harv. L.R. 583, 589.

It is a rule of practice which "has become virtually equivalent to a rule of law",[3] that, a Judge must instruct the jury that it is always dangerous to convict upon the uncorroborated evidence of an accomplice; that, nevertheless, it is within their legal province to convict, but that they ought not to do so, because it is dangerous to rely on the evidence of an accomplice standing alone.[4] As Wigmore points out, this practice was not founded on any rule of law till modern times. "It was recognized constantly that the judge's instruction upon this point was a mere exercise of his common-law function of advising the jury upon the weight of the evidence and was not a statement of a rule of law binding upon the jury."[5] Cautioning the jury was formerly a matter solely for the trial Judge's discretion, and his omission of the caution was of itself no ground for a new trial. Now, this is no longer true, and failure to warn the jury invalidates the verdict, at least where, in the appellate court's opinion, no corroboration exists.[6]

In *Rex* v. *Ambler*,[7] accused was convicted of burglary after trial before a Judge sitting without a jury. An appeal was taken on the sole ground that the Judge erred in convicting upon the uncorroborated evidence of an accomplice. Moreover, "in finding the appellant guilty and in imposing sentence upon him the learned trial Judge admittedly made no reference to the Rule of Practice as to the danger of convicting upon the uncorroborated evidence of the accomplice."[8] McGillivray J.A., Harvey C.J.A. concurring, quashed the conviction;[9] Ford J.A. dissented. The majority judgment stated rightly enough that

> It has always seemed illogical that our law has so developed that a jury which is in duty bound to acquit if there be in their opinion any reasonable doubt as to guilt may, none the less, properly convict in circumstances which make convicting an admittedly dangerous and therefore doubtful course to follow.

---

[3] *Rex* v. *Baskerville*, [1916] 2 K.B. 658, 663.

[4] *Pitrie* v. *Rex*, [1933] S.C.R. 69; *Rex* v. *Beebe* (1925), 19 Cr. App. R. 22; *Vigeant* v. *Rex*, [1931] 3 D.L.R. 512; *Reg.* v. *Stubbs* (1855), 7 Cox C.C. 48.

[5] WIGMORE, EVIDENCE, 2nd ed., Vol. 4, S. 2056, p. 351.

[6] *Rex* v. *Tate*, [1908] 2 K.B. 680.

[7] [1938] 3 D.L.R. 344, (Alta. C.A.).

[8] *Ibid.* 349.

[9] The majority judgment was limited to cases in which evidence of an accomplice was unsupported by corroborative evidence. *Cf. Rex.* v. *Tate*, *supra*, note 6.

and concluded that this was now a matter for Parliament and not for the Courts.[10] McGillivray J.A. was of the opinion that it was as dangerous for a Judge as for a jury to base a conviction upon an accomplice's uncorroborated evidence, and "if it be quite wrong for a trial Judge to tell a jury (after a proper warning) that it is their duty to convict if they believe the accomplice, it cannot be the trial Judge's duty to convict because he happens to believe the accomplice."[11] That it is not the trial Judge's *duty* to convict is true enough; but he *may* convict,[12] just as the jury, where properly instructed, may convict.

Another remark by McGillivray J.A. that invites challenge is the statement that

> the trial Judge, in my view, should decide before convicting not only that he believes the accomplice but also that he believes independent testimony which tends to show that the accused was implicated in the commission of the crime with which he is charged.[13]

This view carries the implication that the trial Judge who sits alone is less capable of achieving justice than in the case where he sits with a jury. The fact that the statement above quoted was followed by a reference to that part of the judgment in *Rex* v. *Baskerville*,[14] which lays down what is evidence in corroboration may serve to explain why it was made. A reading of *Rex* v. *Baskerville* shows that it dealt not only with the "rule of practice" that the jury should be warned against convicting upon the uncorroborated evidence of an accomplice, but also with the statutory requirement, in certain cases, of corroborative evidence to justify the conviction of an accused person.[15] The Court in *Rex* v. *Baskerville* then proceeded to consider what would constitute evidence in corroboration and concluded that "the test applicable to determine the nature and extent of the corroboration is . . . . . the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute."[16] This is far from saying

[10] [1938] 3 D.L.R. 344, 349.
[11] *Ibid. 350.*
[12] *Cf. Boulianne* v. *Rex.* [1932] 1 D.L.R. 285. The proper instruction to the jury is that if they believe the accomplice, they *may*, not *must*, convict.
[13] [1938] 3 D.L.R. 344, 350.
[14] [1916] 2 K.B. 658, 667.
[15] *Cf.* The Criminal Code, R.S.C. 1927, c. 36, s. 1002.
[16] [1916] 2 K.B. 658, 667.

that a jury cannot convict upon the evidence of an accomplice only, if they feel that they can safely rely on his testimony.[17] Accordingly there seems little cause to restrict a Judge acting alone in exercising a discretion to convict upon an accomplice's unconfirmed testimony.

Dealing with the Crown's submission, that although the trial Judge said nothing as to the "rule of practice", it is to be assumed that he knew the law and so properly directed himself, McGillivray J.A. stated that he was "not prepared to concede that [the trial Judge] or any other Judge has all law at all times present to his mind, but [in any event] . . . . . in a case in which the Crown's case rests upon the uncorroborated evidence of an accomplice it is not to be assumed that a Judge who convicts, without reference to the Rule of Practice, has first instructed himself that that which he is about to do is a dangerous thing to do".[18] No one charges the judiciary with omniscience, nor are cases presented to the Court in such a way as to prevent it from becoming familiar with the legal principles involved. Indeed, counsel would be remiss in their duties if they failed to bring them to the Court's attention. In the instant case, it can hardly be imagined that the defence failed vigorously to urge an acquittal on the ground that only the evidence of a criminal, although he was a competent witness,[19] incriminated the accused.

The rule adopted by McGillivray J.A. was that "when, as in the case at bar, a Judge has said nothing to indicate a present appreciation of the danger of convicting upon the uncorroborated evidence of an accomplice, I think it must be assumed that he did not give himself that warning which he would have been bound to give to a jury. In other words, when a Judge seems to ignore the danger mentioned in a rule of practice which is virtually a rule of law it is to be assumed not that he does not know the rule, but that the rule is not then present to his mind".[20]

This kind of judicial hairsplitting is ill-suited to the proper administration of criminal justice. *Omnia praesumuntur rite esse acta.* This should be particularly applicable, since the trial Judge was in a better position than the Appellate Court to pass judgment, and nothing appeared from his judgment to show that he did not consider the proper rules of law. In this

[17] *Rex* v. *Wilkes*, 7 C. & P. 272.
[18] [1938] 3 D.L.R. 344, 351.
[19] *Rex* v. *Attwood* (1787), 1 Leach, 464.
[20] [1938] 3 D.L.R. 344, 352.

last respect, *Rex* v. *Knowles*,[21] which McGillivray J.A. cites, seems to be an authority against him. In that case, the Privy Council decided, *from what appeared in the judgment of the trial Judge*, that he took an erroneous view of the law as applicable to the facts. This prompted Ford J.A., in his dissenting judgment, to say that "in the case at bar, unless it is to be presumed or assumed, from his silence on the question, that the learned and experienced trial Judge did not know or had disregarded or neglected to consider the relevant rule, misdirection cannot be found in his judgment, in anything said in the course of the trial, or as an implication from the evidence or the circumstances surrounding the giving of the evidence of the accomplice".[22] And the following statement of his seems unanswerable :

> If the rule of law is to be that unless it clearly appears that a Judge has had present to his mind that part of the rule in question, dealing with the danger of convicting in the circumstances, this conviction must be quashed, it seems to me that the same rule must be applied to the failure to state orally and audibly such rules as, for instance, those applicable to circumstantial evidence; the explanation necessary to relieve from the consequences of proof or recent possession of things stolen; and indeed the most fundamental one, that unless a Judge or jury is satisfied of the guilt of the accused beyond a reasonable doubt, he is entitled to be acquitted.[23]

To require a Judge to charge himself on such a well-known rule as the one in question seems reasonable only on some notion that audible confession of knowledge or consciousness of a rule of law is good for the judicial soul. Further, it is incongruous to insist on audible self-instruction on questions as to which, if there was a jury, the Judge would be bound to direct them. There is hardly any justification for measuring a trained trial Judge with the same yardstick that is applied in the case of the jury. Certainly, authority is against the view adopted by McGillivray J.A. In *Rex* v. *Frank*,[24] the accused was convicted in the County Court Judge's Criminal Court upon the uncorroborated evidence of an accomplice, the Judge stating that he believed the evidence and that it was sufficient to convict without corroboration. Moss C.J.O. stated :

> In the case at bar there was no jury, and the learned Judge appears to have been alive to the law and practice, and there is no reason to doubt

[21] [1930] A.C. 366.
[22] [1938] 3 D.L.R. 344, 346.
[23] *Ibid.*
[24] (1910), 21 O.L.R. 196.

> that he properly charged himself when forming his conclusions upon the evidence; and there being no question of his power there appears also to be no objection to his practice.[25]

In like vein, Meredith J.A. said :

> No question as to nondirection arises, because the case was not tried by jury, but by the Judge himself, and he was quite familiar with the common objections to the evidence of accomplices, and the warning usually given to jurors respecting such evidence.[26]

Rex v. *Frank* was followed in *Latendresse* v. *Rex*.[27] Neither of these cases was mentioned by McGillivray J.A. His judgment, in the opinion of the writer at least, would stand on firmer ground were it based on the fact that the trial Judge found the evidence of the accomplice unworthy of belief in some respects,[28] and that, therefore, s. 1014 of the Criminal Code justified the quashing of the conviction.[29]

BORA LASKIN.

Toronto, Ontario.

[25] *Ibid. 199.*
[26] *Ibid.*
[27] (1927), 42 Que. K.B. 496.
[28] [1938] 3 D.L.R. 344, 353.
[29] *Rex* v. *Lee Fong Shee* (1933), 47 B.C.R. 205; *Rex* v. *J.* (1929), 38 Man. R. 144. *Cf. Rex* v. *Baskerville*, [1916] 2 K.B. 658, 664.