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

ADMINISTRATION OF ESTATES—REAL PROPERTY—TRANSFER BY PERSONAL REPRESENTATIVE.—The question of title to real estate registered under the Land Titles Act, belonging to the estate of an intestate and sold by the administratrix for the purpose of paying debts within three years of the death of the deceased, was considered by Mr. Justice J. G. Kelly on November 1st, 1940.[1] The question concerned the effect of the Devolution of Estates Act.[2]

The matter came before the Court by way of a stated case from the Local Master at Fort William, arising out of a sale by the administratrix of the estate of Frederick Robert Hurst to John Russell Guthrie and Vivian Guthrie. Upon application by the purchasers to the Local Master for registration as owners with an absolute title under the transfer by the administratrix, the Local Master had refused the application and had indicated that only a qualified title might be registered, "subject to the payment of the debts of the deceased". The questions put by the Local Master in the stated case were as follows :

1. Is it the duty of the Local Master of Titles to decide the question whether transfer is made pursuant to a sale of the property by the administratrix for the purpose of paying the debts of the deceased, and that the sale is to the purchasers for value and in good faith?

[1] *Re Land Titles Act; Hurst and Guthrie,* unreported.
[2] R.S.O. 1937, c. 163.

2. If the Court determines that it is the duty of the Local Master to decide this question and the Local Master is satisfied that the sale is for value and in good faith and for payment of debt, should the Local Master withdraw or delete from the register of parcel number 2053 and 2054 by cancellation or otherwise the notice or entry appearing in the said register in the words following: "subject to the payment of the debts of the deceased Frederick Robert Hurst" as a notice or entry which he is satisfied no longer affects the said registered lands?

3. If the Local Master does so withdraw or delete the said clause what legal effect has this official act of the Local Master upon the liability of the real property of the deceased so conveyed to remain liable to the debts of the deceased during the three-year period mentioned in the Devolution of Estates Act?

The learned Judge decided that it was the duty of the Local Master to inquire as to whether the sale made by the administratrix was necessary for the purpose of paying debts of the deceased, in good faith and for value, and if the Local Master satisfied himself of this it was his duty to give a certificate of title to the purchaser without any reference therein to the land being subject to the payment of debts of the deceased, and to delete this reference from the register. The learned Judge considered it unnecessary to make a general declaration in answer to the third question. No written reasons were given. The following remarks therefore may be of interest.

Section 19 of the Devolution of Estates Act gives wide powers of sale — "except as herein otherwise provided the personal representative of a deceased person shall have power to dispose of and otherwise deal with the real property vested in him by virtue of this Act, with the like incidents, but subject to the like rights, equities, and obligations, as if the same were personal property vested in him."

As to personal property, as mentioned by Hagarty J. in *Reid* v. *Miller*,[3] the personal representatives have power to sell for the payment of debts and to give good title to the purchaser. The purchaser of personal estate is not even entitled to inquire whether the debts remained unpaid at any time.[4]

Section 20(1) states that the powers of sale conferred by the Act on a personal representative may be exercised for the purpose not only of paying debts, but also of distributing or

[3] (1865), 24 U.C.Q.B. 610, at p. 622.

[4] WILLIAMS, EXECUTORS and ADMINISTRATORS, 12th ed., 569; THEOBALD, WILLS, 7th ed., 450.

dividing the estate among the persons beneficially entitled thereto, whether there are or are not debts, and that the concurrence of the persons beneficially entitled shall not be necessary in any such sale except where it is made for the purpose of distribution only. It is only where the purpose of the sale is not wholly or in part for the purpose of paying debts, that the Act places any restrictions on the representative's power of sale.

If it is necessary to sell lands for the purpose of paying debts the power of sale in the personal representative under the Act is coextensive with his power to sell personal property and is subject to no restrictions whatever. (There is in all cases, however, the necessity of obtaining the consent of the Official Guardian or an order when infants are beneficially interested — see section 18 of the Act). This power exists even where the sale is made partly for the purpose of paying debts and partly for distribution.[5] A purchase from a personal representative is safe at any time if the sale is made for the purpose of paying debts and making distribution.[6] In *Re Ross and Davies*,[7] it was held by the Ontario Appellate Division that executors under the Devolution of Estates Act are empowered to sell real property for the payment of debts to the same extent as personal property, and this power is not qualified by limitations on sale for distribution.[8] Mr. Shirley Denison, K.C., in an article in 15 CAN. BAR REVIEW 516, at p. 522, states without discussing the point that "if the executor sells to pay debts, the purchaser takes a good title free from debts. No concurrences are necessary except by the Official Guardian on behalf of infants."

Section 22 of the Act provides that purchasers of land sold for value and in good faith in the manner authorized by the Act shall hold free from debts or liabilities of the deceased owner.

The only sections of the Act which in any sense may be said to charge the real estate of the deceased with the payment of debts are sections 2 and 20 (8). Section 2 provides for the vesting of all real and personal property of the deceased in his personal representative, and that "*subject to the payment of his debts* the same shall be administered, dealt with and distributed as if it were personal property not so disposed of". Section

[5] ARMOUR, *Sales by Executors and Administrators*, [1927] 4 D.L.R. 753, at p. 755.
[6] *Ibid.*, p. 759.
[7] (1904), 7 O.L.R. 433.
[8] *Ibid.*, p. 441, per Maclennan J.A.

20 (8) specifically charges lands with the payment of debts under certain circumstances, not including a sale by the personal representative.

The courts have never regarded the words "subject to the payment of the debts of the deceased," appearing in section 2 as a specific charge on the lands. The Act makes land assets in the hands of the personal representative and the purchaser with notice of debts might still be a bona fide purchaser and entitled to assume that the money was properly applied. There is no statute or other law to charge lands sold by the personal representative specifically with the debts, nor to make a purchaser liable for debts merely by reason of his acquisition of the lands.[9] As there is no charge or lien by reason of debts a purchaser may get a good title.[10]

Reid v. *Miller, supra,* a decision prior to the Devolution of Estates Act, dealt with the provision in 3 and 4 Will. IV, c. 104, that lands descended or devised "shall be assets to be administered in Courts of Equity for the payment of the just debts." It was contended that the lands of a deceased debtor were by force of this provision liable to and chargeable with all his just debts, even though before the issue of execution they had been sold to a purchaser. Within the lifetime of the debtor his lands are not bound by the debt, though liable to its satisfaction and chargeable with it by judgment and execution.[11] Draper C.J. stated: "I do not feel bound by authority nor yet compelled by any argument, to hold that the death of the debtor makes any difference or creates a different charge upon his lands. The statute creates only a general charge, which becomes particular in the lifetime of the debtor either on judgment being entered against him or . . . . when the *fi. fa.* is delivered to the sheriff, and after his death in like manner upon judgment against his personal representatives."[12] Referring to the same statutory provision, WILLIAMS on *Executors and Administrators* says that "neither at law nor in equity is any charge created, until judgment is obtained and the claim of a creditor under 3 & 4 Will. IV, c. 104, being a claim under an administration in equity a prior equitable alienee will take precedence over the equitable

[9] ARMOUR, DEVOLUTION, pp. 196–197.
[10] *Ibid.*, p. 189.
[11] (1865), 24 U.C.Q.B. 610, at p. 616.
[12] *Ibid.*, p. 621. *Kinderly* v. *Jervis* (1857), 22 Beav. 1, at p. 22, was referred to and followed.

judgment creditor".[13] As stated by Kay J. in *Price* v. *Price*,[14] "perhaps it would be more accurate to say that the statute makes debts rather an inchoate than an actual charge, and that the creditor has no actual charge until decree."

The restrictions of section 20 take effect:—

(*a*) When real property is sold by the personal representative for the purpose of distribution. In this case the concurrence of the beneficiary is required, or an order. In the event of an omission to follow this procedure the Act does not charge the lands with the payment of debts. The only defect in a purchaser's title would arise from the rights of beneficiaries who did not concur.

(*b*) When real property is sold by a beneficiary who has received it from the personal representative by way of distribution without an order. In this case the land becomes subject to a specific charge for the debts of the deceased even when sold to an innocent purchaser for value. This charge affects land "conveyed, divided or distributed . . . . . to or among the persons beneficially entitled thereto," without an order. The restriction does not apply to a sale by a personal representative at all. The only restriction upon the power of sale of a personal representative is where the sale is for the purpose of distribution only.

It is therefore necessary for the solicitor for the purchaser, or where the land is subject to the Land Titles Act, the Local Master of Titles, to satisfy himself as to the purpose of the sale. If satisfied that the sale is necessary for the purpose of paying debts, and, incidentally, as circumstances relevant to the determination of this point, that the sale is in good faith and for value, an absolute title may be safely certified.

DANA PORTER.

Toronto.

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CRIMINAL LAW—OBTAINING CREDIT BY FALSE PRETENCES—OBTAINING CREDIT BY A FRAUD.—In the case of *Rex* v. *Reid*,[1] recently decided by the Court of Appeal of British Columbia, the following facts were proved. The complainant was a farmer. The accused man with a companion drove to the complainant's farm in a large touring car, thereby creating an appearance of

[13] 11th ed., p. 1304. *British Mutual Investment Co.* v. *Smart* (1875), L.R. 10 Ch. App. 567; *Re Moon*, [1907] 2 Ch. 304. *See* WILLIAMS, *op. cit.*, 12th ed., p. 1096.

[14] (1887), 35 Ch. D. 297, at p. 305.

[1] [1940] 4 D.L.R. 25.

prosperity. He discussed the price of potatoes with the complainant and agreed to buy a considerable quantity at the price which the complainant suggested. He then asked the complainant if he would give him credit for a day or two. The complainant acquiesced and the accused took the potatoes away with him. From evidence of similar performances[2] it was proved that the accused was a swindler who never intended to pay for the potatoes. In the words of the trial judge "he deliberately went around the country and defrauded these farmers". But apart from the acts which have been described the accused did not make any false statement or misrepresentation to the complainant. The trial judge convicted the accused of obtaining credit by false pretences contrary to section 405 (2) of the Criminal Code. The Court of Appeal quashed the conviction.

The relevant sections of the Criminal Code are as follows:

> 404. A false pretence is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.
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> 405. (1) Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretence, either directly or through the medium of any contract obtained by such false pretence, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself.
>
> (2) Every one is guilty of an indictable offence and liable to one year's imprisonment who, in incurring any debt or liability, obtains credit under false pretences, or by means of any fraud.

Counsel for the accused argued that he ought not to have been convicted because he was not guilty of any false pretence. When he agreed to pay for the potatoes in a day or two he promised to do something in the future. He did not make a representation "of a matter of fact either present or past". He made a promise and broke it but he did not tell a lie.

Counsel for the Crown objected to this innocent interpretation of the accused man's actions. They argued that when a man obtains goods and promises to pay for them he suggests by his conduct that he intends to pay for them. When the

[2] Such evidence is admissible to prove fraudulent intention in support of a charge of obtaining money or goods by false pretences. See CRANKSHAW'S CRIMINAL CODE OF CANADA, (6th ed. 1935) 488.

Evidence of similar acts is also admissible to prove fraudulent intent upon a charge of obtaining credit by a fraud. See *The King* v. *Wyatt*, [1904] 1 K.B. 188, 73 L.J. K.B. 15.

accused bought the potatoes he did not say, in so many words, "I intend to pay for these". But he led the farmer to believe that that was his intention. This suggestion was entirely false because the accused did not intend to pay. He completely misrepresented his own state of mind. And the state of a man's mind is as much a fact as the state of his digestion.[3] Hence the accused man by his conduct made a false representation of a matter of fact; the state of his own mind, his intention to pay for the potatoes. To reiterate the argument; the accused by his actions induced the farmer to believe that two facts were true: (a) that the accused was honest; (b) that he intended to pay for the potatoes. Neither fact was true.

This argument sounds perfectly logical and convincing but it has been rejected in a series of cases decided by English and Canadian courts of appeal.[4] These cases establish conclusively that a man who, in obtaining goods, gives a false impression that he intends to pay for them without making any further misrepresentation cannot be convicted of obtaining goods by false pretences. So far as the Court of Appeal of British Columbia was concerned, none of these previous cases were decisions of dogmatic authority. But the Court decided to follow them and accordingly quashed the conviction.

It would appear that upon the facts proved in *Rex* v. *Reid* the accused was clearly guilty of the second offence defined by section 405 (2): "obtaining credit by a fraud". This conclusion is fully supported by the famous restaurant case, *Regina* v. *Jones*,[5] decided in 1898 by the Court of Crown Cases Reserved. The accused entered the complainant's restaurant and ordered cold lamb and sherry. When he had consumed them he asked for the bill which amounted to four shillings. He then revealed the embarrassing fact that he had no money except one half-penny. The indictment upon which he was tried contained two counts. The first count charged him with obtaining goods by false pretences, the second count charged him with obtaining credit by a fraud.[6] The jury found him guilty on both counts.

[3] The striking remark of Lord Justice Bowen in *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, 483, 55 L.J. Ch. 650.

[4] *Rex* v. *Goodhall* (1821), *R. and R.* 461, 168 E. R. 898; *Regina* v. *Lee* (1863), 9 Cox C.C. 304; *Regina* v. *Jones*, [1898] 1 Q.B. 119, 67 L.J. Q.B. 41, 19 Cox C.C. 87; *Rex* v. *Nowe* (1904), 36 N.S.R. 531, 8 Can. C.C. 441; *Rex* v. *Gurofsky* (1919), 31 Can. C.C. 59.

[5] *Regina* v. *Jones* [1898], 1 Q.B. 119, 67 L.J.Q.B. 41, 19 Cox C.C. 87. To the same effect see *Rex* v. *Thompson* (1910), 5 Cr. App. R. 9; *The King* v. *Wyatt*, [1904] 1 K.B. 188, 73 L.J.K.B. 15.

[6] In England this offence is defined by the Debtors Act (1869) c. 32, s. 13, which provides as follows: "Any person shall in each of the cases following be deemed guilty of a misdemeanour and on conviction thereof

From a legal point of view the Court of Crown Cases Reserved carefully analyzed the entire transaction. Following the line of cases to which we have referred, they ruled that the accused ought not to have been convicted of obtaining goods by false pretences. Apart from the false suggestion implicit in the fact of his ordering the food the prisoner made no false pretence whatever. "It is to be observed," said the Court, "that all the man did was to go into the place, order food, eat it, and not pay for it. No question was put to him by the prosecutor, no inquiry was made, and no statement was made by the prisoner." But the Court held affirmatively that the prisoner was properly convicted upon the second count, that of obtaining credit by a fraud. "The jury," said the Court, "found, and were justified in finding, that when he ordered the goods he had no intention of paying; or in other words, that he intended to cheat and was guilty of fraud."

In *Rex* v. *Reid* there was abundant evidence to prove that the accused had no intention of paying for the potatoes at the time he purchased them and that he "intended to cheat." Hence he could have been convicted of obtaining credit by a fraud. But no such charge was brought against him.

In England, crown counsel usually meet the difficulties of cases like *Rex* v. *Reid* by bringing two charges against the accused. In one count he is charged with obtaining goods by false pretences; in the other he is charged with obtaining credit by a fraud.[7] If the evidence fails to support the first count the accused can be convicted upon the second.

One further question remains. Could the Court of Appeal have found the accused guilty of obtaining credit by a fraud and passed sentence although this offence was not specifically charged at the trial? Such a procedure is authorized under certain circumstances by sections 1016 (2) and 951 of the Criminal Code. In the present case all the requirements of s. 1016 (2) seem to have been satisfied.[8] Section 951 provides as follows:

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shall be liable to be imprisoned for any time not exceeding one year with or without hard labour: (1) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud."

[7] See the cases cited *supra*, note 5, and also *Rex* v. *Carpenter* (1911), 76 J.P. 158, 22 Cox C.C. 618.

[8] Section 1016 (2) of the Criminal Code provides as follows: "Where an appellant has been convicted of an offence and the jury or, as the case may be, the judge or magistrate could on the indictment have found him guilty of some other offence, and on the actual findings it appears to the court of appeal that the jury, judge or magistrate must have been satisfied of facts which proved him guilty of that other offence, the court of appeal

> Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

Undoubtedly the application of this section to particular offences and particular counts is not always an easy matter. It is sometimes difficult to decide whether the commission of offence X, as charged, includes the commission of offence Y. It is submitted, though not without hesitation, that the commission of the offence of obtaining credit by false pretences which was specifically charged in *Rex* v. *Reid* does include the offence of obtaining credit by a fraud. Section 404 of the Criminal Code defines a false pretence as "a representation . . . . which representation is known to the person making it to to be false and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation". In view of this definition it is very hard to imagine a case in which a man could obtain credit by a false pretence without being guilty of obtaining it by a fraud. Every fraud is not a false pretence, as *Rex* v. *Jones* demonstrates, but surely every false pretence must be a fraud. It would seem therefore that in *Rex* v. *Reid* the Court of Appeal could have exercised the power conferred by sections 1016 (2) and 951 and convicted the accused of the offence which he undoubtedly committed but which was not specifically charged.

But the Court of Appeal did not adopt this procedure; they simply quashed the conviction for obtaining credit by false pretences. They did not discuss the question whether sections 1016 (2) and 951 authorized them to convict the accused of obtaining credit by a fraud. Perhaps the crown counsel did not suggest that they do so. Be that as it may, their decision cannot be regarded as a resolution of the question one way or the other.[9]

MOFFATT HANCOCK.

Law Building, University of Toronto.

may, instead of allowing or dismissing the appeal, substitute for the verdict found a verdict of guilty of that other offence and pass such sentence in substitution for the sentence passed by the trial court as may be warranted in law for that other offence, not being a sentence of greater severity."

[9] In *Regina* v. *Benson*, [1908] 2 K.B. 270, 77 L.J.K.B. 674, 21 Cox C.C. 631, the Court of Crown Cases Reserved refused to allow a charge of obtaining credit by false pretences to be amended at the trial so as to charge the accused with obtaining credit by a fraud. It does not appear that the question was raised or discussed whether the commission of the former offence would include the commission of the latter.

EVIDENCE—CREDIBILITY OF WITNESS—CROSS-EXAMINATION AS TO PREVIOUS CONVICTION.—The writer was somewhat astounded the other day to hear a judge of the Ontario Supreme Court, in the course of cross-examination of a witness, make the remark, in answer to an objection by opposing counsel, that lack of relevancy was no objection to a question in cross-examination. There is undoubtedly a feeling in a considerable part of the profession that relevancy plays but a small part where cross-examination is concerned, a view which is fundamentally opposed to the whole law of evidence. The decision of the House of Lords in *Maxwell* v. *The Director of Public Prosecutions*[1] clearly re-stated the proposition that all cross-examination must be relevant, and in particular that the type of cross-examination there in question, namely, as to previous convictions, must satisfy the test of relevancy, even though a statute expressly permits a witness, including an accused person who gives evidence on his own behalf, to be examined as to previous convictions.

The writer has on previous occasions in this REVIEW[2] drawn attention to the fact that, in his opinion, there is altogether too much scope permitted in this country with respect to the cross-examination of witnesses regarding previous convictions. Even though, under both Dominion and provincial legislation, witnesses may be cross-examined regarding such convictions, it is submitted that the principle of the *Maxwell Case* should apply and that every permission created by the statute "must be capable of justification according to the general rules of evidence and in particular must satisfy the test of relevance".[3] In a recent article in the *University of Pennsylvania Law Review*,[4] in an issue devoted entirely to the present and future of the law of evidence, Dean Mason Ladd has contributed an article which deals in considerable detail with the problem of introducing character evidence either in chief or by cross-examination as a test of veracity. He points out that the use of a previous conviction to test credibility may frequently run foul of other theories which prohibit the introduction of character evidence. As he states :[5]

> One of the principal reasons urged for the requirement of reputation rather than opinion as proof of character is to prevent the party from being judged by a single act or experience. It is only when the person's conduct becomes so notorious because of a succession of acts

[1] [1935] A.C. 309.
[2] (1934), 12 Can. Bar Rev. 529; (1935), 13 Can. Bar Rev. 605.
[3] [1935] A.C. at p. 319.
[4] Ladd, *Credibility Tests—Current Trends* (1940), 89 U. of Pa. L.R. 166.
[5] *Op. cit.*, at p. 177.

> drawing wide public notice that proof of the character of the witness is admitted by many courts. It is at once apparent that in admitting the previous conviction of a crime as a test of veracity the fundamental basis of admitting other character testimony is disregarded and character as a fixed quality is predicated upon a single act. The bare fact that the act is a crime and that there has been a conviction makes the single experience otherwise regarded unreliable and unsafe, a basis of future prediction of the lack of veracity. Tested upon logical grounds it is difficult to see how convictions-at-large of crimes-at-large satisfy the needs of relevancy to the task which they are assigned to perform.

As he points out, however, while there is considerable danger in the use of convictions to test credibility, it has been used so long and so generally that it will probably be difficult to make a change in the future. What can be done is to distinguish between crimes which bear some relationship to credibility and others which have no such relationship and evidence of which can only create a prejudice in the minds of the jury.[6] For example, as the law now appears to stand, if a defendant is being sued for damages in negligence, it would seem possible to cross-examine him as to a previous conviction regarding criminal negligence. This is directly contrary to the rule that prohibits proof of the fact that the defendant has been negligent on other occasions.[7]

In criminal matters the situation is more serious, because of the fundamental theory that former crimes of an accused person are inadmissible to prove him guilty of an offence with which he is charged. The writer believes that courts approaching the problem of admissibility of previous convictions in cross-examination of accused persons from the point of view expressed in the *Maxwell Case* have it within their power to prevent an unfair use of previous convictions to create either a prejudice against the accused or to show a propensity of the accused to commit a particular act. In view of the sweeping statements made in some of the Canadian decisions,[8] however, some judges may undoubtedly permit cross-examination under the guise of an attack on credibility which can only be prejudicial to the accused. In that event, it would not seem to be unreasonable to amplify our statutory provisions in order to make clear the

[6] Dean Ladd suggests that personal crimes such as murder, assault, etc., may show a vicious disposition, but not necessarily a dishonest one. On the other hand theft, forgery, perjury, etc., do undoubtedly furnish evidence of a dishonest mind, although perhaps some regard should be had to the time which has elapsed since the conviction.

[7] See *Brown* v. *E. & M. Ry.* (1889), 22 Q.B.D. 391 at p. 393.

[8] *Cf. R.* v. *D'Aoust* (1902), 3 O.L.R. 653; *R.* v. *Mulvihill* (1914), 22 Can. Cr. Cas. 354.

distinction between crimes which may have some value in branding a person as untruthful or not worthy of belief and other crimes incapable of such construction.

As Dean Ladd points out, there can be little doubt that one of the principal reasons which prevents an accused person from testifying is his fear of being confronted with a prior conviction, for even though he may have an honest defence he knows (or his counsel knows in any event) that knowledge of a former conviction, if it be in any way related to the type of thing of which he is now accused, will make a verdict of guilty practically certain. It is the writer's opinion that it would be much fairer to an accused person to permit comment on his failure to give testimony than to expose him to proof of prior convictions which could only paint him as a criminal type in the minds of the jury. Our courts are extremely punctilious in observing the rule regarding comments on the accused's failure to testify. It seems exceeding strange that at the same time they practically force an accused person with a criminal record to remain silent because of the fear of having his previous criminal record forcibly brought to the jury's attention. When, as in the Nova Scotia decision commented on previously in this REVIEW,[9] an accused person is open to cross-examination on offences alleged to have been committed by him but of which he was acquitted, it is submitted that the courts are actually abrogating the cardinal principle of English criminal law which has steadfastly refused to permit the blackening of an accused's character as a means of establishing guilt. What is needed, apparently, is an insistence on relevancy in all stages of examination and cross-examination and a reading of permissive sections of Evidence Acts in the light of that principle.

C. A. W.

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LABOUR LAW—RIGHT OF UNION OFFICER TO BE PRESENT AT EMPLOYER'S INVESTIGATION OF EMPLOYEE'S BREACH OF DISCIPLINE—RIGHT TO ORGANIZE AND BARGAIN COLLECTIVELY.—*Moscrop* v. *London Passenger Transport Board*[1] turns on s. 6 of the British Trade Disputes and Trade Unions Act, 1927,[2] but in the course of his judgment Morton J. made two statements which are relevant with respect to trade union activities in Canada. He said :[3]

[9] *R.* v. *Dalton* (1935), 9 M.P.R. 451, [1935] 3 D.L.R. 773; 13 Can. Bar Rev. 605. And see *R.* v. *Mulvihill* (1914), 22 Can. Cr. Cas. 354.

[1] [1940] 3 All E.R. 225.

[2] C. 22 [Eng.]

[3] *Supra*, note 1, at pp. 230, 231.

> Apart from any express term in an employee's contract of service, the defendant board [the employer] is in no way bound to allow the presence of a third party on the investigation of an alleged breach of discipline by an employee.

And again:

> Apart from any special contract the board [the employer] is not bound to admit any third party to its investigations of alleged breaches of discipline by an employee.

Employer-employee relations in Canada are still largely outside the area of legal right and legal duty.[4] Practices followed or adopted by organized employer and employee associations in their relations *inter se* depend more on good faith and on mutuality of concessions than on rules of law. Even collective labour agreements have been accorded no legal force either by the courts[5] or by the legislature, save with one exception.[6] They represent "gentlemen's agreements" which may acquire legal efficacy indirectly by entering into or becoming part of an individual employee's contract of service.[7] In any case, collective agreements must be preceded by collective bargaining which in turn depends on whether the employer is willing to "recognize" his employees' claim to be represented through an organization and through officers of that organization, whether or not they are also employees of the particular employer.

Recognition is, accordingly, the real test of willingness to bargain collectively. And since it involves an admission of the claim of employees to a voice in the ordering of their employment relations and also a relaxation of employer-domination of industry, opposition of employers has been generally strenuous. They have not denied the "right" of employees to bargain collectively but have preferred to take their stand on the fact that no legal duty compelled them so to bargain with their workers. This stand has been reinforced by declarations of non-interference with their control over their own business and by arguments of more dubious validity, such as the need to oust "trouble-makers" and "agitators". The helplessness of indi-

[4] This, of course, is aside from the present war emergency regulations.
[5] *Young* v. *Can. Nor. Ry.*, [1931] 1 D.L.R. 645 (P.C.); *Caven* v. *C.P.R.*, [1925] 1 D.L.R. 122 (Alta. C.A.), affirmed [1925] 3 D.L.R. 841 (P.C.).
[6] The Collective Agreement Act, 1940 (Que.), c. 38. The requirements of the Act must be met before a collective agreement becomes enforceable.
[7] *Caven* v. *C.P.R.*, [1925] 1 D.L.R. 122, at p. 148, per Beck J.A. See also *Hudson* v. *Cincinnati* (1913), 154 S.E. 47. In the United States the Courts have worked out various theories under which redress is given for breach of a collective agreement. See, Rice, Collective Labor Agreements in American Law (1931), 44 Harv. L. Rev. 572.

vidual employees before an anti-union employer could be overcome only by a strong trade union which compelled respect and attention to employees' claims or by legislative interference in favour of workers to redress the balance which ordinarily is in favour of the employer.[8] Experience both in the United States and in Canada has revealed that both strong unions and legislation are not too much, and may not even be enough, to enforce a more democratic condition in employer-employee relations. Union activities, however well-intentioned and however carefully conducted, run more than a normal risk of being proscribed through injunction or criminal prosecution on the ground of nuisance, defamation, intimidation and the like. Legislation, however favourable *ex facie*, is not self-enforcing and its administration, like the administration of any social laws, may turn or pervert it from its alleged purpose into a weapon of repression.

The accumulated social pressure of employees' claims over a period of years has resulted in various legislative efforts at appeasement. Trade unions in the United States have been, by and large, more fortunate in the legislation there passed than have trade unions in Canada in the legislation given them.[9] In Canada, moreover, the problems which have arisen have been resolved in the various provinces by various laws. This has been compelled by the constitutional division of legislative powers as judicially interpreted. Federal interference in the domain of labour relations has been largely under the aegis of the criminal law.[10] The legislation of the provinces has followed in some respects the pattern of the National Labour Relations Act of the United States,[11] but without the latter's important administrative machinery for enforcement. Generally speaking, the provincial Acts have (1) declared in favour of the right of employees to organize or to form trade unions; (2) asserted the right of employees to bargain collectively through their trade unions and the officers thereof or through representatives chosen by a majority of employees, and in some cases have imposed a

[8] *Cf.* Holmes J., in *Coppage* v. *Kansas* (1915), 236 U.S. 1, in a dissenting judgment: "In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law *in order to establish the equality of position between the parties in which liberty of contract begins.*"

[9] The National Labor Relations Act, 1935, 49 U.S. Stat. 449. The Norris-LaGuardia Act, 1932, 47 U.S. Stat. 70, c. 90.

[10] The Criminal Code, s. 501, as amended by 1934, c. 47, s. 12; The Criminal Code, s. 502 A, as enacted by 1939, c. 30, s. 11.

[11] *Supra*, note 9.

pecuniary penalty on employers who refuse to bargain collectively as provided by the legislation; (3) rendered unlawful or void any clause or condition of a contract of employment by which an employee is prevented from exercising his rights under the legislation, thus outlawing "yellow dog" contracts; (4) provided for the imposition of a fine in case of intimidation, or threat of loss of position or employment, or actual loss thereof, where this is done to compel any person to join or to refrain from joining any organization; (5) preserved the right of the employer to suspend, transfer, lay off or discharge employees for proper and sufficient cause.[12]

In view of the *Moscrop Case*, either a collective agreement or legislation, not to mention the possibility of a specific provision in an employee's contract of service, would have to be relied on as authorizing a trade union officer to represent an employee or to be present with him during any investigation by an employer into an alleged breach of discipline, or any other question affecting employment relations. And in the case of the collective agreement, the "right" of the trade union officer would not be one capable of legal enforcement. Representation could, however, be allowed by an employer *ad hoc* as a matter of grace; but this would not amount to a regularization of relations which is what trade unions seek through collective bargaining.

B. L.

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EVIDENCE—ADMISSIBILITY OF PHOTOGRAPHS—DISCRETIONARY POWER OF EXCLUSION WHERE LIKELY PREJUDICE OVERWEIGHS PROBATIVE VALUE.—In *Rex* v. *Cartman*,[1] Fair J. of the Supreme Court of New Zealand upheld against objection the admissibility of certain photographs recording the gruesome circumstances in which the body of a murdered woman was found. "It is a usual form of evidence", he said, "provided that all precautions are taken to ensure that no incorrect inferences are drawn from the photographs, owing to the position from which, or the circumstances under which they have been taken."

[12] The Trade Union Act, 1937, c. 6 (N.S.); The Industrial Conciliation and Arbitration Act, 1937, c. 31 as amended (B.C.); The Strikes and Lockouts Prevention Act, R.S.M. 1940, c. 200; The Freedom of Trade Union Association Act, 1938, c. 87 (Sask.); The Industrial Conciliation and Arbitration Act, 1938, c. 57 (Alta.); The Labour and Industrial Relations Act, 1938, c. 68, as amended (N.B.). Ontario has no comparable legislation. It may be noted that these provincial statutes are partly declaratory of the common law. Their efficacy is doubtful both because of their terms and the means of enforcement.

[1] [1940] N.Z.L.R. 725. The Court followed an unreported decision *Rex* v. *Patience*, referred to in an article in (1940), 16 N.Z.L.J. 37, and *Green* v. *Rex* (1939), 61 C.L.R. 167.

In Wigmore's words, "a photograph . . . . is a witness' pictured expression of the data observed by him and therein communicated to the tribunal more accurately than by words. Its use for this purpose is sanctioned beyond question."[2] But its admissibility depends on whether the fact which it evidences is itself admissible. If the photograph allegedly misrepresents or distorts, because of the manner in which it was made, the position is no different from the case of a witness lying in his words. It is for the jury to decide what weight is to be attached to a photograph which a witness accredits.

One strong ground of objection to photographs is that they may arouse too much sympathy for one side and create a correlative hostility for the other. This argument was dismissed by Masten J.A. in *Rex* v. *O'Donnell*[3] in these words :

> With respect to the admissibility of photographs on the ground that they tended to inflame the minds of the jury, I think that the ground put forward is *nihil ad rem*. The only question to be considered is, were they admissible under the rules of evidence? If they are the effect which they may have on the jury cannot interfere with their admission. There can be no question but that under the rules of evidence they were properly admitted.

With respect, this is put too inflexibly. Where evidence, although legally admissible, is of slight probative value compared to the prejudice it would create if allowed in, the Judge has a discretion to refuse it, as was indicated in *Rex* v. *Christie*.[4] Such a discretion is very often salutary in the conduct of a jury trial. The Court in *Rex* v. *Cartman* accepted this rule of discretion but concluded that the photographs had considerable probative value and that this was not a case in which the Court ought to suggest to the Crown not to tender the photographs in evidence.

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WAR MEASURES—DETENTION ORDER UNDER DEFENCE OF CANADA REGULATIONS — LIBERAL CONSTRUCTION OF REGULATIONS WITH RESPECT TO EXECUTIVE ACTION.—A succession of cases involving the construction of the Defence of Canada Regulations illustrates a degree of judicial self-restraint in the face of executive action which finds no parallel in time of peace.[1] If

[2] Treatise on Evidence (3rd ed. 1940), s. 792.
[3] [1936] 2 D.L.R. 517 (Ont. C.A.).
[4] [1914] A.C. 545.
[1] *Cf. Yasny* v. *Lapointe*, [1940] 2 W.W.R. 372, [1940] 3 D.L.R. 204; *Rex* v. *Coffin*, [1940] 2 W.W.R. 592. See Notes (1940), 18 Can. Bar Rev. 732, 738.

E. H. Jones (Machine Tools) Ltd. v. *Farrell and Muirsmith*[2] is typical of the attitude of the English Courts towards similar emergency regulations in England, one might hazard the opinion that judicial abnegation varies directly with the distance from the actual theatre of war. *Re Penner*[3] affords another illustration of the fact that the particularity often demanded to show compliance with the terms of the Criminal Code[4] is not insisted upon with respect to the Defence of Canada Regulations.

Regulation 21 (1) (c) provides that "the Minister of Justice, if satisfied that with a view to preventing any particular person from acting in any manner prejudicial to the public safety or the safety of the State it is necessary so to do, may . . . . make an order directing that he be detained in such place and under such conditions as the Minister of Justice may from time to time determine." In *Re Penner* the order directing detention was in the form of a recommendation by the deputy minister which the Minister of Justice initialled. An application for *habeas corpus* was made on the ground that no place of detention was specified in the order. Robson J.A. concluded that it was not a peremptory requirement that the exact place of detention be named in the order. Regulation 21 (1) (c) was enabling, and was satisfied by a general order previously made which provided that persons arrested and detained under Regulation 21 "shall be detained in internment camps provided for the internment of prisoners of war under the same conditions as are prisoners of war held in such internment camps."

[2] [1940] 3 All E.R. 608. See Note (1940), 18 Can. Bar Rev. 578.
[3] [1940] 4 D.L.R. 428 (Man.).
[4] *E.g.* in *Rex* v. *Jones and Manlove*, [1935] 2 D.L.R. 718, 63 C.C.C. 145 (B.C.C.A.), Macdonald J.A. spoke of "the necessity for precision in criminal matters". See also *Rex* v. *Thimsen*, [1940] 3 D.L.R. 158 (B.C.C.A.).