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

CONFLICT OF LAWS — TORT COMMITTED ON SHIP ON THE HIGH SEAS — THE MERCHANT SHIPPING ACT, 1894 — THE PHILLIPS v. EYRE FORMULA.—In a former comment[1] on *Canadian National Steamships Co.* v. *Watson*,[2] I mentioned, *inter alia*, two matters, namely, (1) the opinion expressed by the majority of the judges in the Supreme Court of Canada that the formula stated by Willes J. in *Phillips* v. *Eyre*[3] is applicable to an action in the province of Quebec, that is, that the formula is part of the conflict rules of that province, and (2) the vague, even crude nature of the formula itself. I venture now to make some further observations on both these matters.

The formula in question is as follows :

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . . Secondly, the act must not have been justifiable by the law of the place where it was done.

The majority of the judges in the Supreme Court expressed their agreement with the judges in the Quebec courts that s. 265[4] of the *Merchant Shipping Act, 1894*, applied to the case.

---

[1] (1939), 17 Can. Bar Rev. 546.
[2] [1939] S.C.R. 11, [1939] 1 D.L.R. 273.
[3] (1870), L.R. 6 Q.B. 1, at pp. 28 - 29.
[4] Erroneously cited as s. 264 in the former comment (1939), 17 Can. Bar Rev. 546, 547.

The section is as follows :

> 265. Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this Part of this Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

There being "no such provision", and the ship being registered at the port of Vancouver, the section, as applied to the case, seems to say, in effect, that "the case shall be governed by the law of British Columbia."

The net result seems to be that in the opinion of the majority of the Supreme Court of Canada in *Canadian National Steamships Co.* v. *Watson* both the *Phillips* v. *Eyre* formula and s. 265 of the *Merchant Shipping Act, 1894,* are to be applied. Consequently, the provision of the *Merchant Shipping Act* must be read along with the formula, and, so to speak, fitted into it, and in a case in which there is no actual *locus delicti commissi* in the sense of a country with a system of law (because the alleged tort was committed on the high seas), the court is obliged artificially to say that the *locus* in question was British Columbia, in order to give some meaning to the first rule in *Phillips* v. *Eyre* as applied to the particular case. It is submitted, however, that another view might reasonably have been adopted, namely, that if an alleged tort is committed on a ship, a court of any country in which s. 265 of the *Merchant Shipping Act* is in force and applicable is bound to give effect to the special statutory conflict rule by which the case is to be governed by the law of the country (province) in which the port of registry is situated, and must disregard the *Phillips* v. *Eyre* formula (which, in a case not governed by the statute, requires a court to take into consideration both the *lex fori* and the *lex loci delicti commissi*) and must, subject of course to a reservation in favour of any rule of stringent public policy of the forum, decide the case with sole reference to the law of the port of registry. The argument for the suggested construction of the statute is especially strong if the ship is on the high seas at the time of the commission of the alleged tort, but if the construction is right in the case of a ship which is on the high seas, it would appear to be also right in the case of a ship which is in territorial waters. Whether the suggested construction is right or wrong,

the matter would seem to be one which might well have been discussed by the court. It would be interesting to learn by what course of reasoning effect is supposed to be given to a statute which says that the case is governed by the law of British Columbia, when the court applies the law of British Columbia on the question whether the act was or was not justifiable by the law of the place where it was done (that is, on the high seas) and applies the law of Quebec on the question whether the wrong was of such a character that it would have been actionable if committed in Quebec.

The other point is what is the exact meaning of the *Phillips* v. *Eyre* formula itself. The "first rule" has recently been the subject of an interesting article.[5] The author of that article does not mention the suggestion made elsewhere[6] that the result of the formula as a whole, as construed by the courts, may be that in English conflict of laws the existence and extent of tort liability is defined by the *lex fori*, subject only to a proviso that the "act" must not be justifiable by the law of the place where it was done. On the contrary, he stresses Willes J.'s presumably deliberate use of the word "wrong" in the first rule in *Phillips* v. *Eyre* as contrasted with his use of the word "act" in the second rule, and suggests that the "act" is purely factual, while the "wrong" is the legal effect of the "act" as defined by the law of the place where the act was done, the "wrong", if any, being, as Willes J. states in an earlier part of his judgment, the creature of that law. What is not clear, however, is whether there is any real significance in the change from "wrong" in one rule to "act" in the other rule. It is true that Willes J. states in one part of his judgment a theory of the creation of a tort obligation by the law of the place where the act is done, but when he comes to state the English conflict rules applicable to an action in England in respect of an alleged wrong committed abroad, he does not pursue logically his theory of a foreign created right. In fact the only clear reference to the foreign law so far as his two rules are concerned is to be found in his second rule, in which, on his own theory, we might have expected him to refer to the "wrong" defined by the foreign law, whereas any theory of a foreign created right which he

[5] Hancock, *Torts in the Conflict of Laws: The First Rule in Phillips* v. *Eyre* (1940), 3 U. of Tor. L.J. 400.

[6] (1939), 17 Can. Bar Rev. 546, at p. 549; *cf.* Willis, *Two Approaches to the Conflict of Laws* (1936), 14 Can. Bar Rev. 1, at p. 20. On the general subject of the treatment by English courts of conflict problems relating to torts, see Lorenzen, *Tort Liability and the Conflict of Laws* (1931), 47 L.Q.R. 481.

might have had in his mind appears only in the extremely attenuated form that the act must not be justifiable by the foreign law. In the light of his second rule, his use of "wrong" instead of "act" in his first rule may not have any particular significance, and the natural construction of his second rule would seem to be that it is directed solely to the applicability of the *lex fori*, the only question as to this first rule being what is the situation, actual or hypothetical, to which the *lex fori* is to be applied.

In any case in which, because of a particular local or place element in the factual situation, a conflict rule of the forum indicates the law of a given country, whether the country of the forum or a foreign country, as the proper law governing a particular question, the law to be applied is, it is submitted, as a general rule, the domestic law of that country as applied to a situation similar to the actual situation but divested of the place elements which have given rise to the question of conflict of laws and regarded as a purely domestic situation in the country the law of which has been selected as the proper law.[7] If this is the true meaning of a conflict rule in general, does it make any difference whether, in the case of an alleged wrong, we say that the "act" must have been one which would have been an actionable wrong if done in England, or say that the wrong must be of such a character that it would have been actionable if committed in England? Under the rule as expressed in either of these forms, the act, in fact done abroad, and which in the circumstances in which it was done in the foreign country may be an actionable wrong by the law of that country, must be hypothetically transferred to the country of the forum and be supposed to have been done there in similar circumstances.

[7] If the reference by a conflict rule of the forum is to the law of a foreign country, it seems clear that unless we adopt the doctrine of the *renvoi*, we must adopt the view that the law of the foreign country is to be applied not to the actual situation, but to a similar situation localized in imagination in the foreign country. *Cf.* my *Renvoi, Characterization and Acquired Rights* (1939), 17 Can. Bar Rev. 369, at pp. 381-382, quoting, in note 38, the following version of § 7 of the CONFLICT OF LAWS RESTATEMENT prepared by Cook and approved by Beale, but not adopted by the American Law Institute (Cook, *'Contracts' and the Conflict of Laws* (1936), 31 Illinois L.R. 143, at pp. 166-167, note 59): "Except as stated in § 8, whenever in this Restatement any matter is said to be determined or governed by the law of a given state, the term 'law' shall be construed to mean the purely 'local' or 'domestic' rule of that state, i.e., the rule applicable to a case similar in all other respects to the case in hand but presenting for a legal tribunal in that state no problem in the Conflict of Laws (or, containing from the point of view of a legal tribunal in that state no foreign element)." *Mutatis mutandis* the same principle of construction would seem to be appropriate in the case of a reference by a conflict rule of the forum to the law of the forum.

I take as examples some of the cases discussed in the article above mentioned.[8] In *The Halley*[9] the shipowner was vicariously liable in Belgium for the tort committed in Belgium by a pilot compulsorily employed by the owner under Belgian law, and the similar situation to which English law would be applicable under the first rule in *Phillips* v. *Eyre* would be a tort committed in England by a pilot compulsorily employed by the shipowner under English law. In that hypothetical English situation the owner would not have been vicariously liable by domestic English law, and therefore no action lay against the owner in England in respect of the tort committed in Belgium.[10] Again, in *Potter* v. *Broken Hill Proprietary Association*[11] an action was brought in Victoria by the owner of a New South Wales patent for the alleged unlawful use of the patented invention in New South Wales. The similar hypothetical situation to which the law of Victoria would be applied under the first rule in *Phillips* v. *Eyre* would seem to be that of the use by the defendant in Victoria of an invention covered by a Victorian patent owned by the plaintiff.[12] Whether the defendant was justified in what he did by the law of New South Wales would seem to be a question to be answered under the second rule in *Phillips* v. *Eyre* by reference to the law of New South Wales, and it is difficult to understand why A'Beckett J. thought that the "existence of a privilege conferred on the plaintiff" by the law of New South Wales was an element in the situation to which the law of Victoria was to be applied under the first rule. On the other hand, it is submitted that Hood J. was also in error in saying that the "wrong" which must be actionable in Victoria if committed in Victoria under the first rule was the infringement of a New South Wales patent, instead of being a hypothetical infringement of a Victorian patent. In the result, on the meaning of the first rule in *Phillips* v. *Eyre*, A'Beckett J. thought

[8] Hancock, *op. cit.*, *supra*, note 5.

[9] *Liverpool, Brazil, and River Plate Steam Navigation Co.* v. *Benham* (1868), L.R. 2 P.C. 193.

[10] There are some expressions in the judgment in the Privy Council indicating that the action was dismissed because the right of action existing by Belgian law was contrary to some stringent rule of English public policy—a view which is weakened by the fact that since the coming into force of s. 15 of the *Pilotage Act, 1913*, a right of action similar to the Belgian right is recognized by the law of England. *Cf. The Chyebassa*, [1919] P. 201; *The Arum*, [1921] P. 12. In any event Willes J.'s reference to *The Halley* does not suggest that he cited the case on the point of any stringent rule of local public policy.

[11] [1905] V.L.R. 612.

[12] In fact this hypothetical situation was the actual situation in respect of which the plaintiff, by other paragraphs of his statement of claim, claimed a remedy in the same action.

the plaintiff should succeed, and Hood J. thought the defendant should succeed, while on another ground Hodges J. agreed with Hood J. against A'Beckett J., namely, that the action in respect of the infringement of the New South Wales patent was local, not transitory, and therefore the Victorian court had no jurisdiction.[13] In the case of *Papageorgiouv* v. *Turner*[14] a United States immigration officer was sued in New Brunswick for false imprisonment, the act of detention having been done in the State of Maine. The hypothetical situation to which the law of New Brunswick would be applicable under the first rule in *Phillips* v. *Eyre* would, it is submitted, not be the actual situation of detention by a United States officer, but the similar situation of detention by a Canadian officer in Canada of a person seeking admission to Canada. The question whether a United States officer would be protected from liability was a question to be answered under the second rule, and the question whether a Canadian officer would be protected from liability was a question to be answered under the first rule. The case of *Simonson* v. *Canadian Northern Railway Co.*[15] would seem to be an example of a manifestly erroneous construction of the relevant conflict rule. A workman was injured in the course of his employment. The injury was caused by the negligence of a fellow servant, and both in Saskatchewan, where the injury occurred, and in Manitoba, where the action was brought, statutes had been passed depriving an employer of the common law defence that the injury resulted from the negligence of an employee engaged in a common employment with the injured employee. It was held that no action would lie in Manitoba because at common law the negligence of the plaintiff's fellow servant would not have supported an action against the employer and the Manitoba statute was inapplicable to an injury occurring outside of Manitoba.[16] It is submitted, however, that the reference in the first rule in *Phillips* v. *Eyre* to the domestic law of the forum, that is, Manitoba, ought to have been construed as a reference to the domestic law of Manitoba as applied to a domestic Manitoba situation, the case of an employee

[13] READ, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, (1938) 195-198, rightly criticizes this ground of decision, concluding with the submission that the application in the *Potter Case* of the restrictive effect of the "local-action" doctrine "was, if not an unnecessary refinement, a result to be deplored both theoretically and practically."

[14] (1906), 37 N.B.R. 449.

[15] (1914) 24 Man. R. 267, 17 D.L.R. 516, 6 W.W.R. 898; contrast *Story* v. *Stratford Mill Building Co.* (1913), 30 O.L.R. 271, 18 D.L.R. 309.

[16] *Cf.* to the same effect, *Jones* v. *Canadian Pacific Ry. Co.* (1919), 49 D.L.R. 335, [1919] 3 W.W.R. 994 (Man.).

injured in Manitoba, who would of course be entitled to the benefit of the Manitoba statute abolishing the defence of common employment.

It is of course outside the scope of the present comment to discuss the merits or demerits of the *Phillips* v. *Eyre* formula or to discuss the question whether it can be legitimately applied to cases of liability without fault; but it is submitted that the first rule in *Phillips* v. *Eyre* cannot reasonably be construed as merely safeguarding the stringent local public policy of the forum or in any sense other than that there must be an actionable wrong by the domestic law of the forum in a supposititions local situation corresponding to the actual foreign situation, without any reference to the foreign law.

JOHN D. FALCONBRIDGE.

Osgoode Hall Law School.

* * *

TAVERN REFUSING TO SERVE NEGRO — DISCRIMINATION. —Complete freedom of commerce is a general principle of law in Quebec and any merchant is free to deal with whom he chooses subject to any specific law or the adoption of a rule contrary to good morals or public order; and the adoption by the keeper of a tavern, licensed to sell beer by the glass, of a rule not to serve coloured persons does not offend good morals or public order. So the Supreme Court of Canada, Davis J. dissenting, decided in *Christie* v. *York Corpn.*[1]

No question of an innkeeper's common law obligations arises in the case of a tavern,[2] whatever may be said nowadays as to the desirability of perpetuating old "innkeeper's law" when the conditions which prompted its development have long ago disappeared. The majority judgment in the *Christie Case* did not consider the sale of beer in Quebec to be a monopoly or a privileged enterprise and indicated that the fact that a business cannot be conducted without a licence does not make the operator a trader of a privileged class. The licence in this case for the dual purpose of revenue and control of the industry did not prevent the operation of the tavern from being a private enterprise to be managed within the discretion of the proprietor.

[1] [1940] 1 D.L.R. 81. In *Loew's Montreal Theatres* v. *Reynolds* (1919), 30 Que. K.B. 459, it was held that the theatre management could refuse to admit coloured persons to orchestra seats.

[2] *Cf.* 32 CORPUS JURIS 527; Inns and Taverns (1883), 47 J.P. 579. But see 19 A.L.R. 519, 520.

There has been an English expression of opinion that a publican may at common law exclude persons whose presence might reasonably be objectionable to other guests and that beyond observing the statutory requisites to his licence he is, like any other shopkeeper, his own master.[3] That a publican is free to pick and choose his customers has also been asserted to be the rule in Ireland.[4] In an Ontario decision, *Franklin* v. *Evans*,[5] Lennox J. concluded that a restaurant keeper could lawfully refuse to serve luncheon to a person on account of his colour. He remarked :[6]

> A restaurant keeper is not at all in the same position as persons who, in consideration of the grant of a monopoly or quasi-monopoly, take upon themselves definite obligations, such as supplying accommodation of a certain character, within certain limits, and subject to recognized qualifications to all who apply.

The Quebec License Act,[7] referred to by the majority judgment in the principal case, imposed prohibitions against refusing to serve on licensees of restaurants and hotels but no such provision governed licensees of taverns. But according to Davis J., the statute applicable was the Quebec Alcoholic Liquor Act[8] under which the province took complete control of the sale of liquor therein and established a permit system; only the holder of a government permit could sell beer by the glass and such a person did not, therefore, have the right of the ordinary trader to pick and choose to whom he would sell. The learned Judge stated :[9]

> The old doctrine of the freedom of the merchant to do as he likes has in my view no application to a person to whom the State has given a special privilege to sell to the public . . . . . if there is to be exclusion on the ground of colour or of race or of religious faith or on any other ground not already specifically provided for by the statute, it is for the Legislature itself, in my view, to impose such

[3] PUBLICANS AND LADY CYCLISTS (1898), 62 J.P. 305.
[4] The Law of Licensing and Innkeepers—Refusal to Serve (1936), 70 Ir. L.T. 335.
[5] (1924), 55 O.L.R. 349.
[6] *Ibid.*, at p. 350.
[7] R.S.Q. 1925, c. 25, s. 33 provides: "No licensee for a restaurant may refuse without reasonable excuse to give food to travellers." S. 32 provides: "No licensee for a hotel may refuse without just cause to give lodging or food to travellers."
[8] R.S.Q. 1925, c. 37.
[9] [1940] 1 D.L.R. 81, at p. 92.

prohibitions under the exclusive system of governmental control of the sale of liquor to the public which it has seen fit to enact.

As between the majority's support of the doctrine of freedom of commerce and Davis J.'s enunciation of a principle based on legislative assumption of control of an industry the latter ought to be preferred, especially on grounds of policy and where, as in this case, in the absence of a constitutional guarantee of equality of treatment, the result would be the rejection by the courts of tendencies towards discrimination. The principle of freedom of commerce enforced by the Court majority is itself merely the reading of social and economic doctrine into law, and doctrine no longer possessing its 19th century validity. With governmental intervention in the control of certain industries and services in the public interest, the courts may properly conclude that in the absence of legislative pronouncement there is to be no discrimination by government licensees against customers. If freedom of commerce justifies the refusal to sell beer to a negro, it might also justify the refusal of essential products or services. Where the government has established legislative control of products or services it seems more desirable to interpret the legislation as not permitting discrimination unless expressly providing therefor rather than as allowing licensees to discriminate unless expressly forbidden.[10] Administrative oversight by a licensing authority of discriminatory practices by imposing conditions upon the grant of a licence or by exercising a right to refuse renewal is a possible method of dealing with the question raised by the principal case.[11]

BORA LASKIN.

Toronto.

* * *

LIFE INSURANCE—BANKRUPTCY OF INSURED—POLICY PAYABLE TO ORDINARY BENEFICIARY—DEATH OF INSURED—RIGHT TO PROCEEDS OF POLICY.—*In re the Estate of Mendelson*[1] raises a question which is apparently one of first impression in Canada. M took out a life insurance policy payable to his brother, an

[10] As to a civil right of action under a statute forbidding discrimination see *Bolden* v. *Grand Rapids Operating Co.* (1927), 214 N.W. 241 (Mich.).

[11] On a "public utility" approach to the question raised by the principal case, see the AMERICAN LAW INSTITUTE'S RESTATEMENT OF TORTS c. 37, Topic 1, Mere Refusal to Deal with Another, s. 763, Refusal in Public Utility Business (Vol. iv, p. 40).

[1] (1939), 14 M.P.R. 255 (N.B.)

ordinary beneficiary, who gave no value. Some years later M made an authorized assignment under the Bankruptcy Act.[2] The trustee in bankruptcy was discharged after paying a small dividend to creditors, but when M died a year and a half later the trustee was reappointed under s. 37(7) of the Bankruptcy Act and a contest arose between the trustee and the ordinary beneficiary as to the right to the proceeds of the policy. Harrison J. of the Supreme Court of New Brunswick decided that the trustee became owner of the policy and was entitled to the proceeds against a beneficiary who was a mere volunteer.

It is clear, under the New Brunswick Life Insurance Act,[3] that M before his death could have turned the policy into an estate policy by a declaration to that effect. Under s. 23(b) of the Bankruptcy Act,[4] it seems that the trustee in bankruptcy could, in the bankrupt's lifetime, have exercised the power to make such a declaration. It is a strong argument that this power not having been exercised before the insured bankrupt's death the right of the ordinary beneficiary to the proceeds of the policy became indefeasible. *In re Roddick*[5] is authority for the proposition that the designation of a beneficiary, though not of the preferred class, is a voluntary settlement, the effect of which is to defeat the claims of creditors, unless it is shown that the designation was made in circumstances revealing that the insured was not in a position to make a voluntary settlement. A similar result was reached in *Re Benjamin*.[6] Accordingly, apart from any trust arising under the provisions of the Life Insurance Act, *e.g.* in favour of preferred beneficiaries, it may be urged that the designation of a beneficiary of the proceeds of a life insurance policy results in the creation of a revocable trust which becomes irrevocable on the settlor's death when the *cestui que* trust can claim the proceeds.[7] As is pointed out in Scott on Trusts,[8] "the reservation of a power of revocation does not prevent the creation of a trust in the lifetime of the settlor, and the beneficiary at once acquires a future interest, although it is an interest subject to be divested by the exercise

[2] R.S.C. 1927, c. 11, and amending Acts, s. 9.

[3] 1935 (N.B.), c. 13, s. 27 (1).

[4] The provision reads that the property of the debtor "shall comprise the following particulars: . . . . . (b) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of the property as might have been exercised by the debtor for his own benefit at the date of said petition or assignment, or before his discharge."

[5] (1896), 27 O.R. 537.

[6] (1926), 59 O.L.R. 392.

[7] The insured would become trustee of the contract right against the insurance company. See Note (1935), 13 Can. Bar Rev. 324, at p. 328.

[8] Sec. 57. 1, p. 337.

of the power. The death of the settlor is not a condition prededent to the vesting of the interest in the beneficiary."

The judgment of Harrison J. was based, in effect, on two grounds. Firstly, he was of opinion that "the authorized assignment wipes out the rights of an 'ordinary' beneficiary and operates as a transfer of all beneficial interest in the policy to the trustee. Such an assignment is a 'declaration' by which the insured 'appropriates' the insurance money to his trustee under sec. 27(1) of the Life Insurance Act."[9] This statement is open, however, to considerable doubt, having regard to the definition of a "declaration"[10] as "an instrument in writing signed by the insured, attached to or endorsed on a policy, or an instrument in writing, signed by the insured *in any way identifying the policy or describing the subject of the declaration as the insurance or insurance fund or a part thereof or as the policy or policies of the insured or using language of like import* . . . . .

Secondly, Harrison J. considered that the insured's right in the policy was more than a power to change the beneficiary, that "he had certain contract rights by virtue of the policy under which as Lord Ellenborough said in *Schondler* v. *Wace*[11] there 'was a possibility of benefit, to which the assignees were entitled as part of the effects of the bankrupt'."[12] In *Schondler* v. *Wace*, a bankrupt, before bankruptcy, effected a policy of insurance on his own life and this was not disclosed to his assignees to whom, under statutory provision, he was bound to deliver up "all such effects of which [he] was possessed or interested in, or whereby he hath or may expect, any profit, possibility of profit, benefit or advantage whatsoever". The bankrupt assigned the policy to a person who paid up premium arrears and then assigned it for value to the defendant. Upon the bankrupt's death the defendant obtained the insurance moneys but the court held that the assignees were entitled to the fund as part of the bankrupt's effects, less the arrears, which the assignees would have had to pay if the bankrupt had disclosed the existence of the policy. *Schondler* v. *Wace* is clearly distinguishable from the principal case if, as the case seemed to be, the bankrupt had taken out an estate policy. Further, the words of the statute in *Schondler* v. *Wace* have to be taken into account.

[9] 14 M.P.R. 255, at p. 262.
[10] 1935 (N.B.), c. 13, s. 2(g). *In re Rogers' Will* (1935), 9 M.P.R. 575, referred to by Harrison J. is, accordingly, distinguishable. *Cf.* now The Insurance Act, 1937 (N.B.), c. 44, s. 109(7).
[11] (1808), 1 Camp. 487, 170 E.R. 1031.
[12] 14 M.P.R. 255, at p. 262.

If any question of a revocable trust in favour of an ordinary beneficiary of a life insurance policy is ruled out, it is perhaps arguable that the insured's right to change the beneficiary has the effect of retaining in him the beneficial ownership of the policy during his lifetime, so that on his bankruptcy the policy or its surrender value constitutes an asset of his estate which passes to the trustee in bankruptcy.[13] This argument, of course, pays no regard to the position of the beneficiary so long as he remains beneficiary, *i.e.* so long as no "declaration" is made by the insured which excludes him. (So far then as a declaration is required before the beneficiary can be excluded from rights under the policy, it seems unnecessary to dignify his status by saying that there is a trust in his favour). However, if the insured were to assign the policy to a creditor to secure a loan or debt, under s. 39(4) of the Life Insurance Act the rights of any beneficiary, whether ordinary or preferred, under the policy would be affected, although only to the extent necessary to give effect to the rights of the assignee. But since a trustee in bankruptcy is not an assignee for value, s. 39(4) is inapplicable. Whether legislation should be introduced in this connection is of course a matter of policy, but it might well be deemed incongruous to allow an insured to affect the rights of beneficiaries by assigning a policy as security for a loan or debt and yet permit beneficiaries to enjoy the full proceeds of a policy upon the insured's death following his bankruptcy. This cannot, however, be deemed a hardship when by simply exercising the power devolving upon him the trustee in bankruptcy can appropriate the benefits of the policy to the bankrupt's estate.

* * * * * *

Since the above was written, the judgment of Harrison J. was reversed on appeal, Grimmer J. dissenting.[14] In his reasons for judgment, Baxter C.J. stated, *inter alia :*

> The case which, to my mind, is determinative of this matter is *Nichols* v. *Nixey* (1885), 29 Ch. D. 1005 (5 E. & E. Dig., p. 741, case 6396) where Pearson J., construing the words "all such powers — as might have been exercised by the bankrupt" says that they can not mean that the trustee may exercise the bankrupt's powers at any moment and whether the bankrupt is alive or dead. The intention is that the power is to be exercised in the same way in which the bankrupt could have exercised it if he had remained

[13] *Cf. Re Weisman* (1935), 10 F. Supp. 312.
[14] (1940), 9 Fortnightly L.J., 276.

solvent. The trustee cannot after the bankrupt's death exercise a power which is no longer in existence. In this case the bankrupt possessed a power of appointment which he might have exercised in favour of himself or his estate.

* * *

THE SUPREME COURT OF CANADA AND THE "CONCURRENT FINDINGS" RULE.—Briefly stated, the "concurrent findings" rule is to the effect that where two Courts have already reached the same conclusion, the second Appellate Court (in this case the Supreme Court of Canada) will not enter upon a review of the evidence to determine whether the judgment appealed from is right or not, but will dismiss the appeal. Dissenting judgments in the Court of Appeal, or diversity of opinion between the trial Judge and the majority of the Court of Appeal do not affect the "concurrent findings" rule. Is this desirable from the standpoint of the legal profession?

A review of the many cases on the subject does not give the key as to when it will be and when it will not be applied; in many cases where the judgments of both the trial court and the Court of Appeal have been reversed, no mention whatsoever is made of the rule (*e.g.*, *Pacific Stages* v. *Jones*, [1928] S.C.R. 92); whereas in others, the Supreme Court simply applies the rule and dismisses the appeal; as is stated by the Supreme Court of Canada in a recent case (*Golden* v. *Canadian Consolidated*, October 1939 Sittings) :

> We think this is not a case which falls within any of the exceptions, that is to say, *it is not one of those exceptional cases in which the Court will enter upon a review of the evidence.*

Many members of the profession will support the view that the Supreme Court of Canada is remiss in fulfilling its statutory obligations in thus disposing of an appeal. Counsel for appellants are familiar with the attitude of the Supreme Court in many appeals where the trial was with a jury, which may be summed up as follows :

> It is true that had we been trying the case we would have agreed with you, but the jury was the tribunal entrusted by law with the determination of such matters and they have found against you, and accordingly we cannot interfere.

By virtue of this "concurrent findings" rule should one now place in this category many cases in which the Court of Appeal has affirmed the judgment at the trial?

Consideration should be given to the relevant statutory provisions.

Section 3 of the Supreme Court Act provides :

> "The Court of common law and equity in and for Canada now existing under the name of The Supreme Court of Canada is hereby continued under that name as a general Court of Appeal for Canada and as an additional Court for the better administration of the laws of Canada and shall continue to be a Court of record."

Section 35 states :

> "The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada."

Section 36 provides that an appeal shall lie from any final judgment, or a non-suit or an order for a new trial.

Section 37 provides that an appeal shall lie directly to the Supreme Court from any judgment of a Provincial Court where the amount or value of the matter in controversy in the appeal exceeds the sum of $2,000.00. Subsequent sections provide for procedural requirements as to the perfection of an appeal, particularly the deposit of the security and approval of same, etc.

It is stated in Wharton's Law - Lexicon and Judicial Dictionary that an appeal is "the removal of a case from an inferior Court to a superior Court for the purpose of testing the soundness of the decision of the inferior Court."

It is thus seen that where the Supreme Court of Canada applies the "concurrent findings" rule the right of appeal is denied in effect; or stated alternatively, the Supreme Court in applying the rule abrogates or refuses to fulfil its statutory obligation. The Court itself is created by statute, and according to ordinary rules of construction one would suppose that where the Act creating the Court confers the right of appeal the Court would be obliged to hear the appeal and could not consistently with its statutory duty say that it will not enter upon a review of the evidence. In this respect the Supreme Court of Canada may not be in the same position as the Privy Council. A review of the English authorities indicates that perhaps the rule as applied by the Privy Council may have

originated in respect of appeals from India where the Privy Council felt itself at a disadvantage, owing to non-familiarity with local conditions.

In principle one cannot, of course, object to the dismissal of any appeal, but logic indicates that one may well object to the dismissal of appeals where the Court dismissing them has declined to enter upon a review of the evidence. This in fact denies the right of appeal which is conferred by statute. It does not require the Supreme Court of Canada to inform litigants or counsel that the decision both of the trial Court and the Court of Appeal has been in favour of the plaintiff or the defendant, as the case may be.

In reviewing the cases, many of which are collected in 3 C.E.D. Ontario, page 197, one does not notice any case where the right of the Supreme Court of Canada to apply the "concurrent findings" rule has been questioned.

In *Winnipeg Electric Company* v. *Odegard*, [1928] S.C.R. 192, the Supreme Court of Canada allowed the appeal from the decision of the Manitoba Court of Appeal where there was involved the sum of $800.00. It was an appeal from a County Court judgment by leave of the Court of Appeal. The Supreme Court, while commenting adversely upon the action of the Court of Appeal in giving leave to appeal, nevertheless allowed the appeal and dismissed the action. One might well conclude from this and other cases that where leave is given on account of the amount being under $2,000.00, the Supreme Court would be bound to consider the appeal on the merits and dispose of it accordingly, but in other cases, though there may be many thousands of dollars at stake in the appeal, the appellant has a much more difficult time to have his appeal heard and the evidence reviewed by the Supreme Court. Obviously this is undesirable. If it is to prevail, however, should there not be a cheaper method of determining whether the Supreme Court will dispose of an appeal by applying the "concurrent findings" rule, without the necessity of incurring the expense of printing the cases and preparing factums, etc?

As a remedy one is inclined to suggest that leave to appeal be required in all cases, or that an application be made to the Supreme Court to determine before the case is printed whether the appeal is to be really heard or disposed of on the "concurrent findings" rule.

R. L. McCrea.

Winnipeg.

PRACTICE—PARTIES—ISSUE OF WRIT AGAINST ESTATE OF DECEASED PERSON.—In a recent comment in this REVIEW[1] the question was discussed in relation to the Ontario practice whether a plaintiff in an intended action for the recovery of damages from the estate of a deceased person can have an administrator *ad litem* appointed to defend the proposed action when no administration has been taken out by those entitled to apply therefor. The conclusion was that there was nothing authorizing such an appointment. The recent Saskatchewan case of *Ficulik* v. *Omelon*[2] is relevant to the problem discussed in the aforementioned comment.

In the *Ficulik Case*, the plaintiff issued a writ against "The Estate of Anastiasia Omelon and Atanaz Amelon" claiming the recovery of money advanced to Anastiasia and Atanaz. Anastiasia had died before the action was commenced but after making what purported to be a joint will with her husband Atanaz, "to come into effect only at the death of both of us." The executors named refused to act. On an *ex parte* application the local Master authorized the service of the writ upon the persons named as executors and directed them to appear and defend the action and to represent the estate. Their consent was not obtained and apparently they refused to act. A default judgment was signed but on an application by Atanaz it was set aside and an order was made giving leave to defend and appointing Atanaz to represent Anastiasia's estate.

On appeal from this order Taylor J. properly asserted that "there is no authority in any rule of law or practice for issuing a writ or commencing an action *in rem* against the estate of a deceased person . . . . . 'The Estate of Anastiasia Omelon' is a mere expression and not a legal entity.' "[3] The order of the local Master on the *ex parte* application was grounded on s. 22(1) of the Saskatchewan King's Bench Act, 1930,[4] which provided :

> Where it appears that a deceased person who was interested in the matters in question has no personal representative, the court or a judge may either proceed in the absence of any person representing his estate or may appoint some person to represent the estate for all the purpose of the action or other proceeding, on such notice as may seem proper, notwithstanding that the estate in question may have a substantial interest in the matters, or

[1] (1939), 17 Can. Bar. Rev. 677.
[2] [1940] 2 D.L.R. 68.
[3] *Ibid.*, at p. 71.
[4] R.S.S. 1930, c. 49.

> that there may be active duties to be performed by the person so appointed, or that he may represent interests adverse to the plaintiff, or that administration of the estate whereof representation is sought is claimed, and the order so made and any orders consequent thereon shall bind the estate of such deceased person in the same manner as if a duly appointed personal representative of such person had been a party to the action or proceeding.

The conclusion of Taylor J. was that the issue of the writ of summons as against the estate was a complete nullity and that s. 22 could not be relied on as authority for the proceedings taken because it fell "far short of a declaration by the Legislature declaring an intention that an action may be thus commenced against the estate of a deceased person alleged to be primarily liable and the primary debtor in the proceedings. . . . . It obviously refers to those many cases in which proceedings may be held to be defective for want of parties because the estate of some deceased person may be interested *in a contest pending in an action or proceeding.*"[5]

Section 22(1) of the Saskatchewan King's Bench Act is identical with Ontario Rule 90[6] and the discussion of the latter in the comment in this REVIEW already referred to is applicable to the former.

* * *

WILLS—GIFT OF INCOME ENTITLING DONEE TO CORPUS—APPLICATION TO CHARITY.—Mr. E. H. Coghill, Librarian of the Supreme Court Library, Melbourne, Australia, has drawn our attention to the decision of a single Judge in New Zealand in *In re Dillon (Deceased), New Zealand Ins. Co. Ltd.* v. *Public Trustee*,[1] which raised the problem discussed in previous comments in this REVIEW[2] on *Halifax School for the Blind* v. *Chipman*[3] and *In re Wright, Westley* v. *The Melbourne Hospital.*[4] In *In re Dillon*, the testator provided for the setting up of "The Dillon Trust Fund" by giving the residue of his estate upon trust for investment. He then directed his trustee "out of the proceeds from such investment to pay the administration charges

[5] [1940] 2 D.L.R. 68, at p. 72.
[6] Ontario Rule 90 speaks of the Court, but the Saskatchewan provision speaks of "the court or a judge"; save for this the wording is identical in both provisions.
[1] [1940] N.Z.L.R. 48.
[2] (1937), 15 Can. Bar Rev. 651; (1938), 16 Can. Bar Rev. 569.
[3] [1937] S.C.R. 196.
[4] [1917] V.L.R. 127.

of my trustee and the sum of £3 per week to my sister . . . . for and during her life and to pay the balance of the proceeds of such investment from time to time to the trustees of the Foreign Mission Board of the Methodist Church of New Zealand to be expended by them in furtherance of the hospital work of the said Mission Board." The Court decided against the Mission Board trustees on the question whether they were entitled to surplus income during the life of the testator's sister. Then, alluding to the principle that a gift of income to a person without limitation as to time is a gift of the capital where no other disposition of the capital is made, the Court observed very shortly that this principle did not apply where the gift was to a charity, so that the Mission Board was not entitled to take the capital on the death of the testator's sister.

* * *

ANIMALS—LIABILITY FOR DAMAGE CAUSED BY CAMEL IN ZOO.—In *McQuaker* v. *Goddard*,[1] the plaintiff was bitten while trying to feed a camel which was kept in a zoo owned by the defendant. In affirming a judgment for the defendant the Court of Appeal decided that (1) if an animal, *e.g.* a camel, does not exist in a wild state in any part of the world, it has ceased to be a wild animal, whether in England or in any other country; (2) it was for the judge, not for the jury, to determine whether an animal belonged to the class of domestic animals or to the class of wild animals; in this case the judge had rightly decided that the camel was a domestic animal; (3) there was no evidence of knowledge by the defendant of any propensity to bite on the part of the camel; (4) there was no negligence on the defendant's part; since he did not know that there was any danger that the camel might put its head over the fence within which it was kept and bite someone, he was under no duty to have a more effective fence.'[2]

No question was raised, apparently, whether the defendant as keeper of a zoo was under a duty imposed by law to receive animals in his zoo, or was authorized to keep a public zoo. If such were the case, there is authority that the rule of absolute liability in the keeping of wild animals is inapplicable and that liability depends on negligence.[3]

[1] [1940] 1 All E.R. 471, 56 T.L.R. 409.

[2] For a general discussion of liability for harm done by animals see a recent comment in this REVIEW (1939), 17 Can. Bar Rev. 597.

[3] *Jackson* v. *Baker* (1904), 24 App. D.C. 100; *Guzzi* v. *New York Zoological Society* (1922), 182 N.Y.S. 257, affirmed 233 N.Y. 511.