THE CANADIAN BAR REVIEW

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☞ **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 — MOVABLES AND IMMOVABLES — DOCTRINE OF CONVERSION OF MONEY INTO LAND.—The decision of Morton J. in *In re Cutcliffe's Will Trusts, Brewer* v. *Cutcliffe*[1] is, it is submitted, unfortunate and confusing, because the learned judge, in distinguishing *In re Berchtold*,[2] seems to have misapprehended the principle which was clearly and accurately stated in that case by Russell J. (as he then was). The principle is that the selection of the proper law governing succession on death is in English conflict of laws based on the distinction between immovable and movable things and not on the distinction between real property and personal property;[3] but that when the proper law has been selected on the basis of the distinction between immovables and movables, the distinction between realty and personalty may become important, that is to say, the proprietary interest in question will be distributed among the beneficiaries according to its nature as realty or personalty, if the selected domestic succession law is based on the distinction between realty and personalty. Thus, if the interest in question is a leasehold estate in land, the proper law governing its succession is the *lex rei sitae*, because the property is an interest

[1] [1940] Ch. 565.

[2] *In re Berchtold, Berchtold* v. *Capron*, [1923] 1 Ch. 192.

[3] See *e.g.*, *Freke* v. *Lord Carbery* (1873), L.R. 16 Eq. 461; *Pepin* v. *Bruyère*, [1902] 1 Ch. 24. The exception created by Lord Kingsdown's Act will be discussed later in this comment. As regards the general principle stated and amplified in the text, *cf.* my *Conflict of Laws: Examples of Characterization* (1937), 15 Can. Bar Rev. 215, at pp. 234 - 235; as to the classification of property, and the doctrine of conversion, *cf.* LAW OF MORTGAGES (2nd ed. 1931) 736 - 737.

in an immovable thing, but if by the proper law a leasehold estate in land is characterized or classified as personalty, the distribution among the beneficiaries will be governed by the provisions of that law applicable to personalty.[4]

Again, if the property in question is an interest in an immovable thing (land) at the material time, the law governing succession to it is the *lex rei sitae*, notwithstanding that by the doctrine of conversion the property is personalty and not realty. Conversely, if the property in question is an interest in a movable thing (for example, money, bonds or shares) at the material time, the law governing succession to it is the *lex domicilii* of the *de cujus*, notwithstanding that by the doctrine of conversion the property is realty and not personalty. On the other hand, when the proper law—whether the *lex rei sitae* or the *lex domicilii*—has been selected, and by that law a distinction is made between realty and personalty, the property will be distributed according to its nature as realty or personalty, as the case may be. In other words, the English conflict rules which indicate the *lex rei sitae* and the *lex domicilii* as the proper laws governing succession to immovables and succession to movables respectively take no notice of the distinction between realty and personalty, but when a particular system of law has been selected as the proper law, the domestic rules of that system of law must be applied, and if according to those domestic rules succession depends on the distinction between realty and personalty, that distinction must of course be observed. Therefore, if the property in question is the interest of the *de cujus* as beneficiary under a trust for sale of a freehold estate in land situated in England, and still held by the trustee unsold, and the *de cujus* was domiciled in Ontario, the law of England, the *lex rei sitae*, is the proper law governing succession,[5] and consequently the property would be distributed, by virtue of the doctrine of conversion, as personalty in accordance with the domestic law of England.[6]

The *Cutcliffe Case* presented the converse situation. The property in question consisted at the time of the death of the *de cujus* of certain debenture stock in a British company. This stock had been bought by trustees with part of the proceeds

[4] See, *e.g.*, *Duncan* v. *Lawson* (1889), 41 Ch.D. 394, at p. 398.

[5] So held by Russell J. in *In re Berchtold*, note 2, *supra*, a case in which the land was situated in England, and the *de cujus* was domiciled in Hungary.

[6] By virtue of the English legislation of 1925 the importance of the distinction between realty and personalty is much diminished, but this fact is immaterial to the general principle.

of land originally held upon trust and sold under the *Settled Land Acts*. The land was situated in England, the trustees were resident there, and the trust was created by an English testatrix, and in view of these circumstances it was held that the stock was situated in England. The main question was whether on the death of a beneficiary the succession to his interest in the stock should be governed by the *lex rei sitae* (the law of England) or by the *lex domicilii* (the law of Ontario). On principle the answer would seem to be obvious. The stock was of course a movable, and the beneficiary's interest was an interest in a movable, and the succession should be governed by the *lex domicilii* of the *de cujus*, and in the application of the domestic law of Ontario it would have to be considered whether by the doctrine of conversion the property should be disposed of as if it had been actually reconverted into realty, and not on the basis of its actual nature as personalty. This was not, however, Morton J.'s conclusion. He relied upon s. 22, sub-s. 5, of the *Settled Land Act, 1882*, which provides[7] that capital money arising under the statute, while uninvested or unapplied, and securities on which an investment of it is made, shall, for all purposes of disposition, transmission and devolution, be considered as land.[8] Consequently he held that the interest of the deceased beneficiary was an interest in an immovable, and that the law of England was the law governing succession, so that the heir at law by English law was entitled to succeed and not the next of kin by Ontario law. This conclusion, it is submitted, is based on a confusion between conflict rules and domestic rules of law. The doctrine of conversion is a characteristic doctrine of domestic English law arising from the distinction between realty and personalty, and whether it is a judge-made rule, as in the *Berchtold Case*, or has been expressed in statutory form, as in the *Cutcliffe Case*, in either event the doctrine can have no application to a particular situation unless it has first been decided in accordance with the conflict rules of the forum that the proper law is domestic English law or some other law that distinguishes between realty and personalty and includes the doctrine of conversion. After the proper law has been selected, (that is, as it is submitted, Ontario law, because at the material time the interest of the *de cujus* was an interest in movables), then of course the domestic rules of the selected proper law will be applicable in their entirety, but even if by

[7] In England the provision has been substantially reproduced in the *Settled Land Act, 1925*, s. 75, sub-s. 5: *cf.* note 10, *infra*.

[8] As to the meaning of "land" in this connection, see note 17, *infra*.

those rules the property will for purposes of devolution be regarded as being converted from personalty to realty, this will not involve any reconsideration of the selection of the proper law.

It is also submitted that in the *Cutcliffe Case* Morton J. was in error in thinking that his conclusion was supported by anything that was said or decided in *In re Cartwright.*[9] In this latter case certain freehold estates in land situated in England were held in trust, and the testator, as tenant for life, had sold them under the *Settled Land Acts,* and part of the proceeds were still retained by the trustee and invested in personal securities. The testator, having become absolutely entitled to the investments representing the sale of the freehold estates subject to certain charges, purported to dispose of them by a will made in France in French form. The testator being a British subject domiciled in England, the will, not being in the domiciliary form, was invalid in point of form unless it was a will of "personal estate" within Lord Kingsdown's Act. It was held that the will was invalid, because by virtue of the *Settled Land Act, 1925,* s. 75, sub-s. 5,[10] the investments must be treated as real property. This decision is in accordance with previous cases relating to the construction of Lord Kingsdown's Act, but it has no relevance to the point decided in the *Cutcliffe Case,* in which Lord Kingsdown's Act was not in question. Lord Kingsdown's Act is an example of an unfortunate legislative error faithfully perpetuated by the courts. In the famous case of *Bremer* v. *Freeman*[11] the question was as to the validity of a will of movables made in France in English form by a woman of British nationality and of English domicile of origin who was at the time of her death domiciled in France. The Privy Council in 1857 held the will to be invalid because it had not been made in the form required or authorized by the law of the domicile of the testatrix. In 1861 the British Parliament, desiring to remedy the grievance caused by this decision, passed the statute which is commonly known as Lord Kingsdown's Act,[12] but which may also be cited as the *Wills Act, 1861.*[13] By this statute it was provided in effect that "as regards personal estate" a will made by a British subject outside of the United Kingdom should be valid (that is, so far as formalities

[9] [1939] Ch. 90.

[10] See note 7, *supra.*

[11] (1857), 10 Moo. P.C. 306. For a discussion of this case, see (1930), 46 L.Q.R. 480 - 482, [1932] 1 D.L.R. 16 - 19; (1934), 12 Can. Bar Rev. 140; (1939), 17 Can. Bar Rev. 389, note 56.

[12] 24 & 25 V. c. 114, an Act to amend the Law with respect to Wills of Personal Estate made by British Subjects.

[13] By virtue of the *Short Titles Act, 1896.*

are concerned) if made according to the forms required by the law either of the place of making or of the domicile of the testator at the time of making or of the domicile of origin, within the British dominions, of the testator. What was obviously intended was to give a testator, in the case of a will of movables, a choice among the forms of three different laws, in addition to any of the forms available to him under the existing conflict rule relating to wills of movables, namely, those required by the law of his domicile at the time of his death. Unfortunately, however, the British Parliament, committing an error of which judges and even extrajudicial writers are sometimes guilty, spoke not of wills of movables, but of wills of "personal estate"; with the result that the statute applies not only to wills of movables, but also to wills of immovables in some circumstances, but not in others, with curious and illogical results.[14] Whereas the mistakes of judges and other writers may be remedied, in part at least, by subsequent explanation, those of the legislature cannot be remedied in this way, and the courts in countries in which Lord Kingsdown's Act is in force, have, I think uniformly, taken the legislature at its word. Only in Canada, so far as I know, has any serious effort been made to remedy by legislation the mistake made by the British Parliament in 1861. In Saskatchewan in 1931, and in Manitoba in 1936, the legislatures have adopted a revised version of Lord Kingsdown's Act contained in a model Wills Act prepared in 1929 by the Conference of Commissioners on Uniformity of Legislation in Canada.[15] This revised version is applicable only to wills of movables and effects a notable simplification of the law of wills in the conflict of laws. In Ontario and most of the other provinces of Canada Lord Kingsdown's Act has been expressly re-enacted *mutatis mutandis* or is in force by virtue of the general adoption of English law, and the legislatures have not taken advantage of the work done by the Conference of Commissioners in this branch of the law.

By way of contrast with the principle stated at the beginning of this comment, that is, that the selection of the proper law governing succession is based on the distinction between immovables and movables and not on the distinction between realty and personalty, Lord Kingsdown's Act provides

[14] I have elsewhere attempted to state some of the incongruities resulting from Lord Kingsdown's Act: [1932] 1 D.L.R. 54 - 55; (1934), 12 Can. Bar Rev. 131 - 133.

[15] Conference Proceedings 1929, pp. 46 - 47, Canadian Bar Association Year Book, 1929, pp. 332 - 333; [1932] 1 D.L.R. 56 - 57.

in effect that on the single question of the formal validity of a will made by a British subject some alternative formalities are allowed to the testator in the case of personalty as distinguished from realty. Thus, a will of a freehold estate in land held upon trust for sale and conversion into movables, but not yet sold, is within the statute, and the testator may use either the forms of the *lex rei sitae*, because the subject matter is in fact an interest in immovables, or any of the alternatives mentioned in the statute, because by virtue of the doctrine of conversion the subject matter is personalty.[16] Conversely, a will relating to movables held upon trust for sale and conversion into realty is outside the statute, because the subject matter is by virtue of the doctrine of conversion realty, but is in fact an interest in movables, and therefore the testator must use the forms of the law of his domicile.[17] The inveterate conservatism of lawyers may help to explain, though it cannot justify, the perpetuation of the incongruities caused by the British legislation of nearly eighty years ago.

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EVIDENCE — DISCOVERY — PRIVILEGE AGAINST SELF-CRIMINATION — DOMINION AND PROVINCIAL EVIDENCE ACTS. — In *Staples* v. *Isaacs*,[1] the British Columbia Court of Appeal upheld the refusal of the defendant in a libel action[2] to answer on discovery questions the answers to which would criminate him or to produce documents on such examination which would have

[16] *In re Lyne's Settlement Trusts*, [1919] 1 Ch. 80. In the case of a leasehold estate in land held upon trust, the result would be the same in the absence of a trust for conversion into realty, because the subject matter in its actual condition at the material time would be personalty and also an interest in immovables.

[17] *Cf. In re Cartwright*, note 9, *supra*. In the case of a freehold estate in land held upon trust for conversion into leasehold, Lord Kingsdown's Act would apply, and the testator may use either the forms of the *lex rei sitae* or any of the alternatives allowed by the statute; and in the case of movables held upon a similar trust the testator may use either the forms of the *lex domicilii* or any of the alternatives allowed by the statute. In the *Cartwright Case*, [1939] Ch. 90, at p. 104, Greene M.R. suggests that the word "land" in the *Settled Land Acts* (notes 7, 8 and 10, *supra*) must be construed as meaning a freehold estate if a settled freehold has been sold, and as meaning a leasehold estate if a settled leasehold has been sold, with of course a corresponding difference of result with regard to the application of Lord Kingsdown's Act.

[1] [1940] 3 D.L.R. 473 (B.C.)

[2] It was not disputed that the alleged libel fell within s. 370 of the Criminal Code.

the same effect. Because the decision conflicts with that of an Ontario Divisional Court in *Chambers* v. *Jaffray*[3] the grounds thereof deserve close scrutiny.

The statutory abrogation in provincial and federal Evidence Acts of the common law right to refuse to answer criminating questions was coupled with a grant of protection against subsequent use of the answers given. It seems clear, as Sloan J.A. pointed out in *Staples* v. *Isaacs*, that a provincial Evidence Act which compelled answers to criminating questions but purported to prohibit their use in subsequent proceedings could offer this protection only in respect of proceedings over which the province had jurisdiction. It could not, as Perdue J.A. remarked in *Attorney-General* v. *Kelly*,[4] protect against subsequent criminal prosecutions under the Criminal Code. This additional protection had necessarily to be found in the Canada Evidence Act, and in *Chambers* v. *Jaffray*, also an action for libel, none of the three members of the Divisional Court adverted to this circumstance; but it may be said, in explanation if not in extenuation, that the question was sufficiently considered by Mulock C.J. Ex. in the lower Court. The Canada Evidence Act,[5] sec. 5(2), provides, *inter alia*, that "if with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him . . . . . and if but for this Act, or the Act of any *provincial legislature*, the witness would therefore have been excused from answering . . . . . then although the witness is by reason of this Act, or *by reason of such provincial Act*, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence." O'Connell Co. Ct. J. expressed the opinion in *Rex* v. *Harcourt*,[6] though not without doubt, that the above provision related to provincial legislation which, while compelling answers, afforded a similar protection, and was inapplicable to a statute which absolutely abrogated the common law privilege against self-crimination without providing any corresponding protection.[7] The reason for this construction is not apparent from the words of the Canada Evidence Act; and, as Meredith

[3] (1906), 12 O.L.R. 377.
[4] (1916), 10 W.W.R. 131 (Man.).
[5] R.S.C. 1927, c. 59.
[6] (1929), 53 C.C.C. 156 (Ont.); affirmed on appeal.
[7] E.g. The Ontario Security Frauds Prevention Act, 1928, c. 34, s. 9. See now The Securities Act, R.S.O. 1937, c. 265, s. 14(3).

C.J.O. stated in *Re Ginsberg*,[8] a province was entitled to abrogate the privilege in so far as it might relate to matters within the province's legislative jurisdiction. Moreover, it was under no legal duty in so doing to provide against the use of the criminating answers thus compulsorily obtained.

The main argument in the principal case arose out of the quite tenable position of Sloan J.A. that sec. 5 of the British Columbia Evidence Act[9] could not compel the defendant to answer questions the answers to which might criminate because he could get no protection thereunder with respect to a criminal prosecution under the Criminal Code, and the provincial legislature did not intend to compel answers where it could not provide protection from penal consequences which might flow therefrom. The obvious answer to this was, as the plaintiff argued, that the compulsion was found in the provincial Act and the protection from criminal prosecution in the Canada Evidence Act.[10] But both the British Columbia Evidence Act and Canada Evidence Act exerted compulsion upon and extended protection only to a "witness"; consequently it was necessary to determine whether a defendant who is examined for discovery came within that term.

There is authority for the proposition that, aside from provision by statute or rule of Court, a party examined for discovery is not a witness[11] and that the common law right to refuse to give incriminating answers can be asserted on discovery.[12] *Chambers* v. *Jaffray* depended in part on the fact that Con. Rule 439[13] of Ontario provided that "a party to an action or issue . . . . . may . . . . . be orally examined before the trial touching the matters in question by any party adverse in interest, and may be compelled to attend and testify *in the same manner, upon the same terms, and subject to the same rules of examination as a witness,* except as hereinafter provided." Meredith C.J. said in that case that "but for the provisions of Con- Rule 439 . . . . I should have doubted whether sec. 5 [of the Ontario Evidence Act, compelling incriminating answers but giving protection against their subsequent use] is applicable to examinations for discovery."[14] Although it appears from the judgment of Perdue

[8] (1917), 40 O.L.R. 136.
[9] R.S.B.C. 1936, c. 90.
[10] *Cf.* the remarks of Killam J. in *Rex* v. *Douglas* (1896), 11 Man. R. 401.
[11] *Webster and Kirkness* v. *Solloway, Mills & Co.*, [1930] 3 W.W.R. 445, 25 Alta. L.R. 8.
[12] *Harrison* v. *King*, [1925] 2 W.W.R. 407, 21 Alta. L.R. 381.
[13] See now Rule 327(1).
[14] (1906), 12 O.L.R. 377, at p. 381.

J.A. in *Attorney-General* v. *Kelly*[15] that, apart from whether a rule like Con. Rule 439 existed, the Manitoba and Canada Evidence Acts were applicable to a person compelled to make discovery on oath, his remarks were *obiter dicta* and there was not as full a discussion of the question in his judgment as there was in the dissenting remarks of Haggart J.A.; moreover, the Manitoba Evidence Act provided that "*no person* shall be excused from answering", etc. In *Rex* v. *Doull*,[16] Maclean J. in the Exchequer Court expressed a doubt "whether the word *witness* [in sec. 5 of the Canada Evidence Act] is to be construed so as to include a party giving evidence on discovery."

This being the state of the authorities, what of *Staples* v. *Isaacs*? British Columbia Marginal Rule 370, referred to in that case, was the same as Con. Rule 439 on which *Chambers* v. *Jaffray* partly turned; and, without determining the question, Sloan J.A. was willing to assume that by virtue of Marginal Rule 370c an examinee for discovery was to be deemed a witness within the relevant provision, sec. 5, of the British Columbia Evidence Act. This section could give no protection, however, against the subsequent use of criminating answers in criminal prosecutions; and Sloan J.A. concluded that "whatever may be the effect of M.R. 370c upon the operation of sec. 5 of the provincial Evidence Act that provincial Rule of Court cannot be invoked to extend the operation of sec. 5 of the Canada Evidence Act so as to include a person being examined on discovery within the term 'witness' as used in subs. 2 thereof."[17] *Chambers* v. *Jaffray* was not followed because it could not be "assumed that the terms of a federal statute may be defined for federal purposes by provincial Rules of Court." This was a matter which *Chambers* v. *Jaffray* apparently did not consider.[18] The principal question discussed in that case was the applicability of the compelling and protecting statute to a party to a cause examined for discovery, since the very essence of the discovery was that the answers given *should* be used in a subsequent proceeding, viz., the trial of the action. This question was deemed, however, to be affirmatively concluded by *Rex* v. *Fox*,[19] although Britton J. said in the *Chambers Case* that "it must now be considered as settled law and practice that the protection to a witness from his answers extends only 'to danger from inde-

[15] (1916), 10 W.W.R. 131.
[16] [1931] Ex. C.R. 159.
[17] [1940] 3 D.L.R. 473, at p. 477.
[18] Nor cases blindly following *Chambers* v. *Jaffray:* e.g. *McLeod* v. *Crawford* (1908), 11 O.W.R. 101.
[19] (1899), 18 P.R. 343.

pendent contemporaneous or subsequent prosecution' ".[20] The latter part of these remarks was apparently quoted from the dissenting judgment of Rose J. in *Rex* v. *Fox*, which involved the question of the right to examine for discovery the defendant to an action for the recovery of penalties under a federal statute. The majority of the Court in that case were of opinion, having regard to sec. 5 of the Canada Evidence Act, that discovery could be had, but only Rose J. considered the question whether an examinee for discovery was within the term "witness" in sec. 5; the other Judges seemed to assume the point. On this problem Rose J. said :[21]

> A party becomes a witness when he gives evidence at the trial. A party under examination for discovery is not a witness. What he says is not evidence. It may become evidence if the party examining chooses, but not otherwise.

A fairly recent British Columbia decision, *Blumberger* v. *Solloway, Mills & Co.*, may also be adverted to in this connection. There the holding was that a party examined on interrogatories was not treated as a witness (Marginal Rule 370c not being applicable), and hence sec. 5 of the British Columbia Evidence Act did not operate to take away such party's immunity in respect of self-crimination.

One final point in *Staples* v. *Isaacs* may be noticed. It was attempted to make Marginal Rule 370c effective in relation to the Canada Evidence Act by reference to sec. 35 thereof providing that "in all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken . . . . shall subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings." Whatever the validity of the argument as such, Sloan J.A. had no doubt that Marginal Rule 370c was not a "law of evidence" within the meaning of that section.

There can be no denying that if *Staples* v. *Isaacs* is correctly decided it has serious implications for all cases in which the facts on which a civil action is grounded are such as may support a prosecution under the Criminal Code. Some question may perhaps be raised in connection with what appears to be Sloan J.A.'s interpretation of the British Columbia and Canada Evidence Acts, viz., that they do not purport to compel answers

[20] (1906), 12 O.L.R. 377, at p. 383.
[21] (1899), 18 P.R. 343, at p. 357.

where there is no protection against their subsequent use. As has already been indicated, there is nothing to prevent the province from compelling answers which may criminate without affording any protection against their subsequent use. It is doubtful, however, whether any Court of construction would so interpret either the British Columbia or the Canada Evidence Acts when the result would be the removal of a cherished common law immunity without more. And in any case, *Staples* v. *Isaacs* does not depend on the finding of protection against criminal prosecution in the provincial Evidence Act. Such protection is, however, clearly provided by the Canada Evidence Act, but only to a "witness".

Further, the constitutional power of the province, through Marginal Rule 370c, to put an examinee for discovery in the position of a witness cannot be questioned so far as civil actions are concerned. But because a person is by rule of Court, or by statute, of a province put in the position of a witness *qua* matters within provincial jurisdiction is not a reason for so treating him with respect to matters covered by federal legislation. It would be strange indeed, if without authorizing or complementary federal legislation, the words of a federal statute could be interpreted in terms of meanings given to those words in provincial legislation, at least in cases where the words in question are made to bear meanings they do not ordinarily possess.

But despite the apparent gravity of *Staples* v. *Isaacs* the remedy for the situation it discloses is quite simple. After the word "witness" in the relevant provisions of the Canada Evidence Act might be added some such clause as "or any person who by statute or rule of Court, whether of the Dominion or of any province, is put in the position of a witness"; or the word "witness" might be appropriately defined in an interpretation section.

B.L.

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ADMINISTRATIVE LAW — WAR MEASURES — VALIDITY OF DEFENCE REGULATION UNDER AUTHORIZING ACT.—Only isolated instances exist of regulations, made under the authority of the Defence of the Realm Act during the last war, the validity of which was successfully challenged in the Courts.[1] There was conscious recognition of the fact that "a war could not be

[1] See *Newcastle Breweries Ltd.* v. *Rex*, [1920] 1 K.B. 854; *Chester* v. *Bateson*, [1920] 1 K.B. 829.

carried on according to the principles of Magna Charta".[2] Freedom of executive action in the interests of public safety required that sympathetic construction be given to statutory authorization of delegated legislation.[3] Accordingly, the decision of Bennett J. in the recent case of *E. H. Jones (Machine Tools), Ltd.* v. *Farrell and Muirsmith*[4] is difficult to accept, albeit some may see a vindication of democracy in the fact that in time of great national peril the machinery of justice maintains the same even beat as in normal times.

Section 1 of the British Emergency Powers (Defence) Act, 1939, provided :

> (1) Subject to the provisions of this section, His Majesty may by Order-in-Council make such regulations (in this Act referred to as defence regulations) as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.
>
> (2) Without prejudice to the *generality of the powers conferred* by the preceding subsection, defence regulations may, so far as appears to His Majesty in Council to be necessary or expedient for any of the purposes mentioned in that subsection .... (b) authorize .... (i) the taking of possession or control, on behalf of His Majesty, of any property or undertaking; (ii) the acquisition, on behalf of His Majesty, of any property other than land .... (d) provide for amending any enactment, for suspending the operation of any enactment, and for applying any enactment with or without modification. ....
>
> (4) A defence regulation, and any order, rule or by-law duly made in pursuance of such a regulation, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

Regulation 55(4) of the Defence (General) Regulations, 1939, made in pursuance of the above provision, enabled a competent authority, in this case the Minister of Supply, to "carry on the whole or any part of any existing undertaking or authorize a person to carry on the whole or any part of any existing undertaking, in accordance with any instructions of the competent authority." The expression "undertaking" was defined to mean any public utility undertaking or any undertaking by way of any trade or business. Plaintiff company, E. H. Jones (Machine Tools), Ltd., was notified by the Ministry of Supply that in the exercise of the powers conferred by regulation 55, the

[2] *Ronnfeldt* v. *Phillips* (1918), 35 T.L.R. at p. 47.
[3] *Cf. Rex* v. *Halliday, Ex Parte Zadig*, [1917] A.C. 260.
[4] [1940] 3 All E.R. 608.

defendants were authorized to carry on the company's business; and on the same day the company's bankers were instructed not to allow its account to be operated, thus making it impossible for the company to do business. Bennett J. held that the regulation in question, in authorizing *the carrying on* of any undertaking, went beyond the authority conferred by Parliament which was restricted to regulations authorizing "the taking of possession or control . . . . . of any property or undertaking . . . ."

It may be urged against this construction, in the first place, that the term "control", which may be defined as the "power of directing", gave some warrant for the impugned regulation. Secondly, and of more importance, no reference was made by the Court to the fact, nor was any effect thereto given, that the power to make regulations authorizing the taking of possession or control of any property or undertaking was "without prejudice to the generality of the powers conferred" by subsection (1) of section 1 of the Emergency Powers (Defence) Act, 1939, which allowed the making of defence regulations which "appear to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war . . . . and for maintaining supplies and services essential to the life of the community." In *Rex* v. *Halliday*,[5] Lord Atkinson, speaking of the power conferred by the Defence of the Realm Act "to issue regulations for securing the public safety and the defence of the realm" said : "These are wide words. They are new words. Some effect must be given to them . . . . . I do not think it is legitimate to treat them as of none effect, because if effect be given to them the liberty of the subject may possibly be restricted."

What Maclean J., in the Exchequer Court of Canada, said in *Arpad Spitz* v. *Secretary of State for Canada*[6] may well be adverted to : "When you come to interpret any war measure, the objects of the same must be held strictly in mind, and such measures must be given that construction which will best secure the end their authors had in mind. One must consider not only the wording of the war measures but also their purposes, the motives which led to their enactment, and the conditions prevailing at the time. In time of war particularly the substance of things must prevail over form, and usually all technicalities must be swept aside."

[5] [1917] A.C. 260, at p. 275.
[6] [1939] Ex. C.R. 162, at p. 166.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — AUTOMATIC ELEVATOR.—The plaintiff, in *Kerry* v. *Keighley Electrical Engineering Co. Ltd.*,[1] went up in an automatic lift and emerged at the landing of an upper flat. The door closed, and after remaining at the landing for a few seconds the plaintiff, wishing to descend and having his back to the lift, put out his hand behind him, opened the door and moved backwards through it. The lift was not there and he fell and was injured. There was a defect in the safety apparatus that allowed the door to open although the lift was not at the floor. Atkinson J. refused to find contributory negligence on the ground that the plaintiff was entitled to assume that if the door opened the lift must be there. The Court of Appeal reversed this conclusion and held "that the clear evidence of the plaintiff that he opened this door with his back to it and stepped backwards through it is the clearest admission of the fact that he did not exercise the reasonable care which a reasonable person would have exercised, and, therefore, that the accident was due to his own negligence in so entering through that door".[2]

The Court of Appeal's holding is stated apparently as a proposition of law. The disposition to quarrel with it must be tempered by the knowledge that there is a variance in men's opinions of what is proper conduct and that any determination of reasonable behaviour is some person's (or persons') notion of what the community generally considers to be reasonable. The plaintiff's conduct fell to be regarded in relation to the situation as it appeared to him at the time he acted.[3] From this standpoint there is much to be said for Atkinson J.'s decision, although, retrospectively considered, the plaintiff's conduct may not have been that of a reasonable man acting for his own protection. Decisions do exist which stigmatize backing into elevator shafts as contributory negligence,[4] but they are not cases involving an automatic elevator such as that in the principal case. Likewise, the proposition in *Bonanomi* v. *Purcell*,[5]

[1] [1940] 3 All E.R. 399.
[2] *Ibid.*, at p. 403.
[3] HARPER ON TORTS, s. 72, p. 163.
[4] *E.g., Sodomka* v. *Cudahy Packing Co.*, 101 Neb. 446, 163 N.W. 809; *Keeter* v. *Devoe & Raynolds Inc.* (1936), 93 S.W. (2d) 677 (Mo.). In *Greisman* v. *Gillingham*, [1934] S.C.R. 375, affirming [1933] O.R. 543, there was an interlocking safety device in connection with a freight elevator so that if the elevator moved from where it was left open a gate descended. The plaintiff walked backwards towards the elevator but it had ascended to the next floor, and owing to some defect the gate did not descend so that the plaintiff fell down the shaft. He was found guilty of contributory negligence to the extent of 10% under an apportionment statute.
[5] 230 S.W. 120.

that a plaintiff cannot assume merely because he came down in an elevator and it stopped at his floor that it was still there, may be accepted as sound without it having any application to a case of an automatic elevator the door of which will not open unless the car is there. If in such case the door does open although the car is not there, owing to failure of the automatic lock to work, the doctrine of *res ipsa loquitur* can be invoked.[6]

A useful statement relevant to contributory negligence in relation to elevators generally is that of Maxey J. in *Murphy* v. *Bernheim & Sons* :[7]

> When elevators first came into use, persons using them or approaching elevator shafts did so with misgivings, such as those of passengers on railroad trains when the latter first came into use. Nowadays, elevators and elevator shafts give rise to no more apprehensions of peril than do railroad trains to those who use them. In these days of perfected mechanical equipment, probably not one person in ten thousand has ever approached an elevator shaft without finding either the elevator there to receive him or the shaft so barred that he could not have walked into it even if he tried to do so. The fact that elevator shafts are no longer places of probable danger is a fact which individuals carry in their subconscious minds when they approach them and therefore they do not normally approach them with the utmost degree of caution. When one becomes accustomed after long experience to finding elevator shafts safeguarded, he naturally takes it for granted that all elevator shafts are safeguarded. This does not excuse him from taking care, but it decreases the degree of care the law imposes on one who would escape the imputation of negligence. . . . .
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> . . . . One has a right in these days to expect that if an elevator is not on the floor from which one is approaching the elevator shaft that the shaft will be properly guarded [and this coupled with the fact that the light was dim] makes it improper for a court . . . . to declare a plaintiff who walked into that shaft guilty of contributory negligence as a matter of law.

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[6] *Rudolph* v. *Elder* (1939), 95 P (2d) 827 (Colo.). *Cf.* also *Class* v. *Y.W.C.A.* (1934), 191 N.E. 102 (Ohio), where *res ipsa loquitur* was deemed applicable in a case where on the evidence as to the operation of a semi-automatic elevator it appeared that the opening of the door would cause the car to remain stationary and where the plaintiff while stepping from the elevator after opening the door was caught as the car suddenly shot up. But *cf. Seider* v. *Ray*, [1937] 1 W.W.R. 440 (B.C.) in which *res ipsa loquitur* was held inapplicable but the case turned on the plaintiff being a bare licensee.

[7] (1937), 194 Atl. 194 (Pa.). See also *Douville* v. *Northeastern Warehouse Co.* (1940), 10 Atl. (2d) 394 (Pa.).