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 — ACTION IN ONE COUNTRY BASED ON RETROACTIVE LEGISLATION OF ANOTHER — PUBLIC POLICY AND THE FIRST RULE IN PHILLIPS V. EYRE.—The decision of the Supreme Court of Maine in *Dalton* v. *McLean*[1] brings to the fore an interesting difference between Canadian and American ideas in the field of constitutional law.

The action, brought in the State of Maine, arose out of an automobile collision which occurred in New Brunswick. The defendant was an administratrix acting under the authority of a Maine court. It was alleged that the collision in which the plaintiffs had been injured was due to the negligence of her decedent. He had died soon after the collision.

The simple general principle which American courts follow in tort cases is to apply, so far as possible, the law of the state where the alleged tort occurred. Upon these facts, therefore, the Maine court proposed to apply the law of New Brunswick. Investigation revealed that, at the time of the decedent's death, New Brunswick had no statute providing for the survival of claims against a deceased tortfeasor's estate. Under the common law of New Brunswick in force at that time, the plaintiffs' claims would not have survived and the defendant administratrix would not have been obliged to pay them. But after the death of the decedent the legislature of New Brunswick had passed a survival statute.[2] And this statute contained a section which

[1] *Dalton* v. *McLean* (1940), 14 Atl. (2d)13.
[2] Survival of Actions Act, 1939, Statutes of New Brunswick, c. 46.

gave it a limited retroactive effect. The statute received the royal assent on April 6, 1939; section 10 provided that it should be deemed to have had effect as from July 1, 1937. The alleged tort and the tortfeasor's death in the instant case occurred between these dates. The Maine court therefore concluded that, had the action been brought in a New Brunswick court, it would have succeeded.

Notwithstanding this fact, the Maine court decided not to enforce the retroactive provision of the New Brunswick statute on the ground that its enforcement would be contrary to the public policy of the State of Maine.

This conclusion is not surprising to anyone familiar with American constitutional theory. Retroactive laws have long been viewed with suspicion and prejudice in the United States. A recent text book on American constitutional law tells us that "there always has been in the United States something of resentment against retroactive government action caused by want of notice, the disturbance of the feeling of past security, and the lack of knowledge of conditions when such action occurs."[3] The Maine court referred to cases in which it had held local statutes having retroactive operation to be unconstitutional. It also pointed out that the State of Maine had a special interest in this case since the application of the foreign retroactive statute would affect the process of administration in a court of the State of Maine. For these reasons the court declined to enforce the New Brunswick law and the action was dismissed.

It would be a great mistake to conclude from this single case that American courts are generally unwilling to enforce the laws of Canadian provinces. On the contrary, the tort law of a Canadian province is likely to be more liberally adopted in an American court than it would be in the courts of other Canadian provinces. This situation is due to the fact that Canadian courts subscribe to the somewhat cumbersome rules laid down in *Phillips* v. *Eyre*.[4] According to the first of these rules, a plaintiff suing upon an alleged foreign tort must show that it was of such a character that it would have been actionable if committed at the forum. The effect of this rule, as usually interpreted, is to prevent a plaintiff suing in one province from enforcing a cause of action created by the law of a sister province, unless upon the same set of facts he would also have had a cause of action under the internal law of the province in which

[3] WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES (1936) 636.
[4] *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1.

suit is brought.[5] This rule obviously restricts the application by one Canadian province of the laws of other provinces within the field of tort. American courts, on the other hand, are not hampered by any such restriction. They will apply the law of the place of wrong in all cases whether or not it is the same as that of the forum, except in those rare instances where the court feels that the law of the place of wrong conflicts with the public policy of the forum.

Thus, in the instant case, the Supreme Court of Maine did not concern itself with the question whether, had the collision occurred in Maine, the plaintiffs could have maintained their suit. Suppose that in such a situation the effect of Maine's internal law would have been to extinguish the plaintiff's cause of action upon the death of the tortfeasor. Even on this assumption the Maine court would, in the instant case, have held that the cause of action survived because it was governed by New Brunswick law.[6] But, had the suit been brought in another Canadian province, it would have been necessary to show that under the internal law of that province the plaintiff's cause of action survived.

The first rule in *Phillips* v. *Eyre* dated from a time when common law judges both in England and America were very reluctant to apply the law of foreign jurisdictions. The rule appears to have been invented in order that English judges might not have to impose a liability created by foreign law which was repugnant to English ideals of justice.[7] But the

[5] For a suggestion of a different interpretation of the first rule in *Phillips* v. *Eyre* which would leave the courts more discretion to accept or reject foreign law, see Hancock, *Torts in the Conflict of Laws: the First Rule in Phillips* v. *Eyre* (1940), 3 U. of Tor. L.J. 400. For a critical discussion of this interpretation see Falconbridge, *Conflict of Laws: the Phillips* v. *Eyre Formula* (1940), 18 Can. Bar Rev. 308. There is an exception to the first rule in *Phillips* v. *Eyre* in cases where the foreign liability is based upon the plaintiff's infringement of a rule of navigation in force at the place of wrong. In such cases the foreign liability is enforced. See JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION (1927), 138.

[6] See *Kertson* v. *Johnson* (1932), 185 Minn. 591, 242 N.W. 329; *Burg* v. *Knox* (1933), 67 S.W. (2d) 96. For general statements see *Ormsby* v. *Chase* (1933), 280 U.S. 387, 54 Sup. Ct. 211.

[7] See *The Halley* (1868), L.R. 2 P.C. 193 in which the first rule of *Phillips* v. *Eyre* was enunciated and applied for the first time. In *O'Connor* v. *Wray*, [1930] S.C.R. 231, Newcombe J. refers to the first rule in *Phillips* v. *Eyre* as based upon the public policy of the forum. (See p. 247.) The explanation of the policy underlying the first rule in *Phillips* v. *Eyre* which is given in the text has been adopted by several other writers.

See CHESHIRE, PRIVATE INTERNATIONAL LAW (2nd ed., 1938) 302; DICEY, CONFLICT OF LAWS (5th ed. 1932) 26, 29, 775; Lorenzen, *Tort Liability and the Conflict of Laws*, (1931), 47 L.Q. Rev. 483, 498; Robertson, *The Choice of Law for Tort Liability in the Conflict of Laws* (1940), 4 Modern L.R. 27, 33. If the purpose of the rule is not the exclusion of

sweeping and mechanical operation of the rule also excludes many foreign liabilities which are not in themselves unjust or unfair. For this reason it has sometimes been criticized.[8] The more flexible doctrine employed by American courts which allows the court to reject a foreign liability that is contrary to the forum's public policy appears preferable. It allows the court to discriminate between foreign laws which are merely different from those of the forum and foreign laws which appear to be harsh or unjust. It also permits discrimination between cases in which the forum has an interest in the factual transaction (such as *Dalton* v. *McLean*) and cases in which it has no such interest.

As we have indicated, the first rule in *Phillips* v. *Eyre* has been criticized because, although designed to exclude foreign liabilities which are felt to be harsh or unjust, it also excludes other foreign liabilities which from this point of view are entirely unobjectionable. The instant case suggests that perhaps the rule may be open to the further objection that it fails to completely fulfil its purpose since it does not exclude a type of foreign liability which might be repugnant to the forum's ideals of justice. It would not, apparently, exclude a foreign liability of a retroactive character. Yet in *Dalton* v. *McLean* the Maine court decided that such a liability was contrary to its ideals of justice. To illustrate: suppose the plaintiffs in *Dalton* v. *McLean* had brought their action in a court which subscribed to the first rule in *Phillips* v. *Eyre*. They prove that, had the collision occurred at that forum, the internal law of that forum would have given them a cause of action against the tortfeasor which would have survived against his estate. This would suffice to satisfy the first rule in *Phillips* v. *Eyre*: "The wrong must be of such a character that it would have been actionable if committed at the forum." Yet the court of the forum might still feel, as did the Maine court, that the retroactive liability created by the New Brunswick law was unjust and ought not to be enforced. In order to exclude the New Brunswick law the court

foreign liabilities which are in conflict with the stringent policies of the forum, it is very difficult to see what other purpose the rule can have. The explanation of the policy of the rule which has been given in the text does not appear to commend itself to Dean Falconbridge. See his *Conflict of Laws: the Phillips* v. *Eyre Formula* (1940), 18 Can. Bar Rev. 308, 312, note 10, 314.

[8] See Lorenzen, *Tort Liability and the Conflict of Laws* (1931), 47 L.Q. Rev. 483, 498; Robertson, *The Choice of Law for Tort Liability in the Conflict of Laws* (1940), 4 Modern L.R. 27, 33; Hancock, *Torts in the Conflict of Laws: the First Rule in Phillips* v. *Eyre* (1940), 3 U. of Tor. L.J. 400.

would have to resort to some further doctrine independent of the first rule in *Phillips* v. *Eyre*. Perhaps we may conclude that the defects of this rule merely illustrate again the age-old difficulty of trying to administer justice through the mechanical application of a verbal formula.

MOFFATT HANCOCK.

Law Building,
University of Toronto.

* * *

PUBLIC MEETINGS—POLICE POWERS.—In *Burton* v. *Power*,[1] a member of the "Pacifist Society" held a meeting in a public reserve and persisted in addressing it after being forbidden by a police constable to do so. His conviction of wilfully obstructing the constable in the execution of his duty was affirmed because the Court, following *Duncan* v. *Jones*[2] was satisfied that the constable had a reasonable aprrehension that breaches of the peace would occur which it was his duty to prevent; support for this was found in the history of previous meetings of the society at which incidents occurred which gave reasonable cause for apprehending a breach of the peace on this occasion. In his judgment Myers C.J. stated:[3]

> This is not a charge against the appellant for being a pacifist or for holding opinions of any particular subject, nor does the case involve the law of unlawful assembly or *any question of freedom of speech in any fair sense of the term.*

It is submitted, however, that the case does involve a very important question of freedom of speech, for as has been pointed out in a comment on *Duncan* v. *Jones* "the apprehension of a policeman, provided it is reasonable, [is now] the decisive factor as to whether a meeting should be held."[4]

The decisions in *Burton* v. *Power* and *Duncan* v. *Jones* did not depend on any allegation or finding of obstruction to the public right of passage or of any disorderly or illegal conduct (save the refusal to discontinue the meeting). They turned on the opinion of Bramwell J. in *Rex* v. *Prebble*[5] that a police officer

[1] [1940] N.Z.L.R. 305.
[2] [1936] 1 K.B. 218.
[3] [1940] N.Z.L.R. 305, at p. 306.
[4] E. C. S. Wade, Police Powers and Public Meetings (1937), 6 Camb. L.J. 175, at p. 178–9.
[5] (1858), 1 F. & F. 325.

who reasonably apprehends a breach of the peace is under a duty to prevent it. This principle, accepted in *Duncan* v. *Jones*, is in no way covered by any of the provisions of the Criminal Code; ss. 46 and 47 thereof do not touch it. It is therefore in force in Canada as common law.[6] But it is undoubtedly covered by the provisions of s. 168 of the Criminal Code which makes it an indictable offence wilfully to obstruct any peace officer in the execution of his duty. Further, one may be guilty of an offence under s. 168 although he submit to arrest peaceably.[7]

There is "no specific right of public meeting" in England or in Canada.[8] Highways are at the disposal of the public for the purpose of passage[9] and any restriction of the public right to free and unobstructed user of a street must have clear warrant in law.[10] Professor Goodhart has pointed out the need to distinguish public meetings from public processions.[11] In the latter case the public right of passage is being exercised and the number of people in the procession is immaterial so long as it avoids becoming a public nuisance, a riot or unlawful assembly or becoming disorderly in breach of the peace.[12] But user of a highway for purposes other than travel, *e.g.* for a public meeting, and for which there is no statutory authority is a wrong.[13] It seems clear that if an obstruction of the public right of passage is caused by a public meeting the remedy of indictment or information at the suit of the Attorney-General is open,[14] or a private suit by any individual who has suffered special damage may be brought.[15] Further, an injunction suit at the instance of the municipality charged with the duty of protecting public interests therein to restrain acts of obstruction has been allowed in a number of cases;[16] but the lack of unanimity of the courts in

[6] *Brousseau* v. *Rex* (1917), 56 S.C.R. 22; *Union Colliery Co.* v. *Rex* (1900), 31 S.C.R. 81.

[7] *Rex* v. *Golden*, [1937] 1 W.W.R. 337, 51 B.C.R. 326.

[8] DICEY, LAW OF THE CONSTITUTION, 9th ed., p. 271.

[9] *Ontario Hydro-Electric Power Commission* v. *Grey* (1924), 55 O.L.R. 339; *Henderson* v. *St. John* (1872), 14 N.B.R. 72; *Styles* v. *Victoria* (1899), 8 B.C.R. 406. See generally the Canadian Abridgment, vol. 21, cols. 734 *ff.*, 920 *ff.*

[10] *Hodson* v. *Glenhodson Country Club and Whitby*, [1933] O.R. 271.

[11] *Public Meetings and Processions* (1937), 6 Camb. L.J. 161. See also DICEY, *op. cit.*, *supra*, note 8, appendix, s. 2(1) by E. C. S. Wade.

[12] *Ibid.*, at p. 169.

[13] *McLean* v. *Crown Tailoring Co.* (1913), 29 O.L.R. 455; *Harrison* v. *Duke of Rutland*, [1893] 1 Q.B. 142, at p. 154; *Ex Parte Lewis* (1888), 21 Q.B.D. 191, at p. 197.

[14] *O'Neil* v. *Harper* (1913), 28 O.L.R. 635; *Delta* v. *V.V. & E. Ry.* (1908), 9 W.L.R. 236, 467, 14 B.C.R. 83.

[15] *Ireson* v. *Holt Timber Co.* (1913), 30 O.L.R. 209.

[16] The Canadian Abridgment, Vol. 21, cols. 1060–1062.

Canada in this connection springs, in part, from the statutory provisions respecting title and jurisdiction to and over public streets.[17]

Even aside, therefore, from the reasonable apprehensions of a constable that a breach of the peace may occur unless a public meeting in a highway is dispersed, such a meeting will generally run foul of the law prohibiting public nuisances or obstructions to the public right of passage.

In practice, of course, there is little disposition to interfere with an orderly public meeting even though it cause some appreciable obstruction which is technically a wrong. (It should be noted that there may be an illegal obstruction of a highway although no person is actually obstructed[18] and although the whole street is not obstructed.)[19] The case would be different if, for example, the speaker indulged in improper language or behaviour.[20] And while currently the system of licensing public meetings has developed, the right of a municipality to authorize an obstruction of the highway for the purpose of a public meeting must be founded on legislative authority.[21] In any event, little comfort can be derived from the decision in *Beatty* v. *Gillbanks*[22] to the effect that a lawful assembly does not become unlawful because there is apprehension of a breach of the peace by others seeking to interfere with the assembly. In fine, as Dr. Jennings has stated "a meeting can lawfully be held only on private premises with the consent of the owner, or on a public open space or in a park in which there is no right of way, and even then only with the consent of the local authority and subject to its byelaws."[23]

What the powers of the police are in relation to public meetings on private premises has been settled in England by *Thomas* v. *Sawkins*.[24] Prior to that decision the Secretary of State for the Home Department had stated in the House of Commons that "the law provides that unless the promoters of

[17] *Ibid.*, and see also cols. 878–888.

[18] *Biggar* v. *Crowland* (1906), 13 O.L.R. 164; *Gill* v. *Carson and Nield*, [1917] 2 K.B. 674; *Hagarty* v. *Pryor* (1872), 8 N.S.R. 532.

[19] *Greig* v. *Merritt* (1913), 24 W.L.R. 328 (B.C.); *Rex* v. *Fitzgerald* (1876), 39 U.C.Q.B. 297.

[20] *Wise* v. *Dunning*, [1902] 1 K.B. 167.

[21] *Cline* v. *Cornwall* (1874), 21 Gr. 129; *Code* v. *Jones and Perth* (1923), 54 O.L.R. 425.

[22] (1882), 9 Q.B.D. 308. The case in fact dealt with a procession. *Cf.* Goodhart, *op. cit.*, *supra*, note 11.

[23] THE LAW AND THE CONSTITUTION, 2nd ed., p. 254.

[24] [1935] 2 K.B. 249.

a meeting ask the police to be present in the actual meeting they cannot go in unless they have reason to believe that an actual breach of the peace is being committed in the meeting".[25] But *Thomas* v. *Sawkins* established for the first time in English legal history "that police officers are entitled to enter and remain on private premises if they have reasonable grounds for believing that if they are not present an offence or breach of the peace will be committed there."[26] Moreover, an eminent constitutional authority is of opinion that there is nothing in the case to restrict this right of the police to occasions when the meetings held are advertised as open to the public.[27]

The wide powers of the police under *Duncan* v. *Jones* and *Thomas* v. *Sawkins* compel the conclusion that public meetings can be safely held only with their permission.[28] Certainly if similar powers were claimed by a modern administrative agency criticism and attack would not be long in coming. And yet the police force, as much as any administrative tribunal, is part of legal administration. So long as their discretion is as unfettered as the common law discloses, liberty of free discussion is in potential danger. It is not enough, with so important an issue at stake, to trust the police not to abuse their powers or to exercise restraint in using them. It is an easy transition from zealousness in the execution of duty to denial of freedom of speech. The police themselves ought to welcome some clear definition of their powers which in their present vague condition might operate *in terrorem* against sincere elements in the population genuinely concerned with problems of the day and desirous of discussing them in a public forum. "Suspicions as to probable consequences"[29] of a public meeting seem hardly an adequate basis for interference. There is a problem here which calls for earnest consideration. The criminal law as to sedition and the like affords adequate protection to the state with respect to what occurs at public meetings. But anticipatory control of public speech by the police, as now seems to be the law, raises the question whether the ordinary citizen is not in need of some protection as well.

[25] Parliamentary Debates, House of Commons, (1933–4), vol. 290, col. 1968.

[26] Goodhart, *Thomas* v. *Sawkins: A Constitutional Innovation* (1936), 6 Camb. L.J. 22.

[27] *Supra*, note 4, at p. 176.

[28] DICEY, LAW OF THE CONSTITUTION, 9th ed., appendix, s. 2(1) (B), by E. C. S. Wade, at p. 560.

[29] *Ibid.*

PRACTICE — ADMINISTRATOR AD LITEM — APPOINTMENT TO DEFEND PROPOSED FORECLOSURE ACTION — COMMUNIS ERROR FACIT JUS—RETROSPECTIVE EFFECT OF OVERRULING DECISIONS. —The judgment of the Saskatchewan Court of Appeal delivered by Gordon J.A. in *Saskatchewan Farm Loan Board* v. *Tomlin*[1] overrules the judgment of Taylor J. of the Supreme Court of Saskatchewan in *Ficulik* v. *Omelon*[2] and the judgment of the Local Master in *In re Proposed Action between Hudson's Bay Co. and Morris*[3] not on the merits but by reason of the application of the doctrine *communis error facit jus.*[4] The question involved in the *Tomlin Case* was whether s. 22 of the Saskatchewan King's Bench Act, 1930,[5] gave jurisdiction to appoint an administrator *ad litem* of the estate of a deceased mortgagor so as to enable a foreclosure action to be commenced. The affirmative answer of Gordon J.A. rested on the ground that that had been the practice for a score of years, and to upset the interpretation so long placed on s. 22 (which was unchallenged until *Ficulik* v. *Omelon* was decided) would cause "serious legal repercussions" because of the number of titles to property that might be affected.

The provisions of s. 22(1) of the Saskatchewan King's Bench Act (which alone are relevant to the discussion) are, save for a few words immaterial here,[6] identical with the provisions of Ontario Rule 90. The history of the latter has already been traced in a previous note in this REVIEW[7] wherein the limits of its application were considered. The conclusions reached in that note do not support the interpretation of s. 22 of the Saskatchewan King's Bench Act as perpetuated by Gordon J.A. Further, the decision in the Ontario case of *Re Toronto General Trusts Corp.* v. *Sullivan*[8] which raised a problem similar on the facts to that in the *Tomlin Case*, and which considered Rule 90, is directly contrary to the result in the *Tomlin Case*. The matter is fully treated in the note in this REVIEW already referred to and it is unnecessary to repeat what was there said.

While nowhere in his judgment does Gordon J.A. explicitly state that the interpretation so long placed on s. 22 is wrong

[1] [1940] 2 W.W.R. 282.

[2] [1940] 1 W.W.R. 306, [1940] 2 D.L.R. 68. See Note, (1940), 18 Can. Bar Rev. 323.

[3] [1940] 2 W.W.R. 41.

[4] For a discussion of this doctrine see ALLEN, LAW IN THE MAKING, 3rd ed., p. 274 *ff.*

[5] R.S.S. 1930, c. 49.

[6] Ontario Rule 90 speaks of "the Court" but the Saskatchewan provision speaks of "the court or a judge".

[7] See (1939), 17 Can. Bar Rev. 677.

[8] (1920), 17 O.W.N. 486.

(if it were dealt with as an original question), it is submitted that such an inference is warranted on a consideration of his opinion. While it does not seem appropriate to the judicial function for an appellate Court to perpetuate error or to seek through its decisions to provide what may be termed an "act of indemnity" by continuing a misinterpretation of a legislative enactment,[8A] numerous examples exist of Courts, out of respect for precedent, following decisions or applying principles which are wrong or contrary to what they would decide if allowed a free hand. A noted writer and teacher has said that "in strict theory it is difficult to justify the doctrine *communis error facit jus*".[9] But it has been applied not only to perpetuation of error in case law but also to erroneous constructions of statutes. In this latter connection (bearing as it does on the *Tomlin Case*) Jessel M.R. stated in *Ex parte Willey*:[10]

> Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. *Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs.*

It seems difficult to find antiquity of decision in an interpretation which has persisted but a score of years, and one is hard put to it to explain how the interpretation of s. 22 of the Saskatchewan King's Bench Act, which deals with a question of practice, has any effect on men's daily dealings.

When Gordon J.A. speaks of the "serious legal repercussions" that would follow if the Court overruled the existing interpretation of s. 22 he apparently assumes that such a course would retrospectively upset titles acquired under litigation which proceeded under the practice theretofore followed. This was a matter on which the profession could profitably have been enlightened. As has been stated elsewhere, to give retrospective operation to an overruling decision "is neither logically necessary nor a workable rule of practical sense."[11] The argument for retrospective operation stems from the fiction that Judges do not make law but merely enunciate principles which have always existed. In many cases in the United States where the

[8A] Overruling a Long-Standing Decision, (1938) 186 L.T. 134.

[9] *Supra*, note 4, at p. 274.

[10] (1883), 23 Ch. D. 118, at p. 127.

[11] Snyder, *Retrospective Operation of Overruling Decisions* (1940), 35 Ill. L. Rev. 121, at p. 150.

principle of retrospective operation of overruling decisions is stated as a general rule, exceptions have been also indicated; and the most important or most frequently discussed one has been the exception that "an overruling decision will not be given retrospective operation to affect contracts made or property rights acquired in reliance upon the decision overruled."[12]

But if the view of an English writer be taken literally, Gordon J.A.'s fear of the retrospective operation of an overruling decision was unfounded; for C. K. Allen has stated that "the effect of judicial decisions is seldom retroactive, and when an established doctrine is reversed by a competent tribunal the position, for the future, does not differ from that which follows upon a statutory change of the law."[13] "It is clear", he continues, "that there must be some limits to the doctrine of *communis error*, for otherwise the law would not progress at all."[14]

As between parties whose rights have been litigated so that the matters in controversy have become *res judicatae*, a subsequent overruling decision has no logical claim to retrospective operation. *Interest rei publicae ut sit finis litium.* But the parties may act in reliance upon what they deem to be the law only to find that it is subsequently changed and that they must accommodate their actions to the new position. This of course is nothing new and is of frequent occurrence in these days of fluctuating statutory law. What of parties, however, who litigate on the basis of reliance on the law as they believe it to be but who find that the Court is going to overrule that law? A reconciliation of the doctrine of *communis error* with the judicial duty to lay down correct principles is possible. Reference in this connection may be made to *Bingham* v. *Miller*.[15] In that case the Supreme Court of Ohio, called upon to determine whether the legislature had power to grant divorces, was faced with the fact that the legislature had assumed and exercised this power for forty years, "although a clear and palpable assumption of power, and an encroachment upon the judicial department in violation of the constitution".[16] In his judgment in the case Read J. spoke as follows: "To deny this long-exercised power, and declare all the consequences resulting from it void, is pregnant with fearful consequences. *If it affected only the rights of property, we should not hesitate;* but second marriages

[12] *Ibid.*, at p. 130.
[13] *Supra*, note 4, at p. 285.
[14] *Ibid.*
[15] (1848), 17 Ohio 445.
[16] *Ibid.*, at p. 448.

have been contracted, and children born, and it would bastardize all these, although born under the sanction of apparent wedlock, authorized by an act of the legislature before they were born, and in consequence of which the relation was formed which gave them birth. On account of these children, and for them only, we hesitate. And in view of this we are constrained to content ourselves with simply declaring that the exercise of the power of granting divorces, on the part of the legislature, is unwarranted and unconstitutional . . . . ."[17]

There are quite a number of instances in which a Court has followed a prior decision while at the same time declaring that it was overruled *prospectively*.[18] Such a course finds justification in the fact that the Court can reason that the parties were entitled to rely on the prior decision until it was decided to be incorrect. It is the past conduct of the parties that the Judge is called on to deal with and this falls to be determined on the law as it then stood; that is the law which the parties were under a duty to obey. If the Judge then proceeds to lay down prospectively the correct principle, it is so that past error may be thereafter avoided. Justice is thus achieved while the law is vindicated. The Judge has much the same task before him when he is called on to adjudicate as to the rights of parties according to principles of law which since the commencement of the litigation have been changed by a non-retroactive statute.

* * *

WILLS — VESTING — GIFT ON ATTAINING A GIVEN AGE — POWER TO APPLY INCOME FOR MAINTENANCE.—Problems concerning the vesting of interests under wills and settlements are probably amongst the most difficult with which a court has to deal. In England, this particular work is entrusted to the hands of a specialized Bar and to judges drawn from that Bar who are fully conversant with the subject matter. It goes without saying, therefore, that we have come to expect from England, decisions dealing with future interests which are much more enlightening and enlightened than those we can hope to find in this country where we have, in the writer's opinion, unfortunately, given way to the pioneer attitude that everyone is qualified to do everything and every lawyer and every judge is qualified to deal with any particular problem.

[17] *Ibid.*
[18] *Supra*, note 11, at p. 151, footnote 254.

So long as appeals to the Privy Council remain, however, there is always the possibility that lines of decision which have developed in this country may be overruled by a court steeped in specialized learning regarding vesting problems. Perhaps the best illustration of what can happen in this connection is the confused and sorry story of the "pay and divide" rule in Ontario as it developed between the decision of the Supreme Court of Canada in *Busch* v. *Eastern Trust Co.*[1] and that of the Privy Council in *Browne* v. *Moody.*[2]

The foregoing remarks are prompted by a recent decision of the Ontario Court of Appeal in *Re Barton,*[3] where the Court had to consider a gift to a testator's grandson "when he shall attain the age of 25 years, provided that my executor . . . . may advance to my said grandson such of the income from the said bequest as may be necessary for his maintenance and education prior to his attaining the age of 25 years." The Court, following accepted authority, stated that had the gift been merely to the grandson when he should attain 25 there would be no question that there was a condition precedent to the grandson's taking, namely attaining the given age.[4] The Court, however, held the gift to be immediately vested in interest by reason of the fact that income could be used for the benefit of the grandson and that this context turned the first words of apparent contingency into words merely postponing payment but not suspending the vesting.

This problem has been one of the most bitterly fought of the many problems concerning vesting in England, and while the rule seems to be clearly established that a gift to a person on attaining a given age will be treated as vested by reason of a gift to such person of the intermediate income, the cases are quite explicit to the effect that in order to reach this result the language of the will must clearly indicate that a gift of the "whole" income was contemplated. Thus in the leading case of *Hanson* v. *Graham,*[5] where the gift was to persons when they attained 21 with the added stipulation that the interest on the sum so given "should be laid out at the discretion of his executors . . . . in such manner as they . . . . should think proper . . . . till they [the beneficiaries] should attain their respec-

[1] [1928] S.C.R. 479.

[2] [1936] A.C. 635. For a discussion of the intervening period in Ontario see 14 Can. Bar Rev. 617.

[3] [1940] O.W.N. 362.

[4] See *Hanson* v. *Graham* (1801), 6 Ves. 238; *In re Francis,* [1905] 2 Ch. 295.

[5] (1801), 6 Ves. 238.

tive ages of 21", the problem was stated to be that if nothing more than maintenance could be called for by the beneficiary then there was nothing to temper the words of contingency. The Court held in that case that the beneficiaries were given "not merely so much of the interest as shall be necessary for the maintenance, but the interest entirely", and hence the gift was vested. *Fox* v. *Fox*,[6] a decision of Sir George Jessel, has caused considerable difference of opinion in the English courts on this problem. In that case a sum was to be given to children on attaining the age of 25 (which standing alone would be contingent) and the trustees were empowered to apply "from time to time the income of the presumptive share of each child . . . . or so much thereof respectively as the trsutees . . . . might think proper to and for his and her education". The Court again went through a long line of earlier authority which clearly established that a mere gift of maintenance has no effect on the question of vesting and stated that the point of distinction is "between a gift of interest to be applied in maintenance, and a gift of maintenance, apart from interest".[7] Sir George Jessel held that as the trustees had the power to apply *the whole* income, this was relevant to vesting and turned the words of contingency into a mere postponed period of payment.

In *Re Wintle*[8] North J. refused to follow *Fox* v. *Fox* on the ground that "the whole or such part as they or he shall think fit" should not be construed as a gift of the entire income. The Court of Appeal in England has, however, affirmed the decision in *Fox* v. *Fox*[9]. Of the subsequent cases which involve a discussion of the principle, perhaps one of the best is the decision of Astbury J. in *In re Ussher*[10] where the Court was faced with the direction to trustees to apply "the whole or such part" of the income as the trustees saw fit for maintenance. This was

[6] (1875), L.R. 19 Eq. 286.

[7] Compare the following language of Lord Cottenham in *Watson* v. *Hayes*, 5 My. & Cr. 125 at p. 133 (quoted by Sir George Jessel): "It is well known that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest; which clearly marks the principle that it is the gift of the whole interest which effects the vesting of the legacy. . . . It is therefore the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance; but when maintenance is given, questions arise whether it be a distinct gift, or merely a direction as to the application of the interest; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy".

[8] [1896] 2 Ch. 719.

[9] See *Re Turney*, [1899] 2 Ch. 739.

[10] [1922] 2 Ch. 321.

held to reduce words which alone would suspend vesting to words postponing payment. All the English cases seem to be clear that in the absence of a direction to apply the "whole" or any part, provisions regarding the use of interest for maintenance have no effect on vesting but constitute a separate gift for maintenance, with the result that what is not used for that purpose should be treated as undisposed of.

The decision of the Ontario Court of Appeal makes no reference to this problem or to the difficulties involved in distinguishing a gift of interest from a gift of maintenance, and on the clause in question it is hard to see where anything more than maintenance was granted. If this clause had stood alone, therefore, it is submitted that the residuary legatee should have been entitled to income not used for maintenance and that the gift was contingent on attaining 25. Other clauses of the will provided for a gift over of the "share" of the grandson in the event that he died under certain circumstances before the period of distribution. The Court, after dealing generally with the question of vesting based on the gift of interest, merely stated that this gift over was an additional reason for indicating that the grandson had a present share and "not a chance to have a share". It should be pointed out that in the disputed case of *Fox* v. *Fox* Sir George Jessel also placed some reliance on a gift over, although he was careful to say it was not conclusive, and as indicated above he was presented with a situation where the will itself expressly gave a power to apply *the whole* or any part.

Questions similar to that discussed by the Court of Appeal are typical problems of will construction where the testator's intention has not been expressed and the courts must follow certain recognized rules of construction. The importance of so doing lies not so much in achieving a fair result by the construction in a given case, as in indicating how documents may be constructed by solicitors in the future with some appreciation of the manner in which they will be construed by a court. The only purpose of the present comment is to warn solicitors that there still exists, at least as far as the English cases are concerned, an important distinction between empowering a trustee merely to give maintenance and empowering such trustee to use the whole of the income in his discretion for any given purpose. The distinction may be a thin one, but as it is one which has occupied so much attention in the English courts it seems to be one to which our courts, unless acting as a final Court of Appeal, should direct their attention.

CONSTITUTIONAL LAW—ADMISSIBILITY OF EVIDENCE AS TO EFFECT OF IMPUGNED STATUTE AS AID IN DETERMINING VALIDITY. —*Tolton Manufacturing Co. Ltd.* v. *Advisory Committee, etc.*[1] is important primarily because of the refusal of the trial Judge, Roach J., to admit evidence as to the effect of the Ontario Industrial Standards Act[2] as an aid in determining its constitutional validity. On this point he stated:[3]

> In my view this is not one of those cases where the Court "requires to be informed by evidence as to what the effect of the legislation will be". The whole question can be determined by examining the Act itself. The meaning of the words employed is plain and I cannot find anything within its four corners which requires to be explained by evidence. I am not unmindful of the fact that it is possible that the provincial Legislature under the appearance of legislating with respect to a subject-matter over which it has been given exclusive legislative power may, in that legislation, transgress on the powers of the Dominion Parliament; but if, in the legislation here in question, there has been such transgression, it can be ascertained by examining the Act itself and no further evidence than the mere production of the Act itself would be necessary. Furthermore, if the result of the legislation is pertinent in determining its validity, every possible result could be pointed out in argument. It was for these reasons that, at the trial, I excluded evidence tendered as to what would be the effect of the legislation.

The case for the admission of such evidence was founded on the remarks of Lord Maugham in *Attorney-General for Alberta* v. *Attorney-General for Canada*:[4]

> It is therefore necessary to compare the two complete lists of categories with a view to ascertaining whether the legislation in question, fairly considered, falls *prima facie* within s. 91 rather than within s. 92 [of the B.N.A. Act]. The result of the comparison will not by itself be conslusive, but it will go some way to supply an answer to the problem which has to be solved. The next step in a case of difficulty will be to examine the effect of the legislation. *Union Colliery Co. of B.C. Ltd.* v. *Bryden*.[5] For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be.

In the same case in the Supreme Court of Canada Duff C.J. had stated that to determine whether an enactment was within provincial or Dominion jurisdiction "the judgment of the Judicial Committee in *Union Colliery Co. of B.C. Ltd.* v. *Bryden* is sufficient authority for the proposition that the answer to this

[1] [1940] O.R. 301, [1940] 3 D.L.R. 383.
[2] R.S.O. 1937, c. 191.
[3] *Supra*, note 1, at 305 and 387 respectively.
[4] [1939] A.C. 117, at p. 130.
[5] [1899] A.C. 580.

question is to be found by ascertaining the effect of the legislation in the known circumstances to which it is to be applied."[6] Previously in his judgment Duff C.J. had remarked that "in order to test the validity of the legislation we must, we think, envisage the plan in practice as the statute contemplates it."[7]

A number of matters deserve mention in connection with the foregoing: (1) *Union Colliery Co. of B.C. Ltd.* v. *Bryden* nowhere explicitly states that the Court must ascertain the effect of impugned legislation; but the judgment of Lord Watson considers that question with respect to the legislation involved in the case[8] and the verbatim report of the argument of counsel in the case points to the necessity of so doing.[9] Indeed, it is difficult to imagine how the "pith and substance"[10] of legislation can be properly ascertained unless its effect be taken into account. (2) The statements of Duff C.J. as to ascertaining the effect of legislation whose validity is questioned contain no intimation that evidence on the question will be admitted; for all that appears from what he says, the Court merely considers the effect of the legislation in the course of deciding whether there is an invasion of the legislative field excluded from the competence of the enacting authority. (3) Lord Maugham in saying that the Court "may in a proper case require to be informed by evidence as to what the effect of the legislation will be" sanctions the admissibility of such evidence without much more. (4) According to Roach J. in the *Tolton Case*, it is not a proper case for the admission of such evidence if the Court concludes that the meaning of the words employed in the legislation is plain (so that nothing requires to be explained by evidence) and that an examination of the statute itself will enable the Court to determine its effect.

Undoubtedly there is practical difficulty in opening the doors wide to admit evidence of the effect of legislation for it is easy to "parade the horrors" that will result if the validity of legislation which is opposed is sustained. But Courts have long been accustomed to distinguishing questions of admissibility and weight of evidence. In constitutional interpretation every relevant aid to construction might be considered; weight rather than admissibility should be limited, and this for two further reasons. There is a widespread practice of allowing in evidence while

[6] [1938] S.C.R. 100, at p. 127.
[7] *Ibid.*, at p. 116.
[8] [1899] A.C. 580, at p. 587.
[9] LEFROY, Canada's Federal System, pp. 78–80.
[10] *Cf. Attorney-General for Ont.* v. *Reciprocal Insurers*, [1924] A.C. 328.

reserving the question of its admissibility; even if a ruling of inadmissibility be subsequently made the evidence will have had some effect. Secondly, the growing fashion in constitutional references in Canada is to submit fact-laden briefs and to range far and wide in the course of argument.[11] It is far from satisfactory to make the question of admissibility of evidence of the effect of impugned legislation depend on whether the "plain meaning" rule of construction is or is not applicable. Enough has been said elsewhere in criticism of this rule and of its inappropriateness in constitutional matters.[12]

* * *

CRIMINAL LAW—ORDER QUASHING INDICTMENT—NO APPEAL BY ATTORNEY-GENERAL.—An order quashing an indictment, made by a Judge of the Court of General Sessions of the Peace, is not a "judgment or verdict of acquittal of a trial court" within the meaning of s. 1013(4) of the Criminal Code, and hence is not appealable by the Attorney-General. This has been decided by *Rex* v. *Hansher*,[1] where Masten J.A., for the Ontario Court of Appeal, pointed out that acquittal meant a complete discharge of the accused, and further, that what was made appealable by s. 1013(4) was the act of a trial court and in this case the Judge acting alone was not the trial court.

[11] MacDonald, *Constitutional Interpretation and Extrinsic Evidence* (1939), 17 Can. Bar Rev. 77, at p. 92. *Cf.* also Jennings, *Constitutional Interpretation—The Experience of Canada* (1937), 51 Harv. L. Rev. 1.

[12] H. A. Smith, *Interpretation in English and Continental Law* (1927), 9 J. Comp. Leg. 153, at pp. 159, 160; MacDonald, *Judicial Interpretation of the Canadian Constitution* (1936), 1 Univ. of Tor. L.J. 260, at p. 268.

[1] [1940] O.R. 247.