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—LEGITIMATION BY ADOPTION OR RECOGNITION.—After the publication of my approving comment[1] on the decision of Farwell J. in the *Luck Case*,[2] that decision was reversed by the Court of Appeal[3]—Greene M.R. and Luxmoore L.J., Scott L.J. dissenting—and the two branches of the case have been discussed by Taintor in his recent article.[4] I venture to add some supplementary observations with especial reference to the law of the provinces of Canada and other matters not specifically discussed by Taintor.

David Luck was the illegitimate son of Frederick Charles Luck, who, at the time of David's birth (1906) was domiciled in England and had not been divorced from his first wife. After Frederick's divorce and second marriage and his acquisition of a domicile of choice in California, he (in 1925) publicly acknowledged David as his child, received him into his home with the consent of the second wife (not David's mother) and adopted him as his legitimate child, and the effect, according to the relevant statute of California,[5] was that David was "thereupon

[1] (1940), 18 Can. Bar Rev. 491.

[2] *In re Luck's Settlement Trusts, In re Luck's Will Trusts, Walker* v. *Luck et al.*, [1940] Ch. 323, [1940] 1 All E.R. 375.

[3] [1940] Ch. 864, [1940] 3 All E.R. 307.

[4] *Legitimation, Legitimacy and Recognition in the Conflict of Laws* (1940), 18 Can. Bar Rev. 589, at pp. 621 *ff.*

[5] Civil Code of California (1937), s. 230. As Taintor points out (18 Can. Bar Rev. 622, note 156B) separate provision is made by s. 228 for adoption of a stranger as distinguished from legitimation of a natural child by adoption. In England, and in the provinces of Canada, it would appear that whatever provision has been made, or is likely to be made, for adoption of a natural child is and will be made within the general scheme of adoption of children.

deemed legitimate from the time of his birth". The first question was whether David was a child of Frederick within the meaning of the will of Frederick's father, who left his residuary estate to trustees in trust for all his children living at his death who should attain the age of twenty-one years, the income of each child's share to be paid to that child during his life, and that share then to be held in trust for all the children of that child who should attain the age of twenty-one years, in equal shares. The testator died in 1896, and his son Frederick died in 1938, so that, without any relation back of David's legitimation, he was entitled to share in his father's share, if English conflict rules would permit of the recognition in England of the legitimating effect of his recognition or adoption under Californian law. On this question Farwell J. decided in David's favour, but this decision was reversed by a majority judgment of the Court of Appeal, to which I will return later. The second question was whether David was a child of Frederick within the meaning of the marriage settlement of Frederick's parents. On this question also Farwell J. decided in David's favour, notwithstanding that this involved holding that David was a grandchild of Frederick's parents born within twenty-one years after the decease of the survivor of those parents. The grandmother died in 1892, and the grandfather, as already mentioned, in 1896, so that the twenty-one year period expired in 1917, and David was not at that date a child, legitimate or legitimated, of Frederick. The reversal of Farwell J.'s decision on the first question involved of course the reversal of his decision on the second question, without any need to consider the apparently insuperable difficulty of giving effect to the relation back of David's legitimation so as to enable him to take a share under the settlement in the teeth of the rule against perpetuities;[6] and further observations on the second question would seem to be unnecessary.[7]

As regards the first question it is to be hoped that the House of Lords[8] will reverse the Court of Appeal and restore the judgment of Farwell J., and, in particular, will decline to dispose of the case on the analogy of the old law as to legitimation by subsequent marriage.

By way of premise to the following observations it may be noted that formerly English domestic law made no provision for either (1) legitimation by subsequent marriage or (2) legitima-

[6] [1940] Ch. at pp. 884–885.
[7] See the discussion by Taintor, 18 Can. Bar Rev. 625–626.
[8] Leave to appeal to the House of Lords was granted: [1940] Ch. 919.

mation by recognition or adoption by a father of his natural child or (3) adoption of a stranger. In the case of (1) and (3) the domestic law of England (and Wales) was changed by the *Legitimacy Act, 1926*, and the *Adoption of Children Act, 1926*, respectively. It is true that the *Luck Case* involved (2), and not (3), but it would appear that while (2) is not expressly mentioned in the *Adoption of Children Act, 1926*, the statute is available, in some circumstances at least, for the purpose of adoption by a father of his natural child.[9] There would seem therefore to be some justification for invoking in the *Luck Case* the analogy of adoption rather than the analogy of legitimation by subsequent marriage. The *Adoption of Children Act, 1926*, does not, it is true, provide for the recognition in England of "adoption" elsewhere, but, in the case of an application in England or Wales for an adoption order, the applicant must be "both domiciled in England and Wales or in Scotland and resident in England or in Wales".[10] So far as any implication with regard to a corresponding conflict rule may be drawn from the provision just mentioned, the implication is that the domicile of the adopter at the time of the adoption is alone material. In Ontario a similar implication may possibly be found in the provision that in the case of domestic adoption the adopter must be domiciled in Ontario.[11]

The *Legitimacy Act, 1926*, changed not only the domestic rule, but also the conflict rule, of English law, with regard to legitimation by subsequent marriage. As regards both the domestic and the conflict rules the statute makes the domicile of the father at the time of the subsequent marriage the sole connecting factor, domicile in England or Wales for the domestic rule and, for the conflict rule, domicile in a country other than England or Wales by the law of which legitimation by subsequent marriage is recognized. The statute provides only for legitimation *ab praesenti*, that is, from the time of the marriage or from the coming into effect of the statute, whichever is later, and makes no provision for legitimation *ab origine*, that is, from the time of the child's birth. It is true that if a person claims to have been legitimated *ab origine* under a foreign law, he can not rely upon the statute as making the domicile of his father at the time of the marriage the sole connecting factor for the purpose of legitimation by subsequent marriage, and conse-

[9] *Cf. In re C, In re Adoption of Children Act, 1926*, [1938] Ch. 121, in which the Court approved of the adoption of an illegitimate daughter by her mother. See also the *Adoption of Children (Regulation) Act, 1939*.

[10] *Postponement of Enactments (Miscellaneous Provisions) Act, 1939*.

[11] *Cf.* (1940) ,18 Can. Bar Rev. 495.

quently can not invoke the benefit of any analogy if he claims that he is entitled to be regarded in England as having been legitimated by his recognition or adoption by his father under the law of his father's domicile at the time of the adoption without regard to the domicile at the time of the child's birth. The situation is, however, entirely different, it is submitted, if a person is claiming only to be legitimated *ab praesenti* by virtue of his recognition or adoption by his father under a foreign law. Of the available analogies, a court might reasonably avail itself of the analogy of the statutory attitude with regard to domestic English adoption, or the analogy of the statutory attitude with regard to legitimation by subsequent marriage in both domestic English law and English conflict of laws, and say that the domicile of the adopter at the time of the adoption is the sole criterion. The majority of the Court of Appeal in the *Luck Case* did neither of these things, and instead, summarily rejecting the analogy of the *Legitimacy Act, 1926*,[12] used the analogy of the old law with regard to legitimation by subsequent marriage, and imported into the consideration of legitimation *ab praesenti* by recognition or adoption the harsh rule which was a part of the old law as to legitimation *ab origine* by subsequent marriage. This rule, which Scott L.J. in the *Luck Case* calls the *Wright-Grove* rule,[13] required the law of the domicile of the father, both at the time of the child's birth and at the time of the subsequent marriage of the parents to have been a law which recognizes legitimation by subsequent marriage, and, consequently, precluded forever from the possibility of legitimation by subsequent marriage a child who was born at a time when his father was domiciled in England. It is difficult to think of any defence for the rule on the merits[14] or to understand the argument that

[12] [1940] Ch. at p. 884.

[13] The reference is to the cases of *In re Wright's Will Trusts* (1856), 2 K. & J. 595, and *In re Grove, Vaucher* v. *Solicitor to the Treasury* (1888), 40 Ch. D. 216. The former case was decided by Sir W. Page Wood V.C., and in *Udny* v. *Udny* (1869), L.R. 1 H.L. (Sc.) 441, the same judge, then become Lord Hatherley, Lord Chancellor, said, by way of *obiter dictum*, that he saw no reason to retract the opinion expressed by him in the earlier case. The *Grove Case* was decided by the Court of Appeal. The opinions expressed in the Court of Appeal in the earlier case of *In re Goodman's Trusts* (1881), 17 Ch. D. 266, were *obiter dicta* as regards the rule now in question, because the father was domiciled in Holland both at the time of the birth of the child who was the sole claimant in the case and at the time of the subsequent marriage, although the case is sometimes cited as if it were a decision of the Court of Appeal on the point: *cf.* CHESHIRE, PRIVATE INTERNATIONAL LAW (2nd ed. 1938) 389; (1940), 18 Can. Bar Rev. 620.

[14] *Cf.* Scott L.J., [1940] Ch. at pp. 908 *ff.* The rule is discussed by Taintor, *Legitimation, Legitimacy and Recognition in the Conflict of Laws* (1940), 18 Can. Bar Rev. 589, at pp. 618–627. He considers it a necessary

the child must have at birth a potential capacity for legitimation. The rule rests upon no authority that is binding on the House of Lords, and even in the Court of Appeal there was no authority requiring the application of the rule to legitimation by recognition or adoption.

A question of especial interest to Canadians is whether the *Wright-Grove* rule is in force in the provinces of Canada. In Quebec legitimation by subsequent marriage has long been recognized, and is provided for by articles 237, 238 and 239 of the Civil Code of Lower Canada; and it appears that in that province[15] legitimation depends upon the law of the domicile of the father at the time of the marriage, without regard to the law of his domicile at the time of the child's birth.[16] In the other provinces of Canada, on the recommendation of the Conference of Commissioners on Uniformity of Legislation in Canada[17] statutes were passed (some years before the law of England was changed by the *Legitimacy Act, 1926*) providing for legitimation by subsequent marriage. These provincial statutes differ from the statute of 1926 in two respects. Firstly, they provide that a child whose parents intermarry "shall for all purposes be deemed to be and to have been legitimate from the time of birth", and, secondly, they make no reference to anyone's domicile at any time. In *Re W.*[18] a person was held to be legitimated in Ontario by virtue of the Ontario legislation notwithstanding that he was born out of wedlock in England in 1878 and that his parents were domiciled in England both at the time of his birth and at the time of their subsequent marriage in England in 1881.[19] As the law of England stood at the time of the child's birth, at the time of the subsequent marriage of his parents, and at the time when the case was decided in Ontario, the child was not legitimated by English law, so that obviously the law of the domicile is wholly immaterial as regards the legitimating effect in Ontario of the Ontario statute.

sequel of the doctrine of relation back of legitimation—a doctrine which, he submits, should be overruled by the House of Lords.

[15] In accordance with the opinion of SAVIGNY, SYSTEM, vol. 8, §380.

[16] JOHNSON, CONFLICT OF LAWS, vol. 1 (1933) 346.

[17] CONFERENCE PROCEEDINGS (1919) 53 and (1920) 7, 18; CAN. BAR ASS. YEAR BOOK (1919) 277 and (1920) 311, 322. In 1933 the Conference declined to recommend revision of the provincial statutes in the light of the *Legitimacy Act, 1926;* CONFERENCE PROCEEDINGS (1933) 14, 35; CAN. BAR ASS. YEAR BOOK (1933) 238, 259.

[18] (1925), 56 O.L.R. 611, [1925] 2 D.L.R. 1177.

[19] This decision is not affected by the fact that on another point the case was not followed in *Re Cummings*, [1938] O.R. 486, 654, [1938] 3 D.L.R. 611, [1938] 4 D.L.R. 767. In the latter case it seems to have been assumed that the domicile of the father was immaterial as regards the legitimation of the child in Ontario.

In each of the provincial statutes which follow the model prepared by the Conference of Commissioners on Uniformity of Legislation in Canada there is a provision that nothing in the statute shall affect any right, title or interest in or to property vested in any person prior to the coming into effect of the statute, or, in the case of marriage after the coming into effect of the statute, prior to the marriage. The Ontario statute in its latest version[20] also provides that "a child born while its father was married to another woman or while its mother was married to another man shall not inherit in competition with the lawful children of either parent". This discrimination against adulterine children is much less severe than that made in England by the *Legitimacy Act, 1926,* which provides that if the father was or is at the date of his marriage with the mother domiciled in England or Wales, nothing in the statute "shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born".[21]

Returning now to the decision of the Court of Appeal in the *Luck Case,* while I respectfully agree with Scott L.J. both in his disapproval of the *Wright-Grove* rule and his opinion that in any case that rule should not be applied by analogy to legitimation by recognition or adoption under a foreign law, I venture to express my dissent from one aspect of his reasons. He argues vigorously[22] in favour of what he calls the "universality" of status, that is, status in a wide sense as including its "context" in the law which creates it or its "legal attributes" or "consequences" under that law, so that if the law of a given country is the law determining the particular status of a person and that law attributes to that status certain personal capacity or incapacity and certain rights and duties, then "that self-same personal capacity or incapacity, and the self-same rights and duties" should be attributed to the status in another country, unless the courts of the latter country are bound by some definite and positive rule of municipal law which prohibits them from giving effect to the status or commands them to introduce some specific condition or other modification, when asked to apply the conse-

[20] R.S.O. 1937, c. 216, s. 2, re-enacting 1927, c. 52, s. 3.

[21] Section 1 (2). This limitation in the case of domestic English legitimation will not, by English conflict rules, prevent the recognition in England of the legitimation of an adulterine child by virtue of the foreign domiciliary law of the father, if the foreign law contains no similar limitation: *In re. Askew,* [1930] 2 Ch. 259 [*cf.* (1937), 15 Can. Bar Rev. 39; (1939), 17 Can. Bar Rev. 394, note 75]; *Collins* v. *Attorney-General* (1931), 47 Times G.R. 484, 145 L.T. 551 [*cf.* CHESHIRE, PRIVATE INTERNATIONAL LAW (2nd ed. 1938) 390–391; DICEY, CONFLICT OF LAWS (5th ed. 1932) 571].

[22] [1940] Ch. 864, at pp. 888 *ff.*

quences which by the law of the former country would flow from that status in the particular circumstances of the case before them.[23]

With all respect I submit that Scott L.J.'s theory of the universality of status tends to confuse the solution of problems of the conflict of laws precisely because it confuses two things which ought to be distinguished, namely, the existence of a particular status and the consequences of that status. The particular example which Scott L.J. gives of a "definite and positive rule of municipal law" which prohibits a court in England from giving effect to a status created by the law of a foreign country is the case of *Birtwhistle* v. *Vardill*.[24] This case does not, however, need to be explained as an exception to the universality of status. Accurate characterization of the question makes the result clear. The claimant was unquestionably legitimated under the law of his father's foreign domicile, and his status as a legitimated person was not in controversy. The question which had to be decided was not one as to his legitimacy, but as to his capacity to take as heir to land in England. This was a question of succession to land governed by the *lex rei sitae*, and once it was decided that English succession law required the heir to have been born in lawful wedlock, it was clear that the claimant's right to succeed must be denied, without denying the existence of his status as a legitimated person.[25]

In more general terms, it is submitted that in the conflict of laws it is essential to distinguish between status and the incidents or consequences of status, and between status and capacity. The existence of a status created by a foreign law which according to the conflict rules of the forum is the proper law governing status may well be recognized in the forum, whereas the incidents or consequences of status and the capacity of the person who has a particular status may involve questions which are not accurately characterized as questions of status and which are governed by some other law than the law which governs status.[26]

[23] See especially [1940] Ch. at p. 894.

[24] (1840), 7 Cl. & F. 895.

[25] *Cf.* my *Conflict of Laws: Examples of Characterization* (1937), 15 Can. Bar Rev. 241; *Characterization in the Conflict of Laws* (1937), 53 L.Q.R. 545. Contrast *Udny* v. *Udny* (1869), L.R. 1 H.L. (Sc.) 441, in which the question was one of legitimation, not one of succession, that is, the only controverted question was whether the respondent had been legitimated by the marriage of his parents, and the answer to this question depended of course upon the domicile of his father. If he had been so legitimated it was beyond question that by the *lex rei sitae* he was entitled to succeed to the entailed estates of Udny (in Scotland).

[26] *Cf.* Allen, *Status and Capacity* (1930), 46 L.Q.R. 277, at pp. 293 *ff*; Falconbridge (1937), 15 Can. Bar Rev. 240 *ff*., 53 L.Q.R. 544 *ff*; ROBERTSON,

Finally, without elaborating here what I have discussed elsewhere.[27] I venture to safeguard myself, in approving of the result of Scott L.J.'s judgment, from seeming to approve of the general, if somewhat vague, benediction which the learned judge gives to the doctrine of the *renvoi*.[28] It may well be that as regards the existence of status, as distinguished from the incidents or consequences of status, or as distinguished from capacity, the law of the domicile in an English conflict rule means whatever a court of the domicile would decide, but there are many difficulties, both practical and theoretical, with regard to any supposed general rule that the law of the domicile always has that meaning, and it is to be hoped that whatever the House of Lords decides in the *Luck Case*, it will not casually dispose of the problem of the *renvoi*, without due consideration of various aspects of the problem which have not yet been discussed by any appellate court in England.

JOHN D. FALCONBRIDGE.

Osgoode Hall Law School.

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POWER OF APPOINTMENT — CHILD OF THE MARRIAGE — LEGITIMATED CHILD. — In *In re Wicks' Marriage Settlement, Public Trustee* v. *Wicks*[1] an English marriage settlement provided, *inter alia*, that after the wife's death the settled property was to be held upon trust for all or any one or more of the issue of the husband and wife for such interest or interests, etc., as the husband by deed, will or codicil should appoint, and, subject to any such appointment or in so far as the same should not extend, upon trust for "such issue of the said marriage as being male shall attain the age of twenty-one years", etc.

It was held by Farwell J. that a son of the husband and wife born before their marriage, and legitimated in England by their marriage by virtue of the *Legitimacy Act, 1926*, was not a child of the marriage, (though no doubt he was a child of his parents), and therefore was not a person in whose favour the power of appointment might be exercised. In order to support the decision it is necessary in effect to read the words "issue of

CHARACTERIZATION IN THE CONFLICT OF LAWS (1940) 145; Taintor (1940), 18 Can. Bar Rev. 589, at pp. 591–592, 691–694.

[27] *Renvoi, Characterization and Acquired Rights* (1939), 17 Can. Bar Rev. 369, at pp. 394–395; *Bills of Lading: Proper Law and Renvoi* (1940), 18 Can. Bar Rev. 77, at p. 85.

[28] [1940] Ch. at p. 887.

[1] [1940] Ch. 475.

the marriage" into the clause defining the objects of the power by reason of the words "such issue of the said marriage" occurring only in the subsequent clause. In any event the learned judge decided that a child legitimated by the subsequent marriage of his parents is not a child of the marriage, and on this point the decision appears to be inconsistent with the decision of Maugham J. in *In re Askew*.[2] In that case an English marriage settlement provided, *inter alia*, that in the event of the husband's second marriage he might appoint a certain fund upon trusts for the benefit of any wife who might survive him and of any child of the second marriage. A daughter of the husband and the second wife was born before the husband was divorced from his first wife, so that by English domestic law the daughter was not legitimated by the subsequent marriage of her parents, but by German law (the law of the domicile of the husband at the time of the second marriage) she was legitimated. Maugham J. was apparently so interested in discussing the problem of the *renvoi* that he failed to observe that, although the daughter was legitimated by German law, she was not a child of the second marriage, and therefore was not within the terms of the power of appointment. The result would be that the exercise of the power would be invalid, and any reference to German or any other law relating to legitimation would be excluded. The point is mentioned by Cheshire,[3] who says he "is indebted for this observation to a member of the Chancery Bar."

J. D. F.

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CONSTITUTIONAL LAW—JUDICIAL LIMITATION OF LEGISLATIVE SUPREMACY.—Mr. Justice Riddell's well-known statement in *Florence Mining Co.* v. *Cobalt Lake Mining Co.*[1] that "the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine" has been challenged, it seems, by two decisions which have raised limitations on parliamentary sovereignty other than (1) those arising from the scheme of distribution of powers in the British North America Act[2] or (2) those which are implicit in the Act.[3] In *Beauharnois Light, Heat and Power Co. Ltd.* v.

[2] [1930] 2 Ch. 259.
[3] PRIVATE INTERNATIONAL LAW (2nd ed. 1938) 63, note 2.
[1] (1909), 18 O.L.R. 275, affirmed [1911] 2 A.C. 412.
[2] *Cf.* ss. 91 and 92.
[3] *E.g.*, neither the Dominion nor the provinces can alter the scheme of distribution of powers nor enlarge their powers; *cf.*, *In re Initiative and*

The Hydro-Electric Power Commission of Ontario,[4] the trial judge declared *ultra vires* a provincial statute purporting to make null and void an agreement for electric power which the plaintiff company sought to enforce. Further, he stated that his right to make the declaration was not affected by a statutory provision requiring the consent of the Attorney-General to an action against the defendants.[5] Subsequently the legislature passed a statute which purported to explain the meaning and effect of the provision as to consent and which stated that that was and always had been the meaning. This latter statute came into force before the hearing of an appeal from the judgment of the trial Judge. In delivering the judgment of the Court of Appeal, Middleton J.A. stated that "the rights of the parties had already passed into judgment, and the legislation has no effect upon this action". But he said more :[6]

> The Legislature in matters within its competence, is unquestionably supreme, but it falls to the Courts to determine the meaning of the language used. If the Courts do not determine in accordance with the true intention of the Legislature, the Legislature cannot arrogate to itself the jurisdiction of a further appellate Court and enact that the language used in its earlier enactment means something other than the Court has determined. It can, if it so pleases, use other language expressing its meaning more clearly. It transcends its true function when it undertakes to say that the language used has a different meaning and effect to that given it by the Courts, and that it always has meant something other than the Courts have declared it to mean. Very plainly is this so when, as in this case, the declaratory Act was not passed until after the original Act had been construed, and judgment pronounced.

In *Home Oil Distributors Ltd.* v. *Atty.-Gen. for B.C.*,[7] an interim injunction was granted, and continued, against the enforcement of an order of the British Columbia Coal and Petroleum Products Board fixing the price of gasoline sold within the province. The injunction was founded, in part, on facts disclosed in the report of a Commission laid before the legislature before the passing of the statute constituting the Board. After the injunction was continued the legislature amended the statute by adding a provision declared to be retroactive, to the effect that the statute "was not intended to implement or carry

Referendum Act, [1919] A.C. 935; the matter of succession to the Crown is beyond the reach of either the Dominion or the provinces; the Dominion cannot alter the scheme of organization of the legislative machinery.

[4] [1937] O.R. 796.

[5] The Judge was bound by *Ottawa Valley Power Co.* v. *Hydro-Electric Power Commission*, [1937] O.R. 265, [1936] 4 D.L.R. 594.

[6] [1937] O.R. 796, at p. 822.

[7] [1939] 1 W.W.R. 49 (B.C.C.A.)

into effect the recommendations or findings of any report" and that in construing the statute no reference to any such report should be made. This provision was in force when the trial of the action, which gave rise to the interlocutory injunction, came on.[8] Manson J. stated that the legislative instruction was to be ignored where any question of constitutionality arose for decision. Further, he said, "mere assertion, even by the Legislature, does not make that a fact which is not a fact."[9] And he concluded that the almost irrebuttable inference on the facts was that the legislature sought by the amending provision to remove the possibility of the statute in question being looked upon as one dealing with a matter outside provincial competence. On appeal, Martin C.J.B.C. said in a *per curiam* judgment that in arriving at the conclusion that the statute was constitutional "we have not given effect to the amending statute . . . . . because we regard that interlocutory enactment as ineffective to curtail the unassailable jurisdiction of the Courts of Canada to adjudicate upon constitutional questions under the British North America Act, and under the circumstances before us, we regard it as not of weight in other respects."[10]

Recent case law has made explicit what was implicit in a federal constitution like the B.N.A. Act which distributes legislative power between a central and provincial governments, that a legislature cannot preclude the courts from considering the constitutionality of legislation by imposing *a priori* conditions to litigation which remain unsatisfied.[11] But it is going far beyond this to suggest, as does Middleton J.A. in the *Beauharnois Case*, that the legislature is not entitled to interfere with a trial judgment by a legislative direction, upon a matter within its competence, binding upon the Court of Appeal. There is nothing to justify the learned Justice's remark that the legislature cannot change the meaning to be given to language in a statute as construed by a court; especially when he concedes that the legislature can use other language to express its meaning. Surely the meaning of a statute, declared by the courts, does not become fixed beyond the possibility of change by a competent legislature! The wisdom of thus interfering with the judicial function is

[8] [1939] 1 W.W.R. 666 (B.C.)
[9] *Ibid*, at p. 681.
[10] [1939] 1 W.W.R. 418 at pp. 419–20 (B.C.C.A.)
[11] *E.g.*, *I.O.F.* v. *Lethbridge Northern Irrigation District*, [1937] 1 W.W.R. 414, [1937] 2 D.L.R. 109 (Alta.); *Same*, [1937] 3 W.W.R. 424, [1937] 4 D.L.R. 398, affirmed [1938] 2 W.W.R. 194, [1938] 3 D.L.R. 89 (Alta. C.A.); *Ottawa Valley Power Co.* v. *Hydro-Electric Power Commission*, [1937] O.R. 265, [1936] 4 D.L.R. 594 (C.A.)

another question, and there is on record an instance of disallowance of a provincial statute which purported to reverse a judgment of the Supreme Court of Canada.[12] Attention may be drawn also to an experience of the Privy Council which gave leave to appeal from the decision of the Supreme Court of Eire in *Lynham* v. *Butler*,[13] whereupon the Free State legislature enacted as law the decision of the Court. The case was withdrawn and never decided by the Privy Council.[14]

Again, the B.N.A. Act contains no prohibition against retroactive legislation; and Middleton J.A.'s statement that the legislature "transcends its true function when it undertakes to say that the language used [in a statute] has a different meaning and effect to that given it by the Courts", etc., cannot be accepted as a correct pronouncement on legislative power, whatever may be thought of it as a counsel of caution or as an admonition.

There has been a surfeit of judicial pronouncements against colourable legislation,[15] and Manson J. in the *Home Oil Distributors Case* may have had them in mind in speaking as he did. The Court of Appeal, too, in asserting its right to pass on constitutionality was on unassailable ground. But the legislature is clearly entitled to make its meaning clear, although its amending legislation for this purpose intervenes in the progress of a case through the courts. The presumption of constitutionality would seem to carry with it, as a corollary, the requirement of narrow construction if that will ensure constitutional validity.[16] And the Privy Council very early agreed that legislative declarations, as an indication of what the legislature conceived its power to be, might be helpful in the task of constitutional interpretation.[17] The courts, therefore, when met by such declarations, although in the form of amendments to existing legislation explanatory of its meaning, ought to treat them as helpful guides in interpreting the exercise of legislative power rather than as colourable

[12] See KENNEDY, THE CONSTITUTION OF CANADA, (2nd ed., 1938) at p. 498; KENNEDY, ESSAYS IN CONSTITUTIONAL LAW, at p. 61 *ff.*

[13] [1925] 2 I.R. 231.

[14] The matter is dealt with in HUGHES, NATIONAL SOVEREIGNTY AND JUDICIAL AUTONOMY IN THE BRITISH COMMONWEALTH OF NATIONS, at p. 80 *ff.* *Cf.* also the aftermath of the decision of the Privy Council in *Cotton* v. *Rex*, [1914] A.C. 176, as recorded in KEITH, *Imperial Unity and the Dominions*, p. 376 *ff.*

[15] *Cf. Atty.-Gen. for Ont.* v. *Reciprocal Insurers*, [1924] A.C. 328, 93 L.J.P.C. 137; *Madden* v. *Nelson and Fort Sheppard Ry.*, [1899] A.C. 626; *Ladore* v. *Bennett*, [1939] A.C. 468. *See* LEFROY, *Canada's Federal System* at p. 76 *ff.*

[16] *Severn* v. *Regina* (1878), 2 S.C.R. 70, per Strong J.

[17] *Citizens Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96, 51 L.J.P.C. 11.

attempts to evade the limits of legislative competence. What Strong J. said in *Severn* v. *Regina* is still of some importance: "It does not belong to Courts of Justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it."[18]

* * *

CIVIL LIBERTIES—DISTRIBUTION OF LEAFLETS AND HANDBILLS—MUNICIPAL REGULATION—PUBLIC ORDER.—One of the more striking differences between the B.N.A. Act and the Constitution of the United States lies in the absence of any "bill of rights" in the former so that in Canada there is, *ex facie*, at any rate, no positive guarantee against legislative encroachment on civil liberties. Generally speaking, such matters fall to be controlled by the federal authority under its power to legislate in relation to criminal law,[1] and by the provincial legislatures under their power in relation to property and civil rights[2] and, as has recently been made manifest, their power in relation to municipal institutions.[3]

Freedom of the press has a limited meaning for those who have no press to publicize their views, or who cannot pay to advertise them or cannot, even if they wished to pay, obtain advertising space. Labour groups especially have relied on the distribution of leaflets, pamphlets or handbills as a means of acquainting the public with grievances in the field of industrial relations. Both in the United States and in Canada municipal regulations have been used as a means of controlling this activity. These regulations have come under the scrutiny of the courts in each country and the decisions necessarily indicate differences in approach compelled by constitutional divergences.

The Supreme Court of the United States declared *ultra vires* a number of municipal ordinances which prohibited the distribution of handbills in streets and public places because they abridged the right to freedom of speech and of the press guaranteed by the fourteenth amendment to the Constitution.[4] True, the Court has recognized in other instances the validity of municipal regulations in connection with handbill distribution;

[18] (1878), 2 S.C.R. 70, at p. 103.
[1] The B.N.A. Act, s. 91 (27).
[2] *Ibid.*, s. 92 (13).
[3] *Ibid.*, s. 92 (8).
[4] *Schneider* v. *State of New Jersey* (*Town of Irvington*) (1939), 60 Sup. Ct. 146. The first amendment to the Constitution secures freedom of speech and of the press against abridgment by the United States; the fourteenth amendment is now the constitutional guarantee against their abridgment by the states.

for example, where commercial purposes are involved or obscene statements are made.[5] But its decisions in protection of freedom of speech show its awareness that (to adopt words used elsewhere) "whatever the purported purpose of the [regulating ordinances], the prosecutions [thereunder] are generally for distribution of handbills to whose content the authorities in question are not sympathetic".[6]

In Canada, the courts ask merely whether the municipal by-law is warranted by a provincial grant of power to the municipality. Thus, Hogg J. stated in *Re Rex* v. *Napier*:[7] "The question for determination therefore is: Is this by-law a 'regulation' authorized by the Statute [the Municipal Act]?" But this formal approach cannot mask the fact that very often the issues raised go much deeper. Thus Urquhart J. said in *Rex* v. *Mustin, Rex* v. *Millard*:[8] "In the argument little or nothing was urged in favour of the legality of the by-law, the evils of the C.I.O. and their supposed infringement of the by-law being stressed. However, even if the operation of that body is objectionable to the municipality it cannot interfere with it except on clear legislative authority."

Lawyers in Canada may well begin to brood on the question of the extent to which municipal by-laws of the character of those in the two cases above-mentioned are symptomatic of a tendency "to exalt order at the cost of liberty".[9] And if there be no constitutional prohibition against such legislation, it would be desirable to ascertain where responsibility therefor lies. There is some reason to believe that legislation in the field of public order is competent only to the federal parliament under its exclusive legislative power in relation to the criminal law.[10] However, the "aspect" theory of the B.N.A. Act would still leave the provinces, and through them the municipalities, with some power to legislate on the subjects covered by the criminal law.[11] But the judgments of Duff C.J. and of Cannon J. in *Reference re Alberta Statutes*[12] open new possibilities in connection with exclusive federal legislative control over the matters of public debate and discussion which deserve to be further explored.

[5] *Cf.* Note (1940), 53 Harv. L. Rev. 487.
[6] *Ibid.*, at p. 488.
[7] [1940] O.W.N. 541, at p. 542.
[8] [1940] O.R. 393, at p. 394.
[9] See Book Review by Arthur Garfield Hays of FREE SPEECH AND A FREE PRESS by Giles J. Patterson (1939), 53 Harv. L. Rev. 352.
[10] *Cf. P.A.T.A.* v. *Atty.-Gen. for Can.*, [1931] A.C. 310; *Atty.-Gen. for B.C.* v. *Atty.-Gen. for Can.*, [1937] A.C. 368.
[11] *Hodge* v. *Regina* (1884), 9 App. Cas. 117.
[12] [1938] S.C.R. 100, at pp. 133–135, 144–146.

CONSPIRACY—BREACH OF CRIMINAL STATUTE AS BASIS OF TORT LIABILITY.—In 1935, the Ontario Court of Appeal in *Transport Oil Ltd.* v. *Imperial Oil Ltd.*[1] held that the Combines Investigation Act,[2] being criminal legislation over which the Parliament of Canada had exclusive jurisdiction, did not confer a civil cause of action so as to enable a plaintiff injured by a conspiracy declared illegal under such Act capable of recovering damages against parties to the combine. This decision was subjected to critical analysis in this REVIEW[3] by Professor Finkelman, who pointed out that while the Dominion Parliament could not confer a civil cause of action, none the less the common law of the provinces regulating private rights had always been to the effect that a combination of persons which was formed in pursuance of an unlawful or criminal object was liable to pay damages to any person injured by such combination. In 1939, in *Gordon* v. *Imperial Tobacco Sales Company*,[4] McFarland J. reiterated the principle enunciated by Middleton J.A. in the *Transport Oil Case* and held that "Dominion legislation cannot trespass upon or create any civil right in a province". His view again was that damages sustained by the operation of any combination which might be declared illegal under either the Combines Investigation Act or sections 496 and 498 of the Criminal Code were not recoverable in Ontario in a civil action.

The operation of statutes creating statutory obligations or penalizing certain conduct on questions of civil liability in tort is hopelessly confused even in jurisdictions such as England where legislative powers are vested in one supreme parliament.[5] The problem of determining whether an action lies for damages caused by a breach of a statute is usually attempted to be solved by inquiring whether the legislature *intended* to confer a civil cause of action in addition to any other remedy, such as a penalty, which the statute prescribed.[6] This view has been exposed on many occasions as both fictitious and misleading.[7] It seems useless to discover an intention which the legislature

[1] [1935] O.R. 215.
[2] R.S.C. 1927, c. 26.
[3] 13 Can. Bar Rev. 517.
[4] [1939] 2 D.L.R. 27.
[5] *Cf. Phillips* v. *Britannia Hygienic Laundry*, [1923] 2 K.B. 832 with *Monk* v. *Warbey*, [1935] 1 K.B. 75; *Atkinson* v. *Newcastle Waterworks* (1877), 2 Ex. D. 441 with *Read* v. *Croydon* (1938), 55 T.L.R. 212.
[6] See the cases in note 5, and see also *Falsetto* v. *Brown*, [1933] O.R. 645.
[7] Perhaps the classic statement is Thayer, *Public Wrong and Private Action* (1914), 27 Harv. L.R. 317. See Morris, *The Relation of Criminal Statutes to Tort Liability* (1932), 46 Harv. L.R. 453. See also White, *The Burden of Proof of Negligence in Running-Down Cases* (1938), 6 Camb. L.J. 404 at pp. 414 *ff.*

never had, since if there were an intention to give a civil cause of action the statute would have so stated. The confusion in the case law is doubly enhanced in federal jurisdictions where it is quite clear that, as in Canada, the federal parliament has no jurisdiction to confer a civil cause of action. The truth of the matter would seem to be that, as it is the court's function to determine when a relationship arises which may entail a duty on the part of one person so to act as to save another person from harm, in determining that duty problem the courts may be guided, although not necessarily controlled, by any legislation, whether of an authority having jurisdiction over civil rights or one which, as in Canada, has jurisdiction over criminal law.[8]

One view which has been put forward is that any statute, whether criminal or penal in nature, merely lays down rules for the conduct of a reasonable man.[9] On this view no reasonable man can ignore standards of conduct laid down by any statute, or for that matter any properly authorized by-law of a municipality. Whether the statute was passed to prohibit conduct under the sanctions of criminal law would seem to be of no moment since the common law doctrine of tortious liability must treat such conduct as unreasonable. This view seems to have the support of the House of Lords[10] and goes a considerable length in dispelling any myth of a statute conferring a cause of action. Similarly, if the damage caused by an "illegal" combination, in the sense of a combination formed for "improper" or "unprivileged" purposes is recoverable in a common law action of tort, it is difficult to see how a combination which is "illegal" in the sense of criminal can be deemed "proper" or "privileged" by the common law of a province which is part of the country, which has declared such combination "unprivileged". No one has ever had any difficulty in refusing to enforce contracts which are made in violation of the criminal law on the ground that legislative jurisdiction over property and civil rights is vested in the province and not the dominion.[11] It is difficult to see

[8] See, in particular, Morris, *op. cit.* On the other hand, see Aickin, *Contributory Negligence and Breach of Statutory Duty* (1940), 2 Res Judicatae 129. The latter insists that when a standard of care is prescribed by legislation and the courts hold that breach of that standard results in civil liability, the resulting action is improperly described as an action of negligence but is in truth an action for breach of statutory duty.

[9] See article by Thayer, *op. cit.* and see White, *op. cit.*

[10] *Lochgelly Iron & Coal Co.* v. *McMullan*, [1934] A.C. 1. But see Aickin, *op. cit.*

[11] See *Wampole* v. *F. E. Karn Co. Ltd.* (1906), 11 O.L.R. 619; *Weidman* v. *Shragge* (1911), 46 S.C.R. 1; *Dominion Supply Co.* v. *F. L. Robertson Mfr. Co.* (1917), 39 O.L.R. 495, in all of which the defence of illegality of a

how such a situation differs, other than in the form of remedy, from that presented in the case of imposing tortious liability as a consequence of "criminal" conspiracy.

The Ontario cases previously mentioned must be regarded as of doubtful authority in view of certain expressions of opinion —obiter it is true—made by Duff C.J. in the recent case of *Philco Products Ltd.* v. *Thermionics, Ltd.*[12] In that case one defence to an action for infringement of patents was that the plaintiffs had obtained title to the patents and were using them in pursuance of an illegal conspiracy contrary to the Combines Investigation Act and the Criminal Code. In passing on a preliminary question of pleading, the court indicated that such a defence might be good on the principle expressed in the maxim *ex dolo malo non oritur actio.* In the course of his judgment, however, Duff C.J. went further than was necessary for the actual decision and used the following language:

> If B commits an indictable offence and the direct consequence of that indictable offence is that A suffers some special harm different from that of the rest of His Majesty's subjects, then, speaking generally, A has a right of action against B. As at present advised, I think it is not obvious that this well settled doctrine does not apply to indictable offences under section 498 of the *Criminal Code.*

If this view be correct it is directly opposed to the two Ontario decisions previously cited. It is submitted, with respect, that the view expressed by the Supreme Court of Canada is right and that the Ontario decisions cannot be supported. In this connection it may be interesting to refer to the decision of the Manitoba Court in *Wasney* v. *Jurazsky,*[13] in which a child was injured because a gun had been sold to the defendant in violation of a section of the Criminal Code. It was admitted in that case that the Dominion could not confer a civil cause of action, but the defendant was none the less held liable since the court could come to only one conclusion, namely, that the defendant had engaged in conduct which no reasonable man would have engaged in and as damage had resulted to the plaintiff by reason of such unreasonable conduct, the defendant should make compensation on ordinary principles of the law of torts. Similarly in a case of illegal combines there seems to be no constitutional issue involved. As Professor Finkelman stated in a previous comment in this REVIEW: "The right of action for injury caused

contract made in pursuance of a combination declared "criminal" by Dominion legislation was considered.

[12] [1940] S.C.R. 501.

[13] [1933] 1 D.L.R. 616.

by a conspiracy, arises not by virtue of any federal legislation but by operation of the common law doctrine which gives a right of action to anyone injured by a criminal conspiracy, in this case a conspiracy to violate a Dominion statute."[14]

That the whole question of statutes and civil liability could stand more realistic treatment by the courts is indicated by the fact that in the same volume of reports in which Duff C.J. made the remarks above quoted regarding civil liability for damage caused by an illegal conspiracy, he also used the following language concerning an action brought in Quebec for a damage alleged to be sustained by reason of a breach of a provincial statute governing the conduct of motor vehicles:[15]

> *Prima facie*, in view of the sanction by penalty, the owner of a motor vehicle guilty of an offence under section 31 by reason of which another person suffers harm is not responsible in a civil action.

In this latter instance Duff C.J. reverts to the popular but, to the writer, misleading conception, of discovering a legislature's "intention" to confer a cause of action. Such a view is inconsistent with the view expressed in the *Philco Case* since no one would argue that the Dominion could confer a civil cause of action in tort. In the last analysis, in the absence of competent legislation *expressly* conferring a cause of action, it is the *courts* of civil jurisdiction which must determine the existence of duties and relationships giving rise to tortious liability. Courts are just now emerging from the confusion which has existed between contractual liability and liability in tort. It is not too much to hope that in the near future forward looking courts may free themselves from the fictions and verbiage which becloud practically every issue in which tortious liability is considered in the light of a statutory obligation.

* * *

EQUITY — INJUNCTIONS — ENFORCEMENT OF ECCLESIASTICAL DECREE — RIGHT TO SPECIFIC RESTITUTION OF SACERDOTAL LINEN.—In *Ukrainian Greek Orthodox Church of Canada* v. *Trustees of the Ukrainian Greek Orthodox Cathedral*,[1] the Supreme Court of Canada, affirming a judgment of the Manitoba Court of Appeal,[2] refused to sustain an action brought to enforce an ecclesiastical decree of expulsion against a priest; but on another

[14] 13 Can. Bar Rev. at p. 521.
[15] *Volkert* v. *Diamond Truck Co.*, [1940] S.C.R. 455 at p. 458.
[1] [1940] S.C.R. 586.
[2] [1939] 1 W.W.R. 481, [1939] 2 D.L.R. 494.

branch of the case two members of the Court dissented from the judgment of the majority which refused to order the return to the appellant corporation of the "antimins", a piece of consecrated linen given to the priest for use in the ministration of the sacraments of the church.

The priest's congregation ignored a sentence of the church court excluding him from priesthood and membership in the church. The main ground on which the appellant corporation's action was dismissed was that the rebellious congregation did not, under the terms of the appellant's federal statute of incorporation, become subject to its control.[3] Davis J., while agreeing that the appellant corporation had no legal right to interfere with the congregation's desire to continue the services of the priest, was of opinion that an injunction should go to restrain the priest in so far as he was acting as a priest of the corporation.

Only Crocket J.[4] and Hudson J.[5] spoke, and they briefly, of the refusal of civil courts to give effect to purely ecclesiastical decrees. In the common law provinces[6] and in the United States,[7] the non-involvement of courts in religious disputations is owed largely to the non-existence of any established church. But although a country's government is founded on the separation of church and state, its courts will not refuse to intervene where property rights are in issue.[8] "The Court has no jurisdiction," said Riddell J.A., "to enter upon the belief of any man, except as the inquiry may be necessary to determine property rights of some kind."[9] Generally speaking, therefore,

[3] The members of the Court were not in complete agreement in every detail. Rinfret J. gave no reasons for judgment; Crocket J. said that the appellant's statutory charter did not deprive the congregation of the right to manage its own temporal affairs; the statute did not provide for the merging of the various units of the church organization in the appellant corporation; Kerwin J. said that the statute granted no spiritual jurisdiction over the various congregations, but limited the power of the corporation to temporal affairs only. Nor were the lands of the congregations vested in the corporation. Moreover, the priest was a priest of the unincorporated church and not of the appellant corporation; Hudson J. said that the congregation never became subject to either the spiritual or temporal control of the corporation.

[4] [1940] S.C.R. 586, at p. 591: " . . . . . it is well settled that, unless some property or civil right is affected thereby, the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order."

[5] *Ibid.*, at page 615: "No property right is involved so far as the plaintiffs are concerned. The corporation makes no contribution to the salary of [the priest], nor to the maintenance of the Cathedral Church."

[6] *Dunnet* v. *Forneri* (1877), 25 Gr. 199.

[7] *Cf. Watson* v. *Jones* (1871), 13 Wall. 679; *Watson* v. *Garvin* (1873), 54 Mo. 353.

[8] Note, *When Will Civil Courts Investigate Ecclesiastical Doctrines and Laws?* (1926), 39 Harv. L. Rev. 1079.

[9] *Wodell* v. *Potter* (1929), 64 O.L.R. 484, at p. 498. See also *Bishop of Columbia* v. *Cridge* (1874), 1 B.C.R. (Pt. 1) 5.

religious societies enjoy no special status before the law.[10] The enforcement of a trust may, of course, involve the courts in matters of doctrine, but that will be only to the extent necessary to enable it to give effect to the trust.[11] So too, the task of statutory interpretation may, in the case of a statute giving corporate status to a church organization, require the courts to pass on matters of religious faith.[12] Prohibition may lie, also, where church courts seek to go beyond their statutory jurisdiction.[13] But civil courts will not interfere with the exercise of disciplinary powers within the authority of the church courts,[14] unless the church rules have been violated to the prejudice of a person's material interests.[15] In *Dunnet* v. *Forneri*,[16] a lay delegate to the synod of the Church of England was denied the sacrament of communion, and although by the rules of the synod failure to make communion involved forfeiture of office the Court refused to interfere on the ground that no civil right was invaded, since no emolument was attached to the office of lay delegate. In the principal case, Dennistoun J.A.'s judgment in the Court of Appeal suggests that if excommunication had deprived the priest of his congregation and his living the sentence of excommunication would be inquired into. The facts of particular cases aside, there remains the comfort to be derived from the enunciation of a rule of judicial abnegation in connection with doctrines or discipline of religious organizations "except where they become elements in the adjudication of controversies respecting property, contracts or other civil rights".[17]

The position of the voluntary religious association does not differ from that of the ordinary unincorporated association with respect to the discipline of members.[18] There is the same need to exhaust the remedies of the domestic forum[19] and the same

[10] *Archer* v. *Society of the Sacred Heart of Jesus* (1903), 9 O.L.R. 474.

[11] *Aird* v. *Johnson* (1929), 64 O.L.R. 233; *General Assembly of Free Church of Scotland* v. *Overtoun*, [1904] A.C. 515: "A court has simply to ascertain what was the original purpose of the trust." *Cf. Atty.-Gen.* v. *Pearson* (1817), 3 Mer. 353.

[12] *Thompson* v. *Dibdin*, [1912] A.C. 533; and *cf.* the principal case.

[13] *Ex parte Currie* (1886), 26 N.B.R. 403. As to *certiorari*, see *Ex parte Little* (1895), 33 N.B.R. 210.

[14] *Ash* v. *Methodist Church* (1901), 31 S.C.R. 497.

[15] *Supra*, note 8. *Cf.* Note (1916), 29 Harv. L. Rev. 560; *McCharles* v. *Wyllie* (1927), 32 O.W.N. 202.

[16] (1877), 25 Gr. 199.

[17] *McPherson* v. *McKay* (1880), 4 O.A.R. 501.

[18] *Glavasky* v. *Stadnick*, [1937] O.R. 35, [1937] 1 D.L.R. 473. *Cf. Rigby v. Connol* (1880), 14 Ch. D. 482.

[19] *Wetmon* v. *Bayne*, [1928] 1 W.W.R. 519, [1928] 1 D.L.R. 848 (Alta. C.A.)

right to enjoin expulsion contrary to the constitution.[20] Here too the rule, which has been the subject of criticism, obtains, viz., that the expulsion from priesthood or membership does not *per se* afford a foundation for an action for an injunction in connection with the expulsion or for a tort action.[21] The criticism is based on the fact that the decisions in connection with expulsion pay small regard to the important question of the membership relation and the interests of substance, aside from purely property interests, tied up therein.[22] But this is part of the larger question of the extent to which courts should protect interests of personality.[23]

The difference of opinion in the principal case in respect of the return of the "antimins" reveals an important cleavage on the question of jurisdiction. Thus Crocket J. said that the question of the return of the consecrated linen depended on the allegation that the priest received them as a priest of the appellant corporation, and hence rested on the same foundation as the main claim. Moreover the "antimins" had no substantial monetary value and the mere demand for its delivery would not, apart from other considerations, justify action by way of injunction, especially since the purpose of this claim, as of the whole action, was to enforce obedience to a purely ecclesiastical decree. Kerwin J. was of opinion that the only obligation with respect to the "antimins" was to return it to the consistory of the unincorporated church in case the priest ceased to be a priest of that church, and this event had not occurred. The Judges dissenting on this point, Davis and Hudson JJ., were of opinion that the "antimins" remained the corporation's property which it was entitled to have returned; as Hudson J. stated, "irrespective of the validity or invalidity of the decree of excommunication". And further: "The mere fact that it has little monetary value is not sufficient to deprive the court of jurisdiction. Its sacerdotal value is something which can be estimated only by the ecclesiastical bodies concerned."[24] If the "antimins" was the corporation's property, it is difficult to see why the doctrine of "*pretium affectionis*" did not warrant specific restitution. Nor would it, aside from that doctrine, have been

[20] *Zawidoski* v. *Ruthenian Greek Catholic Parish*, [1937] 2 D.L.R. 509 (Man.).

[21] See the principal case in the Court of Appeal, *supra*, note 2; Note (1916), 29 Harv. L. Rev. 560.

[22] *E.g.* as in the case of trade unions.

[23] *See* Chafee, *The Internal Affairs of Associations not for Profit* (1930), 43 Harv. L. Rev. 993.

[24] *Supra*, note 1, at p. 615.

improper to give equitable relief on the basis of a fiduciary relationship.[25] Trueman J.A. in the Court of Appeal was in favour of relief to the appellant corporation in this respect because of *"pretium affectionis"*, but Dennistoun J.A., like Crocket J. in the Supreme Court, denied relief because "the return of the antimins is demanded, not for their property value, but as evidence of the submission of the priest to the [ecclesiastical] sentence imposed upon him."[26]

[25] *Cf.* Strong C.J. in *Carter* v. *Long & Bisby* (1896), 26 S.C.R. 430, at p. 436.

[26] [1939] 1 W.W.R. 481, at p. 489, [1939] 2 D.L.R. 494, at p. 500. See also *Duke of Somerset* v. *Cookson*, 3 P. Wms. 390, 24 E.R. 1114, cited by Trueman J.A.