# CASE AND COMMENT

WAR MEASURES — LABOUR LAW — DEFENCE OF CANADA REGULATIONS—REGULATION AGAINST "LOITERING" PROHIBITING PEACEFUL PICKETING.—In *Re Rex* v. *Burt*[1] the evidence disclosed that the accused, a trade union organizer, and a group of forty-five men walked slowly up and down (at a pace slower than is ordinarily used in proceeding from one point to another) in front of a plant of the Chrysler Corporation of Canada at a point about 40 feet from the fence around the plant and upon a space 180 feet long and 60 feet wide. They refused to obey a constable's request that they leave and were arrested. A police officer stated that there was some industrial dispute at the plant. There was no evidence to connect the accused and his associates with employees alleged to be on strike at the plant or to prove they were members of any trade union to which employees of the plant belonged, other than a statement made by one of them that they were picketing the premises. Hogg J. held that, even assuming that the purpose of the accused and his associates was to picket in the interests of those engaged in an industrial dispute, an act of loitering was committed by them contrary to Regulation 6 (3) of the Defence of Canada Regulations.

The War Measures Act[2] gives authority to the Governor-in-Council to "do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada". The Defence of Canada Regulations, passed under the authority of the Act, were promulgated by an order-in-council on September 3, 1939, "in order that the Government of Canada may be enabled to take such further action as may in the present emergency be necessary".[3] Part II of the Regulations headed "Espionage and Acts likely to Assist the Enemy"; "Access to Certain Premises and Areas", contains Regulation 6, subsection 3 of which provides :

> No person loitering in the vicinity of a protected place [or] of any premises to which this Regulation primarily applies . . . shall continue to loiter in that vicinity after being requested by the appropriate person to leave it.

---

[1] [1941] O.W.N. 17.
[2] R.S.C. 1927, c. 206, s. 3.
[3] P.C. 2483, Sept. 3, 1939.

By subsection 4 "the premises to which this Regulation primarily applies are premises used or appropriated . . . (b) for the performance of any essential services"; and by subsection 5, an "appropriate person" includes "any constable". The Chrysler Corporation works were declared to be "essential services" by an order-in-council of July 20, 1940, passed under the authority of Regulation 2 (1) (d).[4]

However widely emergency regulations are to be construed, the abrogation of rights by indirection is not warranted on any sound principle of interpretation;[5] especially when the purpose of the particular regulation construed has no relation to the right so improperly curtailed. No doubt, cases arising out of the Defence of Canada Regulations in relation to personal liberty indicate a judicial tendency to abstain from holding the prosecution to strict particularity.[6] Whether the courts would be as generous to executive action in cases of interference with business and property interests is a moot point in Canada. They could find a precedent for strict construction against executive interference with property in the English case of *E. H. Jones (Machine Tools) Ltd.* v. *Farrell and Muirsmith;*[7] but in England personal liberty too has not been inadequately protected. The judgment in *Re Rex* v. *Burt,* however, goes beyond a mere refusal by the Court to allow technicality to govern substance.[8] Regulations as acts of the executive are easily amended, as the short history of the Defence of Canada Regulations bears out, and had it been intended to prevent peaceful picketing there would have been, and is, no difficulty in expressing that intention in words of unmistakable meaning.

The central problem posed by the judgment of Hogg J. is how he could reconcile a ban on peaceful picketing, by invoking a regulation against "loitering", with the fact that this regulation appeared in a part of the Defence of Canada Regulations which, in his own words, was "for the purpose of preventing *spying* upon and obtaining information of activities carried out in premises"[9] such as the Chrysler plant. Organized labour is not likely to react favourably to even an implication that

[4] This provision defines "essential services" as "such services as may for the time being be declared by the Governor in Council to be essential for the prosecution of the war or to the life of the community."

[5] *Cf.* ODGERS, THE CONSTRUCTION OF DEEDS AND STATUTES, p. 265.

[6] See Note (1940), 18 Can. Bar Rev. 814.

[7] [1940] 3 All E.R. 608; see Note (1940), 18 Can. Bar Rev. 578.

[8] *Cf. Arpad Spitz* v. *Secretary of State for Canada,* [1939] Ex. C.R. 162, at p. 166.

[9] [1941] O.W.N. 17, at p. 21.

legitimate trade union activities are being stigmatized as traitorous or put in the class of "spying". That there should be even any doubt that Regulation 6 (3) was not intended to encompass trade union practices is astonishing. Clearly, in respect of some regulations there might reasonably be some difficulty in construing them so as to exclude from their prohibitions the ordinary trade union activities of strikes and picketing. Examples are Regulations 27 and 29 of the Defence of Canada Regulations; Regulation 27 provides that "no person shall do any act with intent to impair the efficiency or impede the working of any . . . machinery, apparatus or other thing used or intended to be used . . . for any undertaking engaged in the performance of essential services"; Regulation 29 provides, *inter alia*, against the doing of any act by a person having reasonable cause to believe that it will be likely to prevent or interfere with the carrying on of their work by persons engaged in the performance of essential services. But in the case of each of these Regulations there is the proviso that "a person shall not be guilty of an offence . . . by reason only of his taking part in, or peacefully persuading any other person to take part in, a strike."

It is submitted that the explanation of Hogg J.'s puzzling interpretation of Regulation 6 (3) can be gathered from the following passage in his judgment:[10]

> The fact that the men in question were "loitering" is the essential act which the Regulation is intended to prevent, although by so doing it may be necessary to hinder or even to prohibit an act which might be carried out in peace time by means of loitering. The purpose of the Regulation must be the paramount consideration.

This passage betrays a philosophy of industrial relations which conceives of peaceful picketing and loitering as synonymous, so that although in time of peace such an act may be tolerated, a regulation, such as that in question in this case, for the safety of the state in time of war forbids it. Is this conception defensible in law?

Regulation 6 (3) is directed against "loitering"; "to loiter" according to the Oxford Dictionary (quoted by Hogg J.) means "to linger unduly on the way when sent on an errand or when making a journey; to linger idly about a place; to waste time when engaged in some particular task; to dawdle". The suggestion that picketing comes within any of the foregoing definitions will not bear close examination. *The Encyclopaedia of*

[10] *Ibid.*, at p. 23.

*The Social Sciences*[11] states that "picketing has three chief purposes; first, to inform those unaware of the fact that a strike is in progress; second, to persuade the workers to join the strike; and, third, by moral suasion, or, if necessary, by physical obstruction to prevent them from going to work." An English Royal Commission Report[12] says that "picketing consists in posting members of the union at all approaches to the works struck against, for the purpose of observing and reporting the workmen going to or coming from the works, and of using such influence as may be in their power to prevent the workmen from accepting work there". Section 501 (g) of the Criminal Code which would seem to free picketing from the taint of criminality involved in "watching or besetting", an offence under s. 501 (f), uses the words "attending at or near or approaching to [the] house or other place [where any other person resides or works or carries on business or happens to be] in order merely to obtain or communicate information".[13] It would not have been irrelevant in construing "loitering" for Hogg J. to refer to s. 238 (e) of the Criminal Code which provides that "every one is a loose, idle or disorderly person or vagrant who *loiters* on any street, road, highway or public place, and obstructs passengers by standing across the foot-path, or by using insulting language, or in any other way". Again, s. 652 of the Criminal Code permits any peace officer to take into custody without warrant any person whom he finds lying or *loitering* in any highway, yard or other place during the night, and whom he has good cause to suspect of having committed or being about to commit any indictable offence. It would be purely fanciful to charge picketers under a vagrancy law and no reported instance exists in Canada to the writer's knowledge. Both ss. 238 (e) and 652 of the Criminal Code are persuasive against an interpretation of "loitering" in Regulation 6 (3) that would encompass peaceful picketing *per se*.

It is not, however, necessary to rest here. Peaceful picketing has in recent years been explicitly recognized by judicial decisions as a perfectly lawful trade union practice.[14] That this

[11] Vol. 14, p. 422 (New York, 1934).

[12] Report of the Royal Commissioners Appointed to Inquire into the Organization and Rules of Trade Unions and Other Associations, Eleventh and Final Report, 1869, p. xxi.

[13] *Cf.* Finkelman, *The Law of Picketing in Canada:* I (1937), 2 Univ. of Tor. L.J. 67, 84 *ff.*

[14] *Cf. Canadian Dairies Ltd.* v. *Seggie*, [1940] 4 D.L.R. 725 (Ont.); *Bassel's Lunch Ltd.* v. *Kick*, [1936] O.R. 445; *Allied Amusements Ltd.* v. *Reaney*, [1937] 3 W.W.R. 193, per Trueman J.A., at p. 205; *Dallas* v. *Felek*, [1934] O.W.N. 247. *See* Note (1937), 15 Can. Bar Rev. 813.

was not always so is no great revelation.[15] The legal history of trade unionism reflects little credit on the judiciary's response to the claims and demands of organized labour, a not inconsiderable section of the community.[16] Those claims and demands had to be met in England by legislation,[17] and they are being met partially on this continent in the same way.[18] Undoubtedly this legislation has not been without effect on the development of the common law. Canadian courts are ceasing to see anything sinister in peaceful picketing; there is hope that the era has passed when a court could say "there is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching".[19] No brief is held for picketing which is accompanied by unlawful conduct, such as assault or defamation. But the mere passing and repassing, without obstructing others, (which was what was involved in *Re Rex* v. *Burt*) in the course of an industrial dispute would not appear to be legally punishable; nor should it matter whether or not the picketing is in pursuance of a strike.[20]

Since peaceful picketing would now appear to be lawful, the former practice of finding that it constituted *per se* some nominate tort, *e.g.* nuisance, must be abandoned; a nuisance, that is, is not implicit in the activity known as "peaceful picketing". On the same reasoning if peaceful picketing were ever synonymous with or comprised within or if it included "loitering" as an offence, it cannot be so considered today. Organized labour, and perhaps lawyers too, will therefore find difficulty in appreciating Hogg J.'s interpretation of Regulation 6 (3); for it has restored what the courts over a period of years, and after painful struggle seem finally to have rejected. Moreover, since, it is submitted, there was no compelling reason for the interpretation, it conduces to a lessening of confidence in the courts by working men, a matter which is not inconsequential. "It is of fundamental importance", said Lord Hewart, "that justice should not only be done, but be manifestly and undoubtedly seen to be done."[21]

[15] *Cf.* Finkelman, *The Law of Picketing in Canada:* II (1938), 2 Univ. of Tor. L.J. 344.

[16] HEDGES AND WINTERBOTTOM, THE LEGAL HISTORY OF TRADE UNIONISM.

[17] *E.g.* The Trade Disputes Act, 1906, 6 Edw. VII, c. 47 (Eng.).

[18] *See* Note (1940), 18 Can. Bar Rev. 810.

[19] *Atchison, T. & S.F. Ry.* v. *Gee* (1905), 139 Fed. 582, at p. 584.

[20] *See* Note (1937), 15 Can. Bar Rev. 813.

[21] *Rex* v. *Sussex Justices: Ex Parte McCarthy* (1923), 93 L.J.K.B. 129, at p. 131.

Not the least that can be said against the judgment in *Re Rex* v. *Burt* is its repudiation of that principle of judicial action which leans against interpreting a statutory provision as taking away rights without express declaration.[22] It was and is for the executive to decide that picketing should be banned and no court ought to assume this responsibility on its behalf. The government war labour policy enunciated in an order-in-council of June 29, 1940, is not indicative of any intention to ban trade unions or their activities. It is true that it is recommended that "there should be no interruption in productive or distributive operations on account of strikes or lockouts";[23] and it is true that strikes are postponed pending the submission, by compulsory direction, of disputes to boards under the Industrial Disputes Investigation Act.[24] But among the numerous principles of the policy are those affirming the freedom of employees to organize in trade unions, a matter protected by the Criminal Code,[25] and to negotiate through their representatives with employers with a view to the conclusion of a collective agreement on working conditions. The stress, of course, is on mutual cooperation of employers and employees and on peaceful settlement of industrial disputes through conciliation and arbitration. It may not be untoward to suggest that the war labour policy would, with respect to collective bargaining, be more apt to be realized if the government compelled collective bargaining by positive direction. So long as employers are free to hire and fire, and free from any legal compulsion to bargain collectively, so long will trade unions feel apprehensive if deprived of the right to strike and the right to picket. The first of these trade union rights has been postponed by explicit statutory provision. If the second is to be affected, it should be done in the same way; for the matter is a political rather than a judicial responsibility.

* * * *

There has come to hand, subsequent to the writing of the foregoing note, an order-in-council of February 7, 1941, published in the Canada Gazette on February 11, 1941, which indicates that the views of the Government with respect to the inter-

[22] *Supra*, note 5; Willis, *Statute Interpretation in a Nutshell* (1938), 16 Can. Bar Rev. 1, at p. 22 *ff*.

[23] P.C. 2685.

[24] R.S.C. 1927, c. 112. By an order-in-council gazetted on December 2, 1939, P.C. 3495, the application of the Act was extended to war industries.

[25] The Criminal Code, s. 502 A, enacted in 1939 by 3 Geo. VI, c. 30, s. 11.

pretation of Regulation 6 are those contended for in the note. The order-in-council reads :

> Whereas regulation 6 of the Defence of Canada Regulations (Consolidation) 1940, prohibits trespassing and loitering in connection with certain premises including those used or appropriated for the performance of essential services as defined in the said Regulations;
>
> And whereas it is not the intention that the provisions of this regulation, in so far as premises used or appropriated for the performance of essential services are concerned, should apply to a lawful strike as long as the action of the strikers is not otherwise unlawful.
>
> Now, therefore, His Excellency the Governor General in Council . . . is pleased to amend regulation 6 . . . and it is hereby amended by adding thereto as paragraph (6) the following :
>
> (6) No person shall be guilty of an offence under paragraphs one and three of this regulation respecting premises used or appropriated for the performance of an essential service provided that he is only taking part in, or peacefully persuading any other person to take part in, a strike and that he is not otherwise unlawfully on or near or loitering in the vicinity of such premises.

B. L.

* * *

QUASI-CONTRACT — WAIVER OF TORT—ELECTION—SUCCESSIVE CONVERTERS—REFERENCE BY HOUSE OF LORDS TO LIVING AUTHORS AND TO RESTATEMENT OF RESTITUTION.—The decision of the English Court of Appeal in *United Australia, Ltd.* v. *Barclays Bank, Ltd.*,[1] which was questioned in a note in this REVIEW[2] has been reversed by the House of Lords[3] on grounds not dissimilar to those raised in the note. The facts, in brief were that a cheque payable to the plaintiff company was endorsed by its secretary, without authority, to another company, M.F.G. The defendant bank accepted the cheque for collection, crediting M.F.G. with it. The plaintiff sued M.F.G. to recover the amount of the cheque as a loan or as money had and received. M.F.G, went into liquidation and the action did not result in any judgment. The plaintiff company then sought to put in a proof of debt but it was not admitted. Subsequently, learning of the bank's part in connection with the cheque, the plaintiff sued the bank for damages for conversion. The House of Lords held that the plaintiff should succeed.

The speeches delivered by the Law Lords clarify a number of points: (1) When courts speak of "waiver of tort" they are

[1] [1939] 1 All E.R. 676.
[2] (1940), 18 Can. Bar Rev. 62.
[3] [1940] 4 All E.R. 20.

referring to a choice of one of two alternative remedies or an election. The bringing of assumpsit does not mean that no tort has been committed; for if so, said Viscount Simon L.C., "how could an action in *assumpsit* lie? It lies only because the acquisition of the defendant is wrongful, and there is thus an obligation to make restitution."[4] (2) There is no election of a remedy, as against a single tortfeasor, until the action instituted is pursued to judgment. Modern procedure enables a plaintiff to combine in a single writ a claim based on tort with a claim based on assumpsit, and the stage of election is not reached until the plaintiff applies for judgment. The Court of Appeal in deciding that the commencement of an action was a conclusive election relied on a dictum of Bovill C.J. in *Smith* v. *Baker*,[5] which was wrong. (3) M.F.G. and the defendant bank were successive converters; each was guilty of a separate tort. The proceedings taken against M.F.G., even if they amounted to a "waiver" or final election against it, did not bar a subsequent action against the defendant bank. (4) Finally, proceedings taken against one tortfeasor do not amount to a defence to an action against another tortfeasor when their independent acts have caused the same damage unless the plaintiff has received satisfaction for his loss; in Lord Porter's words:[6]

> It is plain that an action against one separate tortfeasor for conversion is no bar to an action against another, nor, indeed, does the signing of judgment against the first end the matter. The plaintiff can even then proceed to judgment against the second, and his rights are not exhausted until from one or both he has obtained the full measure of his loss.

It may be noted that the conclusions reached by the House of Lords were put forward more than thirty years ago by Professor Corbin in a comprehensive article on *Waiver of Tort—Suit in Assumpsit*.[7]

Of considerable interest in the Law Lords' speeches were the references to living authors, scholars of repute whose researches have enriched the law and illuminated many of its obscurities. Familiar names pass in review upon a perusal of those speeches: Sir William Holdsworth and Professor Winfield, both of them too well known to require more than the mention of their names; R. M. Jackson, from whose book *The History of Quasi-*

[4] *Ibid.*, at p. 29.
[5] (1873), L. R. 8 C.P. 350.
[6] [1940] 4 All E.R. 20, at p. 51.
[7] (1909–10), 19 Yale L. J. 221.

*Contract in English Law*, Lord Atkin acknowledged that he received assistance;[8] and Lord Wright of Durley, himself a Law Lord, in whose *Legal Essays and Addresses* the subject of quasi-contract is given the most attention. This specific reference to contemporary writers on law by the House of Lords should, it is hoped, be exemplary for other courts. The judiciary does not demean itself by acknowledging assistance *ab extra*. But most significant was Lord Chancellor Simon's reference to the American Law Institute's Restatement of Restitution, in which, he says, in speaking of "waiver of tort", "the true proposition is well formulated".[9] Perhaps this will, or has already caused consternation in courts which take pride, and often, it seems, refuge too, in a narrow insularity. But now that the House of Lords has taken the works of the American Law Institute off from what, with respect to some courts, might be termed "the judicial index", we can confidently look forward to those works becoming quite respectable in Canada in the not too distant future.

* * *

DAMAGES—SHORTENED EXPECTATION OF LIFE.—In *Benham* v. *Gambling*,[1] the House of Lords reduced to £200 the damages awarded for loss of expectation of life where the deceased was a two and one half year old infant. The case raised the problem of assessment of damages under this head before the House of Lords for the first time. The principle that emerges from the judgment of the Court, delivered by Viscount Simon L.C., is that "in assessing damages under this head, whether in the case of a child or an adult, a very moderate figure should be chosen".[2] This, and the tenor of the judgment as a whole, should have a sobering influence on those who became unduly exhilarated when *Rose* v. *Ford*[3] made possible a claim by the living for what was called a deceased's shortened expectation of life.[4]

[8] [1940] 4 All E.R. 20, at p. 35.
[9] *Ibid.*, at p. 29.
[1] [1941] 1 All E.R. 7. At the trial £1200 was awarded; the Court of Appeal reduced the award to £350.
[2] *Ibid.*, at p. 13.
[3] [1937] A.C. 826, [1937] 3 All E.R. 359. The amount of damages was not in issue in this case.
[4] The result of *Rose* v. *Ford*, *supra*, says one writer, "has been a serious and mischievous invasion upon the good sense and sound policy of the common law, thanks to the tyranny of words and the influence of pervading notions of 'liberalizing the law' "; see Note by A.B., *Loss of Expectation of Life* (1938), 11 Aust. L.J. 537.

Viscount Simon laid it down that the problem in assessing damages ("more suitable for discussion in an essay on Aristotelian ethics than in a judgment of a court of law") was not to make a calculation on the basis of the length of life which is lost but to fix a reasonable figure for the loss of "a measure of prospective happiness"; "it is necessary for the court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness".[5] While he recognized that to try to put a money value on this was to attempt "to equate incommensurables", the House of Lords, he said, "in view of the earlier authorities" had to do its best to contribute to the solution of the matter.

No one, in considering the awards of damages in cases involving loss of expectation of life, from *Rose* v. *Ford* on, and in noticing the fluctuations in amounts, could be under any illusions as to the chaos of the situation.[6] An editorial in the *London Times* asserts that "it was unfortunate . . . that the law was ever persuaded to grapple with the unequal struggle of assessing under a separate head damages for shortened life".[7] A note in the *Illinois Law Review*[8] states that "the American cases have consistently denied the shortening of a life expectancy as an item of recoverable damage", but avers that it seemed entirely just that such damages should be allowed and that "it is to be hoped that some American courts will follow the English view". What Viscount Simon's judgment discloses is that the "English view" now evidence a disposition, conceding that the abolition of shortened expectation of life as a head of damage is for the legislature, to confine awards of such damages to sums that, viewed in relation to previous practice, must be considered nominal. The award of £200 in *Benham* v. *Gambling* would have been excessive, the judgment indicated, had it not been that "the circumstances of the infant were most favourable". The Lord Chancellor ended as follows:[9]

> In reaching this conclusion we are in substance correcting the methods of estimating this head of loss, whether in the case of children or adults, which have grown up in a series of earlier cases . . . and are approving a standard of measurement which, had it been applied in those cases, would have led, at any rate in many of them, to reduced awards. I trust that the views of this House . . . may help to set a

[5] [1941] 1 All E.R. 7, at p. 12.
[6] *See* Note by A. B. Keith, *Loss of Expectation of Life* (1940), 22 J. Comp. Leg. 238, where a number of the awards in the cases are collected.
[7] December 17, 1940.
[8] (1939), 33 Ill. L. Rev. 967, at p. 970.
[9] [1941] 1 All E.R. 7, at p. 13.

lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy.

The case for the abolition of any right of a personal representative to claim damages for the loss of "prospective happiness", of which the deceased is deprived by a defendant's negligence, has been fully stated in an article in this REVIEW.[10] The essentially personal character of a claim to a happy life would seem sufficient reason for denying a personal representative's right to damages in this connection; and in Ontario, the Trustee Amendment Act, 1938, has abolished such right.[11] This, of course, has nothing to do with the right of living persons to compensation for *pecuniary* loss to them owing to a deceased's death, caused by negligence. It may be that the Fatal Accidents Acts, which provide for such compensation to near relatives, do not, as they now stand, cover all deserving cases. The suggestion has been made that where the deceased are young children (in which case the parents could hardly ever show loss of expectation of pecuniary benefits) "recovery based on loss of investment or on something akin to replacement value should be considered".[12] This is unobjectionable, but, clearly, sound policy would preclude differentials based on the accident of wealth or poverty. It is possible, of course, for the legislature to fix an arbitrary sum, however this may smack of a tendency to revert to the ancient practice of setting up a tariff of compensation for various wrongs.

B. L.

* * *

BANKRUPTCY—SOLE CREDITOR OF ESTATE—POWER TO HOLD VALID MEETING—QUORUM REQUIREMENTS—WHETHER APPLICABLE TO FIRST MEETING OF CREDITORS.—Although the 'real question' in *In re Woodward, Ex Parte Totten*[1] was one dealing with the jurisdiction of the Registrar in Bankruptcy to appoint a trustee upon the death of the elected one, the Ontario Court of Appeal also considered the power of the estate's sole creditor, who had proved his claim, to hold a valid meeting. This branch of the case was dealt with because Mr. Justice Urquhart had said on the motion which had resulted in an appeal, that the

[10] Wright, *The Abolition of Claims for Shortened Expectation of Life by a Deceased's Estate* (1938), 16 Can. Bar Rev. 193.
[11] 1938, c. 44 (Ont.).
[12] *Supra*, note 10, at p. 199.
[1] [1940] O.W.N. 429, 22 C.B.R. 90.

one creditor was not entitled to hold a proper meeting.[2] The following discussion deals only with this phase of the case.

The section of The Bankruptcy Act[3] which is material, s. 92 (1), reads:

> A meeting shall not be competent to act for any purpose except the election of a chairman of and the adjournment of the meeting, unless there are present or represented at least three creditors, or all the creditors if their number does not exceed three.

It is respectfully submitted that the Court of Appeal, which concluded that the sole creditor was entitled to constitute a quorum for the holding of a meeting, might readily have come (and to the writer for the reasons submitted, preferably) to such a conclusion on a more positive approach to s. 92 (1) alone, without recourse to the two English cases cited as authority for its judgment. The first case, *East* v. *Bennett*,[4] although analogous, did not involve a bankruptcy matter but related to a company meeting of shareholders. Warrington J. held that a single holder of a certain class of shares could hold a proper meeting. Since s. 92 (1) of The Bankruptcy Act (as will be attempted to be shown) specifically covers the situation that was present in the *Woodward Case*, it would have been preferable for the Court's decision to be based on the Act rather than on a decision on something outside of it. The second case, cited by Mr. Justice Fisher alone, *Re Carmen Thomas, Ex parte Warner*[5] is authority for the principle that only one creditor who had proved a claim, thereby becoming entitled to vote, is entitled to hold a meeting of creditors, but is not altogether satisfactory because of Rule 257 of the English Bankruptcy Rules, 1886–1890, in force at the time. This rule reads:

> In calculating a quorum of creditors present at a meeting those persons only who are entitled to vote at the meeting shall be reckoned.

As was pointed out in *In re Glennie*,[6] by Mr. Justice Mellish, when he decided that a single creditor with a proved claim, out of four listed creditors, could hold a meeting (notwithstanding the difficulty presented by s. 42(6) of the then Bankruptcy Act which is the present s. 92(1)): "I have not come to this conclusion without hesitation, and there is here no rule on the point as there is in England," [rule 249, English Bankruptcy Rules,

[2] 22 C.B.R. 1, at p. 5.
[3] R.S.C. 1927, c. 11.
[4] [1911] 1 Ch. 163.
[5] (1910), 55 S.J. 482.
[6] 4 C.B.R. 226 (N.S.), at p. 227.

1915, which is the same as rule 257 of the 1886–1890 rules, above]. There being nothing corresponding in our Act or Rules, the *Thomas Case*, it is respectfully submitted, is not authority for the conclusion arrived at in the *Woodward Case*.

The writer is decidedly of the opinion that where there is a matter to be disposed of which is based on a particular Act or something which has such effect, recourse should be had firstly to it to see whether or not the circumstances of that matter come within any of its provisions. When stress is laid and a decision made on authority rather than on the relevant Act or something with such effect, the decision, it is submitted, is weakened when what appears to be authority is only such to a limited extent because the circumstances of the case to which it is applied are not sufficiently similar. By way of example of this, two cases (particularly the second), appear to some extent to be authorities for decisions contrary to the two already mentioned. In the case of *Sharpe* v. *Dawes*,[7] (which is distinguished, as will be later pointed out, by Warrington J. in the *East Case*, above) the headnote reads: "A single shareholder cannot constitute a meeting of a company under the Stannaries Act, 1869, s. 4." Here, although differing to a substantial degree from the *East Case* because one only of a number of shareholders was present at a meeting, it is interesting to note on what Lord Coleridge C.J. based his finding; he said:[8] " . . . . . we must ascertain what within the meaning of the Act [Stannaries, 32 & 33 Vict. ch. 19] is a meeting, and whether one person alone can constitute such a meeting. . . . The 6th and 7th sections of the Act shew conclusively that there must be more than one person present; and the word "meeting" primâ facie means a coming together of more than one person. It is, of course, possible to shew that the word "meeting" has a meaning different from the ordinary meaning, but there is nothing here to shew this to be the case". In *In re Sanitary Carbon Company*[9] the facts were more similar to the *East Case* than to *Sharp* v. *Dawes* in that, although W was the only one of a number of shareholders to attend the company meeting, he held "in his pocket" the proxies of the only three others. The report of this case reads: "The Master of the Rolls [Sir George Jessel] said that, apart from any authority, he was quite prepared to hold that there had been no meeting of the company, but *Sharpe* v. *Dawes* . . . .

[7] (1876), 2 Q.B.D. 26.
[8] *Ibid.*, at p. 28 *ff.*
[9] [1877] W.N. 223.

was conclusive on the subject. . . . ." In the *East Case,* (and it is interesting to note to what he looked for guidance in coming to his conclusion), Warrington J. said:[10]

> The question resolves itself into this. On the construction of this particular memorandum [memorandum of association of the company] and the particular part of it, can there be such a thing as a meeting of one shareholder? It is not a question of there being several shareholders, and one shareholder only attending the so-called meeting, but where there is only one shareholder so that a meeting in the sense of an assembly of persons is impossible. . . . . In an ordinary case I think it is quite clear that a meeting must consist of more than one person.
>
> But now what I have to consider is whether this is not one of the cases referred to by Lord Coleridge, C.J. as one in which it may be possible to shew that the word "meeting" has a meaning different from the ordinary meaning. . . . I think I may take it also that the persons who framed this document [memorandum of association] may have had, and must be taken to have had, in their minds the possibility . . . that this particular class of shares might fall into the hands of one person. There is nothing to prevent it in the constitution of the company. One must regard the memorandum as far as possible as providing for circumstances which in the ordinary case may arise. . . .

It is only fair to state that Fisher J.A. touched on, but from a negative aspect only, the course the judgment should have taken, when he said:[11]

> There is no provision in the Act stating that a meeting of creditors cannot be called and held because of the fact that there is only one creditor, and on the argument no case was referred to as so deciding.

The first part of sec. 92 (1) of our Act particularly sets the minimum, regardless of how many creditors there are, at three, either to be present or represented. It is obvious in view of this minimum that the latter part of sec. 92 (1) reading, "or all the creditors if their number does not exceed three," must contemplate less than three to be present or represented. The argument that the use of the plural "creditors" suggests more than one is readily answered by reference to (as mentioned by Mr. Justice Urquhart[12] with respect to another section, but nevertheless applicable here) the Dominion Interpretation Act,[13] s. 31 (j), which applies to The Bankruptcy Act: "words in the singular include the plural, and words in the plural include the singular.'.

[10] [1911] 1 Ch. 163, at pp. 168–170.
[11] [1940] O.W.N. 429, at p. 431.
[12] 22 C.B.R. 1, at p. 5.
[13] R.S.C. 1927, c. 1.

Section 92 (1) then plainly sets out that if every creditor attends when there are less than three creditors, the meeting is competent to be held. If one creditor who attends is in fact every creditor, the requirements of this section should be satisfied. It may be mentioned that it is only after the creditor has filed proof of his claim before the meeting at which it is intended to be used that the creditor is entitled to vote, (s. 94). Approaching the argument from another viewpoint in favour of this submission, the only alternative in the latter part of s. 92 (1) would be the attendance of at least two creditors. If the section required two at least to be present or represented, it could and should have been definitely set out as in the case requiring at least three creditors. Not being specifically embodied in the section, the section should be given its plain meaning and the Court should not be asked or required to read something into it.

It is respectfully contended that both the cases cited by the Court of Appeal and by the writer, in view of The Bankruptcy Act being in force, should not be referred to as authorities for or against the conclusion arrived at in the *Woodward Case*, but rather as indicating that where there is something with legislative force in effect, that should be primarily the source from which a decision should be made. Otherwise, what may appear to be conflicting authorities, sought to be illustrated above, (and possibly in other cases cited for and against a finding on the matter, the facts, except for a particular Act, may be the same), may be presented to the courts.

Before proceeding to answer the question of quorum requirements at the first meeting, (being a problem which may arise from the quorum section referred to in the *Woodward Case*), it may be suggested that the answer to it is of importance in the expediting or delaying of the administration of a bankrupt estate. If, as the writer submits, a quorum is not required for the first meeting, then the answer to what otherwise would be an important question in deciding whether a quorum was present, namely, who are to be reckoned as 'creditors' within sec. 92 (1), (because of s. 94, which reads: "A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors unless he has duly proved a debt . . . . . and the proof has been duly lodged with the custodian or trustee before the time appointed for the meeting"), is not of importance, except that it is to be noted that those who qualify under s. 94 would be entitled to participate. The writer is not attempting an answer to this question in this discussion.

The facts in the *Glennie Case*, referred to above, give rise to one of the difficult situations intended to be met by the answer in this note. The facts of this case are directly in point in that it concerned the first meeting, and as only one out of the four listed creditors filed a proof of debt before the first meeting, the question was whether or not this creditor could hold a meeting because of the quorum requirements of s. 42 (6), the present s. 92 (1). Mellish J. stated that as there was no rule in the Canadian Act similar to that of rule 249 of The English Bankruptcy Rules, 1915, (same as rule 257 of the 1886-1890 rules, above, which provides that only those entitled to vote shall be reckoned as creditors in deciding whether there is a quorum) he would base his decision on s. 42 (9) (which is for the purpose of this discussion substantially the same as the present s. 94, above). He decided that only those who are entitled to vote are to be considered 'creditors' within the quorum section; he said:[14]

> I think any creditor who proves his claim is entitled to have the administration of the estate proceeded with even though all the other creditors fail to make such proof . . . . and that creditors to be regarded as such at the first or any subsequent meeting must first prove their claims. . . .

Assuming on these facts that this is a proper finding, (and the writer is not expressing any opinion on it) a serious situation might easily arise which would delay appreciably the administration of the estate if the circumstances were slightly different and the quorum requirements embraced the first meeting. Instead only of the one creditor proving his claim before the first meeting, let us assume (and such an assumption is not extreme) that two, three or four had proved their claims before then, and that in any of these respective cases s. 92 (1) was not satisfied at the first meeting because of the required number (regardless of the number the quorum section requires in any of the situations) failing to attend or to be represented. The estate administration would undoubtedly have to be delayed until the requirements of the section were satisfied, but until then this important meeting (s. 88 (4) reads: "The purpose of such [first] meeting shall be to consider the affairs of the debtor and to appoint a trustee and inspectors and give directions to the trustee with reference to the disposal of the estate") could not take place. By s. 92 (2) (which makes a reference generally to 'a meeting'), if no quorum is present or represented the meeting

[14] 4 C.B.R. 226, at p. 227.

must be adjourned for at least seven days and at the discretion of the chairman to a maximum of twenty-one days. If also the *Glennie Case* was not decided correctly in that a creditor, whether he proves his claim or not, is to be deemed a creditor within the quorum section, and if the first meeting were to be subject to the requirements of this section and a quorum therefore was not present or represented, in that case the same difficulty with respect to the administration of the estate would arise.

The writer is here advancing his reasons why the quorum section does not apply to the first meeting, notwithstanding that the section is included in the part of the Act entitled "Procedure at Meetings", thereby appearing to include all meetings. It is of some interest (and this may have some weight in favour of the writer's contention) to note that although the same question might have arisen under the English Bankruptcy Act, 1914,[15] because rule 24 of The First Schedule, (which Schedule is entitled "Meetings of Creditors"), is very similar to our quorum section, there, however, no difficulty arises because of s. 13 (2) of that Act which reads: "With respect to the summoning of and proceedings at the first and other meetings of creditors, the rules in the First Schedule to this Act shall be observed". There is nothing corresponding to s. 13 (2) of the English Act in our Act. Section 91 of our Act says:

> The Official Receiver . . . shall be the chairman at the first meeting of creditors. . . . . (At the first meeting there is no 'election' of a chairman as is the case at all other meetings and as pointed out by the following subsection.)
>
> 2. At all other meetings the chairman shall be such person as the meeting by resolution appoints.

Section 92 (1), it is to be particularly noted, reads: "A meeting shall not be competent to act for any purpsoe except the election of a chairman. . . . ." The fact that the section reads "except the election of a chairman", without some suggestion of it including the case where the chairman is not elected, which is the case at the first meeting, (s. 91, above), indicates to some extent that this quorum section was to cover only the meetings subsequent to the first. Furthermore, if the first meeting were intended to be included, it should have been specifically mentioned. Two sections and a rule have been selected to point out that where the first meeting is intended to be included it is expressly mentioned. Section 94 reads:

[15] 4 and 5 Geo. V, c. 59 (Imp.)

> A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors unless he has duly proved a debt . . . and the proof has been duly lodged with the custodian or trustee before the time appointed for the meeting.

If such an expression as "a meeting" included, and the above-mentioned heading "Procedure at Meetings," (under which this section is also placed), intended, every meeting, then this section would have only required the words, "a meeting", instead of an expression definitely including the first ("At the first or any other meeting"). It doesn't seem reasonable that the latter would have been used if the former had been sufficient. Section 105 (6)[16] reads:

> Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors before the first meeting, and at all reasonable times.

Again, if "a meeting" meant also the first meeting, the expression, "a meeting", might have been used instead of the one used, namely, "the first meeting". Rule 134[17] reads:

> Proofs intended to be used at the first meeting of creditors shall be lodged with the custodian not later than the time mentioned for that purpose in the notice convening the meeting. A proof intended to be used at an adjournment of a first meeting (if not lodged in time for the first meeting) must be lodged not less than twenty-four hours before the time for holding the adjourned meeting.

Attention is directed to the fact that although s. 94 states that the proof must be lodged with the custodian before the first meeting if the creditor intends voting thereat, rule 134 (aside from adding a provision in the latter part in the case of an adjournment) particularly repeats in the first part what a creditor is to do, with respect to, exclusively, the first meeting.

One might have thought and not unreasonably that these two selected sections, even without the word "first", should have been read as including the first meeting. And the first part of rule 134 appears superfluous in view of s. 94. Yet the word "first" before "meeting" is definitely mentioned in all of these.

The facts that (a) the English Act (from which a substantial portion of our Act is taken) specifically provides, as pointed out, for the inclusion of the first meeting (to which there is nothing corresponding in our Act, which omission is not by itself conclusive that it was intended to be taken as not being included),

[16] 1932, 22 and 23 Geo. V, c. 39, s. 35. (Dom.) made no change in this subsection.

[17] *See* 9 C.B.R. 385.

(b) the quorum section reads "except the election of a chairman", and there is no election of a chairman at the first meeting, and (c) the expression "first meeting" is not expressly mentioned as being included, (and it is specifically mentioned when intended to be included), lead the writer to the opinion that the answer to the quorum question should be in the negative.

L. ISAACS.

Toronto.

* * *

COURTS—STARE DECISIS.—In *National Trust Co. Ltd.* v. *Christian Community of Universal Brotherhood Ltd.*[1] Robertson J. of the Supreme Court of British Columbia concluded that save in exceptional circumstances a single Judge is bound on points of law by the considered judgment of another Judge of the same Court; and à fortiori when this judgment is given in a proceeding in the identical case. This view is not unsupported or unsupportable.[2] But it is instructive to turn to the observations recently made concerning the doctrine of *stare decisis* by Frankfurter J. in *Helvering* v. *Hallock:*[3]

> We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

The Supreme Court of the United States "unlike the House of Lords, has from the beginning rejected a doctrine of disability at self-correction." In the case at hand it denied that it was bound "by reason or by the considerations that underlie stare decisis to persevere in distinctions taken in the application of a statute which, on further examination, appear consonant neither with the purposes of the statute nor with this Court's conception of it."[4]

---

[1] [1940] 4 D.L.R. 767, reversed on other grounds [1941] 1 D.L.R. 268.
[2] See cases cited in [1940] 4 D.L.R. 767.
[3] (1940), 60 Sup. Ct. 444, at p. 450.
[4] *Ibid.*, at p. 452.