THE CANADIAN BAR REVIEW

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CASE AND COMMENT

WILLS — DRAFTING OF CLAUSES EXONERATING BENEFICIARIES FROM PAYMENT OF TAXES.—With the increase in the number of taxing statutes, not only in this country but in other jurisdictions, the problem of the draftsman of wills becomes increasingly difficult, if it is the desire of the testator to make gifts free from the payment of taxation arising by virtue of his death. Three recent Canadian decisions[1] indicate the type of problem involved, and while one decision in Ontario[2] seems diametrically opposed to a contemporaneous decision of the Manitoba Court,[3] from the draftman's point of view this is not as important as the fact that litigation was even necessary, since his problem is one of making provisions in the will concerning which no question can arise by way of litigation. As Professor Leach has pointed out, "we construe, the better to construct."[4]

There are no doubt in existence at the present time many wills which contain a clause simply directing the executor to pay all debts "and succession duties". Such clauses are extremely dangerous from many standpoints. Draftsmen who use such abbreviated forms undoubtedly believe that there is some merit in the short and simple phrase. As, however, a legal draftsman is called on to apply his experience in avoiding pitfalls, the following, amongst other, are some of the difficulties which the case law indicates as the type of problem a draftsman must have in mind when drafting provisions of this nature.

[1] *Re Shaw*, [1941] O.W.N. 209; *In re Johnston Estate*, [1941] 2 W.W.R. 94 (Man.); *Re Snowball*, [1941] O.W.N. 321.

[2] *Re Shaw, supra.*

[3] *In re Johnston Estate, supra.*

[4] LEACH, CASES ON FUTURE INTERESTS (2nd ed.) p. 237.

(1) Does a direction to pay duties arising on death achieve what may be the prime purpose of exonerating specific gifts at the expense of the residuary legatee?

(2) Does such direction take into account taxes which may be levied under the provisions of most Succession Duty Acts on property transferred *inter vivos*, or is the clause confined to dispositions made by the document containing the clause itself?

(3) When a direction to pay "succession duties" is made, what succession duties are referred to in case two or more jurisdictions claim the right to levy a tax either on the property or the person? And what of a change of the domicile or residence of a beneficiary occurring after the will was made and which may result in the imposition of a tax by some other jurisdiction than the one the testator had in mind?

With regard to the first problem it is interesting to compare the decision of an Ontario court in *Re Shaw*[5] with that of the Manitoba court in *In re Johnston Estate.*[6] The wills before the court in each instance contained a clause by which the testator directed all his debts, funeral and testamentary expenses and succession duties to be paid by his executors. In the Ontario case the will in addition made such debts, succession duties, etc., "a first charge on my estate". As taxing statutes in both provinces placed the primary obligation to pay succession duty on the legatee or on the property which was the subject matter of the gift,[7] the question arose whether such a direction was sufficient to exonerate that legatee by requiring payment of the succession duty out of the residue, so that the legatees would take the net amount or value of the thing bequeathed in the will of the testator. Kelly J. in *Re Shaw* held that the clause was in effect redundant and achieved nothing. Adamson J. in *In re Johnston Estate* reached the opposite conclusion and held that it must have been the intention of the testator to give legacies free of duty. Kelly J.'s reasoning was based on the fact that the executor is under obligation to deduct the duty payable by a beneficiary or levied against the property passing to a beneficiary before transferring any assets. In his view, therefore, "the direction of the executors to pay the duties seems to be no more than the direction to do what the law requires executors to do in every case, just as the direction to pay debts, funeral and testamentary expenses, is in law an

[5] [1941] O.W.N. 209.
[6] [1941] 2 W.W.R. 94.
[7] In provincial Acts this is necessary to avoid "indirect" taxation which would result if the tax were imposed on the executor.

unnecessary direction." It is submitted, with respect, that this reasoning is not exactly appropriate to the issue in question. A direction to pay debts does not, naturally, affect the duty of the executor, but it has been held for years that it may have an effect as to the incidence of the debts on property dealt with by the will.[8] This was particularly important at a time when land was not considered an asset for the payment of debts and a general direction to pay debts was treated as a charge of the debts on the land, and as lands charged with the payment of debts had a definite place in the order in which assets were resorted to for paying debts, such a clause had a very real significance in affecting the value of property left amongst various beneficiaries. Even at the present day a direction to pay debts, while undoubtedly considered by many in the profession as a kind of introductory frill with which to open a will, has important significance, not only with regard to the power of an executor to convey,[9] but also with regard to the order in which property is used for the payment of debts.[10] Therefore, while a direction to an executor to pay succession duty is, in one sense, unnecessary, if he is under an obligation to deduct the amounts of duty and pay it to the taxing authorities, it does not follow that it has no significance in shifting the incidence of such succession duty amongst the various beneficiaries. This is purely a question of the testator's intention, and on this point the view of Adamson J. in *In re Johnston Estate*, seems perhaps to accord more with the views of the average testator. He stated:

> It is all very well for Courts and Judges to refine about these matters, but we know very well that when a testator directs that his succession duties be paid out of the general body of his estate, he ordinarily intends the specific gifts and bequests will be free from the duty. And where a fund is set up and directions given, as here, it seems clear. It is true that the conveyancer might have and perhaps should have been clearer, but to the ordinary lay person this would be clear. In my view there is not the slightest doubt that, when the testatrix said to pay succession duties and legacies, she never intended that the residue of the estate should recoup itself from each of the bequests for their *pro rata* share of the succession duties.

[8] See *Re Stokes* (1892), 67 L.T. 223; *In re Roberts*, [1902] 2 Ch. 834; *In re Kempster*, [1906] 1 Ch. 446. Compare *Re Steacy* (1917), 39 O.L.R. 548, where Masten J. seems to consider a direction to pay debts as achieving nothing. And see *Re Webb* (1932), 41 O.W.N. 77.

[9] *In re Tanqueray-Williaume and Landau* (1881), 20 Ch. D. 465; *Mercer* v. *Neff* (1898), 29 O.R. 680; *Banque Provinciale du Canada* v. *Capital Trust* (1928), 62 O.L.R. 458; *Re McCutcheon and Smith*, [1933] O.W.N. 692; *Dumouchelle* v. *Pitre*, [1934] O.W.N. 280. And see Denison, *Testamentary Powers of Sale for Debts in Ontario*, *supra*, p. 565.

[10] See cases in note 8.

It is true that in the Manitoba decision the testatrix, in addition to the direction to the executor, bequeathed all her property to her executor-trustee on trust to sell, etc., to pay debts and succession duty and the legacies thereon set out. This does not seem to add anything one way or another and does not appear to be as strong an indication of an intention to exonerate specific legatees as was the express charge in *Re Shaw*. Both judges pointed out that the language was not clear, the difference between them being that in case of doubt, Adamson J. adopted what he believed to be the intention of the average testator, while Kelly J. refused to make such an inference. For the purpose of a draftsman the moral is clear regardless of the results reached in either case: namely, that a clause of this kind without specific directions as to what is intended is dangerous and improper drafting. In a previous judgment by Kelly J., *Re Reading*,[11] he held that if the direction to pay succession duties included a direction to the executor to do something beyond the executor's obligations under the Act, then the intention must be to give legacies freed of succession duty. That case raised the second of the points to be borne in mind in drafting.

As most succession duty acts impose a tax on certain gifts made *inter vivos* as well as insurance monies which, in many cases, do not form part of the assets of an estate, the question arises, even though a will makes it plain that succession duties are to be payable out of residue, how far that direction exonerates donees who took benefits in the testator's lifetime or by insurance, etc. For example, assuming the validity of Adamson J.'s judgment in *In re Johnston Estate*, would his interpretation allow an executor to pay from residue succession duty leviable against a preferred beneficiary of a life insurance policy? It was not necessary to decide the point in that case, but the difficulty is a real one and perhaps the better view would be to confine succession duty in such a simple and misleading clause as that in *In re Johnston Estate* to gifts made by the will. Certainly the recent decision of the Ontario Court of Appeal in *Re Snowball*[12] indicates that Ontario will require some explicit language in the will as an indication on the part of the testator that he intends to relieve parties taking outside the will from the incidence of succession duty. In that case the clause in question read as follows :

[11] [1940] O.W.N. 9.
[12] [1941] O.W.N. 321.

> I declare that all estate and succession duties payable upon or in respect of my estate or property shall be paid out of my residuary estate, and that all legacies or gifts bequeathed shall be free from inheritance tax.

The Court came to the conclusion that gifts made in the lifetime of the testator were not included within this clause and therefore only specific legacies given by the will were exonerated from the payment of duty. Again the matter can not be said to be free from doubt, and the decision points to the necessity of a draftsman specifically dealing with the problem of gifts made *inter vivos*. In *Re Reading*[13] the clause read as follows:

> To pay my just debts funeral and testamentary expenses and all succession duties and inheritance and death taxes that may be payable in connection with any insurance or any gift or benefit given by me to any person either in my lifetime or by survivorship or by this my will or by any codicil hereto.

The error in drafting here is different from that in *Re Snowball* in as much as it was not explicitly stated whether the beneficiaries in the will and the other beneficiaries mentioned were to be exonerated from succession duty at the expense of the residuary legatee. As previously indicated Kelly J. held that in imposing an obligation on the executor beyond that of the statute it must have been the intention of the testator to achieve something more than merely reminding an executor of his statutory duty, and on this ground he came to the conclusion that it was intended to benefit the specific legatees and donees of property given in the testator's lifetime.

A further problem arises in drafting clauses of this nature. In all the cases discussed the will was made by a testator domiciled in a province whose taxing statutes were involved. Suppose that taxes were demanded from a legatee in some other province or some other country. Assuming a clause specifically clear to exonerate specific legatees and donees of property transferred *inter vivos*, a draftsman must ask himself whether the clause is broad enough, or whether the testator intends it to be broad enough, to call on the executor to pay from residue taxes which may be imposed, by reason of the death, in some foreign jurisdiction. In Canada, presumably, a direction to pay succession duties out of residue, would include both provincial and dominion taxation. Would it include taxation levied by another province or by a completely foreign jurisdiction? Such

[13] [1940] O.W.N. 9.

problems have arisen in England, and in *In re Norbury*[14] Bennett J. concluded that in an English will, where a legacy was given "free of duty" to a beneficiary resident in Germany, this did not include a payment of a tax in Germany known as an inheritance tax. His view was to the effect that an English testator may be presumed to know the English law regarding taxation but, apparently, will be presumed to be ignorant of the laws of any foreign country. In *Re Quirk*,[15] Morton J. felt able to distinguish *Re Norbury* on the facts, but apparently affirmed in principle the view of Bennett J. in the *Norbury Case*. The gift free of duty in *Re Quirk* was of land in France on which no duty was payable in England at all, and therefore the burden on the estate would not have involved double taxation as would have been the case in *Re Norbury* had Bennett J. decided other than he did. The recent decision of Farwell J. in *Re Frazer*[16] raises a similar point. In that case a testator left an annual sum payable to his wife "free of all taxes (including income tax) and duties". The wife subsequently remarried and went to reside with her husband in Kenya. The question for the decision of the court was whether she was entitled to have the executor pay the Kenya income tax on her legacy. Farwell J., following the *Norbury Case*, came to the conclusion that despite the words "all taxes", only English taxes were contemplated by the testator and he accordingly limited what looks to be clear and all-embracing language. In view of the fact that beneficiaries frequently change their residence, and in view of the fact that double succession duty is quite ordinary, a draftsman should always have in mind what limitations if any he intends to make regarding taxes imposed by jurisdictions other than that in which the testator is domiciled, and if he does not intend any limitations then his language should be sufficiently clear and explicit to indicate that intention.[17]

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CONFLICT BETWEEN LIMITATIONS ON TESTAMENTARY POWER BY STATUTE AND CONTRACT.—The Privy Council's decision in *Dillon* v. *Public Trustee of New Zealand*, [1941] 2 All E.R. 284, contains some doubtful reasoning; and doubt is not lessened

[14] [1939] Ch. 528, [1939] 2 All E.R. 625.
[15] [1941] Ch. 46.
[16] [1941] 2 All E.R. 155.
[17] In the light of the court's attitude in *Re Frazer*, it would, apparently, not be sufficient to speak of "all taxes of whatsoever kind". This would embrace only those of the testator's domicile. Presumably the clauses must go further and express an intention regarding the *place* of imposition, as, for example, "whether imposed by or pursuant to the law of this or any province, state, country or jurisdiction whatsoever".

when we see that it reverses what seems to have been a well-reasoned judgment of the Court of Appeal for New Zealand, so far as can be gathered from extracts quoted.

The case involved a statute, like statutes in force in many of our provinces, which gives courts power to vary wills for the benefit of testators' spouses and children. The point decided was that this power could be exercised even to vary testamentary dispositions made in performance of a binding contract.

The testator, Dillon Sr., was an elderly widower who, four years before his death, made a contract with his two sons, whereby they agreed to work his farm along with their own in partnership, the profits to be shared, and he covenanted that by his will he would devise his farm to one son and two daughters. It is hard to believe that the relationships of the parties did not have some effect on the decision, though legally this was irrelevant, since the judgment of the Privy Council conceded that the covenant was "for valuable consideration".

Two years after making this agreement, the testator married again; less than a year later he made a will carrying out his agreement, that is devising his farm to his son and daughters, and leaving the residue of his estate to his new wife. He died shortly after. The new wife, being dissatisfied with the will, applied to have it varied under the statute. She succeeded before the judge of first instance, but he was reversed by the Court of Appeal, which held that the statute did not enable the courts to encroach on the property devised pursuant to contract. Myers C.J. said this :

> The effect of the decision appealed against is that, where A enters into a contract with B, for valuable consideration, that he will by his last will and testament devise certain lands to B, and A subsequently and actually performs his contract, B is to be in a worse position that if A had committed a breach of his contract. It would be an extraordinary thing if our law permitted such a result.

This sounds like cogent reasoning; but the Privy Council thought they saw answers to it. Among other things, Simon L.C., who gave their judgment, said :

> Under a system of law which gives to the court no jurisdiction to alter, to the detriment of B, the devise made by A in B's favour, the compensation due to B from A's estate, if A fails to fulfil his contract to make the devise, will be the value of that which B should have received under the will. In New Zealand however, this value is not necessarily the whole value of the interest which the testator

agreed to devise, but is that value less the extent to which it would be reduced by a redistribution due to the application of the Family Protection Act 1908.

Such reasoning seems to beg the very question to be decided. But apart from that, it is objectionable in that it assumes that if A fails to fulfil his contract, B's only remedy is in damages. This is clearly not so; B also has a right to specific performance; this gives him an interest in the specific property, which binds all who take the property with notice, and even those who take without notice, if volunteers: *Synge* v. *Synge*, [1894] 1 Q.B. 466; *Central Trust Co.* v. *Snider*, [1916] 1 A.C. 266 at p. 272.

When we regard the children's contractual rights in terms of specific performance rather than damages, then it seems obvious that Myers C.J. was right. Following his line of reasoning, let us see how matters would have stood if in breach of his contract Dillon Sr. had died intestate. The children could have sued his administrator for specific performance of the contract, and compelled conveyance of the farm to them. The Act would have had no bearing at all; for it only applies where there is a will. Obviously then, the wife could not have resisted the children's claim to the farm if Dillon Sr. had done nothing.

Let us next see how matters would have stood if Dillon Sr. had broken his contract, not by dying intestate, but by willing everything to the wife. The children would then sue the executor for specific performance of their contract, and unless she could find help in the statute, the wife, being a mere volunteer, could not resist their claim. But the statute could not help her; for it gives the court no power to override legal or equitable rights other than those conferred *by will*. The children in suing would not be claiming under the will; for the will gave them nothing.

In fact the testator did make a will in the children's favour; and we have to consider whether this will could put them in a worse position than if it had left them nothing. No logical reason can be found for saying it could. The children still had a right to say: We disclaim all benefits based only on the will, and claim only those rights given by our contract. It would seem to be no answer for the wife to say: You are beneficiaries under the will, and the Act gives power to redistribute benefits given by wills. Obviously, when a party can claim property under one of two titles, he is entitled to rely on whatever is his strongest title, and it does not lie in his adversary's power to

insist on his relying on his weaker title. The Privy Council seem to overlook this principle entirely, and regard the children's rights as wholly dependent on the will. Actually they existed before the will was ever made.

Logically carried out, the Privy Council's reasoning would seem to allow the courts to give a widow priority over her husband's creditors. They do not of course admit this; Simon L.C. impliedly denies it, saying :

> However these devisees are not creditors of the estate. They are beneficiaries under the will. There is nothing in the nature of a debt owing to the children from the testator's estate.

But is he right? If necessary, we might well take issue with that statement. The dictionaries show that a creditor is anyone who is owed a debt, whether payable in money or in property. The testator had covenanted to pay his children with property for services rendered; the date of payment was deferred, that was all. But whether the children were technically creditors or not was really immaterial. Certainly their position was not lower than that of creditors; actually it would seem to be higher. For these children had acquired a right to receive specific property for their payment; an ordinary creditor's only right is to be paid out of assets available generally. To suggest that the latter right is the higher is to sugegst that an unsecured creditor has a better right than a secured creditor.

The Privy Council's line of reasoning is also brought out by the following passage:

> . . . the statute in such a case authorizes the court to interpose in order to carve out of his estate what amounts to adequate provision.

This is undeniable, so far as it goes; but an earlier passage admits in effect that to find what can be carved as "estate" one must first deduct creditors' claims. A fortiori the courts cannot carve as estate what has ceased to be estate. When the testator covenants to transfer specific property, he impresses that property with a trust (*Synge* v. *Synge, supra; Central Trust* v. *Snider, supra);* he confers an equitable interest therein, and cuts down *pro tanto* the estate which is his own and so available for carving. The testator's covenant in effect conferred on the children the whole equitable estate in his farm, subject only to his life interest; he could no longer dispose of it during his life: *Synge* v. *Synge, supra.* How then the farm could be treated as still his estate on his death and available for carving, is hard to see.

The Lord Chancellor used another doubtful piece of reasoning to answer the Court of Appeal's view that the Act was never intended to derogate from a testator's contractual obligations. His answer was:

> . . . if this were so, a young bachelor who had agreed for a consideration to leave all his property by his last will to a relative, friend or creditor might later marry and leave his widow and children without any support in circumstances where the Act could not modify the distribution of the testamentary estate.

This is true enough; but what does it prove? Is it not equally true that a young bachelor may so hamstring himself financially, by signing bonds and other obligations payable in his lifetime, that he will die insolvent? But does that consideration affect the scope of the Act, so as to let the court deprive creditors of their rights? That cannot be argued. If a woman chooses a husband who has already incurred such obligations, that either she or his creditors must go short when he dies that is her misfortune, not his creditors'. Nor can it make any real difference whether his obligation is to pay money or to transfer property. She is a mere volunteer, and his obligees are not.

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CONSTITUTIONAL LAW—OVERLAPPING LEGISLATION—DRIVING MOTOR VEHICLE PROHIBITED AND LICENCE AUTOMATICALLY SUSPENDED UPON CONVICTION FOR DRIVING WHILE INTOXICATED. —The exercise by the federal Parliament and by a provincial legislature of their respective legislative powers may result in overlapping legislation.[1] If competent provincial legislation is followed by competent Dominion legislation which overlaps, the former legislation is overborne and inoperative to the extent of the overlapping or inconsistency. If competent Dominion legislation is followed by provincial legislation purporting to deal with the same subject in a way which overlaps the Dominion legislation, the provincial legislation is *ultra vires* although, were it not for the Dominion legislation, it would be supportable as a proper exercise of provincial legislative power.[2]

[1] The scheme of distribution of legislative power under ss. 91 and 92 of the British North America Act, 1867, cannot, to be workable, admit of any unreconciled conflict of the powers respectively granted to the Dominion Parliament and to the provincial legislatures. But legislation resulting from the exercise of powers granted may clash. *Cf.* O'CONNOR, Report to the Senate on the British North America Act, p. 25 (annex 1), p. 40.

[2] *See Rex* v. *Garvin* (1908), 13 B.C.R. 331.

It is conceivable, of course, that provincial legislation may co-exist with Dominion legislation on the same subject; this can happen when the provincial statute deals with that subject in a manner which avoids any overlapping or conflict with the Dominion legislation.[3] All this is trite law,[4] the result of a long-established interpretation of the British North America Act.[5] Its application to particular legislation may raise difficulties; a recent decision is illustrative.

In *Provincial Secretary of P.E.I.* v. *Egan*,[6] the Supreme Court of Canada held that s. 84 (1) of the Prince Edward Island Highway Traffic Act, 1936,[7] was not in conflict with s. 285 (7) of the Criminal Code.[8] Section 84 (1) of the provincial Act declares: "The licence of a person who is convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs shall forthwith upon, and automatically with such conviction, be suspended . . ." S. 285 (7) of the Criminal Code provides: "Where any person is convicted of an offence under [certain provisions, one of which covers driving a motor vehicle while intoxicated], the court of justice may, in addition to any other punishment provided for such offence, make an order prohibiting such person from driving a motor vehicle or automobile anywhere in Canada during any period not exceeding three years." There were two questions to be answered in considering the validity of s. 84 (1): (1) Was that provision, independently considered, within the legislative competence of the province? (2) If it was, was it none the less inoperative in view of s. 285 (7) of the Criminal Code? The first question was answered in the affirmative,[9] the second in the negative. On the second point (with which alone this note is concerned) the Supreme Court reasoned that the Dominion legislation prevented an offender from operating a motor vehicle throughout Canada,

[3] See *McColl* v. *C.P.R.*, [1923] A.C. 126.

[4] The phrase "occupying the field" is often used to characterize a situation where competent Dominion legislation covers a field in which competent provincial legislation has hitherto operated. In *Forbes* v. *Attorney-General for Man.*, [1937] A.C. 260, Lord Macmillan said, at p. 274: "The doctrine of the 'occupied field' applies only when there is a clash between Dominion legislation and provincial legislation within an area common to both."

[5] The propositions set out in the text above follow from the "aspect" theory of our constitutional law, and from the assigning of a paramountcy to Dominion legislation in case of a clash with provincial legislation.

[6] [1941] 3 D.L.R. 305, reversing [1941] 1 D.L.R. 291.

[7] 1936 (P.E.I.), c. 2.

[8] 1939 (Dom.), c. 30, s. 6.

[9] See the authorities referred to in the judgment of Rinfret J., [1941] 3 D.L.R. 305, at pp. 321–2. He concludes that s. 84 (1) "deals purely and simply with certain civil rights in the Province of Prince Edward Island."

irrespective of whether a licence had been issued to him or not; while it touched the question of his driving it did not prevent him from holding a licence or accompanying a beginner, as provided for under the Prince Edward Island legislation. But to say that there is no overlapping because the federal legislation strikes at the right to operate a motor vehicle while the provincial legislation automatically suspends the licence (without which a motor vehicle cannot be operated) seems to be hairsplitting. And when Rinfret J. (who spoke for the Court) stated, "The automatic cancellation of the Prince Edward Island licence would not, of itself, prevent the person affected by it from obtaining a driver's licence in other Provinces", he was, with respect, begging the question at issue, which was, whether the federal legislation when applied to a person in Prince Edward Island overlapped the provincial legislation when similarly applied. In only a formal sense could it be said that legislation providing for an order prohibiting an offender from operating a motor vehicle [an order incidentally which, by s. 285 (7) of the Criminal Code, was to be forwarded to the registrar of motor vehicles for the province wherein a licence to drive was issued to such person] did not overlap legislation automatically suspending a licence without which no motor vehicle could be operated.

Suppose X, licensed to drive a motor vehicle in Prince Edward Island, is convicted of driving while intoxicated, and an order is made prohibiting him from driving for two years. What effect does the application of the Prince Edward Island Act have which has not already resulted from the order of prohibition? The application of the federal measure yields the same consequences as does the provincial statute so far as the operation of a motor vehicle is concerned. In both cases what is struck at is the right to operate a motor vehicle after the occurrence of the same event. It would seem then that the federal provision should prevail.

Would the Court have been on firmer ground in stressing that while the provincial enactment provided for an automatic suspension of a licence upon conviction, s. 285 (7) of the Criminal Code was permissive, and hence, in a particular case, if no order prohibiting an offender from driving were made, no actual overlapping would exist were the provincial measure to have its effect? It is by no means clear from the authorities whether the "overlapping legislation" doctrine applies only where actual overlapping or conflict will necessarily result or

whether it encompasses a situation where the respective statutes, considered as applied or invoked, overlap. It is submitted that the latter position is the correct one.

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NEGLIGENCE—CAUSATION—NOVUS ACTUS INTERVENIENS.—A recent decision of the Ontario Court of Appeal in *Mercer* v. *Gray*[1] seems to indicate a more liberal attitude towards the doctrine of *novus actus interveniens* than has been customary in the past. One of the points in that case was whether a defendant who had negligently injured the plaintiff by improper driving of his car was responsible for damage which, on the evidence, might have been enhanced by improper medical treatment. At the trial the jury was charged to the effect that if the doctor were negligent in his treatment then the defendant would not be liable for any increase in damages caused by such treatment. Such a view gives full scope to "the last wrongdoer" doctrine. We have had occasion to discuss this doctrine previously in the REVIEW,[2] and while it has had the support of some eminent members of the House of Lords,[3] we ventured the opinion that it could not be accepted as a fundamental or guiding rule. McTague J.A., giving the judgment of the Court which held the trial judge's charge to be erroneous in the present case, stated that "if reasonable care is used to employ a competent physician or surgeon to treat personal injuries wrongfully inflicted, the results of the treatment, even though by an error of treatment the treatment is unsuccessful, will be a proper head of damages." Such a statement disposes of the view that the conscious act of a third person, even though innocent, breaks the chain of causation.[4] In a later part of his judgment, however, McTague J.A. indicates that if the surgical treatment was so negligent as to be actionable "this would be in effect *novus actus interveniens* and the plaintiff would have his remedy against the physician or surgeon."[5] Such a statement seems to bring back the last wrongdoer doctrine and to make a distinction between innocent errors of judgment on the part of a physician or surgeon and actionable errors. The learned trial judge quoted

[1] [1941] 3 D.L.R. 564.

[2] See (1938), 16 CAN. BAR REV. at p. 138.

[3] *Cf. Weld-Blundell* v. *Stephens*, [1920] A.C. 956; Lord Sumner in *S.S. Singleton Abbey* v. *S.S. Paludina*, [1927] A.C. 16.

[4] See Lord Sumner in the *Singleton Abbey Case*, *supra*.

[5] Where a wrongdoer who intervenes between a defendant's negligence and the ultimate consequences is known, the feeling that there is a remedy against such a wrongdoer undoubtedly has influenced courts in relieving a negligent defendant. Where the wrongdoer is not known, however, some courts have reached the same result. See *Doughty* v. *Tshp. of Dungannon*, [1938] O.R. 684.

three American cases in favour of his views and there can be no doubt that the American authorities overwhelmingly hold a negligent defendant liable for damages which may have been enhanced by medical treatment, even though such treatment was negligent in the sense of being actionable.[6] Apparently the only limitation is in the case of something approaching intentional misconduct on the part of a surgeon, and which would go beyond "that occasional negligence which, as Lord Halsbury has remarked, is one of the ordinary incidents of human life."[7]

It is a little difficult to understand why the learned trial judge's charge was erroneous if negligence, in the sense of actionable negligence, was still to be regarded as a *novus actus*. McTague J.A. was apparently concerned over the fact that actions for malpractice can only be tried in Ontario by a judge without a jury and he apparently felt that in an action with a jury against a negligent motor car driver, evidence could not be given of malpractice against a doctor. With respect, this does not seem to be sound unless the plaintiff was actually making a claim against the surgeon, which was not so in the case in question.

The present judgment seems to manifest a desire to avoid the last wrongdoer rule, but it may be questioned whether the judgment did not, in avoiding it, pay lip service to the rule and thus leave the situation in as confused a state as it was before. While no rigid rules of causation have ever, or will ever, be possible, the problem seems to be whether the damage was the result of a normal incident of the risk created by the defendant's conduct. As medical attention has always been treated as such a normal risk, it is difficult to understand why bad surgery should be in any other category. As a recent American writer has put it, "it would be an undue compliment to the medical profession to say that bad surgery is no part of the risk of a broken leg".[8]

A British Columbia court,[9] not so long ago, held that a defendant who had negligently run into the plaintiff and rendered him unconscious, was responsible for the loss of some $80 which was apparently stolen from the plaintiff's pocket while he was in an unconscious condition.[10] This goes much beyond the present case and is further removed from the last wrongdoer

[6] See the cases collected in PROSSER, TORTS (1941), 362.
[7] Gibson J. in *Murphy* v. *Gt. Northern Ry.*, [1897] 2 Ir. 301.
[8] PROSSER, *op. cit.*
[9] *Patten* v. *Silberschein*, [1936] 3 W.W.R. 169.
[10] It will be noticed that apparently the thief was unknown. See note 5.

rule than any other instance of which the writer knows. If McTague J.A.'s reasoning be right, however, in the event that such a case were being tried by a judge without a jury, it should be impossible to give evidence of theft from an unconscious person since this is a criminal offence and properly one to be tried by a jury.[11] We know of no case where such a point has been made and it would seem immaterial in determining the motorist's liability whether another person's liability was to be determined by a judge or a jury. Perhaps the learned judge intended to convey the same meaning as is taken by the American courts, namely, that unless the evidence is clear that the surgeon did some unusual or intentional act, his mere carelessness, even if it be actionable, is no bar. If this were not so, then another method of dispensing with a jury in negligence cases is at hand, for a defendant can always plead improper and negligent conduct of a surgeon in the course of medical treatment and hope to have the jury dispensed with. There seems to be no precedent for such action.

* * *

CONTRACTS—FRUSTRATION—ONUS OF PROOF—CLAIM FOR RETURN OF MONEY PAID.—Two notable additions to the case law on frustration of contracts deserves some mention. The first of these, *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corporation, Ltd.*,[1] a House of Lords' decision, affords an apt illustration of how substantive rights may be affected by a ruling on a point of procedure. The defendants in an action for damages for breach of a charterparty, pleaded frustration; and the question to be decided was whether, once the fact of frustration was established, the defendants had to go on to prove that it occurred without their fault. The House of Lords concluded that it was for the plaintiffs, when frustration is pleaded as a defence, to prove fault on the part of the defendants. Strangely enough, this seems to be the first case in which the question of the onus of proof has been the subject of a direct decision, and one of the principal factors which persuaded the Lords to their conclusion was that to compel the defendants to prove a negative was not only unusual, but would impose a task of considerable difficulty.

[11] Perhaps this would only be so if the suspected thief were known. Suppose a passing and unknown surgeon negligently extended the injuries of a victim of a motor car accident. Since the victim could not sue such surgeon — but only because he was unable to find him — of what application would the reasoning in the present case be?

[1] [1941] 2 All E.R. 165, reversing [1940] 3 All E.R. 211.

The House of Lords in the foregoing case, in discussing the basis of the frustration doctrine, appeared generally to favour the "implied term" theory, or at least to regard it as the commonly accepted theory of the English law. This has a bearing on the second case to be mentioned, *Fibrosa Société Anonyme* v. *Fairbairn Lawson Coombe Barbour Ltd.*[2] The "implied term" theory involves attributing fictionally an intention to the parties to a contract which they did not possess, and then proceeding to deal with the fictional intention. The theory has been under heavy fire[3] yet it has its adherents if only because it offers a working basis for attacking the problem of frustration.[4] Neither it, nor any other suggested theory, is entirely reconcilable with the cases, and the danger it presents is that it often appears that the courts actually believe that it is a real explanation of some of the decisions. When Lord Wright stated in the *Constantine Case* that "the doctrine of frustration is intended to achieve a just and reasonable result"[5] he gave the doctrine a functional basis which is more consonant with common sense than hypotheses which are apt to mislead.

The facts of the *Fibrosa Case* were that the defendants agreed to manufacture and supply some machinery to the plaintiffs to be delivered c.i.f. Gdynia, Poland. A portion of the purchase price agreed upon was paid when the contract was made. About six weeks later Germany invaded Poland and the plaintiffs wrote asking for the return of the payment since "it is now evident that the delivery of the machines for Poland cannot take place." The defendant replied that considerable work had been done on the machines and that they could not return the money but suggested that the matter could be reconsidered after the war. One of the terms of the contract provided that "should the despatch be hindered or delayed by . . . . . any cause whatsoever beyond [the sellers'] reasonable control, including . . . . . war . . . . . a reasonable extension of time should be granted." The Court of Appeal dismissed the contention that there cannot be frustration under the "implied term" theory when the terms of the contract cover the contingency which allegedly caused the frustration; and it held that despite the reference to war in the contract there was

[2] [1941] 2 All E.R. 300.

[3] *Cf.* WEBBER, THE EFFECT OF WAR ON CONTRACTS; Book Review, (1941), 19 Can. Bar Rev. 224, by C. A. W[right]. *Cf.* McElroy and Williams, *The Coronation Cases I*, (1941) 4 Modern L. Rev. 241.

[4] See, McNair, *Frustration of Contract by War*, (1940), 56 Law Q. Rev. 173. *Cf.* Wade, *The Principle of Impossibility in Contract*, (1940), 56 Law Q. Rev. 519.

[5] [1941] 2 All E.R. 165, at p. 185.

frustration because of war. The decision in this case in the light of its facts provides a sufficient commentary on the "implied term" doctrine.

In denying the plaintiffs' claim for the return of the money paid before the frustration occurred, the Court followed the well known and much criticized case of *Chandler* v. *Webster*,[6] saying, in so doing, that it was for the House of Lords to overrule the principle thereof. Moreover, under that principle, the defendants in the *Fibrosa Case* might have recovered, had they claimed it, an additional sum of money, which, under the contract, should have been paid before the frustration intervened. The inequitable doctrine of *Chandler* v. *Webster* stems, in part, from the position of the courts that frustration automatically terminates the contract, reinforced by the reluctance of the English law to recognize quasi-contractual principles. The rule of the Scottish law on this point, laid down by the House of Lords in *Cantiare San Rocco, S.A.* v. *Clyde Shipbuilding & Engineering Co. Ltd.*,[7] is, as the Court of Appeal in the *Fibrosa Case* stated, more civilized.[8] Under it the plaintiffs would have been entitled to recover what they paid, subject to that sum being decreased in the light of the work done by the defendants on the machinery. The House of Lords should not hesitate, if the opportunity presents itself, to overrule *Chandler* v. *Webster*. Few will mourn its demise.[9]

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EVIDENCE—CREDIBILITY OF WITNESS—CROSS-EXAMINATION TENDING TO SHOW COMMISSION OF OTHER OFFENCE IMPROPER.—*Rex* v. *Koufis*,[1] which was adversely commented on in this REVIEW[2] on the ground that the majority of the Nova Scotia Supreme Court disregarded the cardinal rule of relevancy in supporting, as going to credibility, a cross-examination of the accused which tended to show the commission by him of another similar offence, was recently before the Supreme Court of Canada which set aside the accused's conviction and ordered a new trial.[3] The Court left no doubt as to its attitude in respect of the impugned cross-examination; in the words of Kerwin J. :[4]

[6] [1904] 1 K.B. 493.
[7] [1924] A.C. 226.
[8] *Cf.* AMERICAN LAW INSTITUTE, RESTATEMENT OF CONTRACTS, vol. 2, s. 468.
[9] *See* McElroy and Williams, *The Coronation Cases II*, (1941), 5 Modern L. Rev. 1.
[1] [1941] 1 D.L.R. 609.
[2] (1941), 19 Can. Bar Rev. 219.
[3] *Koufis* v. *The King*, [1941] 3 D.L.R. 657.
[4] *Ibid.*, at p. 662.

> A person charged with having committed a crime is not only entitled to have placed before the jury only evidence that is relevant to the issues before the Court but when testifying on his own behalf, he may not be asked questions that have no possible bearing upon such issues and might only tend to prejudice a fair trial. In the opinion of the majority of the [Nova Scotia] Supreme Court *in banco*, these questions were justified on the ground that they went to the credibility of the accused, but credibility cannot arise in connection with questions relating to an extraneous matter that has not been opened by the examination in chief of the accused or otherwise on his behalf.

And Taschereau J.[5] spoke in the same vein: "When an accused is tried before the Criminal Courts, he has to answer the specific charge mentioned in the indictment for which he is standing on trial, 'and the evidence must be limited to matters relating to the transaction which forms the subject of the indictment' (*Maxwell* v. *Director of Public Prosecutions*, [1935] A.C. 309). Otherwise, 'the real issue may be distracted from the minds of the jury,' and an atmosphere of guilt may be created which would indeed prejudice the accused."

It is, perhaps, significant that the Supreme Court cited only the *Maxwell Case*,[6] a House of Lords decision, but having an authoritative character with respect to the question at issue.[7] This fact, coupled with its apparently deliberate omission of any mention of *Rex* v. *D'Aoust*,[8] *Rex.* v. *Mulvihill*,[9] *Rex* v. *Dalton*[10] and *Rex* v. *Miller*[11] might be construed as evidencing tacit disapproval of the foregoing cases in so far as they concerned the question of cross-examination as to credibility as it arose in the *Koufis Case*.

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WAR MEASURES—REGULATION—NOT AN "ACT OF PARLIAMENT" — WITHIN "LEGISLATIVE AUTHORITY" OF DELEGATING LEGISLATURE.—A regulation creating an offence which is passed under the authority of the War Measures Act[1] is not within the purview of a statutory provision which purports to punish disobedience to "any Act of the Parliament of Canada or of any legislature in Canada";[2] but it is covered by a statutory provision which is stated to be applicable "to any offence or

[5] *Ibid.*, at p. 664.
[6] [1935] A.C. 309.
[7] See (1941), 19 Can. Bar Rev. 219, at p. 222.
[8] (1902), 3 O.L.R. 653, 5 Can. Cr. Cas. 407.
[9] (1914), 19 B. C.R. 197, 22 Can. Cr. Cas. 354.
[10] 9 M.P.R. 451, [1935] 3 D.L.R. 773 (N.S.C.A.)
[11] [1940] 4 D.L.R. 763 (B.C.C.A.).
[1] R.S.C. 1927, c. 206.
[2] The Criminal Code, s. 164.

act over which the Parliament of Canada has legislative authority".[3] This is the short result of the judgments in *Rex* v. *Singer*[4] and *Rex* v. *Sutton*[5] respectively. In the latter case the Court quite properly pointed out that delegated legislation was not removed from the legislative authority of the delegating body because of the interposition of a subordinate agency empowered by the delegating body to pass the delegated legislation.

[3] *Ibid.*, s. 706; and see Regulation 63 of the Defence of Canada Regulations (Consolidation) 1941.
[4] [1941] S.C.R. 111, [1941] 1 D.L.R. 753.
[5] [1941] 3 D.L.R. 719 (B.C.C.A.)