THE CANADIAN BAR REVIEW

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☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

CASE AND COMMENT

CONFLICT OF LAWS—RENVOI—OBITER DICTA OF THE PRIVY COUNCIL.—The judgment of the Judicial Committee of the Privy Council in *Jaber Elias Kotia* v. *Katr Blint Jiryes Nahas*[1] suggests some observations on the Privy Council itself and on the principles of the conflict of laws as expounded by it.

Ibrahim Elias Kotia died intestate and childless on December 7, 1937, a national of, and domiciled and resident in, the Lebanese State. The question was who was entitled to succeed to certain "mulk land" (that is, land held in full ownership) situated in Palestine and belonging to the intestate at the time of his death. The Palestine Succession Ordinance, 1923, s. 4, provides, *inter alia*, that a civil court shall distribute successions according to the following rules:

> (iii) Where the deceased was either a foreigner or, not being a foreigner, was neither a Palestinian citizen nor a member of one of the religious communities, the following rules shall apply: (a) mulk land and movables of the deceased shall be distributed in accordance with the national law of the deceased; (c) where the national law imports the law of the domicile or the religious law or the law of the situation of an immovable, the law so imported shall be applied; provided that, if the national law imports the law of the domicile and the latter provides no rules applicable to the person concerned, the law to be applied shall be his national law.

In the District Court of Jaffa it was proved that in the case of land situated outside of the Lebanon, the Lebanese courts would apply the law of the country in which the land is situated, that is, in the present case, the law of Palestine, and the evidence on this point was accepted as sufficient by the Supreme Court

[1] [1941] 3 All E.R. 20, 57 Times L.R. 619.

of Palestine and by the Privy Council. It was therefore held by the Supreme Court (reversing the judgment of the District Court) and by the Privy Council that the land was to be distributed in accordance with the law of Palestine, the deceased being a person who came within the terms of clause iii of s. 4 of the ordinance.

The decision is obviously right in the result. The Palestine Succession Ordinance clearly provides that the reference by the conflict rule of Palestine to the national law of the deceased (Lebanese law) is to be construed as a reference to the *lex rei sitae* (the law of Palestine) if "the national law imports . . . . the law of the situation of an immovable," and it was proved that the national law does so import. In other words, in Palestine there is in force by statute a particular theory of the *renvoi* which is of course binding on any court of Palestine and on the Privy Council when it hears an appeal from a court of Palestine, and the question how an English court would construe a reference to the national law of a deceased person, or to the law of his domicile, is immaterial, because English conflict rules are irrelevant to the extent that the law of Palestine has its own statutory rules. The particular theory of the *renvoi* expressed in the Palestine Succession Ordinance may be described as the theory of partial *renvoi*, that is, the theory which by statute prevails in Germany[2] and which, without the help of any statute, prevails in France.[3] According to this theory, if a conflict rule of X refers to the law of Y, and the corresponding conflict rule of Y refers to the law of X, a court of X will accept the *renvoi* or reference back and will apply the domestic rules of the law of X. If we substitute Palestine for X, the Palestine Succession Ordinance seems to provide in clear terms for the application of the domestic rules of the law of Palestine (the *lex rei sitae*) by virtue of the reference back from the law of the Lebanon (the national law). Only in the case of a reference by the national law to the law of Palestine as the law of the domicile does the ordinance provide for a possible further reference back to the national law, and this special provision with regard to the law of the domicile makes it doubly clear that the reference by the national law to the law of Palestine as the law of the situation is to be construed as a reference to the domestic rules of the law of Palestine.

On the other hand, several decisions of single judges in England have expounded a theory of total *renvoi*, according to

[2] *In re Askew*, [1930] 2 Ch. 259; (1941), 19 Can. Bar Rev. at p. 314.
[3] *In re Annesley*, [1926] Ch. 692; (1941), 19 Can Bar Rev. at p. 314

which an English court applies whatever domestic rules have been or would be applied by a court of the country to the law of which reference is made by the conflict rule of the forum. The result of this theory of total *renvoi* is that an English court gives effect to whatever theory of the *renvoi* prevails in the law of the particular foreign country in question. Thus, if an English conflict rule refers to the law of the foreign domicile of the *de cujus*, the court applies the domestic law of the domicile in the case of a *de cujus* domiciled in a country in which a theory of partial renvoi prevails, as, for example, France[4] or Germany,[5] but applies the domestic law of England or of some other country in supposed compliance with the conflict rule of the domicile in the case of a *de cujus* domiciled in a country by the law of which the doctrine of the *renvoi* is rejected, as, for example, in Italy.[6]

It would be out of place in the present comment for me to point out again[7] the theoretical and practical objections which seem to be applicable to the English theory of the total *renvoi* or the elements of confusion which occur in the series of judgments of single judges in which that theory has been expounded; but, whatever may be said in defence or in criticism of the English theory of total *renvoi*, it is plain that that theory is fundamentally different from the theory of partial *renvoi* which prevails in France, Germany and Palestine.

The distinction just stated seems to have escaped the attention of Clauson L.J., in delivering the judgment of the Privy Council in the *Kotia Case*, because, in aid of his construction of a conflict rule stated in plain terms in the Palestine Succession Ordinance, he states his view of the way in which an English court would construe a reference by an English conflict rule to the law of a foreign country. There would seem to be two objections to the mode of reasoning of the learned lord justice. Firstly, it is not helpful, in construing a special statutory conflict rule of Palestine which provides for the acceptance of a reference back, to attempt to support a particular construction of that rule by an *obiter dictum* as to what an English court would do in the case of a reference to the law of a foreign country under an English conflict rule. Secondly, the *obiter dictum* as to what an English court would do is erroneous, because it appears on

[4] *In re Annesley*, note 3, *supra*.
[5] *In re Askew*, note 2, *supra*.
[6] *In re Ross*, [1930] 1 Ch. 377; *In re O'Keefe*, [1940] Ch. 124; (1941), 19 Can. Bar Rev. 313, 326–328...
[7] *Cf. Renvoi, Characterization and Acquired Rights* (1939), 17 Can. Bar Rev. 369; *Renvoi and the Law of the Domicile* (1941), 19 Can. Bar Rev. 311.

the face of the English decisions that an English court sometimes accepts the reference back and sometimes does not, after considering what particular theory of the *renvoi* prevails in the foreign law.[8]

Furthermore it would appear that Clauson L.J. has allowed himself to slip into the error of imagining that the Privy Council is an English court, whereas in the case under discussion it was merely a Palestine court sitting in England. It tends to impair one's confidence in the Privy Council as a supreme appellate tribunal if that tribunal seems to forget that its duty is to decide a case as if it were sitting in the country from which the appeal comes, or if its reasons for judgment seem to suggest that it is sitting as an English court, and deciding a case from an English point of view. Particularly, in the conflict of laws it is important that a case be decided from the point of view of the forum, and it leads to confusion if the Privy Council on an appeal from a court in Palestine, that is, from a forum in which English law is a foreign law, seems to transfer the forum to England, with the necessary consequence that English law becomes the *lex fori* and the law of Palestine becomes a foreign law.[9] For the purpose of further discussion of this point the following passage from the judgment of the Privy Council delivered by Clauson L.J. deserves quotation:

> In the English courts, phrases which refer to the national law of a *propositus* are *prima facie* to be construed, not as referring to the law which the courts of that country would apply in the case of its own national domiciled in its own country in regard (where the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the *propositus*, having regard to what, in their view, is his domicile (if they consider that to be relevant), and having regard to the situation of the property in question (if they consider that to be relevant).

It is difficult to assign any intelligible meaning to the foregoing passage unless we suppose that Clauson L.J. imagines the Privy Council to be an English court engaged in the task of construing a conflict rule of a foreign law. So far as I know there is no English conflict rule referring to the national law of a person, and the cases cited by Clauson L.J. do not mention

[8] Contrast *In re Ross* with *In re Annesley* and *In re Askew*, all cited above.

[9] A similar confusion of *fora* seems to vitiate some of the reasoning of Lord Wright, on an appeal from Nova Scotia, in *Vita Food Products* v. *Unus Shipping Co.*, [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433: *cf. Bills of Lading: Proper Law and Renvoi* (1940), 18 Can. Bar Rev. 77, at pp. 82 *ff.*

any such English conflict rule. It has of course frequently happened that an English court has discussed a foreign conflict rule referring to the national law of a person, but only as a foreign rule proved as a matter of fact in an English court, differing from case to case according to the evidence given in the English court. It is hard to imagine how an English court can have any general theory as to the meaning of a reference to the national law in a foreign conflict rule, in the absence of evidence in a particular case, or what bearing the English court's theory can have upon the construction by a Palestine court of a conflict rule of the law of Palestine.

One unfortunate result of the practice of the Privy Council of delegating to one member the statement of the reasons for judgment is that the single judgment delivered is sometimes of a pontifical character, and the reasons given for the judgment and the *obiter dicta* are sometimes so general as to be misleading, even though the effect of the judgment may be right.[10] It is of course incredible that there are not sometimes dissenting opinions in the Privy Council, or even if the members are agreed as regards the disposition of the appeal, that the judgment delivered by one member represents exactly the reasons which the other members might give if they were permitted to express their reasons for publication. In particular, it would seem to be clear that *obiter dicta* contained in the single judgment delivered would probably not have been expressed in the same form in the judgments of all the members if they had individually given their reasons, and it is submitted that such *obiter dicta* should be treated as expressing the views merely of the member by whom the "judgment of their Lordships was delivered," and not as expressing the considered opinion of all the members. If it were well understood and always borne in mind that *obiter dicta* occurring in a judgment of the Privy Council express merely the opinion of an individual member, this would alleviate *pro tanto* the legitimate grievance that appeals from countries outside

[10] One example that occurs to me is the judgment in *MacKenzie* v. *Royal Bank of Canada*, [1934] A.C. 468, in which the Privy Council, in the generality of its statement as to the effect of innocent misrepresentation, completely ignores the distinction drawn in *Kennedy* v. *Panama, New Zealand, etc., Royal Mail Co.* (1867), L. R. 2 Q.B. 580, between misrepresentation which is material in the sense that it induces consent and misrepresentation which is material in the sense that it is fundamental with regard to the subject matter, notwithstanding that in the House of Lords in *Bell* v. *Lever Brothers*, [1932] A.C. 161, the *Kennedy Case* had been cited with approval, by two members of the majority and by one member of the minority. The judgment of the Privy Council may be justified in the result on the ground that the misrepresentation in question was fundamental.

of the United Kingdom are less satisfactorily dealt with than appeals from within the United Kingdom. On an appeal from an English court to the House of Lords, the differences of opinion of the members of the appellate court are not concealed as they are in the case of the Privy Council. Consequently, the *obiter dicta* of the individual members of the House of Lords are less likely to be harmful than are those of the Privy Council. A comparison of the different reasons for judgment in the House of Lords affords a means of estimating the value of the *obiter dicta* of an individual member. The *obiter dicta* in the House of Lords are more likely to be carefully expressed and to be supported by adequate discussion, than the cryptic utterances of the Privy Council.

The subject of the conflict of laws is still in the formative stage. The problems arising are especially complicated and cannot be satisfactorily solved without adequate discussion. It is therefore especially undesirable that the Privy Council should in this field of law make categorical pronouncements on matters of general principle without disclosing in the reasons for judgment that the various possible applications of the alleged general principle have been considered or even that the tribunal is aware of the difficulties inherent in the alleged principle.[11]

A judgment of the Privy Council may be disregarded in the Court of Appeal in England,[12] and even in a divisional court of the High Court of Justice in England a judgment of the Privy Council "ought of course to be treated . . . . . as entitled to very great weight indeed" or is "to be treated with the utmost respect," but is not a binding authority, and need not be followed.[13] *A fortiori* the *obiter dicta* of the Privy Council may be disregarded in an English appellate court. A country from which appeals still lie to the Privy Council is in a less fortunate position. Unless we accept as accurate the *obiter dictum* of Middleton J.A., delivering the judgment in the Court of Appeal for Ontario in *Negro* v. *Pietro's Bread Co.*[14] that "the binding effect of the judgment of the Privy Council is limited to the courts of the colony from which the appeal is had," any Canadian court is bound by a judgment of the Privy Council delivered on

[11] Both the case which is the subject of the present comment and the *Vita Food Case* (note 9, *supra*) are examples of the attempt of the Privy Council to dispose summarily by way of *obiter dicta* of important general principles of the conflict of laws.

[12] *Fanton* v. *Denville*, [1932] 2 K.B. 309, at p. 332, Greer L. J.

[13] *Dulieu* v. *White & Sons*, [1901] 2 K.B. 669, at p. 677, Kennedy J., and p. 683, Phillimore J.; *cf. Hambrook* v. *Stokes Brothers*, [1925] 1 K.B. 141, at pp. 154, 161, C.A.

[14] [1933] O.R. 112, at pp. 117–19, [1933] 1 D.L.R. 490, at pp. 494–6.

an appeal from say Palestine or India.[15] In practice, even the *obiter dicta* of the Privy Council are, in Canada, apt to be regarded as being almost sacrosanct, and it has therefore seemed worthwhile to give some examples tending to show that these *obiter dicta*, so far from being accepted offhand at their face value, should be rather carefully examined.

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NEGLIGENCE—STATUTORY ONUS OF PROOF—CHARGE TO THE JURY.—Certain remarks made by Crocket J. in *Landreville* v. *Brown*[1] in the Supreme Court of Canada, will undoubtedly have a disturbing effect on future litigation involving motor vehicles. This note is not concerned with the decision of the majority of the Court which ordered a new trial of an action in which a pedestrian was injured by reason of an accident with a motor vehicle. It does seem important, however, to examine certain statements of Crocket J., inasmuch as they indicate an intention to overrule, without mentioning them, two decisions of the Ontario Court of Appeal, and a course of practice based on those decisions which is treated as elementary in Ontario. If Crocket J. did intend this effect, it would certainly not be asking too much of the highest court in Canada to deal explicitly with the case law which it in language overrules. If the statement was not intended to overrule these cases, it is submitted, with respect, that it should not have been made, because there can be no doubt that in the very next case which comes before a trial judge involving an accident between a pedestrian and a motor vehicle, the judgment of Crocket J. will be produced and the trial judge will be placed in the dilemma of attempting to follow either what Crocket J. indicates to be his view regarding directions to a jury, or what the Ontario Court of Appeal has definitely held to be the law. It is worth noticing, therefore, that Crocket J.'s judgment does not represent the judgment of the Supreme Court of Canada, since it was concurred in only by Rinfret J., Davis and Taschereau JJ. not dealing with the point at all, while Duff C.J. dissented.

[15] *Cf. Robins* v. *National Trust Co.*, [1927] A.C. 515, at p. 519, [1927] 2 D.L.R. 97, at p. 100, [1927] 1 W.W.R. 692, at p. 696.

[1] [1941] S.C.R. 474.

The point in issue concerns the manner in which a jury should be charged when, by legislation, the onus of disproving "negligence or improper conduct" is imposed on the owner or driver of a motor vehicle. Legislation of this nature is general throughout the common law provinces[2] and section 48 of the Ontario Highway Traffic Act,[3] involved in the *Landreville Case*, indicates the situations where the onus of proving negligence has been removed from the plaintiff and the onus of disproving negligence placed upon the defendant. The section reads as follows:

> 48.—(1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.
>
> (2) This section shall not apply in case of a collision between motor vehicles on the highway nor to an action brought by a passenger in a motor vehicle in respect of any injuries sustained by him while a passenger.

The Privy Council in *Winnipeg Electric Company* v. *Geel*[4] dealt with the proper interpretation of such sections and held that the statutory onus operated in the following manner:

> The burden remains on the defendant until the very end of the case, when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by his negligence. If, on the whole of the evidence, the defendant establishes this to the satisfaction of the jury, he will be entitled to judgment; if, however, the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail, because but for the statute the onus would be on him. A fortiori the defendant will be held liable if the evidence actually establishes his negligence. No doubt the question of onus need not be considered if at the end of the case the tribunal can come to a clear conclusion one way or the other, but it must remain to the end the determining factor unless the issue of negligence is cleared up beyond doubt to the satisfaction of the jury.

Some three years prior to the decision in *Winnipeg Electric Company* v. *Geel*, the Ontario Court of Appeal[5] had reached the conclusion that as it was not necessary, in view of the statutory onus, for a plaintiff to prove a motorist guilty of negligence,

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[2] See MacDonald, *The Negligence Action and the Legislature* (1935), 13 Can. Bar Rev. 534, 550.

[3] R.S.O. 1937, c. 288.

[4] [1932] A.C. 690.

[5] *Ross* v. *Gray Coach Lines Ltd.* (1929), 64 O.L.R. 178.

the failure on the part of the jury to specify with accuracy in what respect a defendant motorist was negligent would have no effect on a verdict rendered against a motorist. In *Newell* v. *Acme Farmers Dairy Limited*[6] the Ontario Court repeated that it was improper to ask a jury, in a case where the statutory burden was placed upon the defendant, to specify wherein they found the defendant to be negligent. As Middleton J.A. stated:

> The importance of this is that the jury may find itself quite satisfied that the defendant has failed to meet the statutory onus cast upon him. But each of the jurors may have a different ground for so thinking, and it may be impossible for a jury who rightly believe that the accident was caused by negligence to specify exactly in what the negligence consisted. This construction of the statute has since received the high sanction of the Judicial Committee in *Winnipeg Electric Co.* v. *Geel*, [1932] A.C. 690.

In the *Landreville Case*, following the practice which has prevailed from the interpretation placed on the statute in the above two cases, the jury were left the following questions:

> 1. Have the defendants satisfied you that the damages sustained by the plaintiff were not caused or contributed to by the negligence of the defendant Gardner?
>
> 2. Was the plaintiff guilty of any negligence which caused or contributed to the accident?
>
> If your answer to that question is "Yes," then state fully the particulars of such negligence.

While there may have been objection to the judge's charge in explaining the statutory burden in so far as he indicated that the jury must be satisfied "beyond reasonable doubt"—a direction which may apply to the onus of the Crown in criminal matters, but which is generally supplanted in civil cases with the "balance of probabilities rule"—the following language of Crocket J. with regard to the form of question seems to be directly at variance with the Ontario cases, which he does not discuss, and the rule laid down by the Privy Council in the *Winnipeg Electric Case*, which is also omitted from discussion.

> I understand that there have been some cases, in which a similar form of question has been used, but it seems to me that the form of question 1 is calculated to mislead a jury, especially when it is not accompanied by any direction, in the event of their answering "Yes," [*sic*] to state fully the particulars of such negligence, as the jury here were directed to do in question 2, and to place any defendant in such a case at a distinct disadvantage as implying that the court expected

[6] [1939] O.R. 36.

> the answer to that question to be "No." The fact that the Legislature has placed the onus of negativing negligence upon the defendant does not require the use of such a form of question. Surely any trial judge could leave the question of the defendants' negligence in the same terms as those in which he leaves the question of the plaintiff's negligence, and instruct the jury as to the burden of proof, which the *Highway Traffic Act* has cast upon the driver or owner of a motor vehicle.

From this language it would appear that the learned judge required an affirmative finding of negligence by the jury against the motorist, since only if such a finding were made would it be at all possible to specify in what the negligence consisted. But this would seem to be exactly what the statute was designed to obviate. It may be that a motorist defendant is, as Crocket J. states, at a distinct disadvantage in a case where the jury is asked to state the particulars in which a plaintiff may have been at fault. This, however, is a matter of policy which the Legislature has dealt with, and does not seem to come within the purview of judicial decision. It might, of course, be possible for a jury to make a definite finding of negligence against an operator of a motor vehicle, but assuming that the jury could agree on such a finding, how can we be sure that some members of the jury might not have had other grounds for believing the defendant to be in fault? And if so, is not the plaintiff entitled to the benefit of the statutory burden? In any event, on a fundamental problem of this nature, it would seem incumbent on a court, if it desired to overrule a well established practice, to indicate with exactness how questions should be framed to bring home to the jury the fact that the Legislature has completely abrogated the ordinary principles of negligence.

Ordinarily, a plaintiff must show some specific act of negligence before he is entitled to shift the loss which he has sustained to the shoulders of the person causing it. The Legislature, rightly we believe, have by the onus sections, in effect, and certainly in practice, shifted to the shoulders of the motorist, as the price of driving a motor car, the losses which he inflicts on pedestrians. It is true that theoretically the motorist can convince a jury that he was not negligent, but the policy which prompted the legislation and which certainly actuates most juries, is tending more and more to make the motorist's obligation absolute.[7] Some persons who believe only in "fault" as a

[7] It should be pointed out, that if a jury cannot find some specific negligence against a motorist defendant, the problem of apportioning degrees of fault becomes theoretically impossible. On the one hand we have the jury finding a specific act of the plaintiff to have been negligent. Against

basis of liability may quarrel with this policy. On the other hand, with the spread of automobile insurance, the "fault" notion recedes further and further into the background and it may well be that in connection with motor vehicle liability, we shall live to see the day when the elaborate paraphernalia and technique of negligence-finding will disappear, as it in practice has disappeared to a large extent under these onus sections. Personally, the writer would shed no tears if this came about.

Peculiarly enough, while in the *Landreville Case* it was the defendant who was placed, in the opinion of Crocket J., "at a distinct disadvantage", if certain Ontario cases are right the situation may be reversed and the plaintiff held at a similar disadvantage. There are decisions[8] in Ontario to the effect that if a motorist complains of damage sustained on a highway by the conduct of a defendant other than the operation of a motor vehicle, the jury may be asked whether the plaintiff satisfied them that his injuries did not arise through his own negligence or improper conduct. While there may be some doubt whether the policy of the statutory burden section was intended to make a plaintiff disprove contributory negligence, it has been so held and a practice similar to that which Crocket J. condemned here operates in the defendant's favour. In such cases the jury are not asked to specify in what respect the plaintiff was guilty of contributory negligence if they find that he has not satisfied them that he was free of contributory negligence, while at the same time the jury are asked to specify in what respect the defendant was negligent.

As remarks found in any judgment of a final court of appeal are bound to be quoted in future litigation, it seems unfortunate, to say the least, that the judgment of Crocket J. should not have dealt more fully with a point of such importance in the law of motor vehicle liability, and we can only hope that before further lengthy and expensive litigation takes place the Supreme Court of Canada may make its position clearer than it is at present.

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what shall they weigh it, if they do not make a specific finding against the defendant? This assumes that the weighing process is actually a scientific or logical process—which it is not. What a jury does is to spread the loss in some manner they deem fair. There seems no reason to believe that they would do better or worse if more questions were left them.

[8] *Wright* v. *C.N.R.*, [1938] O.R. 66; *Groves* v. *Wentworth*, [1939] O.R. 138; *Kielb* v. *C.N.R.*, [1941] 3 D.L.R. 665.

ARRESTS WITHOUT WARRANT—INTERPRETATION OF STATUTES.—The liberty of the subject is a topic which has received considerable attention from the profession in recent years. In *Barnard* v. *Gorman*[1] the House of Lords was faced with the difficult problem of determining whether officers of His Majesty's Customs and Excise could make an arrest without a warrant if they believed a person to have committed an offence under the Customs Consolidation Act 1876, or whether the arrest would only be justified if the person detained were actually guilty of the offence for which he was arrested. The power to arrest, even in the case of suspected breaches of the criminal law has been hedged about with safe guards to protect the liberty of the public and while that branch of law has now been clarified, the present question depended on the incomplete language of a statute which stated that "the offender may either be detained or proceeded against by summons." In one respect a person is not an offender unless he has committed an offence, but the House of Lords had no difficulty in holding that the whole scheme of the Act rendered a wider construction of "offender" not only permissible but necessary. The Court made some interesting observations regarding the two meanings which words such as "offender" and "culprit" are capable of bearing, and the discussion of Viscount Simon L.C. on the word "culprit" seems worth reproducing for the benefit of our readers. Lord Simon's language was as follows:

> I trust that I may be forgiven the digression if I remind your Lordships that the word "culprit" appears to arise from an abbreviated entry which used to be made on the record of a criminal court engaged in trying a prisoner for felony or treason. The prisoner at the bar was asked how he pleaded to the indictment, and, upon his saying "not guilty," if the prosecutor joined issue, this was recorded in the words: "*culpabilis: prest.*" That is to say: "The prosecution says you are guilty and is ready to prove it." The words were abbreviated in the form: "*cul: prit.*" The clerk of the court then asked the prisoner: "How wilt thou be tried?" and the prisoner replied. "By God and the country," the last word meaning the jury. (In the old days, the clerk of assize, when addressing the jury after it had been sworn and before trial commenced, told the jury that the prisoner had been arraigned and upon his arraignment had pleaded not guilty, "and for trial has put himself upon God and the country, which country you are" etc.) It has been suggested that the abbreviation "*cul: prest,*" or "*cul: prit,*" though really only a record of joinder of issue, came to be understood to be a word addressed to the prisoner—and hence the modern word "culprit." It is perhaps some excuse for this *excursus* that the word "culprit" is undoubtedly sometimes used to mean the person guilty of a crime and sometimes (as in

[1] [1941] 3 All E.R. 45.

the illustration above) to mean the person accused of being guilty, and is, therefore, another example of a word of narrow or wider import according to the context in which it is found.

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WILLS—BENEFICIARY KILLING TESTATOR—ACQUITTAL OF CRIME—WHETHER TO BE ACTED ON IN CIVIL PROCEEDINGS.—*Re Emele*[1] was an application by an executor for the opinion and direction of the Court upon the question whether the widow of the testator, who was acquitted on a charge of murdering her husband, was entitled to take under his will. MacDonald J. of the Saskatchewan King's Bench held that evidence of the widow's acquittal in the criminal charge was admissible in the proceedings on the application and should be acted on. Accordingly she was entitled to take.

This decision may be usefully compared with that in *In re Roche, Allen* v. *Helton*,[2] noted in this REVIEW[3] last year. In that case, in a similar situation, a jury in a civil suit by the testator's mother found that the beneficiary, who had been acquitted on a trial for murder, had unlawfully killed the testator. The Queensland Court proceeded on the ground that acquittal of crime did not render inapplicable the principle denying to a beneficiary any benefit under the will of a person whom he has killed.

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QUASI-CONTRACTS—PAYMENT UNDER COMPULSION—DURESS OF PROPERTY—ADEQUACY OF LEGAL REMEDY.—Payments made "under protest and under circumstances of practical compulsion" are recoverable according to the judgment of the Supreme Court of Canada in *Knutson* v. *The Bourkes Syndicate*.[1] K, the defendant, held certain land subject to an option agreement in favour of the syndicate, and subject to another agreement under which the syndicate recited its intention to sell the land to a company to be formed, and the original owner, K's assignor, agreed for a stated consideration to give the syndicate a proper transfer of the land together with the withdrawal of a caution against it filed by one S who claimed an interest in the land. S had agreed in writing to the option agreement, under which the original owner had to make a good title, and hence give S a percentage of the purchase price to satisfy his claim. S gave no approval

[1] [1941] 4 D.L.R. 197.
[2] [1940] St. R. Qd. 1.
[3] (1940), 18 Can. Bar Rev. 404.
[1] [1941] S.C.R. 419, [1941] 3 D.L.R. 593, affirming [1940] O.W.N. 442.

to the second agreement. K obtained a transfer of S's interest in the lands, and insisted on receiving certain sums of money from the syndicate to discharge the caution, knowing that the syndicate had agreed to transfer the land to a company. The syndicate having paid under protest[2] was held entitled to recover the payments because made under circumstances of practical compulsion; first, to preserve its rights under the option agreement, and secondly, to secure property of which it had become owner in equity, subject to carrying out the terms of the second agreement, and which it had obliged itself to transfer to a company.

It was clear, as the court indicated, that the syndicate was entitled under the second agreement to a transfer of the whole interest in the land on paying K the consideration therein stipulated. K would have to see to the discharge of the caution, and under the option agreement he would, as assignee of the owner of the land, pay himself as S's assignee a percentage of what he received from the syndicate. But he was not entitled to any sums in addition to the amount stipulated by the second agreement.

In allowing the syndicate to recover the additional payments wrongfully exacted by K, the Supreme Court relied on cases dealing with duress of property.[3] Generally speaking, these cases turned on circumstances of urgency, such as the prevention of distress[4] or of a sale,[5] or the removal of a cloud on title or of an unfounded charge or lien so that the property might be mortgaged or sold.[6] Statements in them are not lacking, however, in support of a general proposition that a person entitled to property which is kept from him until he pays money which the payee has no right to exact, may recover the money so paid, apparently without regard to whether he might as easily have invoked legal process to recover the property in the first place.[7]

[2] As to the effect of protest, see WILLISTON ON CONTRACTS, (2nd ed.). vol. 5, s. 1623: It is always desirable to make protest, but if a payment is otherwise clearly voluntary, protest will not make it involuntary. Nor if a payment is obviously coerced will recovery be denied because no protest is made. Protest is valuable as evidence and in a doubtful case may establish the coercive character of a payment.

[3] Cases dealing with the recovery of illegal imposts, tolls or taxes stand apart, as the Court itself recognized in referring to *Pillsworth* v. *Cobourg* (1930), 65 O.L.R. 541.

[4] *Hills* v. *Street*, 5 Bing. 37.

[5] *Close* v. *Phipps*, 7 M. & G. 586.

[6] *Joannin* v. *Ogilvie*, 49 Minn. 564, 52 N.W. 217.

[7] In the *Knutson Case*, Duff C.J. relied on a statement by Willes J. in *Great Western Ry.* v. *Sutton* (1869), L.R. 4 H.L. 226, at p. 249, where the latter stated: "I must say that I have always understood that when a man pays more than he is bound to do by law for the performance of a

This seems to be the position taken by the Supreme Court. If so, it would seem, with respect, to have adopted too wide a view.[8] There is a decided difference between cases in which a person pays money to obtain release of property from a threat of some summary action, like distress, and cases where he pays money to obtain property which he could have obtained by resort to ordinary process. In other words, if a person entitled to property can get it promptly by having the ordinary "day in court" he deserves no protection when he pays a wrongful exaction and then seeks to have his "day in court" to recover it.

In the *Knutson Case*, the remedy of specific performance was available against K; and there is authority that a purchaser who pays more than he is obliged to in order to obtain a conveyance cannot recover the overpayment,[9] unless, perhaps, if the refusal to convey causes a delay which would make the purchase useless to the purchaser.[10] There may, however, be cases in which the purchaser may recover an excessive payment, notwithstanding that he had a legal remedy which he failed to invoke. Such are cases where the legal remedy is inadequate; and the inadequacy may result from the delay involved in resorting to legal process.[11] Only on this ground is the decision in the *Knutson Case* supportable. Even so, it did not sufficiently appear that there would be any undue prejudice to the syndicate in respect of its agreement to transfer the property to the proposed company if it suffered the delay involved in invoking its legal remedy.

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duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concession in respect of which he is entitled to recover the excess. . . . This is every day's practice as to excess freight." With respect, the principle thus enunciated is inapplicable. The *Sutton Case* was a case involving excessive railway rates exacted contrary to the equality provision of a statute. No analogy exists between cases involving excessive carrier rates and the *Knutson Case*.

[8] WILLISTON ON CONTRACTS (2nd ed.), vol. 5, supports the view (p. 4518, note 6) that there is "duress of property" in sale of goods cases where a seller refuses delivery unless the buyer agrees to pay a greater price than that originally stipulated, although he acknowledges that there are many cases which deny relief on the ground that the payment in such case is voluntary.

[9] See *Smithwick* v. *Whitley*, 152 N.C. 366, 67 S.E. 913

[10] *Peterson* v. *O'Neill*, 255 Ill. App. 400.

[11] WILLISTON ON CONTRACTS (2nd ed.), vol. 5, s. 1620, p. 4532.