

The Canadian Bar Review

"Justitia, Officium, Patria."

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NOTE AND COMMENT.

* * * AT another place (p. 780), will be found a translation of an article recently published in *Le Droit d'Auteur*, the organ of the International Copyright Bureau, commenting on certain untoward features of the Canadian Copyright legislation of 1921 and 1923. The article discusses the possibilities of conflict between Canadian printers and American authors, and, in so far as this legislation relates to the Revised Berne Convention, the impaired chances of Canada becoming a member of the Union, also the anomalous position of the Canadian author—especially when the provisions of the Act passed during the last session of Parliament become law. We need add nothing to what the writer in *Le Droit d'Auteur* says as to other matters in question, but concerning the way in which the Canadian author is affected we do desire to say that taking the Copyright legislation of 1921 and 1923 as a whole he would seem to be in a worse position than any other British subject in the world touching the rewards of literary creativeness. He will suffer greater hardship than the American author, if it so happens that the United States becomes a member of the International Copyright Union. His work may be printed *in invitum* in Canada, and moreover his freedom of contract in respect of his literary property is invaded. Can this be validly done by Parliament, or is it not an interference with property and civil

rights beyond the strict needs of Copyright legislation? All these are matters so important in their bearing that they strike down to the very roots of citizenship. It is degrading for the citizens of a civilized country to be denied any right of property. The literature of a country is not only one of its chief glories in a cultural sense, but it is a potent stimulus to patriotism. No one would argue that who knows his history books. Surely, then, the author should be protected by the law instead of being despoiled by it. We hope we are not taking too gloomy a view of the situation, but if the tenor of the legislation in question is other than we conceive it to be then we should like to be corrected. If, on the other hand, we happen to be right it would seem to be the plain duty of Parliament to see that the impugned legislation is speedily removed from the statute-book.

* * * OWING to the steady supply of contributed articles now received by the REVIEW the Editor can find but little space for *excerpts* from the pages of our English contemporaries—much as he may desire to refresh his readers therewith. There are, however, two recent items which will not allow themselves to be extruded from our pages. We append them:—

“It will be a matter of great pleasure to the whole Profession to hear that the American Bar Association has unanimously decided to accept the invitation to hold their meeting in this country next year. At the same time the Canadian Bar Association will also be with us, and will act as joint hosts in the reception of our American colleagues. The incidence of the American vacation will enable the meeting to be held in July before the closing of the Courts and at a time when all the members of both branches of the Profession will be available to receive our distinguished visitors.”—*Law Times*, September 22nd, 1923.

"It is only what one might expect to find that a tribunal [the Judicial Committee of the Privy Council], with such varied duties, and working in such an atmosphere, should have produced at times great personalities. Looking back over the interval since it was given its present form by the Act of William IV., the list of the names of its Judges contains those of a succession of impressive personalities. Lyndhurst, Brougham, Cottenham, Kingsdown, Campbell, Westbury, Hatherley, Parke, Willes, Cairns, Selborne, Blackburn, Watson, Hobhouse, Herschell, Macnaghten, Davey, are among the names in that list. The weight of their authority produced contentment with their decisions in the past, and it will go ill with the tribunal if at any time, by neglect, it is made to fail to attract sufficiently competent members.

"But British Judges are not the only Judges who sit on it now. The Chief Justices of the Dominions have places in it, and others of the Dominion Judges sit there from time to time. In each summer there are two months devoted in the main to appeals which come from Canada and which are largely argued by Canadian Advocates. A distinguished Canadian jurist, Mr. Justice Duff, of the Supreme Court of Canada, comes to Downing Street by the desire of the Dominion Government, and brings great experience and an acute and highly furnished mind to bear during his co-operation with his colleagues here. . . . Altogether, there is no visible weakening of the old tradition of giving the best help available to the Committee, and the Judges of the Dominions and of India have begun in a new fashion to lend their assistance. There is still more than can be done, but care must be taken to bring it about, not rashly or hurriedly, but in a fashion in which continuity of spirit may remain unbroken." — Viscount Haldane, in the *Empire Review*, for July, 1923.

* * * THE Appellate Division of the Supreme Court of Ontario has decided in *Rex v. Page* (1922),

53 O. L. R. 70, differing from Middleton, J., that in *habeas corpus* proceedings combined with a *certiorari* in aid, the Superior Court has power to examine the depositions taken in the court below, to ascertain if there is any evidence to support the conviction complained of.

The reasoning of Middleton, J., appears absolutely correct upon general principles. The question is whether the Appellate Division were right in holding that these principles were altered by legislation in Ontario, and that such legislation was still in force.

By the Habeas Corpus Act, R. S. O. 1914, c. 84, which is a survival of an Act passed by the Province of Canada in 1866 (29 and 30 Vict. c. 45), it is provided (s. 5): that a writ of *habeas corpus* being issued by a prisoner a writ of *certiorari* may issue in aid to bring up "all and singular the evidence, depositions, convictions and all proceedings had or taken . . . to the end that the same may be viewed and considered by such Judge or Court and to the end that the sufficiency thereof to warrant such confinement or restraint may be determined by such Judge or Court."

This section has been interpreted by the Ontario courts on various occasions to mean that the court may examine the depositions to impeach a conviction good on its face. Considerable doubt is thrown on this construction by the remarks of Lord Sumner in *Rex v. Nat Bell Liquors Limited* [1922] 2 A. C. 128 at 163, 164, and it seems questionable whether the section should not be interpreted to mean that the court may look at the depositions to see whether an invalid conviction should not be upheld if the trial was regular rather than that a record *ex facie* valid can be thus overturned. The common law is not to be changed by inference.

The accepted construction involves some startling anomalies. Even the Ontario courts recognize the doctrine affirmed in the *Nat Bell* case, viz., that lack of evidence is no ground for impeaching a conviction regular on its face, apart from the Habeas Corpus Act.

A *habeas corpus* only can be obtained where the defendant is in custody, and the Act applies where there is a *habeas corpus*. The result appears to be that if an offender is in gaol he can shew that the conviction was made without evidence, while if he has only been fined he cannot. In the case under discussion, Page had not only been sentenced to imprisonment and fine, but an order had been made confiscating money found in his house. The latter order, if it had stood alone, could not have been examined on the ground of lack of evidence to justify it, though this objection was well founded in fact, as the court held. The objection to the sentence of imprisonment, which alone enabled Page to invoke the Act, was held to be unfounded. The result of the Appellate Court's decision was therefore that Page, by raising an utterly untenable claim, was enabled to overturn a decision which by itself could not have been impugned. Such a farcical result must inevitably throw doubt on a construction of the statute which permits it, if any other interpretation is possible.

But even assuming this interpretation of the Act is correct, the decision in this case appears open to further criticism. Jurisdiction to quash on *certiorari* is really a jurisdiction in error. The right to go into the evidence on which an adjudication is based is essentially an appellate jurisdiction. Therefore, as Logie, J., points out, the Habeas Corpus Act really conferred an appellate jurisdiction in cases falling within the Act. Appeal is a substantive right and not a mere matter of procedure. The effect was as if the legislature had said:

“In all cases where a Court now has jurisdiction to quash adjudications on *certiorari*, it shall hereafter have appellate jurisdiction over such matters.”

The legislature did not really enlarge jurisdiction by *certiorari*, it added a new jurisdiction of a different nature under the guise of merely altering procedure.

This brings us to the effect of the Criminal Code

upon this statutory procedure. In the Page case it was apparently admitted on all sides that the offense being an indictable one, the provisions of the Code dealing with appeal would override provincial enactment, if there was any conflict, and that the Code gave no right of appeal in the case at bar. The appellate division solved this by assuming that in Ontario *certiorari* had been enlarged to appellate dimensions, finding an implied recognition in the Code of the former procedure expressed by the constant references therein to the remedy by *certiorari*. That this is recognised is undoubted, but it must be remembered that the Code is legislation meant to apply to all Canada, and when it uses the term "*certiorari*" it must mean *certiorari* in the general common law sense. There is nothing to indicate that the framers of the Code meant the term to include appeal masquerading under the name of "*certiorari*." Even though the disguise may have been legalized for provincial purposes, it nevertheless remains but a disguise to a paramount extra-provincial authority, and its Acts ought to be construed accordingly, even in Ontario.

D. M. G.

* * * IN *Rosom v. Weslowski, et al.*, (1923) 3 W. W. R., 385, Brown, C.J., K.B., of Saskatchewan had before him a case of intestate succession. John Rosom, the deceased, died intestate, leaving him surviving a widow and four children. A fifth child, Mary Weslowski, predeceased her father, leaving her surviving her husband, John Weslowski and two sons. On the date of the death of her father one of these sons had died. The Court was asked to decide the rights of the parties under these circumstances and for that purpose it was necessary to construe section 16 of The Devolution of Estates Act. Subsections of that section applying to the case read as follows:

"(2) If he [the intestate] dies leaving a widow and children, one-third of his real and personal property shall go to his widow and the remaining two-thirds to his children in equal shares.

“(3) In the last mentioned case if a child has died leaving issue, the distributive share of such child shall go to those who legally represent him, such representatives to take in equal proportions.”

The application of subsection 3 to the facts was stated in the following manner by the Court: “as applied to this case it means that the legal representatives of Mary Weslowski share in the estate of John Rosom to the same extent as [she would have shared therein?] if she had survived her father, and John Weslowski, the husband of Mary, and William Weslowski, the surviving son, being the only legal representatives of Mary Weslowski alive at the date of the death of John Rosom, take that share in equal proportions.”

With great respect, it is submitted that this decision is not in accordance with authority and cannot be supported. John Weslowski, husband of the deceased Mary, was not one of her legal representatives in the sense of the statute. The legislation before the Court was obviously intended to supersede for the province the Statute of Distributions (22 & 23 Car. 2, c. 10), passed in 1670, many of whose provisions with their characteristic phraseology are retained. It is therefore *in pari materia* with the statute of Charles and should be construed in the light of that statute; so that where an expression in that statute has a well ascertained meaning, the same meaning should be attributed to it in the provincial law.

The provision in question in this case is taken in substance from section 5 of the Statute of Distributions, which provides for distribution of the surplusage of the estate “by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children in case any of the said children be then dead.” The meaning of the expression “legally represent” in the passage quoted has been laid down by judicial decision. Thus, in *Re Natt* (1888), 37 Ch. D. 520, North, J., says:

“It was decided long ago that the persons who ‘legally represent’ the children are their descendants in any degree.”

And in Halsbury's Laws of England, Vol. 11, p. 20, s. 38, the rule is stated thus:

“The persons who legally represent the children of an intestate are their descendants and not their next of kin; thus, if a person dies intestate leaving the child and widow of a deceased son him surviving, the child takes the whole share which the deceased son would have taken if he had survived the intestate, although the widow might equally with him have been termed a legal representative of the deceased son.”

In the case of *In re Bell's Estate* (1919), 2 W. W. R., 553, the rule was recognised by Taylor, J., affirmed by the Court of Appeal for Saskatchewan, at page 924 of the same report. R. W. S.

* * * THE case of *Massue, et al. v. Royal Land and Investments, Ltd.* (1923), 2 W. W. R. 315, deals with the effect of building restrictions. *Held*, by Galt, J., that an owner of a parcel of contiguous lands—such as a parcel of adjoining lots—may validly impose restrictions as to building, etc., against all the lands by inserting, in an agreement with the first purchaser of the first portion sold, restrictive covenants to run not only with the portion sold but with all of the lands, and a caveat registered by such owner following upon the said agreement is properly registered.

The Court referred to *Rogers v. Hosegood* (1900), 2 Ch. 388; 69 L. J. Ch. 652, as a case in which the law applicable to the question is exhaustively dealt with. The law upon the subject was in fact first laid down in *Tulk v. Moxhay* (1848), 2 Phil. 774, and was a piece of judicial legislation by Lord Cottenham, L.C. He based his conclusion upon the equitable doctrine and upon the civil law rule which forbids one person to

unjustly enrich himself at the expense of another. His Lordship was as truly adding to the law a new chapter as was Lord Mansfield in establishing the action for money had and received to the use of another in *Moses v. MacFerlan*, 2 Burr. 1005 (1760).

The reason of the decision was given by Lord Cottenham thus:

“It is said that, the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing would be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he himself had undertaken.”

The grounds upon which Lord Cottenham decided *Tulk v. Moxhay* have since been abandoned, and have given way to a theory of equitable servitude, as may be seen by reference to *London and S. W. Railway Co. v. Gomm*, 20 Ch. D. 583; *Rogers v. Hosegood* (1900), 2 Ch. 388 and *In re Nisbet and Potts' Contract* (1905), 1 Ch. 391, and (1906), 1 Ch. 386, 401, 405 and 409; but, while the principle on which the law is based has been altered, the addition to the law made by Lord Cottenham still remains. See Pound's "Interpretations of Legal History," at page 134.

R. W. S.

* * * THE judgment of the Judicial Committee delivered by Viscount Haldane in the case of *Fort Frances Pulp and Paper Company, Limited v. Manitoba Free Press Co. Limited*,¹ (1923) 3 D. L. R. 629;

¹ NOTE.—We have already discussed this case, but from another point of view. See *ante* p. 636.

25 O. W. N. 60, brings us to this,—that the question of jurisdiction as between the Dominion and the Provinces may in some cases be a question of fact. His Lordship quotes with approval from a decision of the United States Supreme Court, *Hamilton v. Kentucky Distilleries Co.* (1919), 251 U. S. 146: "Very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of *ultra vires* which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite."

How is such evidence to be brought before the Court? Manifestly the evidence ought to be before the trial court, which has to decide the same constitutional question which may ultimately go to the Judicial Committee. This opens up a new line of pleading. What would the trial judge in the Fort Frances case have said if counsel had undertaken to produce evidence that an emergency existed which justified the continuation of the regulations in question in that case? Yet this is exactly the point on which the case turned in the end.

We have, therefore, before us the prospect of decisions of questions of constitutional law arising out of the British North America Act as questions of fact by a jury. Nor need this be regarded with levity or sarcasm. If the result is startling it is because Canadian lawyers and Canadian judges have usually dealt with constitutional law as if it were a transcendent branch of knowledge too high to be dealt with like other questions of law. The truth is that many constitutional questions resolve themselves into narrow questions of fact. Take the cases of *C. P. R. v. Notre Dame de Bonsecours* (1889), A. C. 367, and *Madden v. Nelson and F. S. Railway* (1889), A. C. 626; what the Court had to decide in these cases was whether the works in question, in the one case ditches and the other case fences, were a part of the railway or not and whether their maintenance was a part of the maintenance of the railroad. If that question had been left to a jury it

would have been rather difficult for any higher court to have displaced the verdict. In other cases the question of constitutional law has to be decided on the basis of facts collateral to or quite separate from the facts of the main issue in the case. In the Fort Frances case the issue was as to the price to be paid for certain goods. The facts on which the Court could find that an emergency did or did not exist, so as to justify Dominion legislation, would be an entirely separate set of facts. The fact is that these broader findings of fact for constitutional purposes have in the past been made on the slimmest sort of material, material which in an ordinary Court would not have been accepted as evidence. One important constitutional case as between the Provinces and the Dominion is said to have been influenced, if not determined, by counsel reading before the Judicial Committee a cablegram containing statements said to have been made by a Government official which, while not pertinent to the issue, were intended to show what the result would be in case their Lordships should decide in a certain way. No opportunity was given for denying or explaining the statements in the cablegram. If it had been offered as evidence in the lower Court it would no doubt have been ruled out as irrelevant.

We are far behind the United States Courts in the practice of pleading and proving grounds of fact in constitutional issues. As a consequence it is left to judicial knowledge and to the personal knowledge of our judges to eke out the record. It was this that troubled Magee, J., in *Re Reciprocal Insurance*, 23 O. W. N. 429: "It might well be that soliciting of insurance by or for persons and companies without supervision or control over them had become a crying evil calling for strong legislation. I cannot say that I have heard of such conditions existing, but I am not in a position to say that Parliament, our Highest Court, is wrong or the legislation in this regard ineffective."

As another consequence of defective pleading counsel for the appellant has a considerable advantage, if

he has the disposition or the ability to take it, in being able to make statements or inferences of fact not borne out by the record, which statements the respondent can contradict, it is true, but only by a strain of forensic etiquette the recoil of which he may not be prepared to risk.

F. W. WEGENAST.

