

THE CANADIAN BAR REVIEW

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CASE AND COMMENT

FORGOTTEN AMENDMENTS TO THE CANADIAN CONSTITUTION.

—It may come as a surprise to some students of the Canadian constitution to learn that one paragraph of the preamble and no less than eight sections of the original B.N.A. Act (1867) have been totally repealed, while three other sections have been partially repealed. These changes are quite apart from those made by the later B.N.A. Acts of 1871, 1875, 1886, 1907, 1915, 1916, 1930 and 1940, which are usually considered to be the formal amendments to the constitution, and quite apart from any of the other statutes relating to Canadian affairs which Mr. H. McD. Clokie in his recent article on "Basic Problems of the Canadian Constitution"¹ has so well described as being part of our constitutional law.

There has also been a repeal of one provision in the B.N.A. Act of 1915 referring to the change in composition of the Senate.

All these changes in our constitution have occurred without any notice by Canadian constitutionalists of the fact of their existence. Even the King's Printer at Ottawa pays no attention to them, and his published copies of the B.N.A. Acts contain no trace of them. This is not perhaps surprising, considering the manner in which they were made. Nor is the subject of any practical interest, since the changes do not touch any important portion of the constitutional law. Nevertheless the very fact that the Canadian constitution could be amended in England without the Canadian Parliament being in any way informed, still less the provinces, is another reminder of our

¹ (1942) 8 Can. J. Econ. and Pol. Sci. 1.

colonial relationship toward the Imperial Parliament. The latest of these forgotten amendments occurred as recently as 1927, one year after our equality of status with the other members of the Commonwealth was declared.

The story of the amendments is simple. Periodically the British Parliament passes a Statute Law Revision Act, the object of which is to clear the English statute law of enactments which have either ceased to be in force or have become unnecessary, but which have not been expressly repealed. The revision Act is prepared by the Statute Law Committee, set up in 1868 by Lord Cairns to superintend the publication of the revised edition of the statutes. In preparing its lists of statutes for repeal the Committee works on the principle that six categories of enactments are considered as having ceased to be in force, otherwise than by express specific repeal.² These categories relate to statutes which are

1. Expired: that is, enactments which, having been originally limited to endure only for a specified period, by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had for their object the continuance of previous temporary enactments for periods now gone by effluxion of time;
2. Spent: that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect, or on the happening of some event, or on the doing of some act authorized or required;
3. Repealed in general terms: that is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts on which it is to operate;
4. Virtually repealed: where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one;
5. Superseded: where a later enactment effects the same purposes as an earlier one, by repetition of its terms or otherwise;
6. Obsolete: where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being

² Vol. 18, HALSBURY'S COMPLETE STATUTES OF ENGLAND, p. 1183.

put in force, regard being had to the alteration of political or social circumstances.”

In the year 1892 a substantial number of sections of old acts of Parliament were cleared away by the Statute Law Revision Act³ on the principles just enumerated. The schedule to this Act listed all the laws repealed. In the schedule we find this entry:—

“30 & 31 Vict. c. 3. The British North America Act, 1867.

In part; namely,—

From “Be it therefore” to “same as follows”.

Section two

Section four to “provisions” where it last occurs.

Section twenty-five

Sections forty-two and forty-three.

Section fifty-one, from “of the census” to “seventy-one and” and the word “subsequent.”

Section eighty-one.

Section eighty-eight, from “and the House” to the end of the section.

Sections eight-nine and one hundred and twenty-seven.

Section one hundred and forty-five.

Repealed as to all Her Majesty’s Dominions.”

The careful law clerks had taken the B.N.A. Act as simply one more of the English statutes to be revised, had gone through it punctiliously, and lopped off the dead wood just as with any other statutes. The statute next after the B.N.A. Act in the Schedule of revisions is the Dog Licenses Act, 1867,—the statute to which the Imperial Parliament turned its attention after it had disposed of the B.N.A. Act.

So it is that the B.N.A. Act no longer contains the enacting words of the preamble or sections 2, 25, 42, 43, 81, 89, 127 and 145, or parts of sections 4, 51 and 88. If the B.N.A. Act is referred to in Halsbury’s Statutes⁴ it will be seen printed in its correct form—a form discoverable in no Canadian text known to the writer. Similarly, by the Statute Law Revision Act of

³ 55–56 Victoria, c. 19.

⁴ Vol. 5, p. 351.

1927,⁵ section one, subsection (2) of the B.N.A. Act of 1915 was repealed. No doubt if the Statute Law Committee is still at work, somewhere in a distant office a meticulous clerk is paring away any loose portions of the B.N.A. Act of 1930, the Statute of Westminster of 1931, the B.N.A. Act of 1940 and any other such statutes that may pass before his eyes.

It is unnecessary to describe in detail the portions of the Canadian constitution which are repealed. Most of them are of no consequence and relate to provisions which are spent, expired or obsolete. Still, they did no harm where they were, and helped to make the Act more historically complete. Their removal leaves unsightly gaps—or rather would leave unsightly gaps if Canadians were to pay any attention to them. The repeal of section 145 dealing with the Intercolonial Railway, for example, takes out a provision that illustrates very clearly one of the aims of the Fathers of Confederation—that of linking the former colonies by steel from coast to coast. And it might be argued that the obligation to construct a railway includes an obligation to maintain, which is a continuing obligation. Will the Maritime provinces welcome the elimination of section 145? Also the removal of section 2 is difficult to understand. It provides

2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

No doubt this rule remains in our law without the necessity of its statement in the B.N.A. Act, but *cela va bien mieux en le disant*.⁶

This odd group of amendments to our constitutional law provides another argument for those who believe that Canada should acquire a new constitution of her own—a single, complete, independent document superseding all previous statutes and deriving its authority solely from the assent of the Canadian people. Until that occurs we shall not have a Canadian constitution, nor a full sense of national status.

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⁵ 17 & 18 Geo. 5, c. 42.

⁶ For instance, Dr. W. P. M. Kennedy recently cited section 2, though repealed, in support of his argument that Canada is not a "Kingdom" but a "Dominion under the Crown of the United Kingdom". See his article "The Kingdom of Canada", (1939) 17 Can. Bar Rev., 1, at p. 4.

CONSTITUTIONAL LAW — DEBT ADJUSTMENT.—The opinion of the Supreme Court of Canada in *Reference re Alberta Debt Adjustment Act, 1937*,¹ should not occasion undue surprise in view of that Court's previous decision in *Attorney-General for Alberta and Winstanley v. Atlas Lumber Co.*² and of the decision of O'Connor J. of the Supreme Court of Alberta in *North American Life Assurance Co. v. McLean*.³ But repercussions of the opinion, declaring the Debt Adjustment Act to be wholly *ultra vires*, will be felt not only in Alberta,⁴ but in Saskatchewan⁵ and Manitoba.⁶

Debt adjustment legislation is practically indispensable to the type of economy under which we have been living. The British North America Act, by s. 91(21), gives exclusive legislative power to the Parliament of Canada to legislate in relation to "bankruptcy and insolvency." Provincial legislative competence in connection with debt adjustment, e.g. under s. 92(13) (property and civil rights in the province), is accordingly limited to the enactment of provisions (1) which are not in pith and substance within s. 91(21), or within any of the other enumerations of s. 91, and (2) which do not conflict with Dominion legislation enacted under s. 91(21), or under any of the other enumerations of s. 91, and any measures ancillary thereto.⁷ The opinion of the Supreme Court in *Reference re Alberta Debt Adjustment Act, 1937*, indicates that scope for effective provincial debt adjustment legislation is at best narrow, and at worst, especially in view of existing Dominion legislation,⁸ something for theoretical speculation rather than actual realization.

¹ [1942] S.C.R. 31, [1942] 1 D.L.R. 1.

² [1941] 1 D.L.R. 625, affirming [1940] 3 D.L.R. 648 (Alta. C.A.). The Alberta Debt Adjustment Act, 1937, was held *ultra vires* in so far as it purported to make the right of action on a promissory note dependent on the consent of a provincially-appointed board. See Note (1940), 18 Can. Bar Rev. 725.

³ [1941] 1 W.W.R. 430, [1941] 3 D.L.R. 271. The Act was declared to be invalid as being insolvency legislation.

⁴ Debt Adjustment Act, 1937 (Alta.), c. 9, as amended.

⁵ Debt Adjustment Act, R.S.S. 1940, c. 87.

⁶ Debt Adjustment Act, R.S.M. 1940, c. 50.

⁷ Debt adjustment legislation may thus run foul of Dominion legislative power in relation to interest and bills of exchange and promissory notes, to take two examples. *Cf.*, as to interest, the opinion of Duff C.J.C. in the case at bar, [1942] 1 D.L.R. 1, at p. 7; *Lethbridge Northern Irrigation District v. I.O.F.*, [1940] A.C. 513. Dominion legislative power in relation to companies with Dominion objects and certain undertakings, e.g. inter-provincial railways, presents an additional limitation on the applicability of provincial debt adjustment legislation; *cf.* opinion of Duff C.J.C. in the case at bar, [1942] 1 D.L.R. 1, at pp. 5, 7.

⁸ The Bankruptcy Act, R.S.C. 1927, c. 11; The Companies' Creditors Arrangement Act, 1932-33 (Dom.), c. 00; The Farmers' Creditors Arrangement Act, 1934 (Dom.), c. 53, as amended. And see, *In re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Attorney-General for B.C. v. Attorney-General for Can.*, [1937] A.C. 391.

In holding the entire Alberta statute to be *ultra viers*, Duff C.J.C., who spoke for the majority of the Court, stated that any competent elements of the legislation were not severable from the incompetent enactments constituting the Debt Adjustment Board with the powers conferred upon it,⁹ and that even if it were possible to re-write the statute to confine it to what could be validly enacted, there was no probability that the legislature would enact it "in this truncated form." The position and powers of the Debt Adjustment Board were, of course, crucial in the administration of the Act. Mr. Justice Davis had already declared in the *Winstanley Case*¹⁰ that "the Debt Adjustment Board of Alberta is an administrative body and is not validly constituted to receive what is in fact judicial authority". While, it is submitted, this statement alone carries too broad a connotation, it was clear from previous portions of his judgment that Davis J. objected to the barring of access to the ordinary courts in relation to those matters which fell within exclusive Dominion competence. In *Reference re Alberta Debt Adjustment Act, 1937*, Duff C.J.C. made some fairly strong comments in this same connection, and his invalidation of the key sections¹¹ of the Act was grounded on the alleged interference of that section with (1) rights which were within the exclusive legislative authority of the Dominion and (2) certain types of business and undertakings which were also within the exclusive control of the Dominion. Thus, he made reference to the Bills of Exchange Act,¹² to the Bank Act,¹³ to the Companies Act,¹⁴ to the Interest Act,¹⁵ to banks¹⁶ and railways and ocean shipping companies.¹⁷ It was of no avail to Alberta that s. 39 of its impugned Act declared that it "shall not be so construed as to authorize the doing of any act or thing which is not within the legislative competence of the Legislative Assembly". It is clear, then, from the opinion of Duff C.J.C., that future complaints or demands in respect of debt adjustment legislation should be addressed to the Dominion, not to provincial authorities.

⁹ Duff C.J.C. adverted to the "arbitrary" nature of the Board, [(1942) 1 D.L.R. 1, at p. 4], as if such a designation was sufficient to condemn it in law.

¹⁰ [1941] 1 D.L.R. 625.

¹¹ This was the section requiring the Board's permit in order to initiate or continue proceedings.

¹² R.S.C. 1927, c. 16.

¹³ R.S.C. 1927, c. 12, s. 125.

¹⁴ 1934 (Can.), c. 33, s. 44.

¹⁵ R.S.C. 1927, c. 102.

¹⁶ The British North America Act, s. 91 (15).

¹⁷ *Ibid.*, s. 92 (10).

The two main features of the Alberta statute were (1) the requirement of a permit from the Debt Adjustment Board as a condition precedent to judicial and other proceedings with respect to the recovery of money, and (2) the provision in the Act whereby the Board could bring about a composition and settlement. Addressing himself to the argument that the Act was an attempt to legislate in relation to bankruptcy and insolvency, Duff C.J.C. stated, on the first point, that the requirement of a permit, while procedural in form, struck at the substance of the creditor's rights. It deprived the creditor, for example, of the right to present a bankruptcy petition. In regard to the second point, the Act contemplated the use of the Debt Adjustment Board's powers, including those relating to the issue of permits, "to enable it to secure compulsorily the consent of the parties to arrangements proposed by it for composition and settlement." While bankruptcy was not mentioned, normally the Board's duties and powers as to compositions would come into operation when a state of insolvency existed. In fine, the whole statute was conceived as a means of protecting embarrassed debtors who were residents of Alberta.

It is clear, however, that existing Dominion legislation has not covered the entire field of debt adjustment legislation. The Bankruptcy Act enables compositions and arrangements to be made only after a receiving order or voluntary assignment.¹⁸ The Companies' Creditors Arrangement Act,¹⁹ while providing for schemes of arrangement both before and after bankruptcy proceedings, is of limited application, as its name implies. The Farmers' Creditors Arrangement Act²⁰ is likewise of limited application, although enabling compositions or arrangements to be made in advance of a receiving order. It is, indeed, difficult to disagree with Crocker J.,²¹ who alone dissented, that the Alberta Debt Adjustment Act, 1937, was not *ultra vires* "except in so far as its provisions may be found to conflict with any existing Dominion legislation strictly relating to any of the clauses of subjects specially enumerated in s. 91 of the British North America Act, or as being necessarily incidental to the particular subject-matter, upon which the Parliament of Canada has undertaken to legislate as falling within one or other of the said enumerated heads." According to Crocker J., the obvious object of the statute was to grant relief to hard-pressed resident

¹⁸ R.S.C. 1927, c. 11, s. 11.

¹⁹ 1932-33 (Dom.), c.

²⁰ 1934 (Dom.), c. 53, as amended.

²¹ [1942] 1 D.L.R. 1, at p. 20.

debtors and its provisions were predominantly directed to procedure in civil matters in provincial courts; provincial legislative authority was given in this respect by s. 92(13) and (14) of the British North America Act.

Reference re Alberta Debt Adjustment Act, 1937, reveals unmistakably and clearly the defects of the constitutional reference as a means of passing upon the validity of social legislation. The opinion of Duff C.J.C. in a number of particulars indicates the difficulty of avoiding the temptation, in the absence of concrete issues arising out of an actual controversy, to yield to arguments of invalidity based on possible results of the application of the impugned statute.²² Perhaps the most surprising feature of his opinion lay in the fact that it was not supported by even a single authority of any kind. If this suggests the possibility of "sweeping the board clean" in constitutional interpretation, the Supreme Court should have a busy and interesting time.

* * *

TRUSTS — PURPOSE TRUSTS — POWER OF SUCCESSOR TRUSTEE.—*In re Voorhis' Estate*,¹ a New York decision, raises a point which does not seem to be covered by any Canadian or English authority. By paragraph 24 of her will, the testatrix gave her executor and trustee \$10,000 "to be used by him to place a memorial window, or some other memorials, to cost any sum in his discretion up to the sum of one thousand dollars, in Christ Church Cathedral, at St. Louis, Mo., and to place monuments and markers in my family subdivision of the Clark and Glasgow plot in the Bellefontaine Cemetery, at St. Louis, Mo." The trustee died soon after the testatrix, and a successor trustee was appointed *ex parte*, and was authorized by an order of the court to administer the "trust" created by the foregoing paragraph of the will. He spent \$1,000 for a memorial window and \$1,732.60 for a monument and markers, and made certain other expenditures from the income of the balance on hand. Objection was taken by residuary legatees to expenditures from

²² *E.g.*, Duff C.J.C. finds that the requirement of a permit strikes at the substance of creditors' rights and hence is repugnant to certain Dominion statutes; he then concludes that the Act "cannot be construed as limited in . . . application to such debts and demands [as are within exclusive regulative authority of the province]". Again, he suggests that if the Act were upheld it could not be contended, in respect of an obligation to which it applied that there was a "debt owing" to the creditor, within the meaning of s. 4 of the Bankruptcy Act.

¹ (1941), 27 N.Y.S. (2d) 818.

the income; although they apparently conceded that the successor trustee could administer the "trust", they claimed that it terminated when the monuments and markers were purchased. It was held that the successor trustee could not execute the "trust". The testatrix had given a sum of money without requiring it to be used wholly for the purpose of the "trust", discretion being left in the trustee; and therefore the failure of the trustee named in the will, to act prevented the execution of the "trust."

The "purpose" or "honorary" trust,² more properly referred to by the RESTATEMENT ON TRUSTS³ as a matter of the transfer of property "upon an intended trust for a specific non-charitable purpose" with no definite or definitely ascertainable beneficiary designated, has become legally acceptable within limits,⁴ although it is not strictly speaking a trust since there is no *cestui que trust* who can enforce it.⁵ The acceptability of the "purpose trust" has amounted to a recognition by the courts that the trustee has the power, and may if he will, apply the property to the named purpose, although he cannot be legally compelled to do so.⁶ Theoretically, the same attitude might be taken to an intended trust for some indefinite or general non-charitable purposes. But justification for the refusal of the courts in such cases even to permit the trustee to apply the property to the named purposes lies in their uncertainty; and *Morice v. Bishop of Durham*,⁷ as Professor Scott points out, is supportable on this ground.⁸

The objections of Professor Gray⁹ and others¹⁰ to the validity of the "purpose trust" have been more or less technical, and grounded on the requirements of a valid and enforceable trust. But the objections become matters of terminology once it is recognized that the "purpose trust" involves only the conferring of a power. If neither public policy nor the rule against per-

² "Purpose" is the Canadian and English, "honorary" the American designation.

³ Vol. 1, s. 124.

⁴ The rule against perpetuities must not be infringed. The RESTATEMENT OF TRUSTS, vol. 1, s. 124, adds that the purpose must not be capricious.

⁵ Cf. *Morice v. Bishop of Durham* (1804), 9 Ves. 399; (1805), 10 Ves. 521.

⁶ Cf. *re Dean* (1889), 41 Ch. D. 552; *Re Chardon*, [1928] 1 Ch. 464.

⁷ *Supra*, note 5.

⁸ SCOTT ON TRUSTS, vol. 1, pp. 614 ff.

⁹ Gray, Gifts for a Non-Charitable Purpose (1902), 15 Harv. L. Rev. 509; GRAY, RULE AGAINST PERPETUITIES (3rd ed. 1915), appendix H, p. 624. Gray objected that the intended trust was void because there was no beneficiary.

¹⁰ E.g. BOBERT, TRUSTS AND TRUSTEES, s. 166, likewise takes his stand on the absence of any beneficiary, claiming that to allow the testator's purpose to be carried out in such a case would alter one of the basic ideas of the trust.

petuities would be infringed in carrying out the purpose of the testator, there is little social gain in refusing to allow the exercise of the power merely because it would not directly benefit some living person.¹¹

Accepting then that the trustee has the power to carry out the testator's specific non-charitable purpose, although there is no enforceable duty upon him, what is the situation when he dies without having exercised the power? If he refused or was unwilling to effectuate the testator's purpose he would have to hold the property on a resulting trust.¹² The *Voorhis Case* takes the view, in relation to the facts therein, that there is a resulting trust of the beneficial interest at the moment of the testator's death, which is subject to divestiture by the exercise of the power by the testator's nominee only.¹³ Professor Scott and others take the view that a resulting trust arises when the nominated trustee fails to exercise his power.¹⁴ If such trustee, although not unwilling to exercise the power, dies before doing so, can the court appoint a successor to exercise it? According to Professor Scott, this is a question which had not been raised in the cases; but he was "inclined to think that there is no sufficient reason why the court should not" authorize a substitute to exercise the power, for normally the authority conferred by the testator would not be of so personal a character that there would be an intention by the testator to limit it to his nominee.¹⁵ The *Voorhis Case* in taking the opposite view stressed not only the fact that the grant under the will was subject to the discretionary use of the trustee (so that the property vested in the residuary legatees subject to divestiture only by the named trustee), but also that "the nature of the objects to be attained necessarily involved the exercise of the discretion of a person having deceased's confidence. Her language does not fit the viewpoint of an impersonal expenditure."¹⁶

¹¹ SCOTT ON TRUSTS, vol. 1, pp. 621 ff.

¹² *Ibid.*, p. 625.

¹³ See also, Smith, *Honorary Trusts and the Rule against Perpetuities* (1930), 30 Col. L. Rev. 60. The Court in the *Voorhis Case* stated, however, that if the testatrix's instructions were *specific* the prior death or disqualification of the trustee would not prevent execution of the trust by a successor, since no property would result in such case to the residuary legatees.

¹⁴ SCOTT ON TRUSTS, vol. 1, p. 625; SIMES, FUTURE INTERESTS, vol. 2, s. 555.

¹⁵ SCOTT, *op. cit.*, *supra*.

¹⁶ (1941), 27 N.Y.S. (2d) 818, at p. 823.

Collateral points were raised by this case, such as the applicability of s. 13a of the New York Personal Property Law under which a purpose trust enjoys a statutory status as charitable, and hence is enforceable as such. *Quaere* whether the first part of the clause in the will (allowing the expenditure of money up to \$1000 for a church memorial window) would not be held charitable at common law.

WILLS—EXPRESS EXCLUSION OF CERTAIN NEXT OF KIN FROM BENEFITS — RIGHT OF EXCLUDED PERSONS TO SHARE ON INTESTACY.—In *Bateman v. Bateman*,¹ a testator declared in his will: "I dont want [two named next of kin] to have anything." Baxter C.J. of the New Brunswick Supreme Court held that the excluded next of kin were not prevented from sharing in that portion of the estate as to which there was an intestacy. In so doing, he followed *Re Holmes, Holmes v. Holmes*,² where Kay J. stated: "A testator cannot deprive those who are by law entitled to his estate by words of exclusion only. He can only do that by giving the estate to somebody else."

A possible construction would have been to find a gift by implication of the undisposed part of the estate to the non-excluded next of kin. The tendency, of course, is to lean against finding that the testator intended a gift not set forth in his will. Nevertheless, gifts by implication are not uncommon.³ And there is respectable authority contrary to *Re Holmes, Holmes v. Holmes* in connection with the problem under discussion. In *Vachell v. Breton*,⁴ the testator gave to certain children "10 s. and no more." He made no disposition of his personalty. It was held that the excluded children were not entitled to share in the distribution of the personalty. The Court in *Ramsay v. Shelmerdine*⁵ spoke of the "singular conclusion" of the House of Lords in the *Vachell Case* in holding that the addition of the words "and no more" deprived the children under an intestacy. In *Bund v. Green*,⁶ the testator declared it to be his intention that certain next of kin should take no benefit from his property except what was given to them, and that they should not take any share of personalty as to which he might die intestate. The Court held that this declaration amounted to a gift in favour of those taking by law on a distribution of personalty, excluding, however, the persons specified.

Suppose the clause of exclusion in the will covered all of the next of kin. This eventuality was discussed in *Lett. v. Randall*,⁷ and the Court stated that in such case the operation of the Statute of Distributions on an intestacy would not be affected. The policy seems to be that the Crown is not allowed

¹ [1941] 3 D.L.R. 762 (N.B.).

² (1890), 62 L.T. 383.

³ Cf. PAGE ON WILLS (3rd ed. 1941), s. 930.

⁴ (1706), 5 Bro. P.C. 51, 2 E.R. 527.

⁵ (1865), L.R. 1. Eq. 129, at p. 134.

⁶ (1879), 12 Ch. D. 819.

⁷ (1855), 3 Sm. & Giff. 83, 65 E.R. 572, affirmed 2 DeG. F. & J. 388, 45 E.R. 671.

to take by implication if there is an heir capable of inheriting, or next of kin.⁸

So far as the position of excluded persons under dependents' relief legislation is concerned, there is no reason to deny to them the benefit of such legislation.

* * *

CRIMINAL LAW—MURDER—SELF - DEFENCE—PROVOCATION—BURDEN OF PROOF.—*Rex v. Philbrook*¹ and *Mancini v. Director of Public Prosecutions*² raise questions in relation to the burden of proof when issues of self-defence and provocation are involved in trials for murder. In charging the jury, the trial judge must, of course, deal with the burden of proof and, in addition, he must place before the jury whatever defences are supported by any evidence.³ The foregoing cases make it clear that the duty of the Crown to prove the charge beyond reasonable doubt, with the consequence that the benefit of any doubt goes to the accused, involves the further result, where self-defence or provocation is properly left to the jury, that the accused obtains the benefit of these defences if there is any doubt whether they have been established or not.

The *Philbrook Case* establishes an additional point which bears on the application of s. 1014 of the Criminal Code. Misdirection in the charge to the jury in dealing directly with the specific defence relied upon cannot be excused under the curative provisions of s. 1014 on the ground that the charge, taken as a whole, revealed no misdirection.

* * *

AGENCY — TORTS — MASTER AND SERVANT — LIABILITY OF SERVANT ACTING WITHIN SCOPE OF EMPLOYMENT.—In *McIntosh v. Homewood Sanitarium of Guelph Ltd.*,¹ an action against the defendant sanitarium and Clare, its superintendent, for damages for false imprisonment, Mr. Justice Henderson gave an inexplicable decision with respect to an elementary point of law, when he dismissed the action as against Clare because the latter had acted in everything he did within the scope of his authority

⁸ Cf. *Attorney-General v. Henchman*, 3 Myl. & K. 485.

¹ [1941] O.R. 352, [1942] 1 D.L.R. 627 (C.A.).

² [1941] 3 All E.R. 272, 58 T.L.R. 25 (H.L.).

³ *E.g.*, *Rex v. Hopper*, [1915] 2 K.B. 431.

¹ [1941] O.W.N. 451.

as agent of the sanitarium. Where the question is one of liability in tort, the fact that a servant acted within the scope of his employment does not exonerate him; it merely gives the injured party an additional right against the master.²

* * *

PRACTICE—JURY AWARDING MORE THAN AMOUNT CLAIMED BY PLAINTIFF—AMENDING STATEMENT OF CLAIM.—In *Kong et al v. Toronto Transportation Commission*,¹ an action brought under The Fatal Accidents Act, the plaintiff claimed \$1,500 as damages, but was awarded \$3,010 by a jury. The excess of this amount over the amount claimed was not noticed by the judge and counsel at the trial. Subsequently, a motion was made in Chambers by the plaintiff for leave to amend the statement of claim accordingly.

When granting this motion, on discretionary grounds, Roach J., who had presided at the trial, referred to *White v. Proctor*,² *McLellan v. Milne et al* and *Lockhart v. C.P.R.*⁴ Evidently his attention was not called to the much earlier case of *Quillinan v. Stuart*,⁵ tried at Toronto in 1916. It is also not mentioned in any of the decisions cited above. This was an action for libel and came before Masten J. and a jury. The damages claimed were \$10,000. When finding for the plaintiff, however, the jury awarded her \$15,000. Her counsel, the late Wallace Nesbitt, K.C., immediately applied for leave to amend the statement of claim by increasing the claim to \$15,000. Leave was at once given and judgment given for the larger sum with costs. It appears to have been done as a matter of course.

An appeal was taken, but on the two grounds that certain letters produced were not defamatory and that the damages were excessive. No fault seems to have been found with the trial judge's action in allowing the amendment of the statement of claim. One does not find this procedure queried in the Appellate Division either. Meredith C.J.O.⁶ referred to the amendment having been made, but did not make any comment on the fact. A new trial was ordered for reasons not connected with the making of the amendment. It would thus seem that

² Cf. SALMOND ON TORTS, 9th ed., at p. 88 ff.

¹ [1942] O.W.N., 163.

² [1937] O.R., 647.

³ [1937] O.R., 742.

⁴ [1941] 2 D.L.R., 609.

⁵ (1916), 36 O.L.R., 474.

⁶ *Ibid.*, at p. 477.

what was considered novel in the White case had occasioned no difficulty in *Quillinan v. Stuart*, twenty-one years earlier.

It is perhaps surprising that juries do not more often award a greater amount than that claimed. They frequently do not know what sum is mentioned in the pleadings. A plaintiff's counsel does not always inform the jury of the amount being sought as damages, although it was stated by Moss C.J.O. in *Bradenbury v. Ottawa Electric Railway*⁷ that it was not considered objectionable to do so. The jury then have no restricting yardstick to go by and it should not appear strange if their estimate happens to exceed that of the plaintiff, instead of being either below or equal to it. As a member of the Supreme Court of Canada once remarked in an unreported case in which the writer was engaged:—"It is just as easy for a plaintiff to write \$15,000 in his statement of claim as \$5,000, and it really makes no difference. In either event, the members of the jury alone decide what sum, if any, the plaintiff shall actually be awarded." Where they do not know what amount the plaintiff claims, it is difficult to comprehend why they should be expected not to exceed that figure in forming their own estimate. When, therefore, a jury does decide on a sum more generous than what the plaintiff had in mind, one greatly doubts that the Court is not justified in promptly allowing an amendment to the statement of claim, without more ado. The *Quillinan* case is seemingly a precedent for such a course.

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TRIALS.—ARCHITECT ASSISTING COURT IN ACTION ARISING OUT OF BUILDING CONTRACT.

It has been suggested by the courts at various times that a building contract is one in which it would be desirable for the Court to have the assistance of an architect under Ontario Consolidated Rule 268 (see *House Repair Company, etc., v. Miller*).¹ The courts, however, have generally appeared to consider that such assistance should be given by way of evidence. Rule 268 reads as follows :

RULE 268—(1) The Court may obtain the assistance of merchants, engineers, accountants, actuaries, or scientific persons, in such way as it thinks fit, the better to enable

⁷ (1909), 19 O.L.R., 34.

¹ 49 D.L.R. 205

it to determine any matter of fact in question in any cause or proceeding, and may act on the certificate of such persons.

(2) The Court may fix the remuneration of any such person and may direct payment thereof by any of the parties.

(3) Unless all parties are *sui juris* and consent, the powers conferred by this Rule shall only be exercised by or by leave of a Judge.

In a somewhat complicated action arising out of a building contract tried recently before Mr. Justice Mackay, the writer and W. F. Nickle, K.C. agreed that the use of experts by both sides would result in a long and confusing trial. It was, therefore, agreed that Mr. Colin Drever, a well-known architect in the City of Kingston, should be suggested to the Court as a proper person to give the Court assistance under this Rule.

Mr. Justice Mackay was pleased to accept the suggestion and Mr. Drever sat at his Lordship's side during the trial to advise him on technical matters. He had previously inspected the buildings in question in company with the parties to the action and their solicitors, and had noted the points in dispute. The result was that His Lordship was able to refer to Mr. Drever several questions as to the fair cost of certain extras, questions as to whether certain items claimed as extras were fairly within the contract as it would be interpreted by builders and architects, and numerous other technical questions which would normally have involved the opinions of experts on both sides. In the result, a trial that might well have lasted a week was concluded in less than two days.

Provided a suitable expert can be found this method has much to commend it. It appears to be similar to the Admiralty practice of having Trinity Masters sit with the Judge to advise him on technical points. If the practice were to be adopted generally, assistance could be derived from the Admiralty practice.

In retrospect, we can see that the procedure adopted was open to improvement. For instance, in view of the possibility of appeal it might have been better to have the Judge submit to the architect certain written questions. The answers could be treated as the equivalent of a jury's findings thus leaving the questions of law which might be the subject of appeal

separated from the facts for the assistance of an appellate court. A certificate might also have covered the ground.

The Judge having adopted this method is not bound to accept any of the expert's conclusions or interpretations, and in fact there might well be many questions on which he might for good reason disregard the expert's view.

Another field where this method might be used is where personal injuries have been suffered. The parties might agree upon a doctor who would examine the patient and give a certificate on the basis of which the Court could assess damages. A great deal of time could thus be saved for busy doctors.

At the present time it is more than usually desirable to prevent waste of the time of witnesses. The profession has been somewhat arbitrary in the past in forcing witnesses to attend at its convenience without consulting the convenience of the witness. The result is that many witnesses deliberately evade the giving of evidence. The profession has no one but itself to blame for this attitude on their part and might well consider every possible expedient by which time and expense is saved the innocent bystander, to say nothing of the time saved by the courts and the lawyers themselves.

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