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

WILL REGISTERED WITHOUT PROBATE — CONVEYANCE BY EXECUTRIX (DEVISEE) WITHIN ONE YEAR AFTER TESTATOR'S DEATH.—In my comment[1] on *Re National Trust Co. and Mendelson*[2] I ventured to suggest that the decision was so questionable on principle and authority that the point should be reconsidered by an appellate court. In that case, on an application under the Vendors and Purchasers Act, R.S.O. 1937, c. 168, a purchaser was compelled to accept a conveyance of land in Ontario from an executor under a Quebec notarial will which had neither been admitted to probate nor resealed in Ontario. The result was reached, it is submitted, by an unjustified extension of the alleged principle that an executor takes not under the probate, but under the will. In the recent case of *Re Pickles and Johnson*,[3] also on an application under the Vendors and Purchasers Act, Fisher J.A. compelled a purchaser to accept a conveyance from an executor under an Ontario will not admitted to probate in Ontario or elsewhere. The decision obviously creates a serious danger, and the result was reached, it is submitted, by an unjustified construction of certain provisions of the Registry Act, R.S.O. 1937, c. 170. Reliance was placed chiefly upon the decision of Middleton J.A. in *Re Hollwey and Adams*,[4] but in that case the conveyance in question was made

[1] (1920), 20 Can. Bar Rev. 256.
[2] [1941] O.W.N. 435, [1942] 1 D.L.R. 438.
[3] [1942] O.R. 246, [1942] 2 D.L.R. 653.
[4] (1926), 58 O.L.R. 507, [1926] 2 D.L.R. 960; *cf. Re Dennis and Lindsay* (1927), 61 O.L.R. 228, [1927] 4 D.L.R. 848, in which it was held that a conveyance made, more than two years after the owner's death, by the persons beneficially entitled on intestacy, became fully effective by the vesting of the land in the grantors three years after the death under the

by the devisees under a registered but unproved will, long after the expiration of three years from the testator's death, and consequently after the land had become vested in the devisees by virtue of the Devolution of Estates Act. The devisees were also executors, but this would not seem to be material in the circumstances. Owing to the lapse of time the possibility of another will being found was practically negligible, and in that sense no harm was done by the decision. On the other hand, in *Re Pickles and Johnson* the unproved will was registered under the Registry Act, the land was sold by the devisee-executrix, and the purchaser was compelled to accept a conveyance from her, all within less than three months from the testator's death. The purchaser naturally objected to accepting a conveyance from a person deriving title under the unproved will, in view of the possibility that a later will might be discovered and registered within the time or times allowed by s. 79 of the Registry Act. That section provides that a will "registered within twelve months after the death of the testator shall be as valid and effectual against subsequent purchasers and mortgagees as if the same had been registered immediately after such death." Then follows a provision that a will registered at a still later time in special circumstances "shall be a sufficient registration within the meaning of this Act."

Fisher J.A. purported to be giving effect to "the basic principles of ss. 73 and 74" of the Registry Act, "under which a purchaser without actual notice and claiming by priority of registration, is given complete protection"—a protection which "would not be in any way extended by a grant of probate." This is somewhat alarming language in two respects. It suggests that an unproved will, which may or may not be the last will, is, if registered, just as good as a proved will, and it suggests that ss. 73 and 74 of the Registry Act have this effect. Both points will now be discussed.

Apart from the Registry Act, it would seem to be plain that a person "who for the time being is clothed by the court with authority as personal representative is to have the freeholds vested in him,"[5] and can give a good title to a purchaser.[6] There-

Devolution of Estates Act. In 1927, when application was made to a court, twenty years after the death, it might safely be assumed that there was no will.

[5] Per Phillimore L.J. in *Hewson* v. *Shelley*, [1914] 2 Ch. 13, at p. 46, quoted in my former comment (1942), 20 Can. Bar Rev. 256, at p. 259.

[6] The principle was applied in *Hewson* v. *Shelley* to a conveyance by an administratrix whose grant was afterwards recalled on the discovery of a will.

fore if a will is proved the executor can make a valid conveyance to a purchaser, even though the probate is subsequently recalled on the discovery of a later will. The purchaser is protected because his grantor's status is established for the time being by the grant of probate, and not because the conveyance is made by a person who is named as executor in a will which some one says or thinks is the last will. If a purchaser takes from an executor under an unproved will, he must on general principle take the risk that the will, and consequently the conveyance to him, is waste paper by reason of the discovery and probate of a later will.

But now it is suggested that, by virtue of the Registry Act, in some mysterious way an unproved will, if registered, confers on the executor therein named a power to make a conveyance which will be valid notwithstanding the discovery and admission to probate of a later will, and the registration of the probate, all within one year from the death or within the extended period mentioned in s. 79 of the Registry Act,—events which may still come to pass in the very case which is now under discussion.[7] Obviously, this strange result can be justified only if there is some statutory provision which expressly or impliedly requires it. As a general rule, an instrument which is a nullity is not, by the fact of registration, rendered valid. For example, a conveyance in which the grantor's name is forged does not become valid by registration,[8] and it would seem to be clear that a subsequent purchaser from the grantee under the forged conveyance would be in no better position. Is there any substantial difference between such purchaser, and a purchaser who takes a conveyance from a person who is named as executor in a will which, as it later turns out, has been revoked by a later will and is therefore of no more validity in itself than if it had never existed. It is true that if the earlier will is admitted to probate, a conveyance from the executor for the time being is valid, and the purchaser is protected even though the later will is afterwards discovered and the probate of the earlier will is recalled. This follows from the principle stated in *Hewson* v. *Shelley*, cited above. It is a different thing, however, to say that mere registration of the earlier, and in fact revoked, will,

[7] If no later will is discovered, then after the lapse of three years from the death the land will vest in the devisee as such and the defect of the conveyance will presumably be cured, at least in the sense that the danger of the existence of an adverse claim will have reached almost the vanishing point.

[8] *Freehold Loan Co.* v. *McArthur* (1885), 5 Man. R. 207; *In re Cooper, Cooper* v. *Cooper* (1882), 20 Ch. D. 611.

which has not been admitted to probate, converts this revoked will into the last will so as to protect a purchaser from the executor named therein as against a person claiming under the later, and in fact only valid, will. It is not fanciful to suppose that in the later will both executor and devisees may be changed; and the persons claiming under the will would seem to be entitled under s. 79 of the Registry Act to a period of twelve months from the death, or in special circumstances a longer period, within which to register that will. In *Re Pickles and Johnson* these hypothetical, but possibly existing, persons seem to have been somewhat summarily, and, it is submitted, wrongfully, deprived of their rights under the statute within less than three months after the testator's death.

It is respectfully submitted that there is no provision in the Registry Act which requires a court to say that a worthless instrument becomes by registration a good root of title in favour of a subsequent purchaser from the registered owner.[9] Section 56 permits an unproved will to be registered, but does not say that an invalid or revoked will becomes a valid will, the last will, or "the will" of the testator. Section 79, as we have seen, creates an exception to the general principle of ss. 73 and 74, in that it allows an extended time for registration of a will without impairment of the rights of persons claiming under it as against purchasers without notice; and it would seem to be fairly plain that this provision is intended for the benefit of the persons claiming under the will "against any precipitate action either by the heir at law or those claiming under another will,"[10] as, for example, under an earlier in fact revoked will, and it would be difficult, as well as grotesque, to construe the section as intended for the protection of persons acting "precipitately" under the earlier will against the persons claiming under the last will.

We come finally to ss. 73 and 74. These sections are far from being artistically drawn, and their wording has given rise to some nice problems. Their general purpose would seem, however, to be clear, namely, to provide that, as between persons having competing claims relating to the same land, the person who, without having actual notice of the existence of the competing claim, is the first to register the instrument under which

[9] A different principle may apply under the land titles system, but, generally speaking, under the registry office system an instrument is registered for what it is worth.

[10] *Re Hollwey and Adams* (1926), 58 O.L.R. 507, at p. 510, [1926] 2 D.L.R. 960, at p. 962.

he claims, is entitled to priority. It must be assumed that the person who is claiming priority by virtue of the prior registration has a claim of some validity in itself, and that the only question dealt with by the statute is whether his claim or some one else's claim is entitled to priority. The sections simply will not bear the construction that a person who has no valid claim can, by registering an instrument which is in effect a worthless piece of paper, without actual notice of any one else's claim, by this means render his claim valid as against a person who claims under a subsequent valid instrument or as against any other person.

As regards the predecessor of s. 73, it was said by Macaulay C.J. in *Doe dem. Spafford* v. *Breakenridge*,[11] "The Registry Act never could have intended to set off forged deeds or conveyances by persons having no title, in preference to rightful conveyances of the true owners." The latter "cannot be fraudulent and void as to deeds not from the same party, but from strangers who had no title," and registration "of a forged deed, or a deed from a person falsely personating the owner or having no valid or legal title" is not "such a registration as can give efficacy to the deed" by virtue of priority of registration.

It is true that subsequently, namely, in 1865, the Registry Act was amended by the enactment of the predecessor of the present s. 74. In the cases in which this section has been discussed,[12] it has never been suggested, so far as I am aware, that its effect is to make valid, on registration, an instrument which before being registered is invalid, and it would seem that the amendment was directed solely to the question of notice, and the relation of notice to priorities. In 1865 in Upper Canada the courts of common law were still distinct from the Court of Chancery. In equity a person took subject to any earlier instrument if he took with notice, actual or constructive, of its existence. At law there was no corresponding doctrine of notice applicable to competing claims to the legal estate. The primary purpose of the statute was a negative one, namely, to prevent a person from asserting at law, by virtue of prior registration, a claim under an instrument taken with actual notice of an earlier instrument. It also had the effect of excluding the equitable doctrine of constructive notice, so that in equity as

[11] (1851), 1 U.C.C.P. 492, at p. 505.

[12] See, *e.g.*, *Millar* v. *Smith* (1873), 23 U.C.C.P. 47; *cf. Rose* v. *Peterkin* (1885), 13 Can. S.C.R. 677, at pp. 709, 710, Strong J., and, in the Court of Appeal for Ontario, *sub nom. Peterkin* v. *McFarlane* (1881), 9 O.A.R. 429, at p. 465; *Cooley* v. *Smith* (1877), 40 U.C.Q.B. 543, at pp. 557 *ff.*

well as at law, actual notice is sufficient, and constructive notice is not sufficient, to defeat a claim based upon prior registration. In 1873 the predecessor of s. 73 was also amended by the insertion of the words "without actual notice."

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WILLS AND THE REGISTRY ACT.—Perhaps the most startling feature of the judgment of Fisher J.A. in *Re Pickles and Johnson*[1] is the fact that section 79 of the Registry Act[2] appears to have been practically repealed by his decision. If, as the judgment indicates, the mere registration of any document within a year after death, whether a purported will or conveyance from an heir or next of kin, gives priority to purchasers under that document regardless of the true will being registered later within the year, section 79 ceases to have any importance whatsoever. The learned judge, faced with the express language of that section, to the effect that a will or probate registered within twelve months after the death "shall be as valid and effectual against subsequent purchasers and mortgagees as if the same had been registered immediately after such death," recognized that there was some difficulty in saying that a document registered within three months of the testator's death could not be supplanted by a true will registered within a year. In his reasons for judgment he indicated that while the words "subsequent purchasers and mortgagees", as used in section 79 alone, might have caused difficulty,[3] he felt that with reference to section 73 of the Registry Act they must mean subsequent "not in point of time but in point of title." This seems to

[1] [1942] O.R. 246, [1942] 2 D.L.R. 653.

[2] R.S.O. 1937, c. 170: "A will or the probate thereof and letters of administration with the will annexed registered within twelve months next after the death of the testator shall be as valid and effectual against subsequent purchasers and mortgagees as if the same had been registered immediately after such death, and in case the devisee, or person interested in the land devised in any such will, is disabled from registering the same within such time by reason of the contesting of such will or by any other inevitable difficulty without his wilful neglect or default, then the registration of the same within twelve months next after his attainment of such will, probate or letters of administration, or the removal of such impediment, shall be a sufficient registration within the meaning of this Act."

[3] The learned judge indicated (p. 249) that standing alone " 'subsequent' might mean subsequent to a period of a year fixed by s. 79." With respect, this seems to make nonsense of the section. "Subsequent" must, as used in this section, mean subsequent to the date of the testator's death, and so it has been understood in all the cases, to be later referred to, dealing with the section.

ignore the long history of section 79 beginning with English legislation of 1703, from which our present section 79 was directly taken.

The desirability of protecting purchasers and mortgagees of land undoubtedly lies behind any registration system. At the same time, with the introduction of the first Registry Act in England, it was felt equally necessary to protect persons claiming by will against hasty action on the part of other parties, usually the heir-at-law, claiming adversely. Hence, beginning with the West Riding Act of 2 and 3 Anne, c. 4, in which deeds, conveyances and devises by will, not registered as provided by statute, were deemed to be fraudulent and void against any subsequent purchaser, an exception was made to the doctrine of priority of registration in favour of a will being registered after other documents of title had gone on the abstract. It is a queer commentary on our legislative system that section 79 of the present Ontario Registry Act is, in the main, a reenactment of the first attempt, made in 1703, to protect devisees, despite the fact that later English legislation clearly showed the need of placing some limits on the period of time in which a will discovered after the testator's death could be given priority over transfers made prior to its registration. The West Riding Act merely provided that the titles of purchasers and mortgagees were liable to be defeated upon wills being registered within six months after the attainment of them. As Turner L.J. stated in *Chadwick* v. *Turner*,[4] it was probably due to the inconvenience of permitting a will discovered at any time in the future to displace previously registered transactions which caused amendments in the other early Registry Acts in England. These Acts undoubtedly furnished the basis for Canadian legislation, but, strangely enough, they were never adopted in their entirety, with the result that in *Re Pickles and Johnson* the very inconvenience mentioned in *Chadwick* v. *Turner*, and still retained in sec. 79, was used by Fisher J.A. as a reason for repealing, in effect, the whole section.

The earliest appearance, in Canada, of the forerunner of our present section 79 was in the fifteenth clause of 35 Geo. III, c. 5. Robinson C.J. indicated in *Doe dem. Eberts* v. *Wilson*[5] that it was based on the language found in the Middlesex Registry Act of 1708.[6] This Act provided for the registration

[4] (1866), L.R. 1, Ch. 308 at p. 317.
[5] (1848), 4 U.C.Q.B. 386.
[6] 7 Anne, c. 20. While the Canadian section is no doubt based on this Act, in principle it accords more with the earlier 1703 Act.

of memorials of deeds and wills, and in its first clause stipulated that every deed and devise by will "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration" unless a memorial of the deed or will was registered at such times and in such manner as was therein provided. Section 8 of the same Act provided that all memorials of wills should be registered within six months after the death of every testator dying within Great Britain or within three years after the death of every testator dying "upon the sea or in any parts beyond the seas" and further provided that all wills so registered "shall be as valid and effectual against subsequent purchasers as if the same had been registered immediately after the death etc." The early Ontario Act was in exactly the same language with the exception that there was a straight provision for registration of all wills within six months, no extended time being given for persons outside the country.[7] The Ontario Act further provided, as did the first Registry Act of 1703 in England, that in the event of "inevitable difficulty" in obtaining a will, the devisee under the will was given the same protection against prior registrations so long as he registered within six months after he had obtained the will. In the Middlesex Registry Act of 1708 this extremely wide privilege was seriously curtailed, and section 9 provided that where a devisee was prevented by inevitable difficulty from exhibiting a memorial of the will within the six months (or longer period for persons dying outside Great Britain) he should within two years of the death of a person resident in Great Britain register a memorial of the contest or impediment which prevented him registering a memorial of the will, and such registration gave him the same protection as if he had registered the contents of the will itself. Furthermore, in case a will was concealed or suppressed, the Act of 1708 expressly provided that any purchaser was not to have his title disturbed unless the will was actually registered within five years of the death of the testator. A similar limitation was made in the North Riding Act of 1734, 8 Geo. II, c. 6, which placed a limitation of three years after the death of a testator in which the title of purchasers could be disturbed by the production of a concealed will. The liberality of the Ontario statutory provision which contained no such limitations as these early English Acts, was commented on in *McLeod* v. *Truax*[8], where the Court said :

[7] See this difference discussed in *Doe dem. Eberts* v. *Wilson, supra.*

[8] (1837), 5 O.S. 455. See also Proudfoot V.C. in *Re Davis* (1879), 27 Gr. 199 at p. 203: "The effect of our registry law on the subject of wills

> It will be seen that our Legislature was in one respect less careful in guarding the interests of devisees, in omitting (probably by accident) to allow any time in case of the devisor dying out of the Province. In other respects they were more liberal; they give the devisor [? devisee] the benefit of exemption by reason of inevitable difficulty, without requiring him to register the cause of such difficulty within six months or at any time; *and they allow him the benefit of the excuse, so long as the difficulty lasts;* while some of the British statutes will not allow the purchaser to be kept in suspense beyond a limited time; and whether the registering be possible or impossible, the devisee must either contrive to effect it within the time limited, or he may lose his estate.

The liberality in exempting a person claiming under a will is still to be found in s. 79 which was enacted in its present form in 1846 as section 12 of 9 Vict., c. 34. This enactment extended the six months' period of the early Canadian act to twelve months, and provided that a will registered within twelve months of death should be as valid and effectual as if recorded immediately after the death, and further provided that a will registered within twelve months after its attainment by a person who had been prevented by inevitable difficulty in recording the same should be "a sufficient recording." From the legislative background of this section, it seems quite apparent that mere priority of registration, although clearly recognized in the English Acts as the ordinary principle, was displaced by these provisions regarding wills, which were designed to protect devisees against hasty action of the heir-at-law even at the expense of purchasers taking without notice[9]. There seems no justification whatsoever for giving a statute with such a long history behind it an entirely new meaning in 1942. Certainly there seems to be no justification for the view taken by Fisher J.A. in either of the two judgments of Middleton J.A. to which he refers.[10] It is true that in *Re Hollwey and Adams*,[11] Middleton J.A. in

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and the difference between it and the English law, is discussed at some length in *McLeod* v. *Truax*. In some respects ours is more favourable to the devisee, as if there be an inevitable difficulty he is not bound to register the difficulty as required by the English law. And our law allows the devisee the benefit of the excuse so long as the difficulty lasts, which is otherwise under the British Acts."

[9] The general principle is set out in *Doe dem. Elberts* v. *Wilson* (1848), 4 U.C.Q.B. 386 at 389 by Robinson C.J.: "The legislature have first placed all devisees under the peril of being cut out by the prior registration of a deed made subsequently [This must mean subsequent to the death. See note 3, *supra*.] by the heir at law, and have relieved only from this peril a certain class of devisees."

[10] *Re Hollwey and Adams*, 58 O.L.R. 507, [1926] 2 D.L.R. 960; *Re Dennis and Lindsay*, 61 O.L.R. 228, [1927] 4 D.L.R. 848.

[11] *Loc. cit.*

dealing with what is now section 79 said that a will not having been registered within twelve months of the death and the document under which title was being taken in that application not having been challenged for many years after the testator's death, "the jeopardy of displacement by virtue of this section, is non-existent." Middleton J.A. expressly recognized, however, the fact that section 79 was a plain exception to the doctrine of priority of registration, and to the present writer it seems hard to find any reason for concluding that there was no *possible* jeopardy of displacement. Our Act, in light of its history, seems clearly to recognize such a possibility and it is submitted that the judgment in *Re Hollwey and Adams* merely refused to recognize such a theoretical possibility as a bar to title, and did not deny that section 79 was an exception to the doctrine of priority of registration.

With the desire of Fisher J.A. to avoid an unlimited period of time in which previous registered titles might be disturbed by a subsequently discovered will being registered within twelve months of its discovery, one must express every sympathy from the practical standpoint of conveyancing. A survey of the cases shows, however, that the provision has been taken advantage of very rarely,[12] and the mere fact that no one has been sufficiently interested to see that our legislation is properly amended, seems scarcely reason enough to deny the whole purpose of section 79, including the very clear enunciation in the first part of the section, regarding the priority to be given a will registered at any time within twelve months of the death. When the Yorkshire Registries Act, 1884,[13] was passed repealing many of the existing Registry Acts in England, provision was made for registration of a will or, when a person was unable to register the will within six months after death, a notice of such will, and if the latter were done, then if the will were duly registered at any time within two years after the death of the testator, such will would have priority as though registered on the date on which such notice was registered. The Act further provided in section 14 that "every will registered under this Act shall have priority according to the date of the death of the testator if the date of registration thereof be within, or

[12] As illustration of failure to prove "inevitable difficulty," see *Mandeville* v. *Nicholl* (1859), 16 U.C.Q.B. 609; *Stephen* v. *Simpson* (1869), 15 Gr. 594; *Re Davis* (1880), 27 Gr. 199. And see *O'Neill* v. *Owen* (1889), 17 O.R. 525, where the exception to "priority of registration" was recognized, although as the claimant was willing to recognize the title of certain mortgagees from the heir-at-law the case is not as helpful as it otherwise would be.

[13] 47 & 48 Vict., c. 54.

under this Act to be deemed to be within, a period of six months after the death of the testator, or according to the date of registration thereof, if such date of registration be not within, or under this Act to be deemed to be within, such period of six months." These provisions would appear designed to safeguard both the doctrine of priority of registration and the protection of a person claiming under a will against hasty action on the part of adverse claimants. The Judge in *Re Pickles and Johnson*, in his desire to give effect to the doctrine of priority of registration, seems to have eliminated completely the very protection of the person claiming under a will which section 79 was designed to protect. While there is no justification for continuing section 79 in its present form, as previously indicated the remedy would seem to lie with the legislature rather than in a judicial construction of a statute directly contrary to the way in which it has been understood for over 200 years.

C. A. W.

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ADMINISTRATIVE LAW—REVIEWABILITY OF MINISTER'S DETERMINATION OF FAIR PRICE AS BASIS FOR TAX CALCULATION.—Section 98 of the Special War Revenue Act, 1927, added by 1932-33 (Can.), c. 50, s. 20, provides: "Where goods subject to tax under this Part or under Part XI of this Act are sold at a price which in the judgment of the Minister [of National Revenue] is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined." In *The King* v. *Noxzema Chemical Co. of Can. Ltd.*,[1] an action by the Crown for the recovery of excise and sales tax, the Minister of National Revenue, acting under the provisions of s. 98, determined that goods of the defendants were sold at a price less than the fair price on which the tax should be imposed, and also determined what the fair price should be. The defendants were given an opportunity to be heard, and were heard. There was no statutory appeal from the Minister's determinations. The Supreme Court of Canada held that his determinations were not open to review by the courts; Kerwin J. stated that "s. 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal," and Davis J. remarked that "it is a purely administrative func-

[1] [1942] S.C.R. 178, [1942] 2 D.L.R. 51.

tion that was given to the Minister by Parliament in the new s. 98 . . . . . [and] the administrative act of the Minister is not open to review by the Court."

The Court's conclusion that there was to be no review of the Minister's determinations was implicit in its characterization of the Minister's duty or function or act as "administrative". Here was a case in which Parliament had "committed to the head of a department certain duties requiring the exercise of judgment and discretion;"[2] and whatever may be expected from judicial review, it "cannot be expected to insure 'correct' decisions by administrative bodies [for] the correctness of a decision is of course a matter of judgment."[3] Long ago, Lord Bramwell stated in *Allcroft* v. *Lord Bishop of London*[4] that "if a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him," and his opinion so formed cannot be reviewed.

The extent of a court's reluctance to interfere in a matter confided to an administrator's discretion[5] can apparently be gauged from the language it uses in characterizing the act of the administrator. If characterized as "administrative," review is unlikely; it is otherwise of it is characterized as "judicial" or "quasi-judicial."[6] In any event, however, it is the *scope* of judicial review which is important.[7] In the development of administrative law, judicial review of administrative adjudications has become a commonplace with respect to matters of law,[8] of jurisdiction,[9] of adequacy of procedure,[10] of procedural fairness,[11] and even on the question of sufficiency of evidence.[12] The finality of administrative determinations has in a real sense, and this regardless of statutory provisions, been dependent on

[2] See *Bates & Guild Co.* v. *Payne* (1904), 194 U.S. 106.

[3] Report of the Attorney-General's Committee on Administrative Procedure, 1941 (Washington), 79.

[4] [1891] A.C. 666, at p. 678.

[5] *Cf.* Tollefson, *Administrative Finality* (1931), 29 Mich. L. Rev. 839.

[6] See Finkelman, *Separation of Powers: A Study in Administrative Law* (1936), 1 Univ. of Tor. L.J. 313, at p. 321 ff. *Cf.* Report of Committee on Ministers' Powers (Cmd. 4060, 1932) 81. And see the instant case.

[7] *Cf.* Report of the Attorney-General's Committee on Administrative Procedure, *supra*, note 3, at p. 77, setting out what can be expected from judicial review, viz., (1) to check, not supplant, administrative action; (2) to control interpretation of law; (3) to require fair consideration in administrative adjudications; (4) to check extremes of arbitrariness or incompetence in administrative adjudications.

[8] *Cf. Rex* v. *Local Government Board* (1882), 10 Q.B.D. 309.

[9] *Cf. Everett* v. *Griffiths*, [1921] 1 A.C. 631.

[10] *Cf. Re Imperial Tobacco Co. Ltd. and McGregor*, [1939] O.R. 627, affirming [1939] O.R. 213 (C.A.).

[11] *Cf. Frome United Breweries* v. *Bath Justices*, [1926] A.C. 586; *Turner's Dairy Ltd.* v. *Williams*, [1939] 3 W.W.R. 241 (B.C.).

[12] *Cf. Wilson* v. *Esquimalt & Nanaimo Ry.*, [1922] 1 A.C. 202.

judicial approval. Even in the instant case, Kerwin J. seemed to find it necessary to add that "in any event it is quite clear that the Minister acted honestly and impartially and that he gave the respondent every opportunity of being heard, and in fact heard all it desired to place before him."[13] And Davis J., on his part, stated: "If, on the other hand, the function of the Minister . . . . . may be said to be of a quasi-judicial nature, even then all that was necessary was that the taxpayer be given a fair opportunity to be heard in the controversy; and to correct or to contradict any relevant statement prejudicial to its interests;"[14] and this had been done.

With only occasional instruction or assistance from the legislature, the courts have had a free hand in working out the answers to two questions: (1) What administrative acts will be subjected to review? (2) On what objections or in what respects will such acts be reviewed? The approach of the courts to these questions has been such, (and by and large necessarily so) that the answers to the second question gave the clue to the answers to the first. Of course, as in the case at bar, the formal language of the courts has treated these matters in the order enumerated above, although it is manifest than an *a priori* categorization of the acts of administrators with respect to reviewability is pure fiction (except in so far as *stare decisis* governs). In determining how far to review administrative action, the courts must balance nice questions of policy revolving about governmental function in relation to its impact on individuals. The extent to which they can apply the judicial technique to this problem so as to maintain a balance between government and the citizenry is the measure of their statesmanship.

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LANDLORD AND TENANT—LEASE—APPLICABILITY OF DOCTRINE OF FRUSTRATION.—In at least two recent cases it has been held that the doctrine of frustration does not apply in the case of leases. The two cases to which reference will be made are *Vulcan-Brown Petroleums Limited* v. *Mercury Oils Limited*[1] and *Swift* v. *Macbean et ux.*[2]

According to the report of the *Vulcan-Brown Case* the appellant, *Mercury Oils Limited,* leased the gas and oil rights

[13] [1942] S.C.R. 178, at p. 186.
[14] *Ibid.*, at p. 180, citing *Board of Education* v. *Rice,* [1911] A.C. 179, at p. 182.
[1] [1942] 1 W.W.R. 138.
[2] [1942] 1 All E.R. 126.

in a certain parcel of land to the respondent, Vulcan-Brown. Under the lease agreement it was agreed that the respondent should drill an oil well within a certain time, and within four months of the completion thereof should commence to drill another well in the same parcel. If it failed to drill this second well within the time fixed it was to be deemed to have abandoned the land (with certain exceptions) and the appellant was to be entitled to re-enter. The respondent drilled the first well and applied to the Petroleum and Natural Gas Conservation Board for a licence to drill the second well. The licence was refused by the Board by reason of the fact that certain regulations under The Oil and Gas Wells Act, 1931, cap. 46 (Statutes of Alberta), enacted after the execution of the lease, prohibited the drilling of a well within a certain distance of another well. The effect of these regulations was to make it illegal for the respondent to drill another well on the demised parcel.

The respondent brought this action for a declaratory judgment that its failure to drill the second well did not constitute automatic abandonment of the land, and that the drilling of the second well was suspended by causes beyond the control of the respondent. Judgment having been given at the trial for the respondent,[3] the appellant appealed.

The respondent placed reliance on two clauses in previous leases of the parcel which were binding upon the parties to the action. One clause obligated the lessee to carry on drilling operations in strict compliance with the statutes and all other provisions of law applicable thereto; the other provided that drilling on the premises should be suspended only in the event of it being prevented by causes beyond the control of the lessee. The appeal was dismissed with Harvey C.J.A. dissenting.

The Chief Justice was of opinion that an absolute undertaking had been given to perform the drilling of the second well. He says (page 147) "even if it may properly be said that the impossibility of performance is due to a change in the law, it is clearly such a change as should have been foreseen and provided for if it had not been intended that the covenant should be absolute." He does not deal with the applicability of the doctrine to leases.

Clarke J.A., after quoting from the case of *Joseph Constantine SS. Line* v. *Imp. Smelting Corpn; The "Kingswood"*,[4] said: "In the present case I think there was no absolute promise

[3] [1941] 3 W.W.R. 384.
[4] [1941] 2 All E.R. 165, at p. 199.

. . . . and I think it a reasonable implication that the agreement to drill is subject to there being no prevention by the regulations which both parties were bound to observe". Ford J.A. at pp. 150–151, said:

> In my opinion the appeal fails. I agree with the learned trial Judge that which has come to be known as the doctrine of frustration has no application here. Whether the document Ex. 1, which is to be looked to as governing the rights of the parties, is to be treated as a mere contract, or as a grant or demise, the impossibility of performing the covenant to commence the drilling of a second well within the time stipulated does not frustrate, discharge or put an end to the arrangement entered into for the mutual benefit of the parties thereto and their assigns. In fact the appellant treats the arrangement or contract as subsisting and relies upon its terms.
>
> If the doctrine of frustration were relied upon by the appellant I adhere to what I said in *Wulff* v. *Lundy*, [1940] 1 W.W.R. 444. In my opinion the respondent is the grantee of a proprietary interest in land, as a lessee or the owner of a profit a prendre, which has not been and cannot be divested unless, as is claimed by the appellant, the grant itself provides for its being divested.

Lunney J.A. appears from the authorities upon which he relies to hold that the doctrine is applicable. Ewing J.A. agreed with Ford J.A. as to the application of the doctrine.

In the *Swift Case* the plaintiff agreed to let certain premises, together with the furniture, fixtures and effects therein, to the defendants in the event of war within a period of one year from the date of the agreement. The tenancy was to terminate upon the date on which hostilities ceased. Rent was to be payable monthly in advance. In due course the defendants entered into possession of the premises, but, finding them unsuitable for their purposes secured altrenative accommodation and obtained the plaintiff's consent to their subletting the premises. On March 7th, 1941, the subtenants vacated the premises and on that date they were requisitioned by the Government under the Defence Regulations. The defendants thereupon refused to pay further rent, alleging frustration of the contract. The plaintiff, however, contended that the agreement created an estate by demise, to which the doctrine of frustration had no application. The defendants in addition to the defence that there was no lease due to the uncertainty of the commencing and terminating thereof, pleaded the fact that the premises were furnished and therefore the doctrine of frustration applied.

The case was heard by Birkett J. He arrived at the conclusion that the mere fact that the demised premises were let

furnished did not affect the termination of the matter. He says: "I think . . . . in law, the doctrine of frustration has no application to this agreement, and, whatever I might have wished to do in the circumstances, I am compelled to hold that the defendants' liabilities under the agreement are unaffected by the orders of requisition . . . ., and that the plaintiff is entitled in law to recover the rent sued for in this connection."[5] He relied on the cases of *London & Northern Estates Co.* v. *Schlesinger*,[6] *Whitehall Court Ltd.* v. *Ettlinger*[7] and *Matthey* v. *Curling*.[8]

Birkett J. felt that in deference to the arguments of defence counsel that the doctrine applied, he should say something further with respect to the facts. After reviewing the circumstances he concluded that if this were a contract to which the doctrine applied (having previously said that it did not) he found that the contract would be frustrated and ended by the requisition.

It will have been observed that the reason stated for the non-applicability of the doctrine of frustration is that a lease is not merely a contract. While it is a contract it is also the creation of an estate in land and the doctrine cannot be invoked to extinguish a demise of land.

Neither in England nor in Alberta is there any provision comparable to section 2 of the Landlord and Tenant Act, R.S.O. 1937, c. 219. This section provides as follows:

> 2. The relation of landlord and tenant shall not depend on tenure, and a reversion in the lessor shall not be necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation; nor shall it be necessary in order to give a landlord the right of distress that there shall be an agreement for that purpose between the parties.

Would a similar decision with respect to the doctrine be made in Ontario in view of this statutory provision? This peculiar Ontario provision is discussed in WILLIAMS' CANADIAN LAW OF LANDLORD AND TENANT, 2nd edition, at pp. 2 to 3. It might be argued with some force that if the relationship is purely contractual, as the statute says, in effect, it is, the doctrine would be applied in Ontario.

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[5] [1942] 1 All E.R. 126, at p. 131.
[6] [1916] 1 K.B. 20.
[7] [1920] 1 K.B. 680.
[8] [1922] 2 A.C. 180.

NEGLIGENCE—DAMAGES FOR MENTAL SHOCK.—*Austin* v. *Mascarin*[1] was an action arising out of an automobile collision in which the plaintiffs' son was killed. The statement of claim alleged that, as a result of seeing her son suffer the injuries which resulted in his death, the female plaintiff "was profoundly shocked and suffered great mental anguish which has directly affected her health." Relying on *Victorian Railway Commissioners* v. *Coultas*,[2] the defendants moved to strike out the allegation. Hogg J. held that the allegation meant that the plaintiff had been affected in her physical well-being and had not suffered only from mental shock, and dismissed the motion.

The present case is another manifestation of the refusal of Canadian courts to be bound by the narrow principle of the *Coultas Case*, either by distinguishing it,[3] or by asserting that its authority as a Privy Council decision was limited to the courts of the colony from which the appeal to the Privy Council was taken,[4] or by invoking the obligation to follow the House of Lords in matters of English law where it differed from the Privy Council,[5] or even by disregarding it.[6] The direct overruling of the *Coultas Case* would amount merely to a formal recognition of an existing fact; it occupies a place somewhat akin to that held by *Russell* v. *The Queen*[7] in constitutional law.

The main problem in the mental and nervous shock cases is to define the limits of liability, a problem underscored by the decision of the English Court of Appeal in *Owens* v. *Liverpool Corporation*.[8] A recent decision of the High Court of Australia, *Chester* v. *Waverley Corporation*,[9] and a recent Scottish case, *Bourhill* v. *Young's Executor*,[10] indicate that the courts are mindful of the need to set limits to liability for mental and nervous

[1] [1942] O.R. 165, [1942] 2 D.L.R. 316.

[2] (1887), 13 App. Cas. 222.

[3] Thus, in *Toms* v. *Toronto Ry.* (1910), 22 O.L.R. 204, affirmed 44 S.C.R. 268, it was stated that the *Coultas Case* was inapplicable where the shock resulted in physical, not merely mental, consequences and there was actual impact. And in the case at bar Hogg J. was careful to point out that the plaintiff's allegation meant that she had been affected in her physical well-being and had not suffered only from mental shock.

[4] *Negro* v. *Pietro's Bread Co. Ltd.*, [1933] O.R. 112, [1933] 1 D.L.R. 490. It may be noted that Victoria (from which the appeal to the Privy Council in the *Coultas Case* was taken) overcame the effect of the Privy Council decision by statute [Wrongs Act, 1932, No. 4070 (Vict.)].

[5] *Cf. Robins* v. *National Trust Co.* [1927] A.C. 515. See *Coyle* v. *Watson*, [1915] A.C. 1, and *Purdy* v. *Woznesensky*, [1937] 2 W.W.R. 116.

[6] *Cf. Purdy* v. *Woznesensky*, *supra*.

[7] (1882), 7 App. Cas. 829.

[8] [1939] 1 K.B. 394, [1938] 4 All E.R. 727. See Note (1939), 17 Can. Bar Rev. 56.

[9] (1939), 62 C.L.R. 1. See a note on this case by Professor Paton in (1939), 17 Can. Bar Rev. 541.

[10] [1941] S.N. 33. The case is discussed in (1941), 57 Scottish L. Rev. 216.

shock. Recovery was denied in both cases; in the first, to a mother who, although not present when her child was killed, was present when the dead body was removed from a water-filled trench; in the second, to a person who suffered a shock causing serious injury to health from the noise of a collision which occurred in proximity to but not in sight of such person. Dissenting opinions in both cases, persuasively arguing for liability, and the judgment in the *Owens Case* show how far the pendulum has swung away from the *Coultas Case.*

* * *

TAXATION—SITUS OF SHARES FOR SUCCESSION DUTY.—The judgment delivered on 23rd April 1942 by Viscount Maugham for the Judicial Committee in the case of *The King* v. *Williams*,[1] on appeal from the judgment of the Court of Appeal for Ontario, dismissing an appeal from McTague J.,[2] leaves the law as to situs of shares for succession duty purposes in a very unsatisfactory state.

The question in this case was whether certain shares of Lake Shore Mines Limited, (an Ontario company which had established transfer agencies in Toronto and Buffalo), belonging to an American citizen domiciled in Buffalo, where the certificates at all times were located, were at the date of his death property situate in Ontario and accordingly liable to succession duty there. The power of the company to establish a transfer agency out of Ontario, having regard to the provisions of The Ontario Companies Act, was affirmed by the Judicial Committee, following in this regard the judgments of the courts below, and distinguishing the *Erie Beach Case*,[3] which turned on the provisions of a company by-law restricting transfers to the head office in Ontario. The Judicial Committee in the *Williams Case* also finally disposed of the suggestion that stock certificates because they are under seal are specialties and have a situs where found, upon the ground that such certificates do not contain any express obligation or promise, and are merely evidence of title. From the discussion of this question the Committee had "no hesitation in holding that the situs of the certificates is not, taken alone, sufficient to afford a solution to the present problem"—of situs for succession duty.

The judgment discusses and reaffirms the test laid down in *A. G.* v. *Higgins*[4] and *Brassard* v. *Smith*,[5] namely, "Where

[1] As yet unreported.
[2] *Williams* v. *The King*, [1940] O.R. 320, 403; [1941] 1 D.L.R. 22.
[3] [1930] A.C. 161.
[4] 2 H. & N. 339.
[5] [1925] A.C. 371.

could the shares be effectively dealt with", but it explains this to mean "where the shares can be effectively dealt with as between the shareholder and the company, so that the transferee will become legally entitled to all the rights of a member, e.g., the right of attending meetings and voting and of receiving dividends". The Committee rejected the argument that where, as in this case, the shares could be effectively dealt with in different fiscal areas, a different test or tests of situs should be applied, e.g., that of the head office of the company or domicile of the deceased owner, which in their opinion would not be keeping within the "coherent system of principles" by which the court ought to be guided. In this connection the Committee refers to the judgment delivered by Duff C.J., of the Supreme Court of Canada, in *The King* v. *National Trust*[6] as "a very luminous judgment" formulating certain propositions, with which they agreed, and in particular that property whether moveable or immoveable can have for the purpose of succession duty only one local situation, and that in respect of intangible property situs must be determined by reference to some principle or coherent system of principles. Adhering to the established test, therefore, the Committee came to the inevitable conclusion that "one or other of the two possible places where the shares can be effectively transferred must, therefore, be selected on a rational ground".

In seeking a "rational ground" the Committee fixed upon the circumstance, not mentioned in the judgments of the courts below, that the certificates in question had been endorsed in blank by the late Mr. Williams prior to his death, and came to the conclusion that the existence in Buffalo at the date of death of the certificates so endorsed must be the decisive factor. In so doing they rejected "the notion that the domicile of the deceased has anything to do with the situs of the property or that the maxim 'mobilia sequunter personam' has any relevance." On the latter point they are in agreement with the lucid judgment of the present Chief Justice of Ontario in *Treasurer of Ontario* v. *Blonde*,[7] who, however, there indicated his view that the domicile of the owner of the shares, if at the locality where they could be effectively transferred, should be the determining factor. It should be noted that while the decision of the Court of Appeal for Ontario in *Treasurer of Ontario* v. *Blonde* was before the Judicial Committee, in the *Williams Case* they avoided

[6] [1933] S.C.R. 670.
[7] [1941] O.R. 227 at p. 241.

any citations therefrom because an appeal to the Privy Council in that case was then pending.

The reasoning of the Judicial Committee in considering decisive the fact that the share certificates had been endorsed in blank by the testator prior to his death is contained in the following passages of their judgment. They say:—

> This had the admitted result of making a delivery of the certificates with the endorsement signed in blank a good assignment of the shares, since it passed the title to assignees both legal and equitable, with a right as against the Company to obtain registration and to obtain new certificates. (*Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267.) It must be accepted, therefore, as a fact that the certificates were currently marketable in the State of New York as securities for the shares, and that they were documents necessary for vouching the title of the testator to the shares. This conclusion of mixed law and fact has been followed in Canada in *Secretary of State of Canada* v. *Alien Property Custodian for the United States*, [1931] S.C.R. 170. That was a case of conflicting claims to jurisdiction between the Canadian Custodian of Alien Enemy Property and the Alien Property Custodian of the United States. The decision of the Supreme Court depended on special circumstances; but incidentally it was held, and it was not here in dispute, that the lawful holder in the United States of certificates for shares endorsed and signed in blank by the holder is entitled both under Canadian and United States law to have himself or his nominee registered as the owner thereof.

And further:—

> The certificates endorsed and signed as they were cannot be regarded as mere evidence of title. They were valuable documents situate in Buffalo and marketable there and a transferee was capable of being registered as holder there without leaving the State of New York or performing any act in Ontario. On the testator's death his legal personal representatives in the State of New York became the lawful holders of the certificates entitled to deal with them there; any sale by them would be "in order" and the purchaser could obtain registration in the Buffalo registry. If we contrast the position in Ontario the difference is obvious. Nothing effective could lawfully be done there without producing the certificates and the legal personal representatives in Buffalo could not be compelled to part with them in order to enable the transfers to be effected in Ontario rather than at Buffalo. In a business sense the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario.

The judgment concludes by expressly leaving open the question as to what conclusion the Committee would have come to if the shares had not been endorsed and signed in blank by the testator, saying: "There are some obvious distinctions arising in cases where the endorsement on certificates has not been signed by the registered holder."

The writer, who was one of counsel for the Williams' executors before the Ontario Courts, finds it difficult to follow this reasoning to the conclusion as to the decisive factor arrived at by their Lordships. The endorsement of the certificates by the testator prior to his death was not accompanied or followed by delivery to anyone. The certificates were found in his own safe after his death. It would seem, therfore, that the endorsement was an incomplete assignment and no title legal or equitable passed to anyone. His executors, who derived their powers from the grant of probate by a New York Surrogate Court, would derive their title to the shares from that grant and not from the endorsement by the testator. So far as these shares were concerned, the executors were not required to come into Ontario to obtain ancillary letters probate or otherwise to perfect their title. There being a transfer agency in Buffalo, all they had to do under section 62 of The Ontario Companies Act (which, by the way, was not referred to by the Judicial Committee) was to present to the company a certified copy of the New York probate with a declaration of transmission in order to effect transfer of the shares into their names as executors at the transfer office in Buffalo.

The simple endorsement by the testator of the shares without delivery surely is not indicative of any intention on his part to assign the shares or change their status in any way and would seem to have been revoked by his death. Possibly their Lordships considered that at the *exact moment* of death the certificates were in a condition analogous to that of negotiable instruments, *i.e.*, transferable by delivery only. But with all respect, the writer prefers the reasons for selecting New York State as the situs given by Mr. Justice Fisher in the Court of Appeal and quoted by their Lordships as follows:—

> As Williams had the physical control of the certificates of these shares up to the time of his decease and registered in his name and therein evidencing ownership in him of property in the United States of America, and property which he could have sold and effectively transferred at any time to a purchaser in the United States of America, and also could have assigned or pledged as security in a commercial transaction to an American citizen, the situs of the shares was in the United States of America.

These reasons would be equally valid whether the certificates were endorsed or not.

These remarks are hurriedly written to catch the May number of the REVIEW and have not been the subject of thorough

and careful consideration. They must, therefore, be excused on that account. It is probably too much to hope that in their approaching decision in the appeal of *Treasurer of Ontario* v. *Blonde*, the Judicial Committee will elucidate further the law as to situs of shares, because in that case it would seem apparent that, adopting the well-known test they have adhered to, whatever the situs of the shares there in question may have been, it certainly was not in Ontario where the shares in no event could have been transferred.

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CERTIORARI — AVAILABILITY OF ALTERNATIVE REMEDY IMMATERIAL WHERE DENIAL OF NATURAL JUSTICE.— Where there has been a denial of natural justice, certiorari will issue notwithstanding the availability of another remedy. So the King's Bench Division decided in *Rex* v. *Wandsworth JJ., Ex parte Read.*[1] The facts were that at the hearing of charges against the applicant, the justices retired to consider a point of evidence, and on their return gave their decision thereon and also proceeded at once to convict on one of the charges without hearing the applicant. The justices admitted that they had made an error amounting to a denial of justice. Although there was a remedy by way of appeal or by way of case stated, an order of certiorari quashing the conviction was issued.

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CRIMINAL LAW—SELF-DEFENCE — MISDIRECTION.—In the April issue of the REVIEW in commenting on the decision of the Ontario Court of Appeal in *Rex* v. *Philbrook*, [1941] O.R. 352, it was stated that the judgment decided that "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." It has been brought to our attention that this statement might be understood to mean that the Court considered that the charge as a whole revealed no misdirection.

Such a meaning was not intended, and is, of course, wrong. What the Court decided was that, where there was serious

[1] [1942] 1 All E.R. 56.

misdirection in dealing directly with one specific ground of defence, this was not cured by the proper general observations made by the trial judge in another part of his charge. In such case, there is misdirection in the charge taken as a whole. We regret making a statement on a matter of such importance that was susceptible of being misunderstood.