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

LABOUR LAW — TRADE UNIONS — CIVIL CONSPIRACY — PURPOSE OF COMBINATION.—The judgment of the House of Lords in *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*[1] is welcome for several reasons. It represents a functional approach to trade unionism (see particularly the judgment of Lord Wright) and thus atones, after forty years, for *Quinn* v. *Leathem*.[2] In addition, it breathes some reality into the formulae with which the courts have bedevilled the tort of civil conspiracy, and it may even be taken to foreshadow an abandonment of some of the meaningless phrases in which such formulae were couched.[3] The House of Lords did not worry too much about the reason why an act done in combination became unlawful when the same act by an individual was not actionable;[4] the Law Lords admitted that there was no satisfactory explanation either historically or logically for the tort of civil conspiracy. It is not the first time that legal history and logic proved inadequate to explain the existence of legal rules.

[1] [1942] 1 All E.R. 142.

[2] [1901] A.C. 495. In speaking of the jury's findings in *Quinn* v. *Leathem*, Lord Wright said: "Some may question whether they fully appreciated the actual interests or objects of a trade union." [1942] 1 All E.R. 142, at p. 164.

[3] For example, the Law Lords again scotched the notion that malevolence (in the sense of spite or ill-will) had anything to do with actionable civil conspiracy to injure. There is still, however, plenty of work to do in this connection, as a reading of *Allen* v. *Flood*, [1898] A.C. 1 and *Quinn* v. *Leathem*, *supra*, would reveal.

[4] Note, however, Viscount Maugham's attitude; he stated: "I have never myself felt any difficulty in seeing the great difference between the acts of one person and the acts in combination of two or of a multitude." [1942] 1 All E.R. 142, at pp. 150–1.

The *Crofter Case* involved no acts which were, independently of the alleged actionable civil conspiracy, tortious. Like *Sorrell* v. *Smith*,[5] and unlike many other cases both in England and in Canada, it was not complicated by any side issues, such as findings of intimidation or inducing breach of contract, which, consciously or not, are bound to affect the judicial judgment on the question of actionable civil conspiracy. Hence it presented the single issue: When would the courts impose civil liability on persons who did in concert what each of them could do alone without fear of civil liability? Viscount Simon stated the principle of liability substantially as follows: An agreement between two or more persons to effect an unlawful purpose resulting in damage to the plaintiff is actionable. *Sorrell* v. *Smith* and earlier cases had canvassed the matter both in relation to trade competition and labour disputes. The *Crofter Case* settled the fact that "the doctrine of civil conspiracy to injure extends beyond trade competition and labour disputes."[6]

In most of the cases involving the doctrine, and especially in the cases involving labour disputes, the main problem with which the courts are faced is that of the purpose of the combination. [It may be noted here that the House of Lords preferred the term "purpose" rather than "motive" or "intention".] In connection with labour disputes, it is pure fantasy to believe that a simple dichotomy can be established, so that the purpose is either to advance or protect the interests of members of a trade union, or to injure the employer. The purpose is generally, if not always, to do both. A decision as to the main or predominant purpose becomes then a matter of policy and of functional appreciation of social issues. It is in this connection that the *Crofter Case* is of paramount importance. It was to be expected, of course, that the House of Lords would stress the difficulty of drawing the line between actionable and non-actionable civil conspiracy — which recalls Holmes' statement, "as if all decisions were not a series of points tending to fix a point in a line."[7]

It is to be hoped that the *Crofter Case* will put an end to the conception formerly common in discussing civil conspiracy that trade union members who are sued for damages have the burden of justifying the damage occasioned to an employer.[8] The

[5] [1925] A.C. 700.
[6] [1942] 1 All E.R. 142, at p. 166, per Lord Wright.
[7] HOLMES-POLLOCK LETTERS, vol. 2, p. 28.
[8] See Rothschild, *Government Regulation of Trade Unions* (1938), 38 Col. L. Rev. 1335, 1336.

judgment of Viscount Simon makes it clear that a plaintiff has the burden of establishing (1) the agreement between the defendants, (2) to effect an unlawful purpose, (3) resulting in damage to the plaintiff. The substantive effect of this procedural requirement should be salutary. Courts and judges formerly accustomed to appraising trade union activities with a jaundiced eye will now have to appraise with two good eyes.

Viscount Simon states the following proposition of law on the question of "unlawful purpose"[9]:

> I am content to say that unless the real and predominant purpose is to advance the defendants' lawful interests in a matter where the defendants honestly believe that those interests would directly suffer if the action taken against the plaintiffs was not taken, a combination wilfully to damage a man in his trade is unlawful.

Of more importance is a subsequent statement in his judgment that, illegality aside, "it is not for a court of law to consider . . . the expediency or otherwise of a policy adopted by a trade union. Neither can liability be determined by asking whether the damage inflicted to secure the purpose is disproportionately severe. This may throw doubts on the *bona fides* of the avowed purpose, but, once the legitimate purpose is established, and no unlawful means are involved, the quantum of damage is irrelevant."[10] Lord Bowen took a similar attitude in *Mogul Steanship Co.* v. *McGregor, Gow & Co.*,[11] a trade competition case, when he characterized any judicial attempt to limit English competition by some standard of reasonableness as being probably as hopeless an endeavour as the experiment of King Canute.

Australia has had a pronouncement on this matter by its High Court in *McKernan* v. *Fraser*,[12] where Dixon J. stated his view of the law as follows:

> It appears to be settled that for a combination or acts done in furtherance of the combination to be actionable in such circumstances [*i.e.* where neither the end nor means are unlawful and no threat of illegality is made] the parties to the alleged conspiracy must have been impelled to combine, and to act in pursuance of the combination, by a desire to harm the plaintiff, and that this must have been the sole, the true, or the dominating, or main purpose of their conspiracy.

There has been no case in which the Supreme Court of Canada has had an opportunity to express its views on the question,

[9] [1942] 1 All E.R. 142, at p. 150.
[10] *Ibid.*
[11] (1889), 23 Q.B.D. 598, affirmed [1892] A.C. 25.
[12] (1931), 46 C.L.R. 343.

but the pronouncements of some of the courts of the western provinces make the *Crofter Case* particularly valuable. These pronouncements, made in cases involving the question of civil liability for picketing, indicate a tendency to impose liability by *ex post facto* reasoning, in that the quantum of damages suffered by an employer disposes the courts to find that the predominant purpose was to injure the employer rather than to advance the interests of the members of the union.[13] This tendency was reinforced by a purely negative approach to trade union activities — an approach from the standpoint of inquiring whether legal justification existed for what was *prima facie* a conspiracy to injure. The Ontario Courts have been more favourably disposed to trade union activities such as peaceful picketing, and more reluctant to find that, in the absence of nominate torts, they amount to an actionable conspiracy to injure.[14]

One point mentioned incidentally in the *Crofter Case* deserves consideration. The defendants in the case, who were sued as individuals, were officers of a trade union which included in its membership mill workers and dockers. The labour dispute which led to the action involved the mill workers but it was through orders given by the defendants to the dockers, who were instructed not to handle the plaintiffs' goods, that pressure was applied against the plaintiffs. Both Lords Thankerton and Wright took notice of this fact in their judgments. In answer to the contention that the dockers acted for the benefit of the mill workers and not of themselves, the Law Lords stated that there was a sufficient community of interest, the workers were members of the same union, and their interest in its welfare was mutual. This conclusion is of decided relevance on the question of sympathetic action by workmen, which in turn bears on the question of unlawful purpose, *i.e.* whether the predominant purpose is or is not to injure the employer rather than to benefit the workers. The *Crofter Case* presents the simple situation of workers of the same union taking action, although they are in different lines of work. It appears reasonable that the decision on this point should cover the case of pressure applied by workers in different unions but in the same industry. Would

[13] *Cf. Hollywood Theatres* v. *Tenney*, [1940] 1 D.L.R. 452 (B.C.C.A.); *Allied Amusements Ltd.* v. *Reaney*, [1937] 4 D.L.R. 162 (Man. C.A.); *Hurtig* v. *Reiss*, [1937] 4 D.L.R. 433 (Man. C.A.); *Besler* v. *Matthews*, [1939] 1 W.W.R. 113 (Man. C.A.). See also *Corbett* v. *Canadian National Printing Trades Union*, [1942] 2 D.L.R. 762 (Alta.).

[14] *Cf. Rubenstein* v. *Kumer*, [1940] 2 D.L.R. 691, [1940] O.W.N. 153; *Wasserman* v. *Soper*, [1942] O.R. 313; *Canada Dairies Ltd.* v. *Seggie*, [1940] 4 D.L.R. 725.

the courts look favourably upon workers organized in a union in one industry applying pressure in aid of workers in another union in a different industry?

Undoubtedly, the *Crofter Case* leaves many loopholes for restrictive action against trade union practices. The Law Lords' reasons for judgment are not uniform and it is a fairly simple matter to find inconsistencies. But withal, the case is a landmark in the English law of civil conspiracy and an effective herald of a saner judicial attitude to trade union functions under the common law. As such it stands as an example to Canadian courts.

B. L.

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TAXATION—SUCCESSION DUTY—SITUS OF SHARES OF COMPANY WITH SEVERAL SHARE REGISTERS.—The decision of the Privy Council in *The King* v. *Williams*[1] has already been the subject of comment in this REVIEW,[2] but the importance of the case justifies a few additional remarks. By not denying the power of an Ontario company to establish share transfer agencies outside the province or elsewhere than at the head office, the Privy Council came face to face with a problem created for it by its opinion in *Brassard* v. *Smith*,[3] in which it fixed the situs of shares at the place where they could be effectively dealt with; or simply, where the transfer register was kept. Not a word in *Brassard* v. *Smith* indicates that the Privy Council foresaw difficulties in applying its test of situs, if more than one transfer register existed. In the *Williams Case*, the Privy Council had either to repudiate its test as inadequate or find some additional makeweight to give an appearance of consistency to its decisions dealing with the situs of intangibles for purposes of taxation. It choose the latter course.

The additional makeweight was found in the fact of "the existence in Buffalo [where there was a transfer register] at the date the death of certificates in the name of the testator endorsed by him in blank."[4] The emphasis which the Privy Council seemed to put on the fact of endorsement of the share certificates in blank is certainly a case of "much ado about nothing." Surely nothing of legal effect is accomplished by endorsement of share certificates in blank when they remain in the possession of the endorser! To place reliance upon the fact of endorsement in blank is to pile

[1] [1942] 3 D. L. R. 1 (P.C.).
[2] (1942), 20 Can Bar Rev. 471.
[3] [1925] A. C. 371.
[4] [1942] 3 D. L. R. 1, at p. 16.

complexity upon complexity, without adding anything to the solution of problems of jurisdiction to tax. What difference would it make if the personal representatives of a deceased shareholder subsequently endorsed his share certificates?

One finds it difficult, too, to appreciate the point of the Privy Council's assertion that "the legal personal representatives in Buffalo could not be compelled to part with [the share certificates] in order to enable the transfers to be effected in Ontario rather than at Buffalo."[5] It is not what the personal representatives might do that is relevant so far as effecting transfers is concerned, but what the transferees might do; and they can as easily have their shares transferred in Ontario as in Buffalo.

Prior to the decision of the Privy Council in the *Williams Case*, the type of problem it presented had been dealt with by an Ontario Court in *Treasurer of Ontario* v. *Blonde*[6] and by a Quebec Court in *Rice* v. *The King*.[7] The controlling makeweight in the *Blonde Case* was domicile; in the *Rice Case* it was the location of share certificates. The *Williams Case* has not, however, given any clue to the solution of more complicated problems, such as assigning a situs to shares when the share certificates are found in a a place other than that where a transfer register exists.[8] Although the Privy Council appeared to place no emphasis on the fact that the deceased shareholder was domiciled in Buffalo, it is not beyond possibility that this fact may yet become important. *Rice* v. *The King* is a much clearer case from the standpoint of the decisiveness of the location of the share certificates, for in that case while the deceased shareholder died domiciled in New York the share certificates were in Quebec. In truth, in presuming to select a situs for the shares in the *Williams Case* "on a rational ground,"[9] the Privy Council was in an impossible position. It recognized in its opinion that the situs of shares for the purpose of taxation "may be merely of a fictional nature."[10] Constitutional necessity and ordinary expediency might dictate a "one local situation" rule for intangibles.[11] At best, adherence to such a rule involves arbitrary selection of the controlling factors, and a piling of fiction uopn fiction as new factual situations strain the maintenance of consistency.

[5] *Ibid.*
[6] [1941] O. R. 227.
[7] [1939] 4 D. L. R. 701 (Que.).
[8] *Cf.* Laskin, *Taxation and Situs: Company Shares* (1941), 19 Can. Bar Rev. 617, 631.
[9] [1942] 3 D. L. R. 1, at p. 16.
[10] *Ibid.*, at p. 3.
[11] *Cf.* Laskin, *supra*, note 8, at p. 619*ff*.

One need only refer to the experience of the United States in this connection. In *First National Bank of Boston* v. *Maine*,[12] the Supreme Court of the United States announced a rule of immunity from taxation by more than one state. The present Chief Justice pointed out in a dissenting judgment that "the situs of an intangible for taxing purposes. . . . is not a dominating reality, but a convenient fiction which may be judicially employed or discarded according to the result desired."[13] Recently, in *State Tax Commission of Utah* v. *Aldrich*,[14] the Supreme Court of the United States overruled the *First National Bank Case* by name and Mr. Justice Douglas stated:[15]

> There is no constitutional rule of immunity from taxation of intangibles by more than one state. In case of shares of stock, "jurisdiction to tax" is not restricted to the domiciliary state. Another state which has extended benefits or protection or which can demonstrate "the practical fact of its power" or sovereignty as respects the shares. . . . may likewise constitutionally make its exaction.

No doubt the Privy Council may insist on a "one local situation" rule in avoidance of double taxation, regardless of the extent to which it may have to carry fiction. But it can hardly guarantee that a foreign jurisdiction will not upset its design by a competent taxing measure based on another view of jurisdiction to tax.

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NEGLIGENCE — RESCUE OF PERSON ENDANGERED BY DEFENDANT'S NEGLIGENCE.—*Morgan* v. *Aylen*[1] dissipates any lingering notion that the decision in *Haynes* v. *Harwood* [2]depended on the fact that the plaintiff was a policeman who acted in the course of duty. In the *Morgan Case*, the plaintiff was escorting a child who began to cross the road ahead of her and she was injured when she ran out on the road to rescue the child from the danger of being struck by a motorcycle which the defendant was driving at an excessive speed. Cassels J. refused to find contributory negligence on the plaintiff's part and expressly followed *Haynes* v. *Harwood* in allowing recovery against the negligent defendant.

A short note in (1942) 58 *Law Quarterly Review* at page 300, advances the following conclusions with respect to some of

[12] (1932), 284 U. S. 312, 52 S. Ct. 174.
[13] Stone J., 52 S. Ct. 174, at p. 179.
[14] (1942), 62 S. Ct. 1008.
[15] *Ibid.*, at p. 1012.
[1] [1942] 1 All E. R. 489.
[2] [1935] 1 K. B. 146.

the problems of the rescue cases not yet resolved by English law: (1) The contributory negligence of the rescued person should not affect the defendant's liability to the rescuer. (2) On principle, the rescuer should recover against the rescued person if the latter has been guilty of negligence. (3) On principle, and subject to a consideration of the reasonableness of the risk taken, the doctrine of the rescue cases should be as applicable to the rescue of things as to the rescue of persons.

As to (1), American authority supports the view that the rescuer's right of recovery will not be barred by the contributory negligence of the rescued person.[3] Modern apportionment statutes make it important, however, to determine whether damages would now be apportioned if the rescued person as well as the defendant has been negligent. This problem requires consideration of the right of the rescuer against the rescued person, involving (2) above.

It is readily perceived that the rescue cases are not entirely satisfactory from the standpoint of "duty" as expressed in *Palsgraf* v. *Long Island Ry.*[4] Still more is it difficult to justify recovery by a rescuer where the rescued person alone has been guilty of carelessness in exposing himself to danger. Is a person to be penalized who creates a risk of harm to himself? Should he reasonably foresee that a would-be rescuer may come to his assistance and suffer injury? No categorical answer is given by the American cases. In *Saylor* v. *Parsons*,[5] the plaintiff, who was injured in trying to prop up a wall which was about to fall on the defendant after the latter had carelessly weakened it, was denied recovery on the ground that there was no negligence *qua* a rescuer where a person imperils himself. Professor Prosser appears to accept this view.[6] On the other hand, Professor Bohlen submits that the case is wrong "since it assumes that the right of a rescuer is derived from the right of the person imperilled to recover, had he instead of the rescuer, been injured."[7] "It would seem," he says, "that a person who carelessly exposes himself to danger or who attempts to take his life in a place where others may be expected to be, does commit a wrongful act towards them in that it exposes them to a recogniz-

[3] *Mobile and Ohio Ry.* v. *Ridley* (1905), 114 Tenn. 727, 86 S. W. 606: *Highland* v. *Wilsonian Investment Co.* (1932), 171 Wash, 34, 17 P. (2d) 631. The rescuer's right is not regarded as derivative.

[4] (1928), 248 N. Y. 339, 162 N. E. 99 See *Prosser on Torts*, 185 ff.

[5] (1904), 122 Iowa 679, 98 N. W. 500. See also *Linz* v. *McDonald*, (1911), 133 S. W. 535.

[6] PROSSER ON TORTS, 339.

[7] STUDIES IN THE LAW OF TORTS, 569 n.

able risk of injury."[8] *Butler* v. *Jersey-Coast News Co.*[9] gives some support to this opinion. The facts of that case were that the defendant's truck was being driven along an icy pavement at a prohibited speed when it skidded across the highway and struck an electric light pole, breaking it and causing the pole and electric wires to be brought down. The plaintiff, who was driving along the highway, went to the assistance of the driver of the truck and was injured by contact with the charged wires. The trial judgment for the plaintiff was unanimously affirmed on appeal, the Court rejecting contentions of the defendant that there was no proof of negligence, that the injury was not the proximate result of any negligence and that no duty to the plaintiff existed. On this last point the Court stated that the plaintiff was a user of the highway, and while not obliged by law to go to the truck driver's assistance yet being on the highway he had a right to exercise a power either to aid in removing the obstruction or to assist any one who appeared to be in danger. However, the Court took the view explicitly that this was not a rescue case:[10]

> [The rescue cases] are all cases of obvious danger and risk to the rescuing party. . . . Here so far as appearances were concerned there was nothing that necessarily and obviously suggested danger. It is true there was an electric wire with which the plaintiff came into contact, but that the danger of it was so obvious that he ought to have been, as a matter of law, held to avoid it on the theory that he was running into extreme danger as a rescuer would seem to be not the case. For this reason it is unnecessary to invoke or even determine the law of this state in the so-called rescue cases.

The acceptance of the rescue doctrine by courts in the western provinces many years prior to *Haynes* v. *Harwood* was pointed out in a previous note in this REVIEW.[11] There is no Canadian case which upholds the right of a rescuer to recover against a person who imperils himself through his own carelessness. *McDonald* v. *Burr*[12] suggests at least that recovery would not be allowed. In that case the plaintiff was injured in trying to stop the defendant's horses which ran away after being negligently left standing in the street. It was found, contrary to the plaintiff's allegation, that there were no children on the roadway

[8] *Ibid.* It seems that Bohlen changed his mind on this question, and that he was previously not hostile to the decision in *Saylor* v. *Parsons*: see STUDIES IN THE LAW OF TORTS, 446 n.

[9] (1932), 109 N. J. L. 255, Atl, 659.

[10] 160 Atl. 659 at 660.

[11] (1935), 13 Can. Bar Rev. 248, at p. 251.

[12] [1919] 3 W. W. R. 825, 12 Sask. L. R. 482.

at the time nor were any children endangered, and recovery was denied.

The American trend is towards extension of the rescue doctrine to things.[13] There is an expression of opinion against this in the Saskatchewan case of *Converse* v. *C. P. R.*[14]

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TORTS — SLANDER — UNCHASTITY — IMPUTATION OF LESBIANISM.—The short and original point of Asquith J.'s decision in *Kerr* v. *Kennedy*[1] is that an imputation of lesbianism is an imputation of "unchastity" within the meaning of the Slander of Women Act, 1891.[2] In thus taking a broad view of the term "unchastity" the learned Judge observed: "The true approach to the construction of 'unchastity' seems to me to appear when the question is put, what imputations on a woman, *qua* woman, in the sphere of sexual morality are grave enough to be actionable without proof of pecuniary loss, or so likely to cause pecuniary loss as not to call for such proof?"[3]

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EXECUTORS AND ADMINISTRATORS—ADMINISTRATION SUIT—CLAIM OF ARREARS OF ALIMONY.—In *Re Woolgar, Woolgar* v. *Hopkins*,[1] Simonds J. chose to follow Luxmoore J. in *Re Hedderwick*[2] rather than Sargant J. in *Re Stillwell*,[3] in holding that arrears of alimony are not recoverable in the administration of the estate of a deceased person, whether the estate be solvent or not, and that the person claiming them cannot, therefore, maintain an action for administration. The further contention that an alteration in the Matrimonial Causes Rules, 1937, had made a difference was rejected.

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DISCOVERY—PRODUCTION OF DOCUMENTS—OBJECTION TO PRODUCTION IN PUBLIC INTEREST.—*Duncan* v. *Cammell Laird & Co. Ltd.*[1] decides, in the phrase of the Lord Chancellor, a question of "high constitutional importance" respecting executive power to withhold production of documents. The House of Lords has now settled the following points: (1) Documents

[13] PROSSER ON TORTS, 360.
[14] [1932] 2 W. W. R. 1, 39 C. R. C. 378.
[2] See The Libel and Slander Act, R.S.O. 1937, c. 113, s. 18.
[1] [1942] 1 All E. R. 412
[3] [1942] 1 All E. R. 412 at p. 413.
[1] [1942] 1 All E. R. 583.
[2] [1933] Ch. 669.
[3] [1916] 1 Ch. 365.
[1] [1942] 1 All E. R. 587, affirming [1941] 1 All E. R. 437.

otherwise relevant and liable to production must not be produced if, having regard to their contents or because of the class of documents to which they belong, the public interest requires that they should be withheld. (2) An objection to production duly taken by the head of the government department concerned is conlusive upon the Court.

In view of this second point, the recital by the Lord Chancellor of grounds which would not afford to a minister adequate justification for objection to production seems devoid of legal significance; but it has a practical value notwithstanding. At one point in his judgment, Viscount Simon speaks of an objection "validly" taken as being conclusive. It is doubtful whether this qualifies in any way, the conclusive effect of the objection. It may be noted too that the House of Lords declared that an objection to production in the public interest is not a matter of privilege. "Privilege in relation to discovery is for the protection of the litigant and could be waived by him." They held in this connection that the Privy Council in *Robinson* v. *State of South Australia*[2] was wrong in acting on a rule of court respecting a claim of privilege and directing that the case was a proper one for the exercise of the Court's power of inspecting documents in order to determine whether their production would be prejudicial to the public welfare.

[2][1931] A. C. 704.