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Industrial Relations - Torts - Intentional Interference with Advantageous Trade Relationships by Illegal Means - Intimidation - Conspiracy to Threaten Breach of Contract

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COMMENTS
COMMENTAIRES

INDUSTRIAL RELATIONS—TORTS—INTENTIONAL INTERFERENCE WITH ADVANTAGEOUS TRADE RELATIONSHIPS BY ILLEGAL MEANS—INTIMIDATION—CONSPIRACY TO THREATEN BREACH OF CONTRACT. —Canadian courts will doubtless have to contend in the future with the tort of intimidation, as constituted by a threat to breach one's own contract, to which the House of Lords has given its blessing in *Rookes* v. *Barnard*.[1] This case, considered by many to be the most important decision in the area of trade union law since the *Taff Vale* case,[2] has attracted considerable public attention in England. Much of the comment has emphasized their Lordships' treatment of section 3 of the Trade Disputes Act, 1906,[3] of which there is no Canadian equivalent, but the new basis of common-law tort liability may well be thought, in legal circles, to be more important.

The plaintiff, Douglas Rookes, was a draughtsman employed by B.O.A.C. He had been an officer of his union, the Association of Engineering and Shipbuilding Draughtsmen, but had resigned his membership as a result of a disagreement over union policy. When all other methods failed to persuade Rookes to rejoin, the union local, anxious to preserve its 100 percent membership standing,[4] submitted to management a resolution to the effect that if Mr. Rookes was not removed from the design office within three days they would strike. There was, however, an agreement in existence between the employers and employees in the Civil Air Transport Industry which provided that there should be no strikes in the industry and that all disputes would be submitted to arbitration. By agreement, the case was conducted on the basis that this "no strike" provision had been incorporated in the contract of service of each B.O.A.C. employee. Rookes was first suspended on full

[1] [1964] 1 All E.R. 367, [1964] 2 W.L.R. 269 (H.L.).

[2] *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426 (H.L.).

[3] 6 Edw. VII, c. 47.

[4] There was an understanding with management under which the union was given valuable concessions to union security when it attained 100 percent membership.

pay and then dismissed by B.O.A.C. with a week's pay in lieu of notice. He brought an action for damages against the defendant union officers for conspiring to threaten B.O.A.C. with strike action and thus to induce B.O.A.C. to dismiss him.

Of the three defendants, two, Barnard and Fistal, the branch chairman and shop steward, were B.O.A.C. employees; the third, Silverthorne, was the union's divisional organizer for the London Airport area, and was not employed by B.O.A.C.

All three defendants were found by the jury to be party to a conspiracy to threaten strike action to procure the plaintiff's withdrawal from the design office. The jury found that threats made by all three defendants resulted in the suspension and dismissal of the plaintiff. He was awarded £7,500 damages.

Sachs J. held that the defendants had committed the tort of intimidation by threatening to breach the "no strike" provision and thus harming the plaintiff. Section 1 of the Trade Disputes Act, 1906[5] made it necessary to establish individual tort liability upon which to base the conspiracy,[6] a point which is dealt with more fully toward the end of this comment. Sachs J. held, further, that the defendants were not protected by section 3 of the 1906 Act, although there was a "trade dispute", within the meaning of the Act, in existence.[7] On appeal the decision was reversed. The Court of Appeal recognized the existence of the tort of intimidation, but held that a threat to breach one's own contract was not such a "wrongful act" as was necessary to constitute the tort. The court indicated that it did not agree with Sachs J.'s decision that sections 1 and 3 of the 1906 Act were inapplicable. By agreement, the existence of a "trade dispute" was not questioned.[8]

On appeal to the House of Lords it was, however, the plaintiff who was ultimately successful, winning for himself a retrial on the amount of damages, staggering costs and a place on the pages of the *Sunday Telegraph* as the man who won his eight year battle with the trade unions. Their Lordships verified the existence of the tort of intimidation and held that it is committed by a man who threatens the "illegal act" of breaching his own contract. The defendants, they held, had conspired to commit the tort of intimidation. They also held that, in spite of the existence of a trade dispute, the de-

[5] *Supra*, footnote 3.

[6] *Ibid.* "1. . . An act done in pursuance of an agreement or combination by two or more persons shall if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

[7] [1961] 2 All E.R. 825, [1961] 3 W.L.R. 438, [1963] 1 Q.B. 623 (Div. Ct.).

[8] [1962] 2 All E.R. 579, [1962] 3 W.L.R. 260, [1963] 1 Q.B. 623 (C.A..

fendants were not protected from liability by the Trade Disputes Act, 1906. Not only did the House of Lords rewrite the law in this area of tort and "drive a coach and four" through the 1906 Act; for good measure Lord Devlin, with full concurrence of the House, gave a novel and, of course, now authoritative, statement of the English law of exemplary damages.[9]

In the Court of Appeal, Sellers L.J. quoted the following statement of Lord Dunedin in *Sorrell* v. *Smith*[10] "as a concise summary of the main general principles of the law in this matter":[11]

> . . . I think the three leading cases upon the subject, without any doubt, are the well known cases of *Mogul Steamship Co.* v. *McGregor Gow and Co.*,[12] of *Allen* v. *Flood*[13] and of *Quinn* v. *Leathem*.[14] Now, the result of those cases, in my mind, is this: In the first place, every one has the right to conduct his own business upon his own lines, and as suits him best,[15] even although the result may be that he interferes with other people's business in so doing. That general proposition, I think, may be gathered from the *Mogul* case. Secondly, an act that is legal in itself will not be made illegal because the motive of the act may be bad. That is the result, I think, of *Allen* v. *Flood*. Thirdly, even although the dominating motive in a certain course of action may be the furtherance of your own business or your own interests, as you conceive those interests to lie, you are not entitled to interfere with another man's method of gaining his living by illegal means, and illegal means may be either means which are illegal in themselves, or that may become illegal because of a conspiracy where they would not have been illegal if done by a single individual. I think that is the result of *Quinn* v. *Leathem*.[16]

In establishing that the individual defendants in *Rookes* v. *Barnard* committed the tort of intimidation the allegation of conspiracy is not relevant, nor, it may be added to forestall confusion, is the tort of inducing breach of contract.[17] That part of Lord Dunedin's statement with which the House of Lords was con-

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[9] This comment does not deal with the damages aspect of *Rookes* v. *Barnard*.

[10] [1925] A.C. 700 (H.L.).

[11] *Supra*, footnote 8, at p. 669 (Q.B.).

[12] [1892] A.C. 25 (H.L.).

[13] [1898] A.C. 1 (H.L.).

[14] [1901] A.C. 495 (H.L.).

[15] *Crofter Handwoven Harris Tweed Co. Ltd.* v. *Veitch*, [1942] A.C. 435 (H.L.), puts it beyond dispute that this includes the right of trade unions to carry out their own legitimate activities.

[16] *Supra*, footnote 10, at p. 718; approved by Locke J. in *International Brotherhood of Teamsters etc.* v. *Therien*, [1960] S.C.R. 265, at p. 280, 22 D.L.R. (2d) 1, at p. 13; also approved by Lord Evershed in *Rookes* v. *Barnard*, *supra*, footnote 1, at p. 384 (All E.R.); and certainly no member of the House of Lords can be read as throwing any doubt on this statement. See also, the *Crofter* case, *ibid.*, especially Lord Wright, at p. 442.

[17] As established by *Lumley* v. *Gye* (1853), 2 E. & B. 216; 118 E.R. 749 (Q.B.); see *D. C. Thompson and Co. Ltd.* v. *Deakin*, [1952] Ch. 646 (C.A.); and Lord Devlin's statement of this tort in *Rookes* v. *Barnard*, *ibid.*, at p. 401 (All E.R.).

cerned in *Rookes* v. *Barnard* is, therefore, where he speaks of interference "with another man's means of earning his living by illegal means".

Where the "illegal means" is an act done directly to the plaintiff he will, of course, have a cause of action for assault, defamation, fraud, or whatever illegal act he has been the victim of. If the act is done intentionally to injure him in his trade then it would appear that he could recover damages for the harm intentionally done, which could not be considered too remote under any test. It is less obvious, but well established, that where the plaintiff is injured by an act which is within the right of the immediate actor he may, nevertheless, have a right of action against a third party who, with the intention of injuring the plaintiff has, by means of an illegal act, induced the immediate actor to act against the plaintiff. On this point Lord Evershed, for example, relies on the authority of *Allen* v. *Flood*,[18] where Lord Watson said:

> There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for the consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye*,[19] the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party.[20]

Whether the defendant acts directly or through a third party in injuring the plaintiff English law demands an "illegal act" for him to be liable. Pearson L.J., in the Court of Appeal, showed that in each of the "few and ancient"[21] cases which formed the basis of statements, like Lord Watson's, on the nature of liability for indirect injury, there was some "gross illegality".[22] *Rookes* v. *Barnard* does not, of course, alter this settled principle of English law; that there is no right of action based on interference with trade or employment, unless there is, in addition, a conspiracy,

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[18] *Supra*, footnote 13, at p. 96. [19] *Supra*, footnote 17.

[20] See *Quinn* v. *Leathem*, *supra*, footnote 14, *per* Lord Lindley, at pp. 534-535, to the same effect; quoted with approval in the Supreme Court of Canada by Locke J. in *Orchard* v. *Tunney*, [1957] S.C.R. 436, at p. 455, 8 D.L.R. (2d) 273, at p. 290.

[21] *Supra*, footnote 8, at p. 688 (Q.B.).

[22] *Ibid.*, at p. 689; his review of those authorities was approved by the House of Lords, *supra*, footnote 1, *per* Lords Reid, Evershed, and Pearce, at p. 373, 384, and 414 respectively (All E.R.).

inducement of the breach of a binding contract[23] or some other unlawful act.[24] The same is true in Canadian law.[25] The question of principle before the House of Lords, therefore, was simply whether the threat to breach one's own contract can be the "illegal act" necessary to constitute this tort of intentionally "interfer[ing] with another man's method of gaining his living by illegal means".[26] That their Lordships called it the tort of "intimidation" adds nothing except a tag, the convenience of which is outweighed by unhelpful connotations.

"Intimidation" imports the idea of a threat and, especially since the illegal act in this case was a threat, it demands an understanding of the part which threats may play in the tort of intentional illegal interference. Put briefly, although there is authority to the contrary[27] it is now established in English law that "a threat to do an act which is lawful cannot . . . create a cause of action".[28] It follows

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[23] *Nichol* v. *Martyn* (1799), 2 Esp. 732, 170 E.R. 513 (Nisi Prius); *McKernan* v. *Fraser* (1931), 46 C.L.R. 343 (H.C. Aust.); The *Crofter* case, *supra*, footnote 15, *per* Lord Simon L.C., at p. 442; *McManus* v. *Bowes*, [1938] 1 K.B. 98 (C.A.), *per* Slesser L.J., at p. 127.

[24] Dr. Thompson, in Protection of the Right to Work in the Law of Torts (1963), 41 Can. Bar Rev. 167, quotes dicta by Lord Watson in *Allen* v. *Flood*, *supra*, footnote 13, in support of his submission that "On this view there is tortious liability for the infringement of any right, contractual or otherwise, and one should be entitled to expect no less from a developed legal system", at p. 185.

This statement is not supported in its generality by authority or principle in English law. In *Rookes* v. *Barnard*, *supra*, footnote 1, Lord Reid (with whom Lord Hodson concurred on this point — at p. 396 (All E.R.)) made this clear in the course of his consideration of section 3 of the Trade Disputes Act, 1906 "in the light of the law as we know it", at p. 378 (All E.R.).

But see Lord Devlin, where he states "I do not think your Lordships need decide this point", at p. 404 (All E.R.).

See also, however, *inter alia: Sorrell* v. *Smith*, *per* Lord Dunedin, *supra*, footnote 10, at p. 719; the *Crofter* case, *supra*, footnote 15, *per* Viscount Simon L.C., at p. 442, and Lord Wright, at p. 465; *Ware and DeFreville*, v. *Motor Trade Association*, [1921] 3 K.B. 40 (C.A.) *per* Scrutton L.J., at p. 67, citing Lords Lindley and Macnaghten in *Quinn* v. *Leathem*, *supra*, footnote 14.

[25] *Newell* v. *Barker and Bruce*, [1950] S.C.R. 385, [1950] 2 D.L.R. 289. In *Orchard* v. *Tunney*, *supra*, footnote 20, *per* Locke J., at pp. 456 (S.C.R.), 291 (D.L.R.): ". . . false statements . . . led to Tunney's dismissal, . . .", *i.e.* the unlawful means was fraud. The judgment of Rand J. presents greater difficulties, but it is submitted that his reasoning is not incompatible with the statement in the text.

[26] *Per* Lord Dunedin, *supra*, footnote 16.

[27] *Valentine* v. *Hyde*, [1919] 2 Ch. 129; *Giblan* v. *National Amalgamated Labourer's Union of Great Britain and Ireland*, [1903] 2 K.B. 600 (C.A.), *per* Romer L.J., at p. 619-620 (dicta); *Pratt* v. *British Medical Association*, [1919] 1 K.B. 244 (dicta).

[28] *Per* Lord Buckmaster, in *Sorrell* v. *Smith*, *supra*, footnote 10, at p. 747, quoted with approval by Lord Wright in the *Crofter* case *supra*, footnote 15, at p. 467; see also *Rookes* v. *Barnard supra*, footnote 1, *per* Lord Reid, at p. 374 (All E.R.), and *Hodges* v. *Webb*, [1920] 2 Ch. 70; *Ware and DeFreville* v. *Motor Trade Association*, *supra*, footnote 24; *Thorne* v. *Motor Trade Association*, [1937] A.C. 797 (H.L.).

that only where that which is threatened is itself illegal will the threat constitute the illegal means necessary to the tort with which we are concerned. The threat adds no element of wrongfulness. It is simply recognized as an alternative, equally illegal in certain circumstances, to carrying out the act threatened.[29]

Aside from two Irish cases[30] and some inconclusive dicta on both sides,[31] the House of Lords had no authority to turn to which dealt with the issue as such. Their Lordships therefore had to decide as a matter of principle. Lord Reid said "I can see no difference in principle between a threat to break a contract and a threat to commit a tort".[32] Both Lord Evershed[33] and Lord Devlin spoke of "drawing a line"[34] and held that it was not in accordance with "logic, reason or common sense"[35] or "natural"[36] to draw the line between threats to do acts which are criminal or tortious and to do those which are in breach of contract. Lord Pearce decided as a matter of "logic"[37] and Lord Hodson said that this "is no more than an application of an existing principle to a case which has not been before considered".[38] Of course, the decision to include a threat to breach one's own contract among those wrongful acts which constitute illegal means was not come to on the basis of pure policy, but rather as a matter of the extension of legal principles.[39] Each of their Lordships was satisfied, apparently, that "the essence of the offence is coercion"[40] and, since a threat to break a contract "may be a much more coercive weapon when threatening a tort"[41] they decided that it must be counted among the illegal acts which give a right of action. Lord Atkin once said that "the wrongfulness of inducement . . . cannot depend on its weight.

[29] The term "intimidation" is also used to describe a crime contrary to section 7 of the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86, or its Canadian equivalent, section 366 of the Criminal Code, S.C., 1953-4, c. 51. In this context intimidation is limited to threats to do acts which would at least justify a magistrate in binding over to keep the peace one who did them. See *Gibson* v. *Lawson*, [1891] 2 Q.B. 545, referred to in *Rookes* v. *Barnard*, *ibid.*, by Lord Hodson, at p. 393 (All E.R.).

[30] *Cooper* v. *Millea*, [1938] I.R. 749. *Riordan* v. *Butler*, [1940] I.R. 347. Both cases held that a threat of breach of contract did constitute the requisite "illegal act", but both were based on a misreading of dicta by Lord Dunedin in *Sorrell* v. *Smith*, *supra*, footnote 10, as is pointed out in *Rookes* v. *Barnard*, *ibid.*, by Lords Evershed and Hodson, at pp. 385, 394 (All E.R.).

[31] See Lord Evershed, *ibid.*

[32] *Ibid.*, at p. 374 (All E.R.).

[33] *Ibid.*, at p. 385-386 (All E.R.).

[34] *Ibid.*, at p. 398 (All E.R.).

[35] *Ibid.*, at p. 386 (All E.R.).

[36] *Ibid.*, at p. 398 (All E.R.).

[37] *Ibid.*, at p. 415 (All E.R.).

[38] *Ibid.*, at p. 395 (All E.R.).

[39] *Ibid.*, *per* Lord Reid, at p. 374 (All E.R.).

[40] *Ibid.*, *per* Lord Devlin, at p. 398 (All E.R.), quoting Prof. C. J. Hamson, [1961] Camb. L. J. 189. see also Lords Reid, Hodson, and Pearce, at pp. 374, 395, 415 (All E.R.).

[41] *Ibid.*, *per* Lord Reid, at p. 374 (All E.R.).

Coercion . . . means nothing at all on a question of tort except in reference to the means employed".[42] The latter statement seems much more in keeping with the nominate torts approach which has marked the English law.

In reaching their decisions the Law Lords had, each in his own way, to answer the argument that if a threat to breach one's own contract is an illegal act, and gives an intentionally damaged third party a right of action, the doctrine of privity of contract[43] is "strangely outflanked".[44] Beyond saying simply that the action did not sound in contract[45] their Lordships' answers took two forms; the first, put by Lord Evershed[46] and Lord Devlin[47], was that, because it is the threat that is material to the plaintiff's action, the fact that the breach of contract cannot give a right of action to one not a party to it is irrelevant. Nor need there be any concern about such things as lightening strikes, which might occur in seeking to avoid the making of an illegal threat[48] because in any such case, as a matter of fact, the initial breach *implies* an illegal threat to continue the breach or to commit another breach. However, it must be interjected at this point that since a threat to do a lawful act cannot be held to be unlawful[49] it must now, as a matter of law, be the case that a breach of contract will also be held to constitute an illegal act in the context of the tort of "intimidation". It must follow, in other words, from the judgments in *Rookes* v. *Barnard* that a breach of contract may constitute the illegal act necessary in tortious liability for intentional trade interference. The far reaching ramifications of giving a right to sue in tort to every person intentionally injured by a breach of contract need not be spelled out.[50] The courts in future cases may be forced to limit liability to threats; but to so distinguish between the threat and

[42] *Ware and DeFreville* v. *Motor Trade Association*, *supra*, footnote 24, at p. 82.

[43] *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge and Co. Ltd.*, [1915] A.C. 847 (H.L.); *Scruttons Ltd.* v. *Midland Silicones Ltd.*, [1962] A.C. 446 (H.L.).

[44] Wedderburn, The Right to Threaten Strikes, I & II (1961), 24 Mod. L. Rev. 572, at p. 577, and (1962), 25 Mod. L. Rev. 513, at p. 516.

[45] *Supra*, footnote 1, *per* Lords, Reid, Devlin and Pearce, at pp. 374, 398 and 415 (All E.R.).

[46] *Ibid.*, at p. 386 (All E.R.).

[47] *Ibid.*, at p. 399 (All E.R.), Lord Hodson agreeing, at p. 394 (All E.R.).

[48] *Ibid.*, *per* Lord Devlin, at p. 399 (All E.R.).

[49] See *supra*, footnote 28.

[50] The judgments in *Rookes* v. *Barnard*, *supra*, footnote 1 indicate that an action for intimidation also lies at the suit of the person to whom the illegal act is directly done. (Which, among other things, would appear to make possible the transformation of every case of inducing breach of contract into a conspiracy to intimidate); *per* Lords Evershed, and Devlin, at pp. 388, 397 (All E.R.).

the act threatened will be to revive the "leading heresy"[51] which bedevilled the tort law of trade relations in its formative stages.

Their Lordships' second answer to the "privity of contract argument"[52] was, in Lord Reid's words, that "a somewhat similar argument failed in *Lumley* v. *Gye* . . . the fact that the direct cause of the loss was the breach of a contract to which the defendant was not a party did not matter".[53] There appears to be a rather obvious difference between the action for inducing breach of contract, by which a party to a contract may protect his rights under it from third party interference, and the extension to a third party of rights under a contract to which he is a stranger.[54]

International Brotherhood of Teamsters v. *Therien*[55] may be considered the leading Canadian case on tortious liability for intentional interference with trade relationships by illegal means.[56] In the British Columbia Court of Appeal Sheppard J.A. said:

> There is the further question whether the plaintiff has a cause of action. The plaintiff has not founded upon conspiracy. . . . By reason of the action of the union officials . . . the company ceased . . . to employ the plaintiff. The company had the right to cease doing business with the plaintiff but the plaintiff may establish a cause of action by proving that the company was so induced by illegal means . . . and that leads to an inquiry whether the company was induced by the union officials threatening to do that which was illegal.[57]

The learned judge then went on to find that there was a threat to picket which was illegal because it was contrary, under the circumstances, to three sections of the Labour Relations Act.[58] This statement of the law was approved in the Supreme Court of Canada by Locke J., with whom the other members of the court agreed, as follows;

> As it was said by Lord Dunedin in *Sorrell* v. *Smith* . . . , even though the dominating motive in a certain course of action may be the further-

[51] *Sorrell* v. *Smith*, *supra*, footnote 10 *per* Lord Dunedin, at p. 719.

[52] So referred to by Lord Hodson, *supra*, footnote 1, at p. 395 (All E.R.).

[53] *Ibid.*, at p. 374 (All E.R.); see also, Lords Hodson and Pearce at pp. 395, 415 (All E.R.).

[54] Nor is there any similarity at all with the extension of the law of negligence in *Donoghue* v. *Stevenson*, [1932] A.C. 562 (H.L.), to give a right of action in tort, where quite unrelated rights in contract may also exist. But see Thompson, *op. cit.*, footnote 24, at pp. 196-197, where he states that the privity of contract argument "recalls the minority opinions in *Donoghue* v. *Stevenson*".

[55] *Supra*, footnote 16.

[56] So referred to by A.W.R. Carrothers, The British Columbia Trade-Unions Act, 1959 (1960), 38 Can. Bar Rev. 295, at p. 309.

[57] *Therien* v. *International Brotherhood of Teamsters* (1959), 16 D.L.R. (2d) 646, at pp. 678-679.

[58] S.B.C., 1954, c. 17.

> ance of your own business or your own interests, you are not entitled to interfere with another man's method of gaining his living by illegal means.
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> I agree with Sheppard J.A. that in relying upon the sections of the Act the respondent is asserting, not a statutory cause of action, but a common law cause of action, and that to ascertain whether the means employed were illegal inquiry may be made both at common law and of the statute law.[59]

Sheppard J.A.'s is a clear statement of the principle involved. It avoids the obfuscations that result from the use of the term "intimidation". The basis of liability is seen to be the illegal act that interferes with the plaintiff's advantageous relationship, and it is immediately clearer that a man's threat to break his own contract can be considered an "illegal act" only if the breach itself is treated the same way; and all the ramifications thereof accepted.

Although it is clear that in Canadian law there is the same opening for a policy decision that the House of Lords found in *Rookes* v. *Barnard*, it must be borne in mind that labour relations legislation regulates the activities of unions in Canada to an extent unknown in England. Moreover, in every province the labour relations Act requires employers and unions to sign collective bargaining agreements which the Act makes binding upon the parties. *Therien* makes it quite clear that a strike during the life of such an agreement may constitute a breach of the governing Act, because each Act requires the inclusion of provisions for the peaceful settlement of disputes. Had the *Rookes* v. *Barnard* situation occurred in Canada the strike would probably have constituted a breach of a labour relations Act, and Rookes may well have had a cause of action under the *Therien* principle. Nor could there be a legal strike until the procedural requirements of the governing statute had been satisfied. Canadian lawyers may, therefore, think that the new areas of tort liability which *Rookes* v. *Barnard* opens up in order to free the common law of its established hobbles[60] in trade union disputes are not a desirable addition to the general law and quite redundant in the context of Canadian trade union law.

The allegation of conspiracy in *Rookes* v. *Barnard* was not superfluous, although the tort of intimidation had been established, because, it will be recalled, the defendant Silverthorne was not a B.O.A.C. employee. He could not, therefore, have himself committed the illegal act of threatening to breach his contract of em-

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[59] *Supra*, footnote 16, at pp. 280, (S.C.R.), 13 (D.L.R.).

[60] To borrow Lord Devlin's phraseology in *Rookes* v. *Barnard*, *supra*, footnote 1, at p. 405 (All E.R.).

ployment.[61] However, their Lordships held that section 1 of the Trade Disputes Act, 1906[62] afforded no protection[63] so Silverthorne was held liable as a conspirator. Their reasoning on this point will be relevant in Ontario, British Columbia and Saskatchewan, which have provisions similar to section 1 of the 1906 Act.[64]

Briefly, the defence argument was that if the element of combination was removed, as required by section 1, the defendants' threats would not be actionable because without combination there would be no strike, nor would the threats have the coercive effect which caused the damage and thus rendered them actionable.

Lord Reid recognized that "the precise act complained of" (the strike) "could not have been done without previous agreement." Therefore, he said, the section requires us to find the nearest equivalent act that could have been so done and see whether it would be actionable."[65] In this case that "nearest equivalent" would be a threat to induce all unionists to break their contracts, which, he said, would be actionable.[66] Therefore section 1 afforded no protection.[67] Lord Evershed said that the individual threat of each defendant was that "he in common with all his union colleagues would break their service contracts",[68] and Lord Devlin held that the "nature of the act"[69] of the tort of intimidation is such that an individual might commit it. Therefore, they also held that section 1 afforded no protection, even to Silverthorne.[70]

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[61] Only Lord Devlin shows recognition of the problem that this poses, *ibid.*, at p. 400 (All E.R.).

[62] See *supra*, footnote 6, for the text of the section.

[63] *Rookes* v. *Barnard*, *supra*, footnote 1, *per* Lords Reid, Evershed, Hodson, Devlin, and Pearce, at pp. 376, 387, 395, 400-401, 416 respectively (All E.R.).

[64] The Rights of Labour Act, R.S.O., 1960, c. 354, s. 3(1): "Any act done by two or more members of a trade union, if done in contemplation or furtherance of a trade dispute, is not actionable unless the act would be actionable if done without any agreement or combination."; The Trade Union Act, R.S.S., 1953, c. 259, s. 22 is identical with s. 3(1) of the Ontario Act; the Trade-unions Act, R.S.B.C., 1960, c. 384, s. 5, differs only in that it enacts that the act of two or more "is not actionable unless the act would be *wrongful* . . .".

[65] *Rookes* v. *Barnard*, *supra*, footnote 1, at p. 376 (All E.R.).

[66] Lord Reid did not, at this point, advert to the fact that section 3 of the 1906 Act renders inducing breach of a contract of service not actionable in a trade dispute.

[67] *Ibid.*, at p. 376 (All E.R.).

[68] *Ibid.*, at p. 387 (All E.R.)—the effect of this seems to be that a combination to threaten is actionable in spite of section 1, although the threat is to act in a way not unlawful except when done in combination.

[69] *Ibid.*, at p. 401 (All E.R.).

[70] It is, apparently, still open to an English court to find, on the facts, that a trade union official *induced* the members of his union to break their contracts of service (or threatened to do so) rather than that he conspired with them to break, or threaten to break, those contracts, as Silverthorne was held to have done. In England, the official would then come under

If this reasoning commends itself to the bench in those provinces which have similar legislation, and if *Rookes* v. *Barnard* is also accepted as authority on the nature of the illegality involved in a breach of contract, it may mean, for instance, that any strike in which even one striker breaches a contract of service will subject union officials to an action for damages. *Rookes* v. *Barnard* must mean that a single contract breached or threatened can visit with illegality all those acting in combination. Since all wage negotiations carry an implied threat to strike it may be worth conjecturing what the position will be in law where it is obvious that any strike would involve a breach of some contract of service. Is every non-striking labourer who loses wages, every customer who loses his advantageous source of provisions and, indeed, every employer who is damaged by strike action to have an action in tort on this new basis? Nor is there any reason to think that the possibilities are confined to the field of labour law.

The Canadian courts may well consider it more conducive to a desirable predictability in the law to refuse to follow the House of Lords. There is little need in Canadian law of this new big stick with which to beat the unions.[71]

INNIS CHRISTIE*

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CONFLICT OF LAWS—ANNULMENT OF MARRIAGE—JURISDICTION OF BRITISH COLUMBIA COURT TO DECLARE MARRIAGE VOID BASED ON DOMICILE AND RESIDENCE OF PETITIONER—STARE DECISIS.—In *Savelieff* v. *Glouchkoff*,[1] the petitioner, the husband, resident and domiciled in British Columbia, sought a declaration that his marriage in the City of Algiers to the respondent wife was void by reason of her prior and subsisting marriage. At the time of the petition the respondent was resident and domiciled in Ontario.

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the protection of section 3 of the Trade Disputes Act, 1906. Such was the decision of the majority in *J. T. Stratford and Son Ltd.* v. *Lindley*, [1964] the Times, March 26th, a clear attempt by the Court of Appeal to cut down the wide sweep of the House of Lords' judgments in *Rookes* v. *Barnard*, *supra*, footnote 1. In Canada, the trade union official could be held liable for "inducing breach of contract", if the stringent requirements of that tort were satisfied. See *D. C. Thompson and Son Ltd.* v. *Deakin*, *supra*, footnote 17.

[71] I am much indebted to Mr. K. W. Wedderburn for discussion on *Rookes* v. *Barnard*. See also (1964), 27 Mod. L. Rev. 257.

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[1] (1963), 41 D.L.R. 768 (B.C.).

The court dismissed the action for want of jurisdiction on the ground that the domicile and residence of the petitioner is not by itself sufficient to confer jurisdiction. Hutcheson J. of the Supreme Court of British Columbia, relying on *Shaw* v. *Shaw*[2] and *Gower* v. *Starrett*[3] was of the opinion that in that province the court has jurisdiction to entertain an annulment action in three cases only: where both parties are domiciled in British Columbia,[4] where the respondent is resident in the province,[5] or where the ceremony was performed there.[6] These three bases of jurisdiction are said to exist whether or not the marriage is alleged to be void *ab initio* or merely voidable. It was also reiterated that jurisdiction cannot be conferred on the court by the attornment of the respondent thereto where none of these three bases of jurisdiction are present.[7]

Hutcheson J. rejected Manson J's opinion in *Khan* v. *Khan*[8] that the domicile of the petitioner is sufficient to confer upon a British Columbia court jurisdiction to grant a nullity decree. In that case the petitioner, the wife, was domiciled in British Columbia whereas her husband the respondent, was domiciled in the State of Pakistan. She claimed a decree of nullity either by reason of the informality of the marriage which had taken place in the Pakistan Embassy in Washington or by reason of her want of capacity.

In *Shaw* v. *Shaw*[9] the wife petitioned for a decree of nullity of marriage on the ground of the impotency of the husband. The wife resided in British Columbia but her husband was neither resident nor domiciled in the province and the marriage was celebrated in Alberta. The Chief Justice of the Supreme Court of British Columbia followed *Inverclyde* v. *Inverclyde*[10] and dismissed the petition as the respondent was not domiciled within the jurisdiction. From this decision appeal was taken to the Court of

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[2] [1946] 1 D.L.R. 168, 62 B.C.R. 52, [1945] 3 W.W.R. 577 (C.A.).

[3] [1948] 2 D.L.R. 853, [1948] 1 W.W.R. 529 (S.C.).

[4] See *Salvesen* v. *Austrian Property Administrator*, [1927] A.C. 641.

[5] *Cf. Ramsay-Fairfax* v. *Ramsay-Fairfax*, [1955] 3 All E.R. 695, [1956] P. 115, 126 (C.A.).

[6] *Cf. Ross Smith* v. *Ross Smith*, [1962] 1 All E.R. 344 (H.L.) discussed *infra*.

[7] His Lordship relied on *Gower* v. *Starrett*, *supra*, footnote 3, at p. 861 (D.L.R.).

[8] (1959), 29 W.W.R. 181, 21 D.L.R. (2d) 171 (B.C.S.C.).

[9] *Supra*, footnote 2.

[10] [1931] P. 29 where it was held that a decree annulling a marriage on the ground of impotency deals with a marriage that until the date of the decree is voidable only and can be pronounced exclusively by the court of the domicile of the parties. This case was overruled by *Ramsay-Fairfax* v. *Ramsay-Fairfax*, *supra*, footnote 5, and acknowledged to be so by the House of Lords in *Ross Smith* v. *Ross Smith*, *supra*, footnote 6.

Appeal. Although the majority of the court held that the trial judge erred in holding that a decree of nullity could only be pronounced by the court of the respondent's domicile, it dismissed the appeal since the respondent was neither domiciled nor resident in British Columbia and the marriage was not performed in that province. The reasons for judgment of Robertson (with whom Sloan C.J. agreed) and Sidney Smith JJ.A. are based on *Easterbrook* v. *Easterbrook*[11] and *Hutter* v. *Hutter*[12] and support the proposition that in a nullity action on the ground of impotency, the court of the residence of the parties to the marriage would have jurisdiction to declare the marriage invalid. Robertson J.A. pointed out that:[13]

> The ecclesiastical courts did not exercise jurisdiction in nullity cases unless the person cited was either resident or domiciled in the jurisdiction or the *de facto* marriage was performed there.

He also stated:[14]

> In my opinion, so far as jurisdiction over the parties to a marriage void on account of illegality, or, void on account of impotency existing at the time of the marriage, but voidable, in this respect that a declaration might be refused under certain circumstances, is concerned, there was no difference in the principles and rules applied in the ecclesiastical courts.

Sidney Smith J.A., was also of the opinion that[15] for the purpose of the exercise of the jurisdiction of the ecclesiastical courts to declare a marriage void all that was required was the *bona fide* residence of the party cited within the appropriate territorial jurisdiction, and continued:[16]

> From the foregoing considerations there would appear to be no authority in English law that residence of the petitioner alone is suffi-

[11] [1944] 1 All E.R. 90, [1944] P. 10. In this case the petitioner in a nullity suit on the ground of wilful refusal to consummate the marriage was domiciled in Canada and the respondent was domiciled in England. The ceremony of marriage took place in England and thereafter both parties were resident in England. Hodson J. held that the court had jurisdiction to entertain the petition and rejected the distinction for the purpose of jurisdiction between voidable and void marriages.

[12] [1944] 2 All E.R. 368, [1944] P. 95. The petitioner sought a decree of nullity of marriage on the ground that the ceremony of marriage which took place in England had never been consummated owing to the wilful refusal of the respondent. The petitioner was domiciled in one of the United States of America. At the time of the institution of the suit, both parties were resident in England. Pilcher J. was also of the opinion that with respect to the court's jurisdiction there was no difference between void and voidable marriages and held that it had jurisdiction to pronounce a decree.

[13] *Supra*, footnote 2, at pp. 174 (D.L.R.), 60 (B.C.R.), 584 (W.W.R.).

[14] *Ibid.*, at pp. 172 (D.L.R.), 58 (B.C.R.), 582 (W.W.R.).

[15] *Ibid.*, at pp. 177 (D.L.R.), 64 (B.C.R.), 588 (W.W.R.).

[16] *Ibid.*, at pp. 181 (D.L.R.), 67-68 (B.C.R.), 592 (W.W.R.).

cient to found jurisdiction in suits for nullity. In my judgment it cannot be held to do so in the present case.

Moreover, I am of opinion that even if the petitioner had acquired a domicile of choice in the Province of British Columbia, upon the assumption that her marriage was void *ab initio* and that therefore no matrimonial domicile had ever existed, the court would still be without jurisdiction. The authorities seem to be clear that while the court of the residence of the party cited has jurisdiction, it has not exclusive jurisdiction; that there may also be jurisdiction in the court where the marriage was celebrated and also in the court of the domicile of both parties. But the facts in this case are not such as to bring them within either of these other categories.

Bird J.A. reserved the point:[17]

In these circumstances I do not find it necessary to deal with the question raised in the course of argument and founded upon the decisions in *Inverclyde* v. *Inverclyde*, [1931] P. 29, followed in *Fleming* v. *Fleming*, [1934] 4. D.L.R. 90, at pp. 94-95, [1934] O.R. 588, at p. 592, as to whether, in a suit for nullity upon the ground of impotence, jurisdiction does or does not depend solely upon domicile, since here there is neither domicile nor residence of the respondent.

In *Gower* v. *Starrett*,[18] the petitioner, the wife, sought a declaration of nullity on the ground that the respondent had previously been married in Ireland and that his wife at the time of his second marriage was living and had not been divorced. The petitioner and respondent were married in Vancouver and lived together for some time. The domicile of the respondent was assumed to be in Ireland.

Counsel for the petitioner relied on *Spencer* v. *Ladd*; *Finlay* v. *Boettner*[19] in contending that the court has jurisdiction in the case where the petitioner is domiciled in the province. He also contended that jurisdiction exists where the respondent has attorned to the court, and where the petitioner is resident in and the marriage contract was entered into in the province. Farris C.J.S.C., stated:[20]

It would seem rather fortunate that the three points raised by counsel for the petitioner are now definitely before the court for decision, as confusion has arisen as a result of conflicting decisions in respect to how jurisdiction is conferred on the court in respect to nullity actions

[17] *Ibid.*, at pp. 187-188 (D.L.R.), 75 (B.C.R.), 600 (W.W.R.).

[18] *Supra*, footnote 3.

[19] [1948] 1 D.L.R. 39, Where Boyd McBride J. held that the Supreme Court of Alberta had jurisdiction to decree the nullity of a marriage celebrated outside Alberta between the plaintiff, a woman domiciled in the province, and the defendant who was domiciled elsewhere, where the marriage was void *ab initio* because of the defendant's bigamy.

[20] *Supra*, footnote 3, at pp. 854 (D.L.R.), 530 (W.W.R.).

on the grounds: (a) Where the marriage is void *ab initio*, and (b) Where it is based on a voidable marriage.

In order that the Bar of this Province may have the law in respect thereto clearly defined, I have deemed it advisable to confer with my brother judges. They unanimously agree, after a complete examination of this judgment and full consideration thereof, that the findings in this case express the law as they will apply it in like cases until such time as the law is otherwise cited by a court whose judgment is binding on this court.

He then referred to the decision of the Court of Appeal in *Shaw* v. *Shaw*[21] and said:[22]

The effect of the judgments of the majority of the Court of Appeal, was in effect that I was wrong in holding in respect to a nullity action in a voidable marriage, that domicile was necessary in order to give jurisdiction. The court held that the elements to give jurisdiction in a nullity action were the same whether the marriage was void *ab initio* or voidable only, and further held that only if one of the three following elements were present, would the court have jurisdiction, the three elements being: (a) Where the parties are domiciled within the jurisdiction; (b) where the respondent was resident within the jurisdiction, and (c) where the marriage contract was entered into within the jurisdiction.

Farris C.J.S.C., also specifically rejected Boyd McBride J's opinion in *Finlay* v. *Boettner*[23] that the court has jurisdiction when the petitioner only is domiciled within the province.

The court nevertheless held that it had jurisdiction to annul the marriage on the ground that, being a marriage void *ab initio*, it had been celebrated in British Columbia.

Farris C.J.C., considered the decision of the High Court of Justice of England in *De Reneville* v. *De Reneville*[24] but not that of the English Court of Appeal.[25] In that case an Englishwoman, domiciled and resident in England before her marriage, had married in France a domiciled Frenchman and had lived with him in France and French possessions for some years. She then returned to England and presented a petition for nullity on the ground of the incapacity or wilful refusal of the respondent who appeared under protest and objected to the jurisdiction. The issue of jurisdiction was ordered to be tried separately. Jones J.[26] held that there was

[21] *Supra*, footnote 2.
[22] *Supra*, footnote 3, at pp. 855 (D.L.R.), 531 (W.W.R.).
[23] *Supra*, footnote 19. [24] [1947] 2 All E.R. 112.
[25] [1948] 1 All E.R. 56, [1948] P. 100 and see J.D. Falconbridge, Annulment Jurisdiction and Law: Void and Voidable Marriages (1948), 26 Can. Bar Rev. 907; J. Jackson, Annulment and the Choice of Law (1949), 27 Can. Bar Rev. 173; in general S. Ryan, Nullity of Marriage: Jurisdiction, Choice of Law and Related Problems (1950), 28 Can. Bar Rev. 964.
[26] *Supra*, footnote 24.

no jurisdiction and the matter came to the Court of Appeal. In the course of the argument before the Court of Appeal it appeared that it was doubtful whether under French law the facts alleged by the petitioner, if established, would make the marriage void or voidable and the court decided to deal with the preliminary point on two alternative hypotheses: one that the marriage was void and the other that the marriage was voidable.

On the hypothesis that the marriage was void and in view of the fact that on this basis the petitioner was domiciled in England, Lord Green M.R., was of opinion that the court would have jurisdiction to decide the suit despite the fact that the respondent was not resident within the jurisdiction. He said:[27]

> If, however, the marriage is by its proper law a void marriage, no decree of any court is required to avoid it. The wife in that case did not acquire the French domicile of the husband by operation of law. She was free to acquire it or not as she chose, and, if she acquired it, to abandon it or change it for a different domicile of choice. It is clear on the facts that, if she was competent to do so, she did abandon her French domicile (which I am assuming she had acquired) and that she thereby resumed her domicile of origin, which was English. Her domicile, therefore, on the hypothesis that the marriage was void, was English. This at once raises a question as to the jurisdiction of the English courts to entertain a petition for nullity by a supposed wife who is in a position to prove that her supposed marriage was void and that her domicile on that basis is English at the date of the presentation of the petition.

Lord Greene then referred to the decision in *White (otherwise Bennett)* v. *White* and cited the following passage from the judgment in that case of Bucknill J.:[28]

> It seems to me just to the petitioner, and also in the public interest, that the petitioner, being domiciled and resident in this country, should have her status as a single or as a married woman judicially established by this court.

Lord Greene continued:[29]

> This view does, of course, theoretically at least, open up the possibility of conflicting judgments by the courts of the respective domiciles, but, if it be not the right view and if the only court with jurisdiction is a court in a country where both are domiciled, the problem of jurisdiction based on domicile in the case of a void marriage where the domiciles are different would appear to be insoluble.

After rejecting the view that submission to or not objecting to the jurisdiction could found jurisdiction, he said:[30]

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[27] *Supra*, footnote 25, at pp. 60 (All E.R.), 112 (P.).
[28] [1937] 1 All E.R. 708, at p. 713.
[29] *Supra*, footnote 25, at pp. 61 (All E.R.), 113 (P.).
[30] *Ibid.*

> . . . if the marriage was void and not merely voidable, the fact that the husband has protested cannot, in my opinion, deprive the English court of jurisdiction to declare the status of a domiciled Englishwoman. Conversely, if the marriage is voidable only, no such jurisdiction exists and could not be created by the fact, if fact it had been, that the husband had not protested.

Proceeding to consider the matter on the basis that the petitioner was resident but not domiciled in England, he assumed that residence of both parties to a suit is sufficient to found jurisdiction. On this basis he agreed with Jones J., that residence of the petitioner alone was not enough to found jurisdiction.

In the result Lord Greene, with whose judgment Somervell L.J., concurred, held that in the case of void marriages, but not in the case of voidable marriages, where the wife before marriage had been domiciled in England, the English court had jurisdiction to entertain a suit for declaracion of nullity.

In the present case Hutcheson J. concluded that:[31]

> . . . if the grounds for jurisdiction in an action for a declaration of nullity in this province as laid down in *Shaw* v. *Shaw* and *Gower* v. *Starrett* are going to be enlarged to include domicile of the petitioner within the jurisdiction as decided, so far as the courts of England are concerned, in *De Reneville* v. *De Reneville* it must be so decided by the Court of Appeal upon a reconsideration of their decision in *Shaw* v. *Shaw* and overruling *Gower* v. *Starrett* in so far as it excludes as an element giving the court jurisdiction the domicile of the petitioner within the jurisdiction.

From the point of view of stare decisis, *Gower* v. *Starrett*[32] cannot be said to be an authority on the question of whether or not the domicile of the petitioner alone is sufficient to give jurisdiction to the court of British Columbia to annul a marriage void *ab initio* as in *Savelieff* v. *Glouchkoff*.[33] The *ratio decidendi* is otherwise. *Gower* v. *Starrett* stands for the proposition that a British Columbia court has jurisdiction to annul a marriage void *ab initio* where such marriage has been celebrated in the province. The other statements as to the law of British Columbia are merely *obiter* dicta. Furthermore it is only a trial court decision. *Shaw* v. *Shaw*[34] on the other hand is a decision of the Court of Appeal and clearly supports the proposition that the residence or domicile

[31] *Supra*, footnote 1, at p. 773.

[32] *Supra*, footnote 3.

[33] *Supra*, foonotte 1.

[34] *Supra*, footnote 2. The British Columbia Matrimonial Causes Act 1857 (R.S.B.C., 1960, c. 118, s. 6) provides that in all matrimonial suits including suits for nullity of marriage, but excluding suits for dissolution, the court shall proceed and act and give relief on principles and rules which shall conform as closely as possible to the principles and rules acted upon by the ecclesiastical courts in England.

of the petitioner is not sufficient to found jurisdiction in suits for nullity on the ground of impotency.

The *ratio decidendi* in *Savelieff* v. *Glouchkoff* would appear to be in direct contradiction with the views expressed by Manson J. in *Kahn* v. *Kahn*:[35]

> The second point whether the court has jurisdiction in nullity proceedings or to grant a declaration where the petitioner only is domiciled in the jurisdiction raises some difficulty in view of two earlier cases in this province. Apart from these cases the over-whelming weight of judicial authority and other legal opinion recognizes the right of the court to assume jurisdiction in a case where the marriage is alleged to have been void *ab initio* and any one of the following three connective factors is present, namely: The domicile of either of the parties; the residence of the respondent, or the celebration of the marriage in each case within the jurisdiction of the court. Whether these rules are equally applicable to voidable marriages is a question which it is unnecessary to decide. Earlier decisions in this province have indicated that there is no difference for purposes of jurisdiction between the two types of cases and the more recent decisions in England have been inclined to favour this view, overruling the earlier case of *Inverclyde* v. *Inverclyde*, [1931] P. 29. . . . Having regard to all the cases and the observations made by the learned judges, I incline to the view that the court has jurisdiction to grant a nullity decree where the petitioner alone is domiciled within the province.

However, it is difficult to maintain that *Kahn* v. *Kahn* stands for the proposition that the domicile of the petitioner alone is sufficient to confer jurisdiction upon the British Columbia court to annul *even* a marriage void *ab initio* since the petitioner claimed a decree of nullity and alternatively a declaration that she was no longer married to the respondent by reason of a bill of divorcement that was given by her husband and was valid by the law of his domicile. The court said:[36]

> Unfortunately by reason of the expense involved evidence was not led as to the validity of the marriage performed under the circumstances mentioned above in an embassy situate in the district of Columbia, U.S.A. I have the gravest doubts as to the validity of a ceremony performed within the embassy other than in conformity with the laws of the district of Columbia. Without pursuing the matter further, I am satisfied that if the marriage was valid the bill of divorcement was also valid. Alternatively, if the ceremony did not constitute a valid marriage, then the petitioner is entitled to a decree of nullity. It follows therefore that the parties are no longer husband and wife.

This passage seems to indicate that the case only involved the recognition of the foreign bill of divorcement. This interpretation leaves us with *Shaw* v. *Shaw* and a series of conflicting *obiter* dicta.

[35] *Supra*, footnote 8. [36] *Ibid.*, at p. 176 (D.L.R.).

In the field of matrimonial causes the courts perhaps should place less emphasis on stare decisis and more on the necessity of meeting present-day problems. Be that as it may, in view of the difference of judicial opinion in British Columbia and the importance of the subject, it is to be hoped that the British Columbia Court of Appeal will heed Mr. Justice Hutchison's request and at the first opportunity reconsider the whole question of the jurisdiction of the Supreme Court of British Columbia in suits for declaration of nullity of marriage.

The question of jurisdiction in nullity suits involved in *Savelieff* v. *Glouchkoff* arises at an opportune moment in view of the decision of the English Court of Appeal in *Ramsay-Fairfax* v. *Ramsay-Fairfax*[37] and that of the House of Lords in *Ross Smith* v. *Ross Smith*.[38]

In the former case, the parties were both resident in England at the time of the wife's petition for a decree of nullity on the ground of her husband's wilful refusal to consummate the marriage and incapacity. The Court of Appeal held that jurisdiction may be founded on residence where the ground for the decree of nullity is one on which the ecclesiastical courts had jurisdiction.[39] The court pointed out that the ecclesiastical courts based their jurisdiction in cases of nullity on residence not on domicile. If the defendant to a petition was resident within the local jurisdiction of the court then the court had jurisdiction to determine it, which was the situation in *Ramsay-Fairfax*. Lord Denning stated:[40]

> No one can call a marriage a real marriage when it has not been consummated; and this is the same no matter whether the want of consummation is due to incapacity or to wilful refusal. Let the theologians dispute as they will, so far as the lawyers are concerned, Parliament has made it plain that wilful refusal and incapacity stand together as grounds of nullity and not for dissolution: and being grounds of nullity, they fall within the old ecclesiastical practice, in which the jurisdiction of the courts is founded on residence and not upon domicile. [Counsel for the husband] sought to draw a distinction between a marriage which was void and a marriage which was voidable. He admitted that in marriages which were void, the courts where the parties

[37] *Supra*, footnote 5. [38] *Supra*, footnote 6.

[39] And also where the ground is an additional one now enacted in section 8 of the Matrimonial Causes Act, 1950, 14 Geo. 6, c. 25 as it was the case here with respect to wilful refusal.

[40] *Supra*, footnote 5, at pp. 697 (All E.R.), 133 (P.). Note that in the All E.R., Lord Denning is reported to have said: "The courts of the place where the marriage was celebrated also may have jurisdiction, but the courts where both parties reside certainly have jurisdiction". This passage does not appear in The Law Reports.

> resided had jurisdiction, but he said that in marriages that were voidable, it was only the courts of the domicile. However valid this distinction may be for some purposes, it is not valid for our present purposes. Take the case of impotence itself, which has always made a marriage voidable. The old ecclesiastical courts would certainly assume jurisdiction on the grounds of residence and not of domicile; and if they would have assumed jurisdiction, so should we also. Likewise with wilful refusal, which also makes a marriage voidable.

Referring to *Easterbrook* v. *Easterbrook*[41] and *Hutter* v. *Hutter*[42] he said:[43]

> I am clearly of opinion that those two cases were rightly decided and should be upheld: but *Inverclyde* v. *Inverclyde*, [1931] P. 29 was wrongly decided and should be overruled.
>
> One word more. It may be in these nullity cases that the courts of the domicile also have jurisdiction: so may the courts of the place where the marriage was celebrated: but the courts where both parties reside certainly have jurisdiction.

In *Ross Smith* v. *Ross Smith*,[44] the parties were married in England in 1955. In 1959 the husband being domiciled in Scotland and resident in Kuwait, the wife, who was resident in England, presented a petition for nullity of the marriage on the ground of the husband's incapacity or wilful refusal to consummate the marriage. Karminski J. held that there was no jurisdiction based on the place of celebration alone where the grounds for nullity were incapacity or wilful refusal.[45] The Court of Appeal reversed his decision and held that the English Court had jurisdiction.[46] On appeal, the majority of the House of Lords agreed with Karminski J. and held that jurisdiction in nullity over a marriage that is voidable, as distinct from being void, is not conferred on the High Court of Justice of England merely by the fact that the marriage was celebrated in England. Their Lordships felt that *Simonin* v. *Mallac*[47] should not be extended to voidable marriages.

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[41] *Supra*, footnote 11.

[42] *Supra*, footnote 12.

[43] *Supra*, footnote 5, at p. 698. Note that in *Ross Smith* v. *Ross Smith*, *supra*, footnote 6, at p. 354 (All E.R.), Lord Reid was also of the opinion that *Inverclyde* v. *Inverclyde*, *supra*, footnote 10, was wrongly decided so far as it refused to recognize residence of the respondent as a ground of jurisdiction in a suit of a kind that could have been entertained by the ecclesiastical courts.

[44] *Ibid.*, And see: W. Laley, Basis of Jurisdiction in Nullity of Marriage (1962), 78 L.Q. Rev. 417; J. K. Grodecki, P. R. H. Webb, P.S.C. Lewis, Nullity Jurisdiction: Three Commentaries on the Ross Smith Case (1962), 11 Int. & Comp. L.Q. 651.

[45] [1960] 3 All E.R. 70, [1961] P. 39.

[46] [1961] 1 All E.R. 255, [1961] P. 39.

[47] (1860), 2 Sw & Tr 67. In that case it was held for the first time that by reason of the marriage having been celebrated in England, an English court had jurisdiction to entertain a petition for annulment of the marriage although the respondent was neither resident nor domiciled in Eng-

Lord Cohen said:[48]

> I think it is too late now to overrule that case. I would, however, confine its operation to cases where the marriage in question was alleged to be void. . . . There seems to me to be a fundamental distinction between a so-called marriage which was void *ab initio* because, *e.g.*, it was bigamous, and a voidable marriage which remains binding on the parties unless and until the competent court declares it to be null. In the case of the first class of marriage, if it was celebrated in England, I am compelled by the decision in *Simonin* v. *Mallac* to hold that the High Court had jurisdiction to declare it null even though the respondent is neither domiciled nor resident in England, but I see no reason why I should extend this anomalous decision to the case of a voidable marriage.

Lord Guest stated:[49]

> It is said that because the ecclesiastical courts did not for the purposes of jurisdiction draw any distinction between void and voidable marriages therefore the High Court should not. But there was no occasion for the ecclesiastical courts to draw a distinction because their jurisdiction was founded on residence in both cases. And I accept that the High Court has jurisdiction in relation to void and voidable marriages founded on residence and that *Inverclyde* (*otherwise Tripp*) v. *Inverclyde*, [1931] P. 29 was wrongly decided.
>
> I have already referred to some of the distinctions between void and voidable marriages. The most notable appear to be these. In a void marriage the wife, if petitioner, can go to the court of her domicile to have the marriage annulled. *De Reneville* v. *De Reneville*, [1948] P. 100. In a voidable marriage she must adopt the domicile of her husband for the purpose of obtaining a decree of nullity. In a void marriage the decision depends on the ascertainment of a state of facts instantly verifiable at the date of the marriage, such as lack of capacity or of the necessary consents or duress. This challenge can be made by third parties at any time. Where a marriage is voidable the decision depends on supervening circumstances such as wilful refusal to consummate the marriage or impotence which may be *quoad hanc* and therefore not ascertainable till after the parties have cohabited. A voidable marriage can only be challenged by parties during their lives. These are sufficient distinctions to show why if the court of the place of the celebration is to have jurisdiction to annul a void marriage, it should not have a similar jurisdiction in the case of a voidable marriage. The jurisdiction, in my view, should depend on residence or domicile. This was the decision of the Court of Appeal in *Casey* v. *Casey*, [1949] 2 All E.R. 110 although it is true that the members of the court based their decision on differing grounds. The Court of Appeal in the present case would, I think, have felt themselves bound to

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land. This decision has been followed in many cases both in England and in other jurisdictions within the Commonwealth but in all the earlier cases the marriage was alleged to be void and not merely voidable. See *Gower* v. *Starrett*, *supra*, footnote 3.

[48] *Supra*, footnote 6, at p. 360.

[49] *Ibid.*, at p. 383.

follow *Casey* but for the decision in *Ramsay-Fairfax (otherwise Scott-Gibson)* v. *Ramsay-Fairfax*, [1956] P. 115 which they considered established that for the purpose of founding jurisdiction in nullity cases no distinction can be drawn between void and voidable marriages. *Ramsay-Fairfax* did not concern the place of celebration but the residence of the parties. All that was decided was that residence gave jurisdiction in the case of void and voidable marriages which was an inevitable decision in view of the inherent jurisdiction of the ecclesiastical courts.

It was not until *Hill (otherwise Petchey)* v. *Hill*, [1960] P. 130 that it was held in England that the place of celebration gave jurisdiction in the case of voidable marriages. This case had been preceded by *Addison (otherwise McAllister)* v. *Addison*, [1955] N.I. 1 where Lord MacDermott, C.J. sitting as a single judge, held to the same effect. In my view these decisions cannot be justified either in principle or on precedent.

For these reasons I agree with my noble and learned friend on the Woolsack that the decision of *Simonin* v. *Mallac* should not be extended to voidable marriages.

As for Lord Morris of Borth-y-Gest, he was of the opinion that:[50]

If however, the decision in *Simonin* v. *Mallac* can be supported, I cannot find in it any good reason for applying the jurisdiction so as to cover one who is not domiciled or resident in England and who is the respondent to a petition to annul a voidable marriage. Where there is such a petition the court is being invited to bring marriage status to an end and to do so with retrospective effect. If it can be said that by marrying in a particular country parties impliedly agree to have "the force and effect" of their marriage decided on by the courts of that country I cannot think that any agreement should be implied which extends beyond some agreement to have a decision in such courts whether the marriage was or was not valid *ab initio*. The laws of different countries may vary in their provisions concerning the annulment of marriages which are valid *ab initio*: they may vary in their provisions as to what ancillary relief may be granted in the event of such an annulment. The particular place where the ceremony of marriage takes place may have no relevance as between the parties so far as their marriage status is concerned assuming that the ceremony did bring about such a marriage status. It seems to me that it would be most unlikely that parties who enter into a valid marriage in one particular country which is not intended to be the country of their domicile or residence would intend that the law to be applied to their future married status should be the law of the country in which the actual ceremony of marriage took place and I cannot think that any agreement to such effect ought to be implied. It has not been suggested that the fact that a marriage ceremony takes place within the jurisdiction can be the basis for jurisdiction to dissolve the marriage.

If a respondent is domiciled or resident in England then there may be a decree of nullity either if the marriage is void or if it is voidable.

[50] *Ibid.*, at pp. 366-367.

> It does not follow from this that if jurisdiction over a respondent in nullity proceedings can be asserted for the reason that the respondent has married in England the jurisdiction should extend both to voidable and void marriages. If the reasoning in *Simonin* v. *Mallac* can be relied on at all it seems to me that its application ought to be limited to cases where what is sought is a decree of nullity in respect of a "void marriage" or, stating the matter otherwise, a decree which in effect declares that some ceremony of marriage that took place within the jurisdiction did not, for one reason or another, bring it about that there was a marriage which *ab initio* was valid.

His Lordship seems to have overlooked the elementary and primary distinction between jurisdiction and choice of law. Where the court of the place of celebration takes jurisdiction it will not necessarily apply its own substantive law to determine whether or not the marriage should be annulled. The ascertainment of the proper law in a nullity suit depends upon an analysis of the intrinsic nature of the alleged defect in the marriage. It is necessary to separate the contractual defects of the marriage from those that affect status. If the defect is one of form the court might apply the *lex fori* which is also the *lex celebrationis* but in case of impotency or wilful refusal it might apply the law of the domicile of the parties. In other words the answer will be given by the appropriate choice of law rule in force in the forum. The argument that "it would be most unlikely that parties who enter into a valid marriage in one particular country which is not intended to be the country of their domicile or residence would intend that the law to be applied to their future married status should be the law of the country in which the actual ceremony of marriage took place . . ." is not well founded and irrelevant as far as the jurisdiction of the court is concerned. The law of the place of celebration is not necessarily the proper law of the marriage. Again, we are dealing here exclusively with a question of jurisdiction and not the law to be applied by the court of the place of celebration. There would probably be less objection to the jurisdiction of the *forum celebrationis* if such forum were prepared to apply, wherever appropriate, the personal law of the parties. It is certainly wrong for the forum to annul a marriage on a ground not recognized as sufficient by the proper foreign law.

The dissenting opinion of Lord Hodson is to be preferred to that of the majority. He said in part:[51]

> I cannot find the distinction between void and voidable any more satisfactory for the purpose of jurisdiction than that between one kind of void marriage and another.

[51] *Ibid.*, at pp. 371-372.

> Whether the marriage is void or voidable the question to be determined is always the same, that is to say, was it or was it not a valid marriage. Leaving formality on one side the question will be, was there capacity to marry?
>
> The distinction between divorce and nullity proceedings is vital. The one seeks to destroy a valid marriage the other seeks to establish that there was no marriage.
>
> With all respect to those who take a contrary view I remain convinced that the line of cleavage for jurisdictional purposes is between divorce and nullity and not between different kinds of nullity proceedings. I see no justification for maintaining the distinction between void and voidable marriages when jurisdiction is exercised on the ground that the marriage was celebrated in England and rejecting the distinction when jurisdiction is exercised on the ground of residence.

Lord Merriman, also dissenting, stated:[52]

> As regards the jurisdiction of the court of the ceremony, it has throughout the argument been sought to distinguish between void and voidable marriages. It is apparently conceded that the court of the ceremony may pronounce on void marriages, but it is argued that in the case of voidable marriages it is otherwise. In my opinion, no satisfactory point of principle has been offered in support of this distinction. The distinction cannot be derived from the ecclesiastical courts because the distinction was not recognized by these courts in connexion with jurisdiction. As far as my researches have gone, the first reasoned distinction between void and voidable marriages was drawn by Sir James Wilde (afterwards Lord Penzance) in 1868 in *A.* v. *B.* (1868), L.R. 1 P & D, at p. 561. What is lacking, however, is any suggestion that the distinction between a void and voidable marriage has any bearing on the jurisdiction of the court.

The most unfortunate result of *Ross Smith* v. *Ross Smith* is undoubtedly the acceptance by the House of Lords of the relevance for the purpose of jurisdiction of the distinction between void and voidable marriages that had been rejected in the *Ramsay-Fairfax* case. Thus, today in England this distinction is relevant when the basis of jurisdiction is the *locus celebrationis* and not when it is the residence of the parties. As a result of the decision of the House of Lords, *Ramsay-Fairfax* must be interpreted within narrow limits.

In Canada it is interesting to note that in *Steele* v. *Steele*,[53] Bissett J. of the Nova Scotia Court for Divorce and Matrimonial Causes, preferred to follow the decision of the Court of Appeal[54] and held that celebration of a marriage in the province is sufficient to confer jurisdiction to annul a voidable marriage.

To conclude it is suggested that the distinction between void

[52] *Ibid.*, at pp. 376, 377.
[53] (1964), 43 D.L.R. (2d) 57 (N.S.).
[54] [1961] 1 All E.R. 255.

and voidable marriages has no bearing on the jurisdiction of the court and that the doctrine of the majority of the House of Lords in the *Ross Smith* case should be rejected in Canada.[55] The rule adopted in the *Ramsay-Fairfax* case, which bases jurisdiction on the residence of the parties, has already been accepted in British Columbia.[56] On the other hand the *ratio decidendi* of the *De Reneville* case, if incorporated in the rules of jurisdiction applicable in nullity cases in British Columbia, would be most beneficial and in conformity with logic and historical tradition. What really matters in nullity suits involving a foreign element is whether or not the court seized with the case will apply the proper law. In the common-law provinces if the ground of annulment is lack of formality, this issue should be determined in accordance with the *lex loci celebrationis;* if any other basis for relief is alleged, the issue should be determined in accordance with the personal law or laws of the parties at the time of marriage. Liberalization of jurisdictional rules is dangerous only where the substantive law of the forum is applied as a matter of course. Why place needless restrictions upon the right of a party to claim matrimonial relief? The bases of jurisdiction could be multiplied if the application of the proper law were insisted upon. Of course, there will not always be a consistent choice of law in the various jurisdictions of the world although in practice the number of connecting factors is rather limited. For this reason and for reasons of convenience to the parties and in the interest of administration of justice some sensible limitations must be placed upon the number of courts that can exercise jurisdiction to grant nullity decrees. The jurisdiction of the British Columbia court in nullity of marriage proceedings as enunciated by the Court of Appeal in *Shaw* v. *Shaw* and *Gower* v. *Starret* could be slightly modified to read as follows:

The court has jurisdiction to annul a marriage whether it is alleged to be void or voidable if:[57]

1. *Either party* is domiciled in British Columbia at the commencement of the proceedings.[58]

[55] Especially in view of the fact that the British Columbia court must conform as closely as possible to the principles and rules acted upon by the ecclesiastical courts in England. In *Shaw* v. *Shaw*, *supra*, footnote 2, Sidney Smith J.A. said at p. 178 (D.L.R.), referring to English cases: "The decisions in these cases are of course not binding upon us, and this court will not follow them unless in its opinion they correctly express the law."

[56] *Whitaker* v. *McNeilly* (1957-58), 23 W.W.R. 210, 11 D.L.R. (2d) 90 (B.C.).

[57] Modifications in italics. For a proposal in England see Report of the Royal Commission on Marriage and Divorce, 1956 Cmd. 9678.

[58] See *Salvesen* v. *Austrian Property Administrator*, *supra*, footnote 4;

2. The respondent is resident in British Columbia at the commencement of the proceedings.[59]
3. The marriage was celebrated in British Columbia.[60]

This proposal embodies the views expressed by Manson J. in *Khan* v. *Khan* with respect to marriages void *ab initio* and extends them to cover voidable marriages.[61]

Until the British Columbia Court of Appeal or eventually the Supreme Court of Canada, determines once and for all the bases of jurisdiction of the court in nullity suits, controversies on the subject are likely to continue. Lawyers in British Columbia are now faced with a number of seemingly conflicting Supreme Court decisions that call for prompt solution if hardship for petitioners is to be avoided. As for the rest of Canada, the picture is even more confusing.[62] The best approach would undoubtedly be for Parlia-

De Reneville v. *De Reneville, supra,* footnote 25; *Kahn* v. *Kahn, supra,* footnote 8; *Solomon* v. *Walters* (1956), 3 D.L.R. (2d) 78 (B.C.); also *Sheppard* v. *Sheppard,* [1947] 2 W.W.R. 826 (B.C.); *Gill* v. *Gill,* [1927] 2 W.W.R. 761 (B.C.); and *Finlay* v. *Boettner,* [1948] 1 D.L.R. 39 (Alta.) (domicile of plaintiff); *Bevand* v. *Bevand,* [1955] 1 D.L.R. 854 (N.S.). Note that the distinction between void and voidable marriages is still relevant for determining the domicile of the petitioning wife or at least until British Columbia adopts the Uniform Domicile Code (1961), see Proceedings of 43rd Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, p. 139. Note also that whether the marriage is void or voidable depends upon the particular defect alleged by the petitioner if recognized by the proper law as a ground of nullity.

[59] *Ramsay-Fairfax* v. *Ramsay-Fairfax, supra,* footnote 5; *Whitaker* v. *McNeilly, supra,* footnote 53. *Purdy* v. *Purdy,* [1919] 2 W.W.R. 551 (B.C.) seems to be overruled. *Cf. Adelman* v. *Adelman,* [1948] 1 W.W.R. 1071 (Alta.).

[60] *Gower* v. *Starret, supra,* footnote 3; see also *Reid* v. *Francis,* [1929] 3 W.W.R. 102 (Sask. C.A.); *Bevand* v. *Bevand, supra,* footnote 56; *Hinds* v. *McDonald,* [1932] 1 D.L.R. 96 (N.S.); *Spencer* v. *Ladd,* [1948] 1 D.L.R. 39 (Alta.); *G.* v. *G.,* [1928] 1 W.W.R. 651 (Sask.).

[61] It is unfortunate that for constitutional reasons (see s. 91 (26) of the B.N.A. Act, 30 & 31 Vict., c. 3) the Legislature of the Province of British Columbia cannot add a section to the Divorce and Matrimonial Causes Act, *supra,* footnote 34, that would cover specifically the cases in which the courts of that province have jurisdiction to annul a marriage.

Note that in *LeBlanc* v. *LeBlanc,* [1955] 1 D.L.R. 676, the Nova Scotia Court for Divorce and Matrimonial Causes applied The Divorce Jurisdiction Act 1930, R.S.C., 1952, c. 84, to proceedings brought by a deserted wife for the annulment of a voidable marriage. It is submitted that this is wrong as the Act deals with jurisdiction for the purpose of divorce only.

In *Abate* v. *Abate,* [1961] 2 W.L.R. 221, the court applying *Armitage* v. *Attorney-General,* [1906] P. 135, held that the principle that the English courts will recognize as valid a decree of divorce obtained in a State where the husband was not domiciled, if the courts of his domicile would recognize the validity of the decree applies also to foreign nullity decrees. See also G. D. Kennedy, Recognition of Foreign Divorce and Nullity Decrees (1957), 35 Can Bar Rev. 628.

[62] For a survey see Castel, Private International Law (1960), p. 110 *et seq.*; Cartwright, Lovekin, The Law and Practice of Divorce in Canada (3rd ed., 1962), p. 44, *et seq*; Power, The Law and Practice Relating to Divorce (1948), p. 136 *et seq.*

ment to adopt a uniform federal law on the subject as was done in the field of divorce in 1930 when the Divorce Jurisdiction Act was passed.[63]

J.-G. C.

* * *

CONSTITUTIONAL LAW—SALES TAX ON INTERPROVINCIAL TRANSACTIONS—COLLECTION FROM NON-RESIDENT RETAILERS—RECIPROCAL ENFORCEMENT OF TAX CLAIMS.[1]—Nothing is quite so appealing to today's financially pressed provincial governments as a high-yield, low-rate tax which its residents quickly accept as one of the myriad costs of everyday living and so, presumably, just as quickly forget. This helps to explain the fact that a retail sales tax is today imposed by eight of the ten provinces at a rate of from three percent to six percent and accounts for fifteen point seven percent —some $528 million—of total provincial revenues.[2] The move by the provinces towards a sales tax was a response to the financial difficulties created by the depression and the demand for relief from other taxes, particularly those on property.[3] But two factors —the uncertainty as to the constitutional validity of the tax and substantial aid from the federal government—slowed the introduction of the tax to the extent that only Quebec and Saskatchewan have sales taxes of pre-war vintage while those of British Columbia, Ontario, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland, have been introduced since 1947.

The right of the provinces to raise revenue is derived from sections 92(2) and (9) of the British North America Act, 1867. In so far as the sales tax is concerned the relevant section is section

[63] Another solution is to amend the B.N.A. Act so as to give back to the provinces the power to legislate in the field of marriage and divorce as requested by some groups in Quebec. This would enable each province to effectuate badly needed reforms in this area of the law. There is also no reason why two federal laws should not be passed, one dealing with marriage and divorce in the common-law provinces and one in the Province of Quebec.

[1] This is a revised version of a paper given at the 1963 meeting of the Canadian Tax Foundation.

[2] Dominion Bureau of Statistics, Provincial Estimates for 1963-64. This figure includes only the "general" retail sales tax and does not include the sales tax on alcoholic beverages, amusements and admissions, motor fuel and fuel oil, and tobacco, which taken together would account for another $572 million annually. The Dominion Bureau of Statistics estimates that sales taxes will yield a total of $1.1 billion for the provinces in fiscal 1964, providing 33% of total revenue and 50% of all provincial tax revenue. In the ten year period 1953-1963 the general sales tax has climbed from 8% to 15% of total provincial revenues.

[3] Due, Provincial Retail Sales Taxes in Canada, Canadian Tax papers No. 1, Canadian Tax Foundation (1951).

92(2) which limits each province to: "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes." The Privy Council defined the term "direct taxation" for the first time in 1884[4] when the Earl of Selbourne L.C., adopted John Stuart Mill's classic distinction between direct and indirect taxes: a direct tax is "one which is demanded from the very persons who it is intended or desired should pay it", and indirect taxes are "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."[5] Whatever might be the opinion of economists today[6] as to Mill's definition of a direct tax, it is "now one of law and a permanent criterion"[7] whenever section 92(2) is being applied by the courts.

Mill's definition put sales taxes, properly so called, beyond the power of the provinces to levy. What did it leave to the provinces, and what they have in fact employed, are consumption, or use taxes, that is a tax levied on the enjoyment or use of goods the legal liability for payment of which falls upon the purchaser, as the ultimate consumer of those goods. Two cases dealing with British Columbia fuel oil taxes and one concerning a New Brunswick tobacco tax settled the validity of this type of provincial sales tax. In the first case[8] the constitutionality of British Columbia's Fuel Oil Tax Act.[9] which imposed a tax on the "first purchaser after manufacture" was tested. The Privy Council struck it down as being an indirect tax because the "purchaser" might resell and pass the tax on. British Columbia tried again some seven years later and

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[4] *Attorney General for Quebec* v. *Reed* (1884), 10 App. Cas. 141 (P.C.)

[5] *Ibid.*, at p. 140.

[6] It should not be thought, as some critics have implied, that the Privy Council was unaware that the application of Mill's definition would not always yield the same result as the test of ultimate incidence in the economist's sense. The judgment of the Board in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, at p. 581 is quite clear on this point: "Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and the excellence of an economists definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies." For a discussion of the importance of economic considerations in interpreting s. 92(2) see Note in (1950), 28 Can. Bar Rev. 577.

[7] *Cairns Construction Ltd.* v. *Government of Sask.* (1958), 16 D.L.R. (2d) 465, at p. 491 (Sask. C.A.) aff'd [1960] S.C.R. 619.

[8] *Attorney-General for British Columbia* v. *Canadian Pacific Railway Company*, [1937] A.C. 934 (P.C.).

[9] R.S.B.C., 1924, c. 25.

this time the tax was imposed on every person who "consumes any fuel oil in the province".[10] Again the imposition was attacked as being indirect, but on this occasion the Privy Council, without referring to its earlier judgment, upheld the tax as being direct.[11] Lord Thankerton said in effect that the Act in question exacted the tax from a person who had "consumed" fuel oil and did not relate to any commercial transaction in the commodity between the taxpayer and someone else and was therefore direct — notwithstanding that individual taxpayers (for instance industrial users, truckers) might in fact recoup themselves.[12]

That nothing turns on whether the taxpayer is termed a "purchaser" or a "consumer" was made clear in the case that erased the last doubts about the validity of provincial sales tax legislation, *Atlantic Smoke Shops Ltd.* v. *Conlon & A.-G. Canada*.[13] In issue was the New Brunswick Tobacco Tax Act, 1940, which imposed a tax of ten per cent on every "Consumer" who purchased tobacco at a retail sale in the province. Section 5 of the Act also imposed the tax on every person ordinarily resident in the province who brought tobacco into the province, or received delivery of it in the province, for his own consumption. The tax was attacked as being indirect and section 5 in particular was alleged to contravene sections 121 and 122 of the British North America Act by preventing the free entry of goods into New Brunswick. Viscount Simon L.C., held that the tax clearly satisfied Mill's test for direct taxation—the consumer of tobacco would not, in the normal course of events, pass it on—and the legislature had carefully designated it as a "peculiar contribution" from the particular party selected to pay it.[14]

[10] Fuel-Oil Tax Act, S.B.C., 1930, c. 71 as am. by the Fuel-Oil Tax Amendment Act, S.B.C., 1932, c. 51.

[11] *Attorney-General for B.C.* v. *Kingcome Navigation Co. Ltd.*, [1934] A.C. 45 (P.C.).

[12] Affirming the position of the Privy Council in *Bank of Toronto* v. *Lambe*, *supra*, footnote 6, that it is the general tendencies of the tax that must be considered — not what might happen in particular cases. See also *Rex* v. *Caledonian Collieries*, [1928] A.C. 358 (P.C.); *Attorney-General for B.C.* v. *McDonald Murphy Lumber Co.*, [1930] A.C. 357 (P.C.); *Charlottetown* v. *Foundation Maritime Ltd.*, [1932] S.C.R. 589, at p. 594 where the court said: "... Mill's canon is founded on the theory of the ultimate incidence of the tax, not on the ultimate incidence depending upon the special circumstances of individual cases, but the incidence of the tax in its ordinary and normal operation. It may be possible in particular cases to shift the burden of a direct tax, or it may happen, in particular circumstances, that it might be economically undesirable or practically impossible to pass it on. It is the normal or general tendency of the tax that will determine...."

[13] [1943] A.C. 550 (P.C.). For a discussion of the *Conlon* case see Note, (1942), 20 Can. Bar Rev. 157. The United States Supreme Court has ruled on a provision similar to section 5 of the New Brunswick Statute, see *Henneford* v. *Silas Mason Co.* (1937), 300 U.S. 577.

[14] *Ibid.*, at p. 564. For the importance of draftsmanship in this area see

Turning to section 5, Viscount Simon recognized that it was a supplementary provision to guard against avoidance and rejected the argument that it imposed a trading tax. The tax was not imposed on the commodity nor on anyone as a condition of its lawful receipt; it was imposed on the person in the province who was its "consumer" and "any person found within the province may legally be taxed there if taxed directly".[15]

By 1943 the main provisions that are today common to the sales tax legislation of the eight provinces were given their blessing by the Privy Council. These provisions take the following general form:

1. Impose a tax on the purchaser at the time of making a purchase and define a purchaser as one who purchases at a retail sale in the province for his own consumption or use;

2. Require every vendor to have a certificate or licence before he can sell in the province, and define a vendor as one who, within the ordinary course of his business in the province, sells to a purchaser at a retail sale in the province;

3. Constitute each vendor an agent of the Minister to levy and collect the tax from the purchaser and require him to make returns and keep such records and books as might be prescribed;

4. Require every resident of the province who brings goods into the province, or has them delivered to him in the province, for his own use or consumption, to report the matter and pay the tax;

5. Provide penalties of fine and imprisonment for violations of the Act.

There is no doubt about the constitutionality of any of the above provisions. The *Kingcome* and *Conlon* cases settle the issues of direct taxation and of purchase outside the province of residence for consumption or use inside that province. Furthermore the provinces have the undoubted right to regulate commerce within their boundaries by requiring the acquisition of a licence as a condition of the right to carry on business[16] and to further require vendors within the province to act as tax-collectors.[17]

The question of evasion would no longer appear to be one of

Attorney-General of British Columbia v. *Esquimalt and Nanaimo Railway Co. et al.*, [1950] A.C. 87 (P.C.), discussed in Note, (1950), 28 Can. Bar Rev. 577.

[15] *Bank of Toronto* v. *Lambe*, *supra*, footnote 6, at p. 584.

[16] Ss. 92(13) and (16) B.N.A. Act, 1867; and see *A.-G. Manitoba* v. *Manitoba Licence Holders Association*, [1902] A.C. 73 (P.C.); *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 (P.C.); *Cherry* v. *The King*, [1938] 1 D.L.R. 156 (Sask. C.A.).

[17] *Clarke* v. *City of Moose Jaw*, [1923] 2 D.L.R. 216 (Sask. C.A.)

major importance. With eight of the ten provinces and most of the bordering states imposing a sales tax the temptation to avoid by purchasing in tax-free jurisdictions has been withdrawn. Nor are the differentials in the rates between the provinces so great as to prove attractive to the peripatetic purchaser. Moreover each of the eight provinces has an almost identical provision in its legislation requiring the resident consumer to report and pay tax on out-of-province purchases. Enforcement of this provision is only administratively feasible, however, when the total amount of the goods used by the taxpayer is large enough to justify a check on his payments. In fact the provinces have only been able to enforce it when the commodity purchased has been an automobile and then only because of the compulsory registration requirements for motor vehicles. However there are still the two tax-free provinces —Alberta and Manitoba—and there is a differential in rates, no matter how small, between the taxing jurisdictions. Inevitably, therefore, there will be some evasion on the purchase of quickly consumed commodities of small bulk, particularly when evasion is regarded as a species of sport rather than the crime it is.

A more serious evasion problem arises when a vendor in one province sells by mail or through agents in another province in which it keeps no place of business and to which it delivers by mail or common carrier. No tax is imposed at the time of sale—which would be when the order is received by the vendor—as any sales tax on the vendor would be indirect, and the consumer is outside the jurisdiction. The consumer is liable to tax in his province at the time of delivery to him, but it is safe to assume that usually he does not report and pay. As a result no tax is paid at either end. It was in an attempt to stop this type of evasion that Quebec amended its Retail Sales Tax Act in July of 1963[18] and May 1964.[19]

The 1963 amendment adds a third person to the usual vendor and purchaser found in sales tax legislation—a retailer. A "retailer" is defined as follows:

> Section 2(13). "*Retailer*"—means a person whose establishment is outside the Province but who solicits therein, through a representative or by the distribution of catalogues or other means of publicity, orders for moveable property from persons ordinarily residing or carrying on business in this Province, for consumption or use by them in this Province;
>
> "Retailer" also includes a person who, acting as representative of

[18] Retail Sales Tax Act, R.S.Q., 1941, c. 88, as am. in particular by S.Q., 1963, c. 27.

[19] See Bill 35 as adopted by the Legislative Assembly on May 26th, 1964.

a business house outside the Province, solicits, receives or accepts from persons ordinarily residing or carrying on business in this Province, orders for moveable property for delivery in this Province, for use and consumption by them in this Province, when the business house which he represents is not registered as a retailer in this Province.

Certain essential elements in the definition of the "retailer" should be noted. First, he is a person whose establishment is outside the taxing province—presumably in another province but conceivably in one of the United States or anywhere in the world—who solicits business within Quebec either through representatives, or by catalogues, or by *any means* or publicity. The term also includes the representative of such a retailer who solicits, *accepts or receives* orders, but only when the retailer he represents does not have the registration certificate required by the Act. Like a vendor within Quebec, the retailer is required to obtain a registration certificate from the Deputy Minister:

Section 3(a) 1. No retailer shall ship, deliver or cause to be delivered any moveable property to a person ordinarily residing in this Province or carrying on business therein, for consumption or use by such person in this Province, unless upon his application, a registration certificate has been delivered to him under this act and is in force at the time of shipment or delivery.

3(b) The Minister may require as a condition for the registration of a person who has neither residence nor place of business in the Province, security, in such amount as he may fix.

It should be noted that section 3(a) does not prohibit the retailer from soliciting or selling in Quebec without a certificate, but only prohibits him from shipping or delivering to the Quebec consumer unless he has obtained the certificate. The further provisions of the amendment impose the same obligations on the retailer as are imposed on the vendor in Quebec.

The retailer must collect upon delivery:

Section 9. The tax imposed by section 6 shall be collected by the vendor or retailer at the time of delivery and be transmitted by him to the Minister in such manner as the Lieutenant-Governor in Council may prescribe.

The retailer is to act as the agent of the Minister and remit to him and to keep and render accounts:

Section 10. The vendor or retailer shall act, in such cases, as the agent for the Minister, and he shall account for and remit to him, through the Department of Revenue, the amounts so collected on or before the fifteenth day of each month for the preceding calendar month, even if no sale or delivery subject to the tax was made during the month.

> Section 14. 1. The vendor or retailer, as agent for the Minister, shall keep and render accounts of the taxes collected, in the form and manner established by the Minister.
>
> 2. The account rendered shall be verified by the affidavit or the statutory declaration of the vendor or retailer.

Furthermore by sections 14(3) and (4) the retailer may be required to keep a record of all sales and forward such record to the Minister and any Quebec revenue officer is entitled to enter the retailer's premises to examine his books and documents and verify the quantities of property sold. By section 17 any retailer who fails to obtain the required certificate, or fails to collect and remit the tax, or refuses to allow his books to be inspected, is liable upon summary conviction to a fine of between fifty and one thousand dollars and in default of payment, to imprisonment for three months.

It must also be noted that according to section 23(a) added by Bill 35 in May 1964:

> A person who has neither residence nor place of business in the Province cannot institute or continue any proceedings therein for the recovery of a debt arising from the sale or delivery of property to a person who resides or carries on business therein, unless he holds a registration certificate issued under this act.
>
> Such incapacity shall be noticed *ex officio* by the court and its officers.
>
> Nevertheless, any proceedings instituted shall be valid notwithstanding such incapacity upon the subsequent obtaining of the registration certificate.

It is clear that the tax imposed on the consumer in Quebec who receives delivery from a retailer outside that province is a direct tax within section 92(2). This exact point was in issue in *Conlon*[20] and as noted above the Privy Council decided that goods were not denied free admission to a province in contravention of section 121 when the consumer had to pay a tax either on bringing the goods into his province or on receiving delivery of them there. The nature of the tax certainly is not changed by the fact that the retailer collects it at the time of delivery. The crucial constitutional questions are whether the retailer can be required to act as an agent of the Minister of Revenue and collect the tax as a condition of doing business in Quebec; whether he can be required to obtain a certificate from the Quebec authorities as a condition of shipping into Quebec; whether he can be required to keep records and

[20] *Supra*, footnote 13. The amendment provides that if the retailer collects the tax the purchaser does not have to report and remit the tax on the out-of-province purchase, see s. 3.

accounts and make reports; whether his books and accounts, no matter where situated, are to be open to inspection by Quebec's revenue officers; and whether he is to be subject to fine and imprisonment for failure to comply with any or all of these requirements?

It seems clear that Quebec has exceeded her constitutional powers in attempting so to regulate a retailer whose place of business is outside its provincial boundaries. Any province may certainly regulate the conduct of economic activity within its boundaries[21] and as part of that regulation it may certainly require a licence to carry on business,[22] and can further require vendors within the province to act as tax-collectors.[23] But it is implicit in section 92 of the British North America Act, 1867, that each province's legislative authority is limited by its territorial boundaries. And it is explicit in the only two sections under which the provinces may so regulate economic activity, sections 92(13) and 92(16). Section 92(13) speaks of "Property and Civil Rights In The Province" and section 92(16) of ". . . matters of a merely local or private Nature in the Province". The provisions of the amendment clearly prescribe a course of conduct to be followed outside Quebec by a retailer whose place of business is outside that province. That the intent is to control extra-provincial conduct is made clear by section 14(4) which authorizes a revenue officer to enter the retailer's premises outside the province and examine his books and records to ascertain if the commands of Quebec legislation are being obeyed. If the revenue officer is refused the right to examine the books the retailer is made liable to a fine and imprisonment.

It might be argued that the "pith and substance" of the legislation is to regulate the conduct of those who solicit business inside Quebec in furtherance of the taxing power granted under section 92(2) of The British North America Act and that any external effects it might have are only incidental to the valid imposition of a direct tax within the province. Indeed it could well be said that the tax cannot be effectively collected without such external regulation. That very argument was advanced in regard to section 5 of the New Brunswick Tax Act in *Conlon*.[24] Viscount Simon recognized the reason for section 5 but rejected the "watertight" argument:[25]

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[21] *Supra*, note 16.

[22] *Ibid.* See also *Reference re Natural Products Marketing Act*, [1936] S.C.R. 398, aff'd [1937] A.C. 377 (P.C.).

[23] *Supra*, footnote 17.

[24] *Supra*, footnote 13.

[25] *Ibid.*, at p. 568. Viscount Simon then went on to find s. 5 valid on its merits.

> It is manifest that s. 5 is enacted merely as a supplementary provision, to guard against the methods of avoidance of s. 4 which might otherwise remain available. At the same time, the validity of s. 5 must be judged according to its terms, and, if its enactment by the provincial legislature be beyond the powers of that legislature, it cannot be justified on the ground that it is needed to make the whole scheme watertight.

It is submitted that the real effect of the legislation is, in fact and substance, external regulation as an incident of doing business in Quebec, and that such regulation is beyond the legislative competence of the province as being an extra-provincial assertion of authority, and unwarranted by anything in section 92 of the British North America Act. If it be objected by Quebec's revenue officers that there is little solace in having a valid tax that cannot be effectively collected, the reply is that the solution is to be sought elsewhere than in external regulation and that perhaps part of the answer is to be found in greater co-operation between the revenue officers of the various provinces.

It is submitted that the amendment is unconstitutional on the alternative ground that it infringes section 91(2) of the British North America Act as being legislation "in relation to trade and commerce". The provinces may regulate economic activity under sections 92(13) and (16), but in so regulating they must not seek to control exports or imports. If they do, they infringe the federal trade and commerce power.[26] Under section 3(a) of the Quebec legislation the retailer must obtain a certificate before he can ship to or deliver to, the consumer in Quebec. He does not require the certificate to solicit in the province or to effect the sale; he requires it only as a condition of shipping or delivering into the province. It seems clear that it is beyond Quebec's legislative competence so to prescribe the conditions under which she will allow goods to enter the province. Again it might be argued that this is valid regulation of doing business in Quebec—that one who solicits and sells to Quebec residents must comply with the laws of Quebec. But again it is submitted that the Province of Quebec has attempted to regulate in a manner beyond her legislative competence by imposing what is in effect an import control. The following passage from the judgment of Kerwin, C.J.C. in *Reference re the Farm*

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[26] *Lawson* v. *Interior Tree, Fruit & Vegetable Committee*, [1931] S.C.R. 357; *Crickard* v. *A.-G.B.C.* (1958), 14 D.L.R. (2d) 58 (B.C.S.C.); *Attorney-General for B.C.* v. *McDonald Murphy Lumber Co.*, *supra*, footnote 12. For a more recent discussion of the limits of the provincial power to regulate trade, see *Reference re Farm Products Marketing Act, R.S.O., 1950, c. 131, as Amended*, [1957] S.C.R. 198.

Products Marketing Act, R.S.O. 1950, c. 131, as Amended,[27] is instructive.

> It seems plain that the province may regulate a transaction of sale and purchase in Ontario between a resident of the province and one who resides outside its limits; that is, if an individual in Quebec comes to Ontario and there buys a hog, or vegetables, or peaches, the mere fact that he has the intention to take them from Ontario to Quebec does not deprive the Legislature of its powers to regulate the transaction, as is evidenced by such enactments as the Sale of Goods Act, R.S.O. 1950, c. 345. That is a matter of the regulation of contracts and not of trade as trade and in that respect the intention of the purchaser is immaterial.

The transaction with the retailer that is contemplated by the amendment is not one of sale and purchase in Quebec. The retailer solicits in Quebec but the sale does not take place until the order is sent to, and accepted by, the retailer whose place of business is outside Quebec. Once the out-of-Quebec sale takes place the retailer must obtain a certificate from the Quebec authorities before he may ship to the purchaser. This, it is submitted, is the regulation of trade as trade and not of contracts entered into in Quebec.

It is also possible, though this is a moot point, that the requirement of a certificate to ship into Quebec infringes section 121 of the British North America Act.[28] Until 1958 it was thought that section 121 was aimed solely at the establishment of customs duties affecting interprovincial trade.[29] However Rand J., in *Murphy* v. *C.P.R. and A.-G. Canada*[30] sought to give the section an expanded meaning and it is possible that section 3(a) of the Quebec amendment might violate such an interpretation:

> I take section 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.[31]

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[27] *Ibid.*

[28] "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

[29] *Gold Seal Ltd.* v. *Dominion Express Co. & A.-G. Alberta* (1921), 62 S.C.R. 424, at p. 456; *Atlantic Smoke Shops Ltd.* v. *Conlon & A.G. Canada*, *supra*, footnote 13, at p. 569.

[30] [1958] S.C.R. 626.

[31] *Ibid.*, at p. 642.

An issue similar to the constitutional questions raised by the amendment came before the United States Supreme Court under legislation from Iowa that was almost identical to that of Quebec.[32] The General Trading Company was a Minnesota Corporation that solicited orders in Iowa through salesmen who worked out of the Minnesota head office. All orders were subject to acceptance in Minnesota; no office branch or warehouse was maintained in Iowa; and the goods were shipped into Iowa by common carrier or through the post. In issue was Iowa's right to require the Minnesota trader to collect Iowa's use tax (a direct tax in Canadian constitutional terms) as a condition of soliciting business in Iowa. In a brief judgment for the majority upholding the legislation, Mr. Justice Frankfurter held that the Minnesota company was maintaining a place of business in Iowa; that the transaction was within the taxing power of Iowa; and "to make the distributor the tax collector for the state is a familiar and sanctioned device".[33] In a vigorous dissent, Mr. Justice Jackson said that "no state has a constitutional warrant for making a tax collector of one as the price of the privilege of doing interstate commerce. He does not get the right from the state, and the state cannot qualify it".[34]

Aside from the dangers inherent in applying the constitutional decisions of one country to the constitution of another, there are certain distinctions between the *General Trading* case and the issues raised by the Quebec legislation. The states are not limited to a particular type of tax, though the Iowa tax was in fact direct. Most importantly, Iowa did not require the out-of-state trader to be licensed before shipping into Iowa. The use of salesmen in Iowa appeared to give the General Trading Company a "place of business in Iowa". Different considerations might have arisen if the only solicitation had been by mail—a situation the Quebec legislation contemplates. Finally, and with respect, Mr. Justice Frankfurter's decision was both brief and unreasoned and therefore unsatisfactory. As one writer put it: "It can hardly be that it was because the issue was so simple that it was so lightly avoided by more assertion."[35] Mr. Justice Jackson's dissent seems more apposite when the constitutional powers of the provinces are in issue.

Assuming, for the sake of argument, that the amendment is constitutional, how is Quebec to enforce its tax legislation on

[32] *General Trading Co.* v. *State Commission of the State of Iowa* (1943), 322 U.S. 335.
[33] *Ibid.*, at p. 338.
[34] *Ibid.*, at p. 339.
[35] Note, (1943-44), 57 Harv. L. Rev. 1086, at p. 1094.

persons beyond its jurisdiction? Can the extra-provincial vendor be subjected to a judgment in the province of his establishment for the amount of the sales tax imposed nominally on the purchaser but demandable from the vendor as collector for the Quebec treasury—thus indirectly compelling him to register and collect the tax? The Supreme Court of Canada has recently had occasion to restate the common-law rule that the courts of one jurisdiction will not enforce the revenue laws of another jurisdiction.[36] The court also made it clear that this rule is not escaped by one jurisdiction taking judgment in its own courts and then bringing suit on that judgment in the other jurisdiction—the claim asserted remained a claim for taxes. Leaving aside the important and interesting question of whether the common-law rule should be applied as between the component parts of a federal union,[37] Quebec has sought to overcome the rule by an amendment to its Code of Civil Procedure.[38]

> 1. Article 79 of the Code of Civil Procedure is amended by adding the following paragraph:
>
> The courts in the Province shall recognize and enforce the obligations resulting from the taxation laws of another Canadian Province in which the obligations resulting from the taxation laws of the Province are recognized and enforced.

Quebec also requires this amendment for collection of income taxes due by persons who do not reside in the province and have no property there. When the Federal-Provincial Tax Sharing Arrangements Act[39] expired on March 31st, 1962, the federal govern-

[36] *United States of America* v. *Esperanza P. Harden*, [1963] S.C.R. 366. For a discussion of the problems raised by *Harden* see Castel, Foreign Tax Claims and Judgments in Canadian Courts (1964), 42 Can. Bar Rev. 277.

[37] The United States Supreme Court in *Milwaukee County* v. *M. E. White Co.* (1935), 296 U.S. 268, held that a judgment in one of the United States, although a judgment founded upon a revenue law, is enforceable in a sister state as a combined result of the full faith and credit clause of the American Constitution, U.S. Constitution, art. IV, s. 1 and an Act of Congress passed thereunder (1958), 28 U.S.C., s. 1738. The court expressly left open the question of whether revenue laws (as opposed to judgments) of one state must be enforced in another and that precise question has not since come before the Supreme Court. However several state courts have entertained tax claims of sister states—see *e.g. City of Detroit* v. *Gould* (1957), 146 N.E. 2d 61 where the authorities are collected. The New York Court of Appeals, however, recently held that neither the full faith and credit clause, nor comity, nor public policy, required the courts of New York to entertain an action to enforce a liability, not reduced to judgment, under the tax laws of Pennsylvania. See *City of Philadelphia* v. *Cohen* (1962), 184 N.E. 2d 167. The New York Legislature decided, however, that public policy required otherwise and enacted a reciprocal enforcement statute in 1962 under which tax suits may now be entertained in New York from over half of the other States. Reciprocal enforcement statutes respecting tax claims are now in force in more than half of the American states.

[38] S.Q., 1963, c. 63.

[39] S.C., 1956, c. 29.

ment withdrew in part from the personal and corporate income tax fields to permit the provinces to impose their own taxes in these areas—a right restricted under the various tax rental agreements in effect since 1941. Under new federal-provincial agreements, the federal government now collects both the personal and corporate income taxes for eight of the provinces and the personal income tax for Ontario. Quebec, however, remained outside the scheme and levys and collects its own personal and corporate taxes. Thus Article 79 of the Code of Civil Procedure must also be considered with An Act to Amend the Provincial Income Tax Act[40] which provides in section 3 that:

> A tax shall be paid as hereinafter required for each taxation year, upon his taxable income by
>
> a) every person resident in the province on the last day in the taxation year, concerned;
>
> b) every person not taxable under paragraph (a) but who carried on a business in the province at any time in the taxation year concerned;
>
> c) every person resident outside Canada who was employed in the province at any time in the taxation year concerned.

The other nine provinces have all included reciprocal enforcement provisions in their income tax Acts.[41] Without such provisions the Minister of National Revenue would not be able to enforce his claim as collector of the provincial tax when a taxpayer who has been a resident of one province moves to another at a time when he owes tax to the first province under the Income Tax Act of that province. However each of the provisions extends only to an "agreeing province" and in each case an "agreeing province" is defined as one that has entered into a collection agreement with the Government of Canada—thus excluding Quebec. Moreover each of the nine provinces' reciprocal enforcement sections refers only to the enforcement of judgments under the taxing acts and not to the enforcement of the taxation laws themselves. Thus the reciprocity that Article 79 requires has not been established. However it would require only minor amendments in the provinces' reciprocal enforcement provisions (and perhaps

[40] S.Q., 1963, c. 25.

[41] S.B.C., 1962, c.27, s.53; S.A., 1961, c.1, s. 55; S.S., 1961, c.2, s. 52; S.M., 1961, c. 1, s. 55; S.O., 1961-62, c. 60, s. 50; S.N.B., 1961, c. 2, s. 52; S.N.S., 1962, c. 8, s. 52; S.P.E.I., 1961, c.1, s. 52; S.N., 1961, Act No. 1, s. 53. The sections are almost identical to s. 50(1) of the Ontario Income Tax Act: A judgment of a superior Court of an agreeing province under that province's income tax statute, including any certificate registered in such superior Court in a manner similar to that provided in subsection 2 of section 28, may be enforced in the manner provided in the Reciprocal Enforcement of Judgments Act.

in Article 79) to create such reciprocity, at least for income tax purposes. As for the reciprocal enforcement of sales taxes, that would seem to depend on how anxious the other provinces are to collect tax on interprovincial transactions.

It seems fairly clear that Article 79 is constitutional. (The key question in applying it is of course whether the "taxation laws" referred to are themselves constitutional, and if it is the Quebec sales tax amendment that is in issue, the suggested answer is that it is not.) The Supreme Court decision in *A.-G. for Ontario* v. *Scott*[42] would seem to support the change in Article 79. In that case Ontario's Reciprocal Enforcement of Maintenance Orders Act,[43] was in issue. The Act enables a non-resident wife to enforce a maintenance order of an English court against a husband resident in Ontario when an Ontario court has confirmed the order. The judgment of Rand J. is applicable to article 79.

> That the province can confer such a benefit on a non-resident seems to me to be beyond serious argument. Rights in property and in action in non-residents are created by the law of Ontario in transmissions through death or in the course of business as everyday occurrences. . . . A civil right within the province does not require that the province, in creating it, should have personal jurisdiction over both parties to it. . . .[44]

It would therefore seem that the legislature of one province can empower its courts to enforce, against one of its residents, the obligations arising from the taxation laws of another province—provided of course that the "taxation laws" are themselves valid. That this should be so is highly desirable as there is nothing to be said for the creation of tax havens within the several jurisdictions of a federal union.

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[42] [1956] S.C.R. 137.

[43] R.S.O., 1950, c. 334, now R.S.O., 1960, c. 346, as am. by 1961-62, c. 123.

[44] *Supra*, footnote 42, at p. 140.

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