Recent Cases

CRIMINAL LAW — ATTEMPTED MURDER — ACCUSED SUFFERING FROM FUNCTIONAL AMNESIA COVERING PERIOD VITAL TO DEFENCE — HYPNOSIS AS MEANS OF RESTORING MEMORY — APPLICATION FOR LEAVE TO HYPNOTIZE ACCUSED IN PRESENCE OF JURY IN ATTEMPT TO OVERCOME AMNESIA — NO QUESTIONS TO BE PUT AS TO FORGOTTEN EVENTS WHILE ACCUSED UNDER HYPNOSIS. *R.* v. *Pitt,* (1968), 68 D.L.R. (2d) 513, (1969), 66 W.W.R. 400.

As medical science and technology progress there will undoubtedly be inceasing pressure on the courts to adopt new methods in finding just solutions to legal problems. To say that courts have been hesitant to do so is an understatement. However, it may well be that the conservative armour of the Canadian judicial process has been dented by the recent decision of the British Columbia Supreme Court in *R.* v. *Pitt.*

In this case the accused was charged with attempted murder of her husband. The accused, due to what was described as functional amnesia, was unable to recall what occurred during the crucial period of time in which the alleged offence took place. After asking the accused if she had told the court all she could remember and receiving an affirmative reply, the defence attorney, after having the jury excluded, asked the court to give leave that the accused be hypnotized in the presence of the jury. It was hoped that this would assist the accused in recollecting the events that transpired during the crucial period.

After hearing the testimony of two psychiatrists who regarded hypnosis as a useful means to enable a person suffering from functional amnesia to recall forgotten events, it was held by Aikins, J., "that it would be unfair to deny to the accused the right to have the assistance of this particular procedure or psychiatric procedure which ... would appear to be an accepted procedure, a proper procedure, and one which is efficacious." The judge, however, was quick to point out that under no circumstances would he permit the testimony of the accused to be given while she was in a state of hypnosis. What he would authorize was the psychiatrist asking her, while she was in a hypnotic state, to attempt to recall the events of the crucial time period, and to relate these events after being brought out of the trance.

The procedure to be used was determined by means of a dialogue between the judge and the Crown and defence attorneys. It was decided that:

1) accused would be hypnotized before the jury,
2) psychiatrist would take the stand, and by answering questions put to him by the defence attorney, would explain what was to occur,
3) accused would be brought into the courtroom only after the psychiatrist gave his explanation,
4) Crown attorney could cross-examine the psychiatrist either before or after the accused had been hypnotized and had given her evidence.[1]

The use of hypnotism as a legal tool has been rare. In the United States the hypnotizing of an accused was, at first, only permitted in order to aid defence counsel in preparing his case,[2] but under no circumstances would statements made by an accused while hypnotized be admissible evidence.[3] Then, in a 1963 Ohio case,[4] hypnosis was allowed in a courtroom for the first time, although the jury was excluded. However, after the testimony the District Attorney amended the indictment thereby eliminating the necessity of a decision by the judge on the admissibility of this evidence.

It appears that Aikins, J., was basing himself on the American position in so adamently stating his refusal to admit any testimony by the accused while she was under a hypnotic trance. A question may be asked as to the reasoning behind such an exclusion since the court readily admitted, as evidence, statements made by the accused on the basis of what may be referred to as a post-hypnotic suggestion. It is submitted that the answer lies in the highly complex nature of hypnosis. Only a person who is specifically trained in

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[1] In this case, cross-examination of the psychiatrist took place after accused gave testimony. The accused had been hypnotized by the psychiatrist once before, and in the event that the Crown wanted to attack her credibility, it wanted to cross-examine the psychiatrist as to what accused had told him when under hypnosis the first time. The judge, therefore, allowed this cross-examination to take place after the accused gave evidence, so that the Crown would be able to point up any inconsistencies between the two stories.

[2] *Cornell* v. *Superior Court*, 52 C. 2d 99, 338 P. 2d 447.

[3] *Cornell* v. *Superior Court, supra*, n. 2; *People* v. *Ebanks*, 117 Cal. 652, 49 P. 1049. In the latter case, decided in 1897, the court held that the law of the United States does not recognize hypnotism and consequently any defence based on hypnotism would be illegal and so not admissible.

[4] The *Nebb Murder Trial*, discussed in: Harry Arons, *Hypnosis in Criminal Investigation*, (Springfield, Ill., 1967), at pp. 106-108.

hypnosis can properly utilize it for the purpose of elliciting the required information from the subject. This necessarily excludes questioning by either of the attorneys while the accused is under the trance. However, in the case of the post-hypnotic suggestion the accused can be examined in chief and cross-examined in the ordinary fashion.

Should hypnosis prove useful and gain substantial judicial acceptance, will courts, when faced, for example, with functional amnesia, go so far as to order the accused hypnotized although neither attorney has made such a request? Psychiatrists have said that hypnosis be used "sparingly, judiciously and on a highly individual basis".[5]

Thusfar, the hesitancy of courts to allow hypnosis may derive from thinking which views it as some sort of trick or chicanery. Today, however, hypnosis is being used more and more in many fields of medicine with extremely beneficial results. There appears to be no reason why courts should fear its use when it can clearly help in the quest for truth. In *Cornell* v. *Superior Court*,[6] when asked why he opposed hypnosis, the District Attorney replied: "We have nothing against hypnosis; it is just that it is a little unusual." Justice J. Peters looked up and stated: "Since when is the unusual unlawful!"[7]

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[5] *Ibid.*, at p. 110.
[6] *Supra*, n. 2.
[7] Arons, *op. cit.*, p. 51.

PRACTICE — DIVORCE — SERVICE — WHEREABOUTS OF RESPONDENT SPOUSE UNKNOWN — WHETHER SUBSTITUTED SERVICE PERMISSIBLE WHERE NO LIKELIHOOD OF NOTICE REACHING RESPONDENT. *McAdams* v. *McAdams*, [1968] 2 O.R. 784, 70 D.L.R. (2d) 582; *Sutt* v. *Sutt*, [1968] 2 O.R. 786, 70 D.L.R. (2d) 584.*

Under the new federal *Divorce Act*,[1] where the spouses are living separate and apart, a petition in divorce may be presented to a court on the ground that there has been a permanent breakdown of their marriage by reason of certain circumstances,[2] one of which is where

> the petitioner, for a period of not less than three years immediately preceding the presentation of the petition, has no knowledge of or information as to the whereabouts of the respondent and, throughout that period, has been unable to locate the respondent;[3]

In such circumstances, it should be obvious that a substituted form of service would have to be permitted to the petitioner in order to effect service of the notice of the petition on the respondent spouse. However, this matter is no longer so obvious, as seen by these two recent decisions of the High Court of Ontario.[4]

In *McAdams* v. *McAdams*, Mr. Justice Stewart held that, under the Ontario *Matrimonial Causes Rules of Practice*, a judge had no power to dispense with service upon the respondent spouse. He held further that an order for substituted service could only be granted where there was some reasonable prospect of the material served coming to the respondent's attention. The learned judge relied principally on Rule 791 (1) and Rule 792 of the new *Matrimonial Causes Rules*, enacted pursuant to section 19 (1) of the *Divorce Act*. Rule 791 (1)[5] provides:

> Unless otherwise ordered by a judge, the notice of petition, the petition and all papers required to be served therewith shall be served on each respondent personally.

Rule 792[6] goes on to say:

> A judge may dispense with service of the notice of petition and other documents on a respondent, *other than the respondent spouse*, who cannot be found if no claim is made against him, or if made, is abandoned (emphasis added).

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* Since the writing of this note on a recent case, the Court of Appeal has rendered its decision. See *Sutt* v. *Sutt*, (1969), 2 D.L.R. (2d) 33. See *infra*, n. 12.

[1] 16-17 Eliz. II, S.C. 1967-68, c. 24.

[2] S. 4 (1).

[3] S. 4 (1) (c).

[4] September 20, 1968 and October 2, 1968 respectively.

[5] *Regulations under* The Judicature Act *and* The Matrimonial Causes Act, R.R.O. 1960, Reg. 396, Rule 789 (1), rep. & sub. by O. Reg. 156/68, ss. 15 and 17.

[6] *Ibid.*

Applying the maxim *expressio unius est exclusio alterius,* the Court concluded that under no circumstance did it have the power to dispense with service upon the respondent spouse. Mr. Justice Stewart added:

> I do not believe that similar applications should be dismissed but that they should be adjourned *sine die* for better material. It might well be that information might come to the attention of the petitioner as to the whereabouts of the missing spouse in which event it seems to me rather unnecessary that all the previous papers should have to be redrafted and filed. I therefore adjourn this matter *sine die,* recognizing, regretfully, that this will probably also be *in perpetuum.*[7]

The only recourse left open to the deserted spouse, after seven years, is to apply for an order declaring the missing spouse dead. But should he reappear later on, the marriage will not have been dissolved!

In *Sutt* v. *Sutt,* decided a few days later, Mr. Justice Parker refused to accept the *ratio* in *McAdams* v. *McAdams.* He specifically disapproved of the *McAdams* case holding that, while as a general rule substituted service should not be ordered unless there is some reasonable prospect of the material substitutionally served coming to the attention of the person upon whom it should be served, it would be frustrating the intention of section 4 (1) (c) of the *Divorce Act* to deny the deserted spouse the recourse to which he or she is entitled merely because there is no reasonable expectation that the material to be served would not come to his or her attention. Mr. Justice Parker added that the *Divorce Act* should be interpreted as new social legislation intending to provide an exception to the general rule.[8]

The learned judge relied on previous jurisprudence, principally on *Brissette* v. *City-Wide Taxi Ltd.* and *Boyd,*[9] and several English decisions in matrimonial causes, where orders for substituted service

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[7] (1968), 70 D.L.R. (2d) 582, at p. 584.

[8] See *Myers* v. *Myers,* (1968), 70 D.L.R. (2d) 586, 65 W.W.R. 575 (B.C.S.C.) where Tyrwhitt-Drake, Co. Ct. J., would have deemed it proper to *dispense* altogether with service. But since he was prohibited to do so under the British Columbia *Rules* (see *infra,* n. 12) the learned judge, rather than "saddle [the petitioner] with substantial costs of prolonged and far-flung publication of a notice which would almost certainly be unproductive", ordered that service be made at the main Post Office of the City where the spouses were married and resided until the disappearance of the respondent spouse. See also, *Watts* v. *Watts,* (1968), 70 D.L.R. (2d) 621 (B.C.S.C.) where the Court approved *Myers* v. *Myers.* It is respectfully submitted that this is a more rational approach as, in the final analysis, the disappeared spouse, if he is not dead, is not likely to appear in the proceedings even if he does get notice.

[9] [1952] O.W.N. 501.

were granted even if the whereabouts of the respondent spouses were unknown.[10]

It is respectfully submitted that the view of Mr. Justice Parker in *Sutt* v. *Sutt,* that the *Divorce Act* must be deemed to be an exception to the general rule of personal service, must prevail. If Rule 792 is to be interpreted restrictively, as in *McAdams* v. *McAdams,* then it must be deemed to be *ultra vires* as repugnant to the *Divorce Act,* in so far as it would restrict the courts in the exercise of their functions under section 4 (1) (c) of the *Act.*[11] The interpretation arrived at by Mr. Justice Stewart in *McAdams* v. *McAdams* is in part imputable to the *Rules* themselves which are in this respect inadequate. The learned judge was faced, on one hand, with a rule requiring personal service (Rule 791 (1)) and, on the other hand, with another prohibiting "dispensing" with service against the respondent spouse. None dealt specifically with substituted service, and thus Mr. Justice Stewart held that he had no authority to grant such an order. This is a lapse for which he cannot be held responsible, but which he could have easily remedied as did Mr. Justice Parker in *Sutt* v. *Sutt.*[12]

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[10] *Peckover* v. *Peckover* and *Jolly,* (1858), 1 Sw. & Tr. 219, 164 E.R. 700; *Appleyard* v. *Appleyard* and *Smith,* (1875), L.R. 3 P. & D. 257; *Jenson* v. *Jenson,* (1898), 78 L.T. 764.

[11] See the case of *Andrews* v. *Andrews* and *Roberts,* [1945] 1 D.L.R. 595. King's Bench Rule 502 (2) of Saskatchewan was held to be *ultra vires* as it was held to deal with the substantive law of divorce, which was within the sole legislative competence of the Dominion Parliament, in that it purported to restrict the Court in the exercise of its duties under s. 5 of the *Marriage and Divorce Act,* R.S.C. 1952, c. 127 and s. 31 of the *Divorce and Matrimonial Causes Act,* 1857, 20 & 21 Vict., c. 85.

[12] In British Columbia, for example, the equivalent rules are Rules 13, 14 and 15 of the *Supreme Court Rules,* 1961, B.C. Reg. 241/60 (Order LXa), B.C. Gaz. 1960, Part II, vol. 3, No. 25, p. 597, as amended by *Order in Council No. 1811,* B.C. Reg. 154/68, B.C. Gaz. 1968, Part II, vol. 11, No. 13, p. 241. Rule 13 (1) provides substantially the same as Rule 791 (1) of the Ontario *Rules,* while Rule 15 is identical with Rule 792. The difference lies in Rule 14 which provides: "Where personal service cannot be effected, leave to substitute another mode of service may be granted by a Judge, on application supported by an affidavit of the solicitor or other person having conduct of the proceedings." The Court of Appeal, in *Sutt* v. *Sutt,* got around this lapse of the *Matrimonial Causes Rules* of Ontario by holding that Rule 16 of the *General Rules* had been incorporated in the *Matrimonial Causes Rules* in virtue of s. 19 (3) of the *Divorce Act.* Rule 16 (1) provides: "Except as hereinafter provided, in the absence of such acceptance of service every writ of summons shall be served personally, but, if it appears that the plaintiff is unable to effect prompt personal service, substituted service, by advertisement or otherwise, may be ordered." The Court concluded that it would be requiring the impossible (*Lex non cogit ad impossibilia*) to

Quebec has also enacted *Rules of Practice* pursuant to section 19 (1) of the *Act*.[13] However, no similar provisions to that found in the Ontario *Rules* have been enacted. Rules 17 and 18, the only rules concerning service, deal solely with the delays which must be afforded to the opposite party in the notice to appear. Rule 18 provides in part:

> (W)ithin 40 days of service by another mode of service authorized by a judge on petition, whether in the Province of Quebec, in Canada or in the United States; and 60 days elsewhere in the world according to a mode authorized by a judge on motion.

Thus the Rule implies that a form of substituted service is permissible. In the absence of specific provisions in the *Rules*, we must therefore fall back on the provisions of the *Code of Civil Procedure*, at least in so far as they are not inconsistent with the *Divorce Act* (or any regulations made thereunder by the Governor-General in Council).[14] Under Article 138 C.C.P., the judge or prothonotary has complete discretion on the matter.[15] In practice, where a bailiff makes a return showing that after repeated attempts he has not been able to locate the defendant or respondent, the Court will order, upon motion, that the proceeding be served by special mode. Thus the likelihood of a judge refusing in Quebec to grant an order for substituted service on the ground alone that there is no way of knowing whether the material so served will reach the party for which it is intended is remote.

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insist that substituted service be permitted only when it is shown to be reasonably likely that the proceedings will come to the knowledge of the respondent spouse. Applying the maxim *ubi jus, ibi remedium*, the Court held that rules of practice should not be construed and applied so as to render inoperative substantive rights and substituted service should not be permitted upon proof of reasonable likelihood that the proceedings will come to the knowledge of the respondent spouse, but where reasonable probability of the same can be shown.

[13] *Rules of Practice of the Superior Court of the Province of Quebec concerning divorce*, Q. Off. Gaz. 1968, vol. 100, No. 25, p. 3470 ff.

[14] Rule 1.

[15] Article 138 C.C.P. reads: "The judge or prothonotary may, on motion, *if the circumstances so require it*, authorize a mode of service other than those provided by articles 120, 122, 123 and 130, particularly by public notice or by mail" (emphasis added).

ADMINISTRATIVE LAW — SUPERINTENDING AND REFORMING POWER OF THE SUPERIOR COURT — COMMITTEE ON STUDENT DISCIPLINE OF A UNIVERSITY — WHETHER ORGANISM IS A TRIBUNAL AND CONSEQUENTLY SUBJECT TO REVIEW UNDER THE PROVISIONS OF ARTICLES 33 AND 846 C.C.P. — SUBSIDIARY CONCLUSION — PRAYING THAT THE COURT ORDER COMMITTEE TO CONDUCT A HEARING IN A QUASI-JUDICIAL MANNER, IN PUBLIC AND BEFORE AN IMPARTIAL AND UNBIASED TRIBUNAL — ABSENCE OF PROOF TO JUSTIFY SUCH AN ORDER — ARTICLES 33, 846, 850 C.C.P. *Fekete* v. *The Royal Institution for the Advancement of Learning (McGill University)*, [1969] B.R. 1.[1]

The Appellant, in his column entitled "Boll Weevils", in *Flux*, a weekly supplement of the *McGill Daily* (a newspaper published by the Students' Society of McGill University), reproduced certain materials from *The Realist* which the Administration condemned as contrary to the standards of decency accepted by the University.[2] He was therefore summoned to appear before the Committee on Student Discipline (Senate Disciplinary Committee) to answer the following charge:

> Participating in the publication on campus of an article which contravenes the standards of decency acceptable by and in this University: namely, an article in the column entitled "Boll Weevils", appearing on page 4 of the supplement entitled *Flux* of the *McGill Daily* of November 3, 1967, the whole incompatible with your status as a student of this University.[3]

After several meetings in which the Appellant objected to the members of the Committee on the ground of bias, the jurisdiction of the Committee, and the fact that the hearings were not public (the Committee later offering to conduct the hearings on closed circuit television within the University), the Appellant applied to the Superior Court for a writ of evocation (*certiorari* and prohibition) based on articles 33 and 846 of the *Code of Civil Procedure*. Subsidiarily, the Appellant concluded that the Respondent "be ordered to conduct a hearing of the charges against the petitioner in a quasi-judicial manner, in accordance with the rules of natural justice, in public and before an unbiased tribunal".[4] Both requests were denied in the Court below,[5] from which judgment the appellant appealed.

The Court examined the scope of both article 33 C.C.P. and article 846 C.C.P. The general superintending and reforming power

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[1] Brossard, J., (Choquette, Montgomery, Rivard and Salvas, JJ., concurring).
[2] *Flux*, p. 4, in *McGill Daily*, November 3, 1967.
[3] [1969] B.R. 1, at p. 2.
[4] *Ibid.*, at p. 4.
[5] [1968] C.S. 361.

of the Superior Court under article 33 C.C.P. was interpreted to extend to "bodies politic and corporate", a view which is well supported by jurisprudence,[6] while, under article 846 C.C.P., the power of evocation of the Superior Court, which is limited to cases "pending before a Court", was held to extend also to other judicial bodies and individuals set up under the authority of the Legislature. The difference between bodies whose actions are reviewable under article 33 C.C.P., and those whose are not, lies, in the words of Mr. Justice Brossard, in the following criterion:

> Ce critère important serait le suivant: exerce des pouvoirs judiciaires ou quasi judiciaires le tribunal qui, en vertu de la loi, est appelé à rendre des décisions ayant force de loi dans des litiges auxquels il n'est pas partie et dans lesquels il n'a pas d'intérêt, soit personnellement, soit comme mandataire des parties au litige ou de l'une d'elles.[7]

He thus concluded that the Committee on Student Discipline was not one of those bodies:

> Je ne puis admettre que toute décision que peut rendre *The Committee on Student Discipline* de l'Université McGill soit, en vertu de la loi et des statuts sous l'empire desquels l'Université McGill et *The Royal Institution for the Advancement of Learning* ont été incorporées, de la nature d'une décision judiciaire ayant force de loi, et puisse avoir, dans un sens à la fois juridique et judiciaire, l'effet de chose jugée.[8]

The writ of evocation was consequently denied.

The learned judge then proceeded to consider the subsidiary conclusion, which he also rejected. The conclusion, as drafted, was a combination of the remedies of injunction and *mandamus*. The Court felt that this request was premature: there was no evidence of a denial of natural justice. Any examination of this question could only lead to conjectures; the hearings on the actual charge had not yet been held, and in those meetings held prior to the proceedings before the courts, the Court could not find any evidence that the Committee had not proceeded "in an unbiased way". In any event, the Court held that the Superior Court, under its general superintending and reforming power, was not permitted to substitute its judgment by compelling non-judicial bodies to act in a quasi-judicial manner.

However, although all of Appellant's conclusions were rejected, the Court pointed out that the Senate Disciplinary Committee did not necessarily have *carte blanche* in conducting its hearings. It was still bound by the rules of natural justice, and should it deny the

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[6] See the authorities cited therein, at pp. 5-6.
[7] *Ibid.*, at p. 6.
[8] *Ibid.*, at pp. 6-7.

Appellant the benefit of these rules it would answer to the Superior Court for its actions in virtue of article 33 C.C.P. The Court concluded that, unless there was an abuse of right amounting to malice or a denial of justice, the Superior Court's superintending and reforming power did not authorize it to

> (D)icter à une autorité universitaire la conduite qu'elle doit suivre dans l'exercice de ses droits, à mon avis fondamentaux, d'assurer l'ordre et la discipline académique au sein de l'institution, des droits que je me permettrais de déclarer aussi importants et aussi précieux pour l'ordre public, suivant les lois actuellement en vigueur, que peut l'être celui de la liberté de la presse ou d'information.[9]

This *dictum* appears to be of the widest application. Not only is a court told that it has no business interfering with an educational institution's procedure to enforce academic discipline, but the learned judge compares this right to self-determination of its internal affairs to that of freedom of the press or freedom of speech. The University has thus a general mandate to maintain order and discipline within its community in any way it sees fit, short of an abuse of right tantamount to malice or a denial of justice. In the present context of organized opposition and dissension, this broad power given to the University to regulate its internal affairs may not be much. It is one thing for the Court to have recognized the power of a university to regulate its internal affairs, but it is another for the University to have the means to exercise this right.

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[9] *Ibid.*, at p. 9.

CRIMINAL LAW — ALIMENTARY OBLIGATION — FAILURE TO PROVIDE THE NECESSARIES OF LIFE FOR THREE CHILDREN — STEP-FATHER — NO SUCH LEGAL OBLIGATION — BOTH UNDER THE CRIMINAL CODE AND CIVIL CODE — ARTICLE 186 CR. C. — ARTICLE 167 C.C. *R.* v. *Charron,* [1969] R.L. 125.

The accused was charged under section 186 Cr. C. with failure to provide the necessaries of life for three children under the age of sixteen years. It appears from the facts that the petitioner, a widow, and mother of the three children, had married the accused and that during the months of May, June and July, 1967, he had not contributed to the support of the children. The accused admitted his failure to provide for them but argued that he was not employed at the time; that in any event, the petitioner was employed in a hospital and, in addition, maintained boarders in the house, receiving directly, and keeping, all the revenues derived from them, and finally, that in law, he was not compellable to provide for the children of his wife.

The Court examined article 186 (1) and (2) of the *Criminal Code:*

(1) Every one is under a legal duty

(a) as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years;

(b) as a husband, to provide necessaries of life for his wife; and

(c) to provide necessaries of life to a person under his charge, if that person

(i) is unable, by reason of detention, age, illness, insanity or other cause, to withdraw himself from that charge, and

(ii) is unable to provide himself with necessaries of life.

(2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies upon him, to perform that duty, if

(a) with respect to a duty imposed by paragraph *(a)* or *(b)* of subsection (1),

(i) the person to whom the duty is owed is in destitute or necessitous circumstance, or

(ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or

(b) with respect to a duty imposed by paragraph *(c)* of subsection (1), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

Upon a reading of the article, Mr. Justice Langlois came to the conclusion that the accused was neither a father, a guardian, nor a head of a family within the meaning of the article without elaborating on the reasons which led him to such a conclusion. He held, further, that as there was no legal duty to support the children of his wife under article 186 or any other article of the *Criminal Code,* unless such a duty could be found elsewhere, the accused had to be acquitted.[1]

The learned judge then referred to the *Civil Code* in order to determine if the accused had a civil obligation to support the children of his wife.[2] Article 167 C.C. provides:

> Les gendres et belles-filles doivent également et dans les mêmes circonstances des aliments à leurs beau-père et belle-mère; mais cette obligation cesse:
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> 1. Lersque la belle-mère a convolé en secondes noces;
> 2. Lorsque celui des deux époux qui produisait l'affinité et les enfants de son union avec l'autre époux sont décédés.

In this French version of article 167 C.C., the words "belle-fille", "belle-mère" and "beau-père" are of significance: in French, they can mean either "daughter-in-law" or "step-daughter", "mother-in-law" or "step-mother", and "father-in-law" or "step-father" respectively. But the Court concluded rightly that they could only be capable of meaning "daughter-in-law", "mother-in-law" and "father-in-law" respectively as the word "gendre" could only mean "son-in-law", and never "step-son". This construction of the article is supported by both Mignault [3] and Trudel.[4]

The cases of *R.* v. *Wright, R.* v. *Brown* and *R.* v. *Hall* [5] were cited by the Court for the proposition that the *Criminal Code* [6] does not create any legal duty to provide, but when such a legal duty otherwise exists, the *Code* provides for punishment for failure to provide necessaries. Thus, the "existence of a legal duty to provide necessaries is a condition precedent to criminal liability... Unless the legal duty already exists by law, either under some other provision of the Code, or otherwise, there cannot be any criminal liability..." [7]

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[1] *R.* v. *Wright,* (1931), 66 O.L.R. 456, 55 C.C.C. 172, [1931] 3 D.L.R. 200; *R.* v. *Brown,* (1941), 75 C.C.C. 290, [1941] 1 W.W.R. 268; *R.* v. *Hall,* (1941), 76 C.C.C. 311, 56 B.C.R. 309, [1941] 2 W.W.R. 295.

[2] See generally: *Phaneuf* v. *Prévost,* (1916), 49 S.C. 189 (Ct. of Rev.); *Desjardins* v. *Boyer,* (1886), 14 R.L. 506; Guthrie D., *Alimentary Obligations,* (1965), 25 R. du B. 525, at p. 527.

[3] *Le Droit civil canadien,* t. 1, (Montreal, 1895), p. 483.

[4] *Traité de Droit civil du Québec,* t. 1, (Montreal, 1942), p. 473.

[5] *Supra,* n. 1.

[6] Section 242 of the old *Criminal Code.* See *infra.*

[7] *R.* v. *Wright,* (1931), 55 C.C.C. 172, at p. 176.

In *R.* v. *Wright,* which involved an action against a father to provide for his child in the custody of her mother pursuant to a decree in divorce, where no provisions for the maintenance of the child were made in the decree, the Court found that no civil liability existed under the laws of Ontario, and consequently there could not be criminal liability. In *R.* v. *Hall,* upon similar facts, the Court came to the opposite conclusion holding that the *Poor Relief Act* [8] of England applied in British Columbia by virtue of the *Proclamation of November 19, 1858,* which provided that the common law of England, at that time, applied in civil and criminal matters, unless specifically declared otherwise in statutes.[9] Under this *Act,* the husband was bound to support his child in need. In *R.* v. *Brown,* the husband was already providing support for his children and the issue was whether there was any duty under the laws of Saskatchewan to support his divorced wife. Here again the Court held that the *Criminal Code* did not create any legal duty to provide, but found that such duty existed under the common law of Saskatchewan. The husband was convicted.

None of these cases are remotely similar on the facts to the case at bar; they are distinguishable in law to a certain extent by being based on section 242 (1) of the previous *Criminal Code* which read: "Every one who as a parent, guardian or head of a family is under a legal duty to provide necessaries . . ." The wording of this subsection clearly implied the necessity of a precedent legal obligation in order for criminal liability to attach. However, section 186 (1) of the present *Code* has been reworded: "Every one is under a legal duty (*a*) as a parent . . . to provide necessaries . . ." Here the legal duty is created by the *Criminal Code* itself.[10] In fact, section 186 (2) provides: "Every one commits an offence who, being under a legal duty within the meaning of subsection (1), . . ." Thus these cases would apply today only if it were not possible to bring a case within the scope of subsection (1) of section 186.

It is respectfully submitted that Mr. Justice Langlois, in examining the applicability of section 186 Cr. C. to the facts in this case, may have been hasty in summarily deciding that it did not apply. The learned judge confined his remarks to paragraph (*a*) of subsection (1) of section 186 Cr. C. Should he have gone further?

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[8] *Poor Relief Act, 1601,* 43 Eliz., c. 2.

[9] The *Proclamation* is maintained in force in British Columbia by statute. See the present *English Law Act,* R.S.B.C. 1960, c. 129.

[10] See *Tremeear's Annotated Criminal Code,* 6th ed., Leonard J. Ryan ed., (Toronto, 1964), p. 296: *"Effect of Revision.* — S. 186 declares a duty and creates an offence for breach of it".

Assuming, for the present, that he is correct in saying that the accused is neither a father, a guardian, nor the head of a family, is the accused not a person having under his charge someone who "is unable... by reason... of age... to withdraw himself from that charge" and who "is unable to provide himself with the necessaries of life", within the meaning of paragraph (*c*) of subsection (1) of section 186 Cr. C.? The accused by contracting a marriage with a widow having three young children must be said to have accepted the charge of caring for these children, even if he did not legally adopt them. In such circumstances, it would seem strange that the husband does not assume some kind of responsibility for the welfare of these children.[11] Turning back to section 186 (1) (*a*) Cr. C., that the accused is not a father by blood or by adoption is obvious; that he is not a guardian or a head of a family is not so obvious. Section 185 (*d*) Cr. C. provides that a "'guardian' includes a person who has in law, or in fact, the custody or control of a child." Can it not be said that the accused had *de facto* control of the children living under the same roof? If he does, does this control automatically end upon his leaving the home permanently, or do his obligations toward them, if any, continue? This definition equally applies to a head of a family.[12] If a grandfather, older brother or sister, uncle or other relative can be head of a family upon the disappearance of one or both of the parents, by virtue of what principle is the step-father so different as to be ineligible to assume such duties? Perhaps only blood relatives are capable of becoming heads of a family.

On the basis of the authorities in this area, we cannot dispute Mr. Justice Langlois' judgment, but one cannot be entirely satisfied by it without, at least, attempting to answer some of the questions raised above.

L. S.

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[11] See *R.* v. *Gibbins* and *Proctor*, (1917-19), 13 Cr. App. R. 134 where it was held that a woman living in a common law relationship with a man who so neglected his child by previous wife so as to cause her death, if she accepted the charge of the child, may also be guilty of murder. The Court stated that, even if the child is not hers, by living with the father, she no doubt assumed some duty towards the deceased child. The Court found that she was under no obligation to live with the man, and, thus, having accepted to live with him, she must accept the responsibilities. *A fortiori*, would not a person legally married to the mother of three children have assumed some responsibilities towards them?

[12] Lagarde, I., *Droit pénal canadien*, (Montreal, 1962), p. 275.