transaction is not enough to bring the rule into play.[13] Moreover, the agent must have been carrying on business at the time of service, and must have some authority independent of the office in the foreign country.[14]

However, the foregoing line of authority, stemming from *Newby* v. *Von Oppen*, has been questioned. In *Droeske* v. *Champlain Coach Lines Inc.*,[15] service on a foreign company through an agent definitely not carrying on business in the sense required by these authorities was accepted. More significantly, in *Alberta Pulpwood Exporting Co.* v. *Falls Paper and Power Co.*[16] Ford, J. A., described the law in this area as in a state of flux, and discredited the applicability of *Newby* v. *Von Oppen* on the ground that it was based on the English rules for service which are quite different from the Alberta rules. He suggested that the Alberta Rules of Court for the service of foreign corporations[17] should be the sole consideration in determing the validity of service. These rules merely demand service on the agent of a corporation, without further qualifications as to registration or residence. Such a view is consonant with the view of Egbert, J., at trial in the *Alberta Pulpwood Exporting Co. Case.*[18] However, it is necessary to conclude that the law on the conditions under which a foreign corporation may be served within the jurisdiction is unsettled. Where doubt remains, the safest practice may be to serve an officer clearly responsible outside the jurisdiction: *Crawford* v. *Calville Ranching Co.*[19]

Two additional points should be noted with respect to service of a foreign company. First, the plaintiff is entitled to make all the necessary inquiries in order to determine whether a foreign company has a fixed place of business in the jurisdiction: *Alberta Pulpwood Exporting Co.* v. *Falls Paper and Power Co.* Secondly, the mere fact of registry does not mean the company carries on business in the province of registry.

It is to be hoped that future judicial decisions provide answers to some of the unresolved questions relating to actions by and against foreign companies and, hopefully, some alleviation of the unusal strictness of the Alberta law in this regard.

BEVERLY MCLACHLIN*

13 *Apel* v. *Anchor Insurance & Investment Corp.* (1921), 21 O.W.N. 25, 27; *Murphy* v. *Phoenix Bridge Co.* (1899), 18 P.R. 495.
14 *Murphy* v. *Phoenix Bridge Co.*, *ibid.*
15 [1939] O.R. 560.
16 *Supra*, n. 11, at 539.
17 Now Supreme Court Rules, 15(2), 20.
18 (1954) 11 W.W.R. (N.S.) 97.
19 (1912) 22 W.L.R. 50; 2 W.W.R. 926; 6 D.L.R. 375.
* M.A., LL.B. (Alta.) of the 1968 Graduating Class.

GUARDIANSHIP—WILLS—THE INFANT MOTHER WHO HAS NEVER BEEN MARRIED AND WISHES TO PROVIDE FOR HER ILLEGITIMATE CHILD.

Aristotle said that democracy arose from men thinking that if they are equal in any respect they are equal in all respects. And Thomas Jefferson stressed "We hold these truths to be self-evident: that all men are created equal." But the illegitimate child whose previously-unmarried mother dies while under the age of 21 years would be justified to question whether all men are created equal.

Under our present laws the infant mother who has not been previously married and who has an illegitimate child, can own property, but she cannot make provisions by will to leave her property to her child.

Furthermore, and what may have more far reaching effects on her baby, this mother cannot appoint a guardian or guardians by deed or will.

The Domestic Relations Act, R.S.A. 1955, c. 89, as amended states as follows:

> 42. (1) Unless otherwise ordered by the Court the father and mother of an infant are the joint guardians of their infant, and the mother of an illegitimate infant is the sole guardian of the illegitimate infant.

The Domestic Relations Act of Alberta further provides for the appointment by the parent of a guardian of an infant after the death of such parent. See the following:

> 43. (1) A parent of an infant may by deed or will appoint a person to be guardian of the infant after the death of such parent.

The mother we are discussing, not being of the full age of 21 years, cannot appoint a guardian by deed. Can she do so by will?

Let us now examine The Wills Act, R.S.A. 1960, c. 118:

> 9 (1) A will made by a person who is under the age of twenty-one years is not valid unless at the time of making the will the person (a) is or has been married.

It will be seen by this provision that a mother of very tender years, providing she is married, can make provisions in her will for the guardianship and maintenance of her child after her death.

And the mother, also of very tender years, who has previously been married and is now no longer married but bears an illegitimate child can also, while still under the age of 21, make provisions for guardianship and maintenance of her child.

In fairness to The Wills Act 1960 I must complete the quotation of section 9. It goes on to say that a will made by a person under the age of 21 years is not valid unless at the time of making the will the person

> (b) is a member of a component of the Canadian Forces
> (i) that is referred to in the National Defence Act as a regular force, or
> (ii) while placed on active service under the National Defence Act
> (c) is a mariner or seaman.

While recognizing the great strides women have made in their goal for equality with men, I find myself unable to imagine a situation in which our infant mother with her illegitimate baby could make use of this portion of section 9 for enabling her to make her will.

It is true that by reason of The Intestate Succession Act, R.S.A. 1955, c. 161, and in particular section 15 provision has been made that illegitimate children and their issue shall inherit from the mother as if the children were legitimate, and shall also inherit through the mother, if dead, any real or personal property which she would have taken, if living, by gift, devise or descent from any other person. It is equally true that under The Domestic Relations Act, R.S.A. 1955, c. 89, the Supreme Court of Alberta has power under section 45 to appoint a guardian or guardians of the infant.

However, in an age, when we are stressing Human Rights (the United Nations declared 1968 as the International Year for Human Rights),

this child should be given the equal opportunity of the child whose parent or parents, though under 21 can by will name his or her guardian and arrange for his maintenance after the parents' death.

And at the same time the unmarried infant mother whom we have been discussing should not be deprived of her parental right to arrange for guardianship and care of her child after her death by reason only that she is not nor has been married.

I would urge that our Wills Act be changed to provide that a mother who is not of the full age of 21 years and is not and has not previously been married, but has borne a living child, be permitted to make a valid will.

—ADLYNN MISKEW HEWITT*

* B.Sc., LL.B. (Alta.) of the Alberta Bar.

BENEFITS UNDER SECTION 137(2) OF THE INCOME TAX ACT—*CRADDOCK AND ATKINSON* v. *M.N.R.*

The judgment of Gibson, J. in *W. L. Craddock & S. C. Atkinson* v. *M.N.R.*[1] unless it is reversed by the Supreme Court of Canada, may well prove to be a frontier whose crossing will prompt Parliament and its fiscal planners to review the direction which Canada's approach to legal reduction of taxes should take in the future. In two giant strides, starting with the case of *Conn Smythe et al.* v. *M.N.R.*[2] the Exchequer Court has altered the entire complexion of legal tax avoidance by its revolutionary analysis of the construction of Section 137.[3]

Mrs. Gwyneth McGregor in The Canadian Tax Journal[4] has given a careful analysis of the *Smythe* case. She explains that the purpose of dividend strips is to extract the undistributed income of a corporation and get it into the hands of the shareholders without payment of any tax. Prior to the *Smythe* case, section 137(2) was not generally thought to apply to dividend strips, particularly after the introduction into the Income Tax Act, in 1963, of section 138A. This view seemed to be confirmed by the fact that no attempt had, up to that time, been made by the Minister of National Revenue to assess shareholders as a result of such strips carried out prior to the enactment of this section. The *Smythe* case was the first of those cases where the taxpayer relied upon the courts to establish that a "strip" was not subject to tax. This procedure was adopted in preference to taking advantage of the right offered by The Hon. E. J. Benson, while he was Minister of National Revenue, to pay tax at an effective rate of 16-2/3% on the surplus stripped (a course that had been available to them under section 105(B)) rather than pay tax at full rates less the applicable dividend credit should the strip be held to be taxable. For those who elected to take his offer, the Minister agreed to refund any tax paid if it were subsequently determined by the courts in a parallel case that the shareholders were not taxable as a result of the strip.

The facts in the *Smythe* case are rather complicated and they are fully set out in Mrs. McGregor's article.[5] They are, however, briefly set out as follows:

The shareholders of Conn Smythe Limited, an Ontario company, (Conn Smythe, his son Conn Stafford Smythe, Clarence H. Day and A. M. Boyd) incorporated

1 [1968] C.T.C. 379; 68 D.T.C. 5254.
2 [1967] C.T.C. 498; 67 D.T.C. 5334.
3 H. H. Stikeman, Canada Tax Service Letter No. 130, October 9, 1968.
4 (1968), 16 Can. Tax J. 16.
5 *Id.*, at 19.