MR. JUSTICE WILLIAM GORDON EGBERT*

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Mr. Justice Egbert of the Trial Division of the Supreme Court of Alberta died on February 7, 1960. There can be no more fitting memorial than his reported judgments, which number more than one hundred. Although his career as a Justice of the Supreme Court covered but ten years, his valuable contribution reached into nearly every field of the law. It is not possible here to comment upon all of his judgments or even to review all of the most important ones. References may be made, however, to cases selected from different fields of law in order to illustrate Mr. Justice Egbert's judicial qualities.

General

Anyone who has read judgments of Mr. Justice Egbert will be familiar with his characteristic approach to a legal problem. Painstaking and scholarly, he was never content to give cursory reasons for judgment. All the facets of each case are set out with exceeding clarity and the relevant authorities exhaustively reviewed. The value of such careful and scholarly work was frequently acknowledged by the Appellate Division. When the trial judgment in *City of Calgary* v. *Reid and Vincent*,[1] a case involving zoning by-laws and the City Act, came up for review, Porter, J.A. said simply, "For the reasons so fully and clearly stated by the learned trial judge I would dismiss the appeal with costs." The most obvious illustration of his Lordship's thoroughness is provided by his judgment in *Turta* v. *C.P.R. and Imperial Oil Co. Ltd.*,[2] the leading case in Canadian Land Titles Law. His Lordship wrote a meticulous judgment of seventy pages, setting out the facts of the case in nineteen numbered paragraphs, the evidence in points numbered from twenty to thirty-three, and the law pertaining to the case under separate headings describing each point dealt with. By this system of numberings, headings, and sub-headings what might have been an almost impenetrable jungle of facts, evidence, and law was reduced to lucid decision. In *Duce* v. *Rourke*,[3] a motor vehicle negligence action, Mr. Justice Egbert undertook to review exhaustively the English and Canadian cases on remoteness of damage in the thirty years since Re Polemis[4] extracting a series of ten principles from the labyrinth of cases. Confronted with a plea of *non est factum* in *Mahoney* v. *Eldorado Mining and Refining Ltd.*,[5] he proceeded to treat the subject historically from 1552 to the present in a ten-page analysis. Examples could be multiplied indefinitely. The same

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*Mr. Justice Egbert was born in Milverton, Ontario, on February 11, 1892, and moved to Alberta in 1905. He received his B.A., from the University of Toronto in 1916 and his LL.B. from the University of Alberta in 1920. He practiced law in Calgary, forming in 1926 a partnership with A. L. Smith, Q.C. and C. E. Smith, Q.C., which continued until January, 1950, when Mr. Justice Egbert was appointed to the bench.

[1] (1959) 27 W.W.R. (N.S.) 193, Porter, J.A. at p. 225.

[2] (1952) 5 W.W.R. (N.S.) 529.

[3] (1951) 1 W.W.R. (N.S.) 305.

[4] [1921] 3 K.B. 560.

[5] (1954) 11 W.W.R. (N.S.) 49.

degree of care is manifest in cases where a rather peremptory handling of the issue might have been possible, as it is in cases of major legal significance.[6] However, while his Lordship dealt exhaustively with the issues before him, he was not addicted to the practice of going beyond the limits of a given fact situation to pronounce an opinion with respect to peripheral questions.

Mr. Justice Egbert did not shrink from facing problems of a highly technical or academic nature. He displayed as much skill and ease in dealing with intricate problems calling for application of the doctrine of equity as in discussing more routine matters of the law of tort. In *Beaver (Alberta) Lumber Ltd. v. Canadian Construction Co. Ltd.*,[7] he was faced with the delicate problem of deciding whether a restrictive covenant created such an interest in land as to justify the filing of a caveat thereon. The plaintiff had taken a restrictive convenant in selling certain land and had filed a caveat in accordance with the agreement. A subsequent purchaser of the land gave notice to the plaintiff to remove the caveat. Mr. Justice Egbert held that a restrictive covenant may create a equitable interest in land under certain conditions. The covenant must be negative in substance. It must not be merely personal and collateral as between the covenantor and covenantee, but must touch or concern some nearby (dominant) land. The burden on the servient land, once these conditions are fulfilled, is an equitable interest, vested in the owner of the dominant tenement and running with both parcels of land. In the instant case it was found by Egbert, J. that there was no intention that the covenant should benefit other lands. It was therefore merely personal and collateral and did not justify the filing of a caveat. In *re Sullivan Estate*[8] he applied the equitable doctrine of election, and in *Hendrickson v. Mid-City Motors Ltd.*[9] he faced squarely the much discussed problem as to whether there can be a fundamental mistake of identity, sufficient to render a contract *void ab initio,* where the parties are dealing *inter praesentes.* He decided *Morrison v. Burton*[10] on the basis of mutual mistake, although the issue was not raised by counsel.

His Lordship frequently set out and discussed the evidence given in a case in some detail, showing no reluctance to indicate the manner by which he worked his way through a mass of conflicting testimony. To the contrary, he appears to have been concerned to make perfectly clear the foundation of his findings of fact. Sitting with the Appellate Division in *Kellie v. Calgary,*[11] an action against a police officer for assault, he took some pains at the beginning of his judgment to explain why, in his opinion, the evidence of the plaintiff was completely unreliable. In a motor negligence case, *Schwindt v. Giesbrecht,*[12] there were certain discrepancies between the various stories of the witnesses for the defense. Mr. Justice Egbert said:

> My observation of these witnesses and their demeanor does not lead me to the conclusion urged by counsel for the plaintiff. It is true, as quite usually happens, that some of them

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[6] See, for example, the careful discussion of a minor point in limitations in *Snyder v. Powell* (1959) 28 W.W.R. (N.S.) 41.

[7] [1953] D. D.L.R. 834.

[8] (1951) 3 W.W.R. (N.S.) 363.

[9] (1951) 1 W.W.R. (N.S.) 609.

[10] (1955) 15 W.W.R. 667.

[11] (1950) 1 W.W.R. (N.S.) 691.

[12] (1958) 25 W.W.R. (N.S.) 18.

were more impressive than others. It is also true that these minor discrepancies make their stories as a whole more convincing that if they had all told the same pat, carefully prepared stories, differing in no particular one from the other.[13]

Mr. Justice Egbert always took care to discuss the basis for his assessment of damages. Details of damage suffered and evidence given with respect to it were set out in his judgments at length. In a case involving loss of expectation of life, *Thomson* v. *Stabler and Parcels*,[14] he reserved judgment until the Appellate Division had handed down its decision in an appeal from him on a similar issue.[15] The Appellate Division reassessed the award of damages granted in the earlier case without giving reasons for so doing. Mr. Justice Egbert expressed his concern for the establishment of general principles and standards in this area:

> It seems to me, and I say it with greatest respect, that the reassessment of damages by an appellate court in the particular circumstances of a particular case can be of little assistance to a trial judge in future cases, in the absence of any enunciation of the principle upon which the reassessment is based . . . . Accordingly, until such time as the Appellate Division of this Court enunciates some principle applicable to Alberta . . . for the assessment of damages for loss of expectation of life, which shall act both as a guide and as a direction to me in future cases, I have, keeping in mind my abhorrence of the suggestion that it should be cheaper to kill than to maim, no alternative but to assess damages in such cases at amounts which do not shock my own conscience.[16]

As stated, his Lordship's *forte* was a meticulous and thorough treatment of cases. And, significantly, he expected of an Appellate Court at least a proportionate amount of care.

An examination of Mr. Justice Egbert's judgments leads to the conclusion that he was endowed not only with a high degree of academic proficiency and integrity, but also with a keen personal interest in the application of the law to each new situation. One concludes that he took genuine pleasure in deftly and patiently following each aspect of a case to its conclusion. *Schwindt* v. *Giesbrecht*, cited above, arose out of a motor vehicle accident. The plaintiff alleged gross negligence on the part of the defendant, the latter relying on the defenses of *volenti non fit injuria* and contributory negligence. Having paused in his statement of the facts to discuss the evidence, Egbert, J. takes up the story almost with zest:

> To resume the narrative, according to the evidence of the defendant and his witnesses, at about the time the defendant pulled level with the patrol car for the second time, the plaintiff said to the defendant "Let's give them a run for it"—in other words he suggested that they race and pull away from the patrol car. The defendant adopted this suggestion and passed the patrol car at a speed in excess of the legal speed limit . . .[17]

Security of the Individual

Nothing is more striking in the judgments of Mr. Justice Egbert than his desire to see that the state and its agencies should not overbear the individual. In criminal trials the question of the admissibility of a confession requires a delicate balancing of the interest of society in punishing crime against the interest in protecting an accused from abuse by those in authority. When a

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[13] *Supra*, at p. 21.

[14] (1952-53) 7 W.W.R. (N.S.) 510. See also: *Ruff* v. *Hetesy* (1957) 21 W.W.R. (N.S.) 595 at pp. 601-602; *Schwindt* v. *Giesbrecht*, *supra*, pp. 25-26; *Chillibach* v. *Pawliuk* (1955-56) 17 W.W.R. (N.S.) 534 at p. 542; *Hudson's Bay Oil and Gas Co. Ltd.* v. *Dynamic Petroleums Ltd.* (1958) 26 W.W.R. 504 at pp. 511-513.

[15] *Osbaldeston and Harvie* v. *Bechthold and Gibson* (1952-53) 7 W.W.R. (N.S.) 253.

[16] *Supra*, at p. 513.

[17] *Supra*, at p. 21.

young girl was charged with breaking and entering, Egbert, J. refused to admit the statement she had given to the police:

> I take it that threats and intimidation can take forms other than words and in the situation we have here, where a young girl is suddenly arrested, is bundled along with her belongings into a patrol car, is taken to the grim surroundings of a police station where she is closeted unaccompanied by anyone else, with two burly detectives and then questioned, if that is not intimidation I do not know the meaning of the word, and I would consider myself derelict in my duty if I allowed evidence obtained in that way to go before a jury.

And further:

> I think I should add this for the benefit of the police. I appreciate the difficulty they have in getting evidence in a lot of these cases but these rules were established for the protection of the subject against abuses of power or authority by police and other state officers, and as far as any court presided over by me is concerned, in the future the police should know that they must abide by the rules in the very strictest possible way if they hope to have evidence, obtained in the shape of so-called confession admitted in my court.[18]

Yet his Lordship did not fall into the error of treating the production of evidence such as the result of a blood-test as requiring proof that it was voluntarily given.[19] His judgment anticipated that of the Supreme Court of Canada in *Attorney General* v. *Begin*[20] and was written at a time when there was a sharp conflict on the subject in provincial courts.

In another case the evidence of police officers was rejected and the uncorroborated statement of the accused accepted. A prominent Edmonton citizen was brought before his Lordship on a charge of impaired driving. He discussed the difficulty of proving such a charge and expressed his own belief that the police are sometimes swayed by the fact that the odour of liquor is present when in truth there may be no real degree of intoxication or impairment.[21] Again, concerning the admissibility of a statement made by the husband of the accused in her presence his Lordship stated in *Reg.* v. *Dreher*:[22]

> It is true that there are earlier cases . . . which lend support to the view that such a statement made by the spouse of an accused is admissible under practically all circumstances. But these judgments were delivered at a time when the law of evidence was in a state of flux, when the rules of procedure were a great deal harsher than they are now, and when the law did not have so high a regard for the rights of persons accused of crime. I venture to think that the principles enunciated in these earlier judgments are no longer the law and indeed should be no longer the law.

In civil as well as criminal cases Mr. Justice Egbert was a vigourous champion of the rights of the citizen as against interference by government or under its authority. The problem of striking a balance between these two is again a difficult task. Egbert, J., however, was not one who always looked on government regulation with sympathy. Where the Highway Traffic Board refused a liveryman's license, he held a provision that a license "may" be issued to mean "shall" be issued. He felt entitled to construe narrowly a statute encroaching on the common law right of the subject to carry on any lawful occupation, and granted mandamus:

> Since the legislature has seen fit to confer upon the executive branch of the government through the medium of the Board such wide and arbitrary powers whereby the means of livlihood and the property of the subject may, by discretionary action of the Board, be imperilled, it is, in my opinion, the duty of the courts to be particulary assiduous in ensuring that the Board does not attempt to exercise powers which were not clearly conferred upon it by the legislature in language which can leave no doubt as to the intention of the legislature.

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[18] *Regina* v. *Cansdale* (1951) 2 W.W.R. 411 at p. 412.

[19] *Regina* v. *McIntyre* (1951) 3 W.W.R. (N.S.) 552.

[20] [1955] S.C.R. 593.

[21] *Regina* v. *H.* (1955-56) 17 W.W.R. (N.S.) 35.

[22] (1952) W.W.R. (N.S.) 337 at p. 346.

In other words the Court is left as the only guardian of the rights and property of the subject, and should zealous in ensuring that the subject is not improperly deprived of such rights or property.[23]

Similarly, a remedy by way of mandamus was allowed in a case where a drivers license had been suspended upon notice to the Motor Vehicles Branch in Alberta of a conviction in Ontario. His Lordship said:

At the outset I must express my shocked amazement at the contention of counsel for the Minister that the claim of a resident of Alberta to a driver's license—and consequently to drive upon the highways of Alberta— is a privilege and not a right. Since time immemorial the Queen's subjects have been free to move along the Queen's highway provided only they kept the Queen's peace. While the requirement of technical competence in the operation of that modern mode on conveyance, the motor vehicle, may, for the public safety, require the subject to prove that competence as a condition to the issue of a license to drive—and the consequent right to drive—that requirement does not reduce a "right" to a "privilege" . . . I know of no legislation which has reduced my inviolable right to drive into a privilege to be granted or refused at the uncontrolled whim of some petty bureaucrat.[24]

A striking case, and one which became something of a *cause célèbre,* is *Copithorne* v. *Calgary Power. Co.*[25] Pursuant to the consent of the Minister of Agriculture under the Water Resources Act, the company entered onto the plaintiff's farm to construct a power line. The plaintiff applied for an interim injunction, contending that he should have received notice and that he should have been given the right to be heard. He contended also that the statute did not authorize the minister to grant a right of way for a power line. His Lordship held that the plaintiff had raised two "fair questions" and issued the interim injunction. Counsel for the company cited an Ontario case[26] for the proposition that an injunction should not be granted against a trespasser—that damages are sufficient recompense. The judge said in reply.

However, counsel did not cite any authorities which are binding upon me and, in the absence of such authorities, I would unhesitatingly refuse to follow such a principle. Counsel's argument amounts to this, that if a corporation is sufficiently wealthy to meet all claims for damage which may be assessed by a court, it may, with impunity, enter against my will and without authority up on my property, erect there such structures at is pleases and remain in possession indefinitely, and that the court has no power in the matter except to assess the damages I have suffered. I find it difficult to believe that a court of equity has no power to restrain such a high-handed procedure.[27]

It is true that the Appellate Division set aside the interim injunction and that Copithorne ultimately lost his action on the ground that the Minister's consent was an administrative act and that notice to the plaintiff was not required.[28] Nevertheless, the decision of Egbert, J. attracted considerable support, and it was perhaps not a coincidence that the legislature, in 1956, amended the Water Resources Act to require the Minister to consider various factors in cases of this nature, including objections of the owner.[29]

Any proceeding before Mr. Justice Egbert involving the custody of children was dealt with most carefull.y He was concerned above all with the best interests of the child in deciding who should obtain custody.[30]

His Lordship was also aware of the disadvantageous position in which the

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[23][1950] 2 W.W.R. 289 aff'd. (1951) 1 W.W.R. (N.S.) 46.

[24]*Rezina ex rel Christofferson* v. *Minister of Highways* (1959) 28 W.W.R. 36 at p. 38.

[25](1955) 16 W.W.R. (N.S.) 436.

[26]*McLaren* v. *Caldwell* (1880) 5 D.L.R. 363.

[27]*Supra,* at p. 441.

[28](1955) 17 W.W.R. (N.S.) 105 and [1955] S.C.R. 24.

[29]1956 C.A.P. 61.

[30]*Reg.* v. *Ross* (1952) 6.W.W.R. (N.S.) 335; *In re Tokarchuk Infants* (1952) 5 W.W.R. (N.S.) 19.

individual is placed when his interest conflicts with that of large business enterprises. In the well-known *Bourbonnie* case[31] the successful plaintiff in an action arising out of a motor vehicle accident brought action to require the defendant's insurer to apply the insurance monies toward the judgment. The insurance company attempted to raise all the defenses which would have been available to it had the action been based on the insured's negligence or misconduct. This would have placed on the plaintiff the burden of presenting substantially the same case a second time. His Lordship, interpreting s. 302 (1) of the Alberta Insurance Act,[32] held that the action was based on the creditor's judgment and his statuory right. He added:

> May I add that in my opinion any other finding would create a deplorable situation. An injured person might be under the necessity of conducting a long and expensive trial against an insured, while the insurers, with full knowledge of the proceedings, sat back and did nothing. After being successful the plaintiff might then be in a position of having to repeat the long and expensive process involved in the first trial, with the added disadvantage that the insurers would then have complete knowledge of the plaintiff's evidence, and of his witnesses . . . I cannot believe that any such manifestly unfair situation was ever intended by the Alberta Insurance Act.[33]

Land Law

Alberta has had its share of litigation arising out of the development of the oil and gas industry, and Mr. Justice Egbert showed time and again a profound insight into fields of law touching upon the subject, especially the Torrens system and its application. The leading case, *Turta,* v. *C.P.R. and Imperical Oil Co.,* has been mentioned. In 1908 the Canadian Pacific Railway transferred land, reserving coal and petroleum. Through a mistake in the Land Title Office, however, the reservation in this instance covered only the coal. Turta eventually became the registered owner of the land in question. In 1943 the Registrar of Land Titles purported to correct the error. Oil was discovered in 1947, giving rise to the problem of ownership of the oil. The C.P.R. relied on the Statute of Limitations, the validity of the corrections, and on two exceptions to the indefeasibility of Turta's title—"prior certificate of title" and "misdescription". Egbert, J. rejected all of these arguments and held that Turta owned the petroleum. This most important decision on the principles of Torrens statutes was upheld in the Court of Appeal and the Supreme Court of Canada.[34]

The difficulty of resolving the conflict of interests between a *bona fide* purchaser for value without notice relying on the register with that of a holder of a mechanics lien who had registered it within the thirty-five day period allowed by statute, was faced by his Lordship in *re The Mechanics Lien Act.*[35] The dilemma was decided in accordance with basic Torrens System principles by a holding in favour of the *bona fide* purchaser. This decision, although reversed by the Appellate Division in Alberta, was ultimately upheld by the Supreme Court of Canada.

In these cases, and in a number of others as well, his Lordship was called

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[31] (1959-60) 30 W.W.R. (N.S.) 1.

[32] R.S.A., 1955, ch. 159.

[33] *Supra,* at p. 13.

[34] (1952) 5 W.W.R. (N.S.) 529, aff'd. (1953) 8 W.W.R. (N.S.) 603, aff'd. [1954] S.C.R. 427.

[35] (1952-53) 7 W.W.R. (N.S.) 481, rev'd. (1953) 9 W.W.R. (N.S.) 841, rev'd. [1954] S.C.R. 384.

upon to unravel complicated transactions in land and oil.[36] His analysis of the facts was always clear and precise, and although he was not always sustained on appeal, all of these judgments show a thorough grasp of the business transactions which were involved. Doubtless his long practice in a leading Calgary firm had given him an excellent knowledge of these subjects.

Statutory Interpretation and Validity of Provincial Legislation

It fell to the lot of Mr. Justice Egbert to decide a number of important cases on the Wills Act. Alberta permits holograph wills, and questions have arisen as to whether a "formal' will may validly be altered by holograph and whether a holograph codicil may be made to a "formal" will. The first question is a difficult one, for the statute can be read either way. Egbert, J. held the holograph alteration of the formal will ineffective.[37] In the case of the holograph codicil, however, he held it valid.[38] Another question not yet firmly settled is whether a holograph will need be signed at the foot or end. In *Re Brown Estate*[39] he thought not, but the will before him was not holograph, and he held invalid those portions below the signature. The will was completed on an unusual type of printed form, and was not irregular. His Lordship resisted any temptation he might have felt to point out that the testator was penny-wise in trying to make a home-made will, but he did indulge in the understatement that the form seemed "to have been designed to cause confusion and misunderstanding".

When construing a will, Mr. Justice Egbert made every effort to give effect to the testator's intention.[40] but as he said in *re Brown Estate*[41] neither the desire of the court to give effect to the intentions of the testator nor its desire to intepret, if possible, a will so as to prevent an intestacy can override the specific stipulations or prohibitions of a statute.

In connection with wills, there is a leading judgment on the Family Relief Act written in 1951, four years after the Act was passed.[42] A wealthy farmer left a small amount of money to his wife and the residue to a charitable organization. The judgment was the first in Alberta to canvass thoroughly the principles on which the court should give relief to the widow. Characteristically, the leading cases from all other jurisdictions were examined and then the principles applied. The conclusion of the judgment excoriates the residuary beneficiary for its strong opposition to the widow's application:

> To me it is indeed surprising that a charitable institution, which, aside from the testator's bequest, has no moral right to the benefit it is receiving, should adopt this attitude. I would have thought that the adoption of that attitude of sweet charity connoted by the very nature of the institution would not only have been more creditable but, in the long run, would have conduced to its financial benefit by promoting that public confidence and respect which begets further bequests.[43]

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[36]See: *Shilletto* v. *Plitt* (1955) 16 W.W.R. 55, *Merril Petroleums* v. *Seaboard Oil Co.* (1957) 22 W.W.R. 529; *Wtstern Minerals Ltd.* v. *Gaumont* (1951) 1 W.W.R. (N.S.) 369, rev'd. (1952) 3 W.W.R. (N.S.) 434, aff'd. [1943] 1 S.C.R. 345; *Calvan Consolidated Oil Co.* v. *Manning* (unreported) rev'd. (1958) 25 W.W.R. (N.S.) 641, aff'd. [1959] S.C.R. 253.

[37]*Re Cottrell* (1951) 2 W.W.R. (N.S.) 247.

[38]*Re Ferguson-Smith* (1954) 13 W.W.R. (N.S.) 387 rev'd. on other grounds (1957) 21 W.W.R. 139.

[39](1953) 10 W.W.R. (N.S.) 163.

[40]In re Burns Estate (1952) 6 W.W.R. (N.S.) 433.

[41]*Supra.*

[42]*Re Willan* (1951) 4 W.W.R. (N.S.) 114.

[43]At p. 138.

Mr. Justice Egbert relied upon the Contributory Negligence Act to apportion the blame for an accident whenever possible.[44] Even where the Vehicles and Highway Traffic Act gave a motorist the statutory right of way at an unmarked intersection, Egbert, J. found both motorists to have been negligent and applied the Contributory Negligence Act, apportioning the blame as he thought just.[45]

The validity of provincial legislation inevitably comes before a provincial trial judge. A person accused under the Highway Traffic law frequently contends, for example, that the legislation is *ultra vires*. In *Reg. v. Dickie*[46] a man was convicted under provincial law of driving while his driver's license was suspended. Mr. Justice Egbert found that by virtue of a similar provision in the Criminal Code Parliament had occupied the field and that the provincial enactment was consequently *ultra vires*. He appears to have been reluctant to apply the "aspect" doctrine in cases of this nature, in spite of the judgment of the Appellate Division in *Rex v. Corry*,[47] which clearly supported the contrary view.

The Province of Alberta has made various attempts to abolish slot machines. The 1935 Act, similar to the one of 1924, was designed to prohibit their use altogether. It forbade their operation, provided for their seizure, and doubtless because of the danager of invalidity, ingeniously provided that no slot machine should be capable of ownership or the subject of property rights. Its validity was promptly challenged, but the Appellate Division upheld it, ruling that it was not criminal law, and nothing prohibits a province from confiscating property.[48] Then, in 1952, when an owner of slot machines was faced with confiscation proceedings in the magistrate's court, he applied to Egbert, J. for a prohibition order. The main argument in this instance was that the functions of the Magistrate were those of a superior court and therefore could not validly be given to a provincially appointed judge. After a discussion of *bona vacantia,* Mr. Justice Egbert concluded that jurisdiction in this area is vested only in a superior court.[49]

A few months later His Lordship presided over the trial of a civil case in which the plaintiff owed the balance of the purchase price of various machines on which miniature hockey and other games could be played. The defendant alleged that they were slot machines. The judge pointed out that the literal

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[44] *Western Canadian Greyhound Lines v. Trans-Canada Auto Transport et al* (1952) 6 W.W.R. (N.S.) 695, and *Ritland & Ritland v. Gaetz et al* (1953) 9 W.W.R. (N.S.) 289.

[45] *Archibald v. Reicheld* (1955-56) 17 W.W.R. (N.S.) 202.

[46] (1954) 13 W.W.R. 545.

[47] [1932] 1 W.W.R. 853. The position taken by Mr. Justice Egbert in *Reg v. Dickie* was commented upon and criticized by Mc Bride, J.A. in *Reg v. Mankow* (1959) 28 W.W.R. (N.S.) 433 at p. 439. He said: "The judgment in the *Dickie* and *Pomerleau* case is a lengthy one and displays again the trial judge's characteristics thoroughness in analyzing and reviewing the authorities. With respect however, in such circumstances, if a trial judge of this court is of opinion that a considered judgment of this division is no longer binding on him as having been wrongly decided or having been overruled, according to the judgment or judgments of a higher court, it will be insufficient on the part of the trial judge to support his viewpoint in general reasoning or reference to 'innumerable cases'. It will be essential to cite the precise case or cases explicity justifying the position taken and on which he relies. Were it othervwise, the rule as to stare decisis would go by the board."

[48] *Rex v. Stanley* [1953] 3 W.W.R. 517.

[49] *Johnson v. A.G. of Alta.* (1952) 7 W.W.R. (N.S.) 193.

definition of "slot machines" in the Act was wide enough to include gold clubs, baseball bats and footballs. He observed:[50]

> If we are not to arrive at absurdities equal to those encountered by Alice in Wonderland, me must find an acceptable meaning narrower than the literal meaning.

He concluded that these games vended amusement only and not prizes; they were not slot machines. The Appellate Division reversed both judgments, but the Supreme Court of Canada restored them.[51] On the constitutional issue four judges out of seven found the legislation invalid, three on the ground that it was in pith and substance criminal law and one on the ground that the provincial legislation, which might otherwise have been valid, was rendered invalid by virtue of a similar provision in the Criminal Code.

In 1954 the legislature passed a new act designed to avoid the infirmity of the earlier one. Egbert, J., carefully examining the reasons for judgment in the Supreme Court of Canada, held that the new Act, like the old, was in relation to Criminal Law. The Appellate Division sustained this judgment on the narrower ground that Parliament had occupied the field.[52]. In this case the words of the Alberta Slot Machine Act clearly covered the situation at bar, but his Lordship found the Act *ultra vires* by looking at the *intention* of the legislature which, he said, was to invade the field of Criminal Law given to Parliament by s. 91 (27) of the British North America Act. His judgment expressed near contempt for what he considered to be the legislature's colourable attempt to trespass upon federal jurisdiction.

It is clear, moreover, that he was not loth to express criticism of a poorly drawn statute, especially in a case where a literal interpretation of legislation must lead to an unjust result. Thus, in *Crown Lumber Co. Ltd.* v. *Stanolind Oil and Gas Co. Ltd.*, he commented on the Mechanics Lien Act:

> I have already pointed out the absurdity of s. 48, and the impossibility, as it seems to me, of giving any meaning to some of its provisions. Nevertheless, I am of the opinion that the section read as a whole shows a clear intention on the part of the legislature to permit a claimant for a valid lien . . . to register his lien with the Minister of Mines and Minerals.[53]

In *re Ferguson Estate*[54] he pointed out the "absurd situation" which might arise under the Exemption Act if, contrary to the plain intention of that legislation to protect the widow and infant children of an execution debtor as well as the debtor himself, the widow and children were not entitled to exemption from seizure if no creditor had become an execution creditor during the debtor's lifetime. He fully accepted, however, the limitations of his own authority. In the *Ferguson case* he added:

> But the absurdity is created by the statute itself, and is one which must be corrected by the legislature and not by the Courts.[55]

Similarly, in *Copithorn* v. *Calgary Power Co.*, he said:

> Whatever may be my opinion of legislation which on its face permits a man to be deprived of his property without notice and without an opportuniy of being heard, or in any way objecting or protesting, which, in fact, so far encroaches upon he right of private property as to destroy it, that opinion is something I cannot take into account in coming to a decision on

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[50] *Regent Vending Machines* v. *Alta Vending Machines* (1952) 7 W.W.R. (N.S.) 433.

[51] [1954] S.C.R. 127 and [1954] S.C.R. 98.

[52] *Regent Vending Machines* v. *Alta. Vending Machines* (No. 2) (1955) 16 W.W.R. (N.S.) 141 aff'd. (1956) 19 W.W.R. 509.

[53] (1957) 24 W.W.R. (N.S.) 337.

[54] (1957) 23 W.W.R. (N.S.) 521.

[55] *Supra*, at p. 526.

the matter now before me. The fact is that a statute exists, that its enactment is apparently within the powers of the provincial legislature, and that I am bound by it until such time as a court shall declare it to be invalid.[56]

Although Mr. Justice Egbert was always most careful to base his decisions on decided cases and was ever conscious of the authorities by which he was bound, he nevertheless had little difficulty, on occasion, in finding grounds for refusing to following seemingly binding decisions.[57] *In Johnson, In re the Slot Machine Act,*[58] he was faced with two earlier decisions of the Appellate Division holding the Act *intra vires.* He refused to follow them on the ground that the question with which he was concerned (that the Act gave Magistrates the jurisdiction of a Superior, District or County Court within s. 96 of the B.N.A. Act) was not raised in those cases.[59] Although his decision was reversed by the Appellate Division, the Slot Machine Act was later held *ultra vires* by the Supreme Court of Canada as being criminal legislation.[60] In *Reg.* v. *Dickie and Pomerleau*[61] *his Lordship* was faced with a decision of the Appellate Division of the Alberta Supreme Court[62] which was admittedly on point, yet he refused to follow that decision because he was convinced that it was contrary to the current of Supreme Court and Privy Council decisions.

While always respectful of decisions coming from other provinces, Mr. Justice Egbert did not automatically and uncritically accept them. When the occasion so demanded, he made it clear that he was not bound by them. Thus, in the *Bourbonnie* case, he felt is necessary to go contrary to decision of the Ontario Court of Appeal.

I am fully aware that in coming to the conclusion I have reached I am running counter to the unanimous judgment of the Court of Appeal of another province. But with all respect I am so convinced that the judgment in the *Dokuchia* case is in error that I cannot bring myself to follow it unless I am actually bound by it, and, of course, I am not.[63]

Some of the decisions of Mr. Justice Egbert were new departures in the development of legal principles. One such decision was *Chilliback* v. *Pawliuk.*[64]

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[56] *Supra,* at p. 438.

[57] *Loftus & Brown Cleaners and Dyers Ltd.* v. *Snider* (1953-54) 10 W.W.R. (N.S.) 577.

[58] 1952-53) 7 W.W.R. (N.S.) 193.

[59] *Rex* v. *Stanley* [1953] 3 W.W.R. 517, and *Reg* v. *Louis* [1949] 1 W.W.R. 945.

[60] (1952-53) 7 W.W.R. (N.S.) 193 rev'd. [1954] S.C.R. 127.

[61] (1954) 13 W.W.R. (N.S.) 545. Mr. Justice Egbert may have reconsidered the position which he took in this case. In *Re Budd Estate* (1958) 24 W.W.R. 343, he made the following comment: "Counsel for the Public Trustee urges that I am not bound by this judgment of the Appellate Division [*In re Simpson Estate* [1927 3 W.W.R. 534] and refers me to my own judgment, in *In re Reg.* v. *Dickie; In re Reg.* v. *Pomerleau* . . . , in which I expresseed the opinion that where a decision of the Appellate Division has been expressly or impliedly overruled by a court of superior jurisdiction superior to it, I am bound to follow the judgment of the court of superior jurisdiction rather than that of the Appellate Division. But even if I am right in the opinion expressed in the case, counsel has been unable to refer me to any cases where the point at issue was raised and dealt with in a superior court, so that it could be said that the decision of the Appellate Division in *In re Simpson Estate* had been either expressly or impliedly overruled.

[62] *Rex* v. *Corry,* supra.

[63] *Supra,* at p. 14. The case referred to is *Dokuchia* v. *St. Paul Fire and Marine Insurance Co.* [1947] O.R. 417.

[64] (1956) 17 W.W.R. (N.S.) 534: [1956] 1 D.L.R. (2d) 611. This case is severely criticized by A. B. Weston in (1956) 34 Can. Bar Rev. 453; A position in favour of the decision is taken by S. J. Helman in the same issue of the Canadian Bar Review at p. 873. See also the comment by James B. Milner in *Canadian Jurisprudence,* edited by Edward McWhinney, Carswell, 1958, at pp. 95 and 101. Milner expresses tht view that "The seal is not *prima facie* evidence of consideration at all. It was recognized as a ground for the enforcement of a promise long before the concept of consideration came into the Common Law."

The plaintiff had been injured in an automobile accident due to the defendant's gross negligence. The defendant, having had his driver's license cancelled, sought to obtain a release of liability from the plantiff. The release was given by way of a document prepared by the Department of Highways, to which was attached a red wafer seal. The document expressly stated that no consideration was given. Egbert, J. found that the seal imparted mere *prima facie* (and not conclusive) consideration. He found, further, that the evidence disclosed that the parties did not intend the document to be executed as a sealed instrument.

Conclusion

His Lordship was not averse to praising counsel for a job well done. Thus, in the Turta case, he said:

> I would like to express my appreciation to all counsel involved in this difficult case for the clear manner in which it was presented, and for the great assistance afforded me by their excellent written arguments.[65]

Nor was he hesistant to rebuke counsel if he saw fit, as in *Davies* v. *Davies*[66] where he refused to allow the successful defendant the costs of the action because counsel had not fulfilled his undertaking with the court to file a short brief of the authorities he relied upon.

It is hoped that this article will have shown, at least in part, the happy combination of qualities which made possible Mr. Justice Egbert's contribution. A profound sense of balance and fairness permeates his judgments His style of judicial exposition is characterized not so much by a striving for eloquence as by a deep concern for order, exactness, and thoroughness. He possessed an unusual faculty for analyzing technical matters in the most lucid and readable manner. What strikes the reader above all is the vast knowledge which he brought to bear on problems both directly and indirectly related to the law. The intense application of these qualities to a short, but productive career of public service has left a permanent creative impact on law and society in this province.

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[65] *Supra*, at p. 599.

[66] (1955) 15 W.W.R. (N.S.) 379.