in the case of a minor encroachment on a street or road. The *Herron* case shows that section 420 of the Municipal Government Act[29] effectively prevents title being acquired by adverse possession, and public policy would normally preclude any encroachment which would interfere with the use of a street or road, of which the swimming pool constructed across the road in the *Herron* case is an example. However, it would require a strained interpretation of section 420 to hold that section 183 does not apply to a road or street vested in a municipality, and it may well be that it does apply. The consequences of holding that it does could be very serious if a necessary roadway becomes effectively blocked, or benign if it protects an encroachment which is inadvertent and insignificant.

X. CONCLUSION

The policy behind section 183 is sound. It is very easy to make a mistake about boundaries, and once money has been laid out in improvements, it will in many cases be much more detrimental to A as owner of Blackacre to have to remove them or be denied the use of them than it will be to B, as owner of Whiteacre, to give up the land upon which they are situated in exchange for fair compensation. In cases of complete mistake of identity of property, it seems unfair that B should be able to retain the benefit of a building or other improvements without paying for them. Perhaps the points mentioned above should be clarified and perhaps the legislation could give greater guidance as to the principles upon which the court should proceed, but in the two recent cases in which the plaintiff was successful, *Mildenberger* v. *Prpic* and *Maly* v. *Ukrainian Catholic Episcopal Corporation of Western Canada*, it seems appropriate that the relief was available.

—W. H. HURLBURT*

29. R.S.A. 1970, c. 246.

* B.A., LL.B., Director of the Alberta Law Institute of Law Research and Reform; Professor, Faculty of Law, University of Alberta.

FAILURE OF THE ACCUSED TO TESTIFY: *VEZEAU* v. *THE QUEEN*

In a seven to two decision[1] the Supreme Court of Canada in *Vezeau* v. *The Queen*[2] dismissed an appeal by the accused from a judgment of the Court of Appeal for Quebec[3] which had allowed an appeal by the Crown from acquittal and had ordered a new trial. The accused had been charged with non-capital murder and the Crown relied heavily on identification evidence to prove its case. The defence sought to question the accuracy of that evidence in addition to relying on the defence of alibi. The accused did not take the stand. The error of law argued by the Crown as the basis of its appeal in the Court of Appeal was alleged to be in the last sentence of the trial Judge's instructions to the jury:[4]

1. The majority judgment was given by Martland J.; Judson, Ritchie, Spence, Pigeon, Beetz and de Grandpre JJ. concurring. The dissent was written by Dickson J., Laskin C.J.C. concurring.
2. (1976) 28 C.C.C. (2d) 81.
3. 15 C.R.N.S. 336, [1971] Que. C.A. 682n.
4. *Supra*, n. 2 at 83.

> After your swearing-in as jurors I indicated to you that in our criminal law, the accused who is before the Court is presumed innocent. Not only is the Crown obliged to prove the guilt of the accused beyond all reasonable doubt but the accused himself does not have to establish his innocence. What is more, he is under no obligation to give evidence in his defence. In this case the accused has not testified. *You cannot draw any conclusion unfavourable to the accused from this fact.* [emphasis added]

Mr. Justice Martland speaking for the majority of the Supreme Court agreed that the trial Judge erred in law when instructing the jury not to take into consideration in their deliberations the failure of the accused to take the stand. He expressly adopted[5] the reasoning of the Court of Appeal that "It is clear that the jury had the right to consider the failure of the accused to testify and to draw therefrom any logical conclusion."[6]

Martland J. then went on to consider the powers of the Court of Appeal on an appeal from acquittal as defined in s. 613(4) of the Code. Relying on the decisions of the Supreme Court in *White* v. *R.*[7] and *R.* v. *Grauthier*[8] he stated that in addition to successfully arguing error of law:[9]

> . . . it was the duty of the Crown, in order to obtain a new trial, to satisfy the Court that the verdict would not necessarily have been the same if the trial Judge had properly directed the jury.

Martland J. was satisfied that the Crown had in fact fulfilled that duty. He relied heavily on the alibi defence and the effect the erroneous jury charge had on that defence:[10]

> The direction of the trial Judge precluded the jury when considering this defence from taking into consideration the fact that the appellant had failed to support his alibi by his own testimony. The failure of an accused person who relies upon alibi, to testify and thus to submit himself to cross-examination is a matter of importance in considering the validity of that defence.

Mr. Justice Dickson speaking for the dissent took a different tack. He failed to commit himself completely as to whether there was error in the jury charge preferring to concentrate on whether the Crown could satisfy its onus to convince the Court ". . . with a substantial degree of certainty that the jury would necessarily have convicted the accused in the absence of the offending words."[11] Dickson J. unlike Martland J. regarded alibi as only a secondary defence[12] and held that the Crown's identification evidence was not such as to warrant a new trial.

The difference in emphasis between the majority and dissent approaches in this case can be gleaned by contrasting the words of Dickson J.:[13]

> This case was almost entirely one of fact dependent upon identification. The narrow point of law raised by the Crown is to be found in one short sentence in a charge extending through 28 pages of transcript.

with those of Martland J.:[14]

> Counsel for the appellant contended that there was no question of law which warranted the appeal by the respondent to the Court of Appeal, suggesting that the only issue at

5. *Id.*
6. *Supra*, n. 3 at 338-339.
7. (1947) 89 C.C.C. 148, [1947] S.C.R. 268.
8. 27 C.C.C. (2d) 14, 33 C.R.N.S. 46.
9. *Supra*, n. 2 at 87.
10. *Id.* at 88.
11. *Id.* at 91.
12. *Id.* at 93.
13. *Id.*
14. *Id.* at 85.

> trial was one of fact as to identification of the appellant. . . .
> The point is, however, that the decision of the jury was made in the light of an express direction that they must not in reaching a decision from the fact that the appellant had not given evidence.

It can be seen from the foregoing that no basic difference in law divided the Court and as the majority of justices agreed with Martland J.'s approach it would be trite to say that his judgment is authority as to the applicable law in the area of judicial instructions to juries when the accused fails to testify.

It is submitted that *Vezeau* is in fact a case which outlines one of the parameters in this area; a parameter that has not been dealt with directly by a high court previously. As Dickson J. points out the case is unique:[15]

> The present case is not one in which the accused seeks to impugn the Judge's charge on the ground that the latter commented upon the failure of the accused to testify. That is the situation which usually comes before the Courts.
> . . . in the present case the complaint originates with the Crown.

Section 4(5) of the Canada Evidence Act[16] was discussed both in the Court of Appeal and the Supreme Court. Both courts and both the majority and the dissent in the Supreme Court agreed that their judgments were not to be considered as based on that section. However, that section is relevant in commenting upon *Vezeau* because it provides a perspective through which the majority decision in *Vezeau* can be viewed.

Section 4(5) provides:

> The failure of the person charged or of his wife or husband of such a person, to testify, shall not be made subject of comment by the judge, or by counsel for the prosecution.

Dickson J. states that:[17]

> The purpose of this subsection is not obscure. An accused person enjoys the presumption of innocence, and the burden of proof beyond a reasonable doubt rests upon the prosecution from the beginning to the end of the trial. The jury is so instructed in every jury trial involving a criminal charge. Comment upon the failure of the accused to testify might tend to defeat these jural safeguards.

It is clear therefore that a judge cannot "comment" to the jury on the failure of the accused to testify. This however begs the question—what constitutes a "comment"? In a series of cases[18] involving the appeal by the accused from conviction (unlike the case in *Vezeau*) the Supreme Court elaborated on that section. It was held that a "statement" of the accused's right to refrain from testifying does not constitute a comment[19] and at any rate comments by a judge must be considered ". . . solely in the light of possible prejudice to the accused".[20] These cases pointed out what was permissible for judges to state when instructing the jury as to the failure of the accused to testify. As Longley J. pointed out:[21]

> I am aware that in both Canada and the United States decisions have gone very far in the direction of shutting out anything which bore the semblance of comment on the part of judge or counsel in respect of the non-testifying of a prisoner on his trial. But it seems to me there should be some limit to this doctrine and I think the limit shoud be where

15. *Id.* at 90.
16. R.S.C. 1970 E-10.
17. *Supra*, n. 2 at 88-89.
18. *McConnell and Beer* v. *R.* [1968] 4 C.C.C. 257, 69 D.L.R. (2d) 149, [1968] S.C.R. 802 and *Avon* v. *R.* (1971) 4 C.C.C. 357, 21 D.L.R. (3d) 442, [1971] S.C.R. 650.
19. *McConnell and Beer, Id.* at 263.
20. *Id.* [1968] 1 C.C.C. 368 at 379-380 (Ont. C.A.).
21. *R.* v. *McLean* (1906) 39 N.S.R. 147 at 171.

> reference could not be construed as unfavourable to the prisoner, not its effect as occasioning a substantial wrong or miscarriage on the trial.

In *Vezeau* counsel for the appellant accused attempted to argue that the trial Judge's remarks fell within this permissible area.[22] The Court rejected this argument because, it is submitted, section 4(5) and its corresponding area of permissible remarks were not really relevant to the impugned remarks of the trial Judge. As Dickson J. points out:[23]

> The Crown's complaint, of course, does not stem directly from s. 4(5) of the Canada Evidence Act. It is founded on the Judge's observation, which followed his comment on the failure of the accused to testify, to the effect that the jury could not draw any unfavourable conclusion from the failure of the accused to testify.

The remarks in this case, it is submitted, went beyond the prohibition of section 4(5) or the permissible area of remarks to mark another parameter of prohibition. The remarks that fall within this area are prohibited not because they may have the effect to having the accused's ". . . right not to testify presented to the jury in such a fashion as to suggest that their silence is being used as a cloak for their guilt."[24] Instead remarks such as in this case are prohibited because they prevent the jury from exercising its power of observation and to draw conclusions about the accused's case from the manner it was presented to them. As the Court in *Vezeau* points out this is particularly significant when the defence of alibi is relied upon:[25]

> The failure of an accused person, who relies upon alibi, to testify and thus to submit himself to cross-examination is a matter of importance is considering the validity of the defence.

As pointed out above the Crown instigated the appeal against acquittal in the Court of Appeal relying not on a breach of section 4(5) but on a number of cases[26] which have held that a jury is entitled to take into consideration the failure of the accused to testify, although of course by statute a "comment" by the judge is prohibited. *Vezeau*, along with these cases is authority for the proposition that a judge is prevented from instructing a jury not to take failure to testify into consideration in their deliberations. It is submitted that section 4(5) provides protection for the accused by providing one parameter on judicial instruction while *Vezeau* keeps the power of observation of the jury intact by providing another parameter on judicial remarks.

—JOSEPH O. SEGATTO*

---

22. *Supra*, n. 2 at 85-86.

23. *Id.* at 90.

24. *McConnell and Beer, supra*, n. 16 S.C.R. at 809.

25. *Supra*, n. 2 at 88.

26. *R.* v. *Steinberg* [1931] O.R. 222 *aff'd* S.C.C. [1931] S.C.R. 421, 56 C.C.C. 9, [1941] 4 D.L.R. 8; *R.* v. *Comba* (1938) 70 C.C.C. 205, [1938] 3 D.L.R. 719, [1938] S.C.R. 396; *Coffin* v. *R.* (1955) 21 C.R. 333; *Corbett* v. *R.* (1973) 14 C.C.C. (2d) 385.

* LL.B. (Alta.), articling with the firm of Newson Hyde, Edmonton, Alta.