> The rule, as I understand it, is that the Court of Appeal will not interfere with an order made by a Judge in the exercise of his discretion unless he has proceeded on some wrong principle, which is not the case here.[21]

It should be noted that this statement is quite different from the portion of the headnote quoted above.

In *King v. Paradis* Chief Justice Michaud apparently exercised his discretion on the sole ground that several of the witnesses were resident in New Brunswick and did not discuss the propriety of this exercise on the motion to set aside the order because, he stated, it was not questioned.

J. W. McManus, III Law, U.N.B.

21. [1924] 3 D.L.R. 103, at p. 104 (Man. C. A.).

ASSAULT — AGREEMENT TO "FIGHT IT OUT"— RIGHT TO RECOVER DAMAGES — EX TURPI CAUSA — VOLENTI NON FIT INJURIA

The plaintiff and defendant, who had been drinking in a tavern, quarrelled and agreed to go outside and settle their differences with their fists. The plaintiff, knocked down by a blow to the head, suffered a couple of broken teeth, cuts on his face and a fractured ankle. He claimed damages for assault. The defendant denied the assault, alleging that the plaintiff was the assailant and that reasonable force only was used in self-protection. **Held,** for the defendant. *Wade v. Martin.* [1955] 3 D.L.R. 635 (Nfld.).

This case was decided on two grounds, each embodied in a Latin maxim: (1) ex turpi causa non oritur actio; and (2) volenti non fit injuria. In regard to the former, the trial judge said the fight was a breach of the peace; that it was "indeed criminal". Consent of the parties to participate in the fracas could not render it innocent because " 'No person can license another to commit a crime'. . . Nor can anyone lawfully consent to bodily harm, save for some reasonable purpose: for example, a proper surgical operation or manly sports."[1]

In *The Queen v. Coney,* Mathew, J. said: "It was said, that because of the consent of the combatants to fight there could not be an assault, . . . The contention really meant that the agreement of the men to fight rendered the contest lawful and innocent. There is, however, abundant authority for saying that no consent can render that innocent which is in fact dangerous."[2] And in *Rex v. Donovan,* Swift,

1. Salmond on Torts (11th. ed. 1953) 42.
2. (1881-2) 8 Q.B. 534, at pp. 546 and 547.

J. said: "If an act is unlawful in the sense of being itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime."[3]

A plaintiff cannot recover compensation for harm received while he is voluntarily participating in a crime if the harm is caused by another acting jointly with him. However, "a plaintiff is not 'disabled from recovering by reason of being himself a wrongdoer, unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction.' "[4] In *Colburn v. Patmore*, a newspaper proprietor failed in an action against his editor to recover compensation for damages he had to pay because of a libel printed in the paper. Lord Lyndhurst said: "I know of no case in which a person who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime."[5] Also in *Burrows v. Rhodes*, Kennedy, J. said: "It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom."[6] Similarly in *Haseldine v. Hosken*,[7] the court agreed that if a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, the courts will not assist him.

Probably the most recent relevant Canadian decision before *Wade v. Martin* is the Ontario case, *Danluk v. Birkner*.[8] The plaintiff was on the second floor of a building operated as a betting establishment when a buzzer announced a raid by the police. The plaintiff ran to a door, opened it and stepped out. There being no platform or stairs he fell to the ground and was injured. The trial judge gave judgment for the plaintiff on the ground that, as an invitee, the defendants owed him a duty which they had not discharged. The Ontario Court of Appeal[9] allowed an appeal on two grounds: (1) the plaintiff did not have the status of an invitee, and, even if he did, the defendant's invitation did not extend to the act complained of; and (2) the plaintiff was forbidden by criminal law to enter the premises and should not be compensated for injuries which resulted from his own criminal misconduct. The Supreme Court of Canada[10] upheld the decision of the Court of Appeal, but on the sole ground that, even as an invitor, the defendant's duty did not extend to the manner in which the plaintiff made his exit.

3. [1934] 2 K.B. 498, at p. 507 (C.C.A.).
4. Salmond on Torts (11th. ed. 1953) 42.
5. 1 C.M. & R. 72, at p. 83; 149 E.R. 999, at p. 1003.
6. [1899] 1 Q.B. 816, at p. 828.
7. [1933] 1 K.B. 822 (C.A.).
8. [1945] O.W.N. 822.
9. [1946] O.R. 427; [1946] 3 D.L.R. 172.
10. [1947] S.C.R. 484; [1947] 3 D.L.R. 337.

The Supreme Court did not pass on the second ground of decision in the Ontario appeal. There is, however, much to be said for the view of Roach, J.A. that the plaintiff did not have the status of an invitee. The courts ought not to recognize a request or invitation to a person to do an act in violation of the Criminal Code.[11] Nor should the plaintiff have been considered a licensee, for a licensee is one who is permitted to go on the premises, and permission means that he has the consent of the occupier who cannot in law "consent" to a crime.

The basic notion in the instant case and in the Ontario Court of Appeal decision in the *Danluk* case appear the same: to bar recovery for injuries suffered by one's participation in an unlawful act. The reason is that it would be against public policy to permit a person to benefit from his own crime.

The second ground for deciding for the defendant in the *Wade* case was that the plaintiff had consented to the assault. The trial judge said that, even if the fight were not criminal, consent would on the facts be a bar to recovery. If it were a crime, however, the defence of consent would pose the problem whether the plaintiff could consent to a criminal act. "It has never been decided whether consent in such cases is a good defence in a civil action, but it is submitted that on principle it ought to be."[12] At first sight some of the early English cases seem to be authorities for the proposition that consent would not be a defence: ". . . but licence to beat me is void, because 'tis against the peace."[13] It was also said that "the fighting being unlawful, the consent to fight, if proved would not be a bar to the plaintiff's action."[14] Trespass was introduced to bring within the jurisdiction of the King's courts offences which, falling short of felonies, seriously threatened the peace of the realm. Not only was the writ used to give a remedy for trespasses actually committed with force and arms against the King's peace, but, under the writ, the King's courts took jurisdiction, concurrently with the local courts, over invasions of personal and property rights directly resulting from acts which had no element of violence and did not amount to breaches of the peace. So long as the writ of trespass was the only machinery by which breaches of the King's peace could be punished, the consent of a private party could not defeat an action. But since setting up separate machinery for punishing breaches of the peace not amounting to felonies late in the seventeenth century, the Crown had no interest in the trespass action. Thus the rationale of these early cases no longer applies to trespass actions. ". . . it is a manifest contradiction in terms to say that the defendant assaulted the plaintiff by his permission."[15]

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11. But see the editorial notes in [1946] 3 D.L.R. 172, at p. 173 and [1947] 3 D.L.R. 337.
12. Salmond on Torts (11th. ed. 1953) 42.
13. **Matthew v. Ollerton**, Comberbach 218; 90 E.R. 438.
14. **Boulter v. Clark**, (1747) Bull N.P. 16.
15. **Christopherson v. Bare**, (1843) 11 Q.B. 473, at p. 477; 116 E.R. 554, at p. 556.

The two maxims quoted both were obstacles to recovery in *Wade v. Martin*. However, the maxim "volenti non fit injuria" might conceivably, though it is submitted improperly, be circumvented by the argument that the courts, even in a civil action, will not recognize consent to an unlawful act, and thereby leave the defendant in the same position as if there had not been consent. Nevertheless "ex turpi causa non oritur actio" stands firmly in the path of recovery. For, even though consent were not recognized, the action would arise out of the plaintiff's own unlawful act.

A Canadian case, *Bradley v. Coleman*.[16] is of interest because it contains dictum on the scarcity of authority on the present problem. It also refers to the conflict of United States authorities, but says that the rule prevailing in the majority of the states in 1922 was: " 'Where the parties engage in mutual combat in anger, each is civilly liable to the other for any physical injury inflicted by him during the fight. The fact that the parties voluntarily engaged in the combat is no defence to an action by either of them to recover damages for personal injuries inflicted upon him by the other.' "[17] The conflict of American authority appears in the following comparison:

Corpus Juris states: "By the weight of authority consent will not avail as a defense in a case of mutual combat, as such fighting is unlawful; and hence the acceptance of a challenge to fight, and voluntarily engaging in a fight by one party with another, because of the challenge, cannot be set up as a defense in a civil suit for damages for an assault and battery, although it seems that such consent may be shown in mitigation of damages."[18]

The Restatement of the Law of Torts, on the other hand, states this rule in s. 60: "Except as stated in s. 61, an assent which satisfies the rules stated in ss. 50 to 59 prevents an invitation from being tortious and, therefore, actionable, although the invasion assented to constitutes a crime."

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16. (1925) 28 O.W.N. 261.
17. Ibid., at p. 262.
18. 5 C.J., at p. 630.