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LEGAL ASPECTS OF THE POWER DEVELOPMENT OF THE SAINT JOHN RIVER BASIN *

Gerald F. FitzGerald †

INTRODUCTION

The orderly development of the rivers of the world presents one of the great challenges of our times. In particular, the hydro-electric development of international rivers, that is, rivers that border on or traverse at least two states, poses legal problems of great complexity. Lack of accepted international law on the uses of these streams is a major obstacle in the settlement of differences, with the result that progress in development is often held up for years to the detriment of the countries concerned.[1]

The Saint John River Basin, no less than some of the greater systems, presents a challenge to the international lawyer. Fortunately, as will be seen, there is a favourable legal context in which engineers and economists may work towards the full development of the hydro-electric potential of the basin.

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*This article is an expanded version of a talk delivered at the Mid-Winter Meeting of the New Brunswick Section of the Canadian Bar Association, at Fredericton, N. B., on February 20, 1959.

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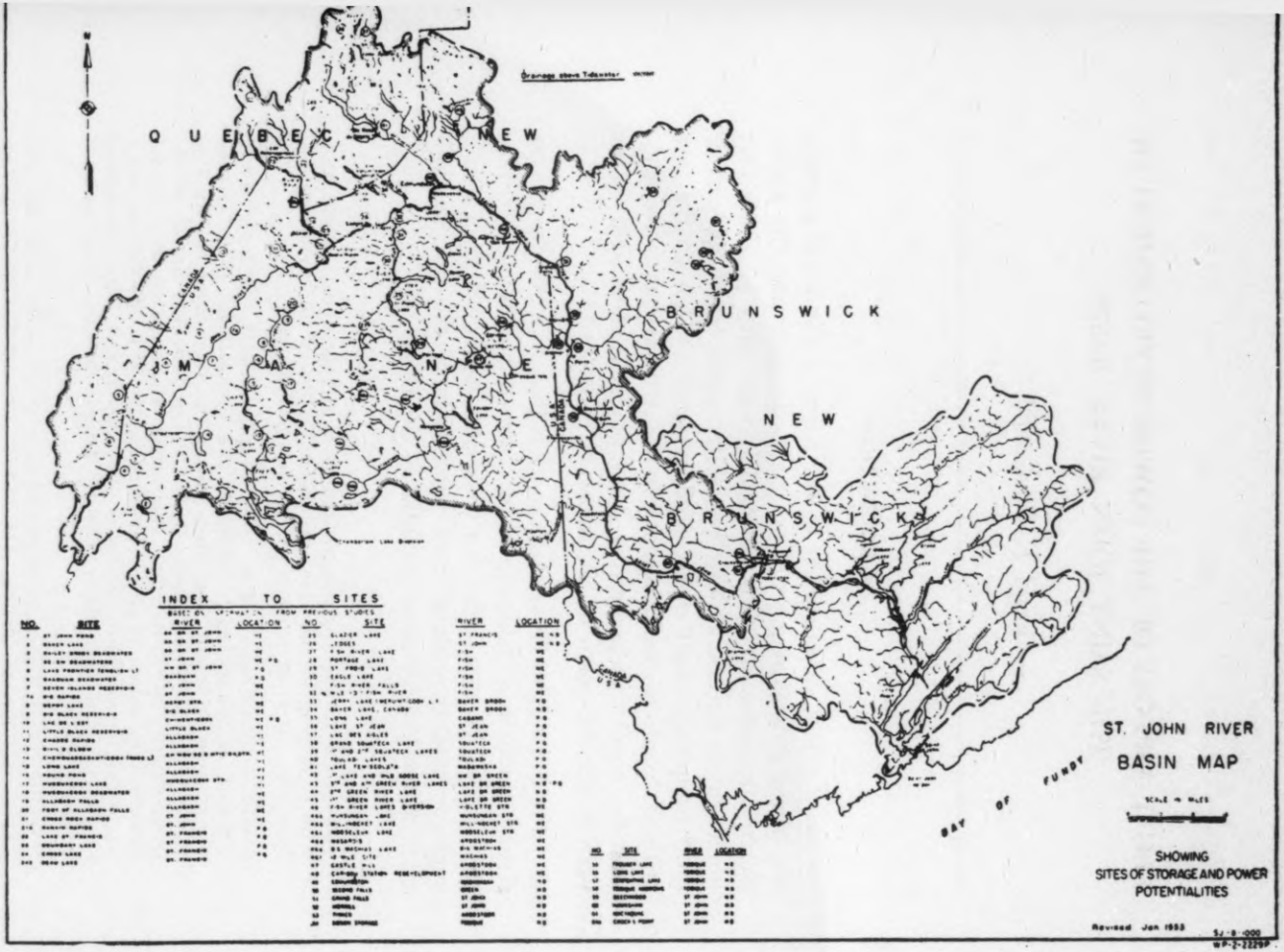
1. Sevette, Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interest (UN E/ECE 136 and E/ECE/EP/98 Rev. 1. 1952), p. 1; UN Dept. of Economic and Social Affairs, Integrated River Basin Development, Doc. E/3066 (1958), p. 43.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I

SAINT JOHN RIVER BASIN

I. Topography[2]

The Saint John River Basin is located in Northern Maine and the adjacent areas of Quebec and New Brunswick between the watersheds of the St. Lawrence River to the north and the Penobscot River to the south. The basin has a drainage area of 21,600 square miles and is one of the largest rivers on the Atlantic coast of North America. Of the total drainage area, 65 percent, or 14,000 square miles, lies in Canada, while 35 percent, or 7,600 square miles lies in the United States, being wholly located in the State of Maine. Of the total area in Canada, 2,750 square miles are in the Province of Quebec and 11,250 square miles in New Brunswick. The basin area at tidewater, just above Fredericton, New Brunswick, is 16,000 square miles. The main stem of the river is 450 miles in length.

The river rises in Little Saint John Lake in the extreme southwestern corner of the basin, on the international boundary between Quebec and Maine. After flowing along the boundary for about 38 miles, it flows through Maine for about 107 miles. Thence it proceeds easterly along the international boundary between New Brunswick and Maine for about 70 miles and then in a general south-easterly direction about 200 miles through New Brunswick to its mouth at Saint John on the Bay of Fundy. The total fall in the river between its source at Little Saint John Lake and tidewater some 89 miles from its mouth, just above Fredericton, is about 1,578 feet.

II. Existing hydro-electric developments

The chief hydro-electric power sites on the river are located at Grand Falls, New Brunswick, with a gross head of 132 feet, 4

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2. For a more detailed description of the Saint John River Basin, see Water Resources of the Saint John River Basin - Quebec - Maine - New Brunswick - Interim Report to the International Joint Commission (Under the Reference of 7 July 1952) by the International Saint John River Engineering Board, 6 April 1953, p. 18 *et seq.* See also, Bailey, The St. John River, in Maine, Quebec and New Brunswick, 1894. For a history of the Saint John River, see Raymond, The River St. John - Its Physical Features, Legends and History from 1604 to 1784, Sackville, 1943 and Wright, The Saint John River, Toronto, 1949.

units and an installed capacity of 57,000 kw, and at Beechwood, New Brunswick, with a head of 60 feet, 2 units and an initial installed capacity of 68,000 kw.[3]

III. Proposed hydro-electric developments

During 1955, energy requirements in New Brunswick were 423 million kwh. One forecaster has estimated that by 1980 the requirements will increase to 2,647 million kwh, an increase of over 600 percent. In Maine the energy requirements are expected to increase from the 1955 figure of 2,417 to 7,160 million kwh, a predicted increase of almost 300 percent.[4]

It is not surprising then that major power developments are proposed for Hawkshaw, New Brunswick, with a gross head of 55 feet and an initial installed capacity of 75,000 kw, and Morrill, New Brunswick, with a gross head of 53 feet and an initial installed capacity of 44,000 kw.[5] But before certain of the existing developments can be expanded and the projected ones made feasible, increased storage is needed upstream.[6] The major storage

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3. For other existing hydro-electric power sites in the basin, see Water Resources of the Saint John River Basin - Quebec - Maine - New Brunswick - Interim Report to the International Joint Commission (Under the Reference of 7 July, 1952) by the International Saint John River Engineering Board, 6 April 1953, p. 41:

Name	*River*	*Gross Head (ft.)*	*No. of Units*	*Installed Capacity (kw)*
Squa Pan	Squa Pan Stream	27	1	1,400
Caribou	Aroostook	14	2	800
Tinker	Aroostook	85	4	10,400
Tobique Narrows	Tobique	78	2	20,000
Edmundston	Madawaska	20	2	1,600
Second Falls	Green	25	2	1,100

4. Millar, International Passamaquoddy Tidal Power Project, Reprinted from The Engineering Journal, October 1958, p. 8.

5. Canadian House of Commons, Standing Committee on External Affairs, 23rd. Parl., 1st. Sess., 8 Minutes of Proceedings and Evidence, p. 320, Appendix A, Saint John River Profile (December 16, 1957).

6. In this regard, it has been suggested that the addition of further capacity at Grand Falls and ultimately the driving of a second tunnel which could make it economically feasible approximately to double the present installed capacity of the plant would depend upon the development of storage control upstream. However, the installation of the third unit at Beechwood, which, it is estimated, will fit into the load characteristics of the New Brunswick Electric Power Commission in 1964 or even sooner, will not depend upon the development of further water storage upstream at that time. See, Tweeddale, Paper presented at Fredericton, N. B., to Canadian Bar Association, Section on Mines, Petroleum and Power, February 20, 1959, p. 2 (mimeographed).

site is located at Rankin Rapids, Maine. This project would have the advantage of providing regulated flows for downstream sites in New Brunswick, as well as generating 400,000 kw through a head of 310 feet.[7] The project is now being studied as a source of auxiliary power for the Passamaquoddy tidal power project which needs to be firmed up with power from other sources.

In the light of the above background material, the question of the main legal rules applicable to the Saint John River Basin may now be considered.

II

LEGAL RULES APPLICABLE TO THE SAINT JOHN RIVER BASIN

I. Provincial and State Law

(a) New Brunswick

At common law the use of the water of New Brunswick rivers is based on the doctrine of riparian rights. These rights include an entitlement on the part of the riparian owners to have the water flow down the stream to their land along its regular channel in the manner in which it has been accustomed to flow, substantially undiminished in quantity or quality. Conversely, a riparian owner has the right of having the water flow from his land without obstruction. Although a riparian owner does not own the water in a running stream, he may use it for ordinary purposes connected with riparian land even on a consumptive basis. He may also take water for extraordinary purposes, such as a hydro-electric power development, though in this case he must restore it to the stream substantially undiminished in quantity and quality.[8]

Statutory rules have been developed to avoid the many difficulties arising out of the extraordinary use of waters. Thus, as early as 1921, the Dams Act[9] required the approval of the Lieu-

7. Information received from the office of the Canadian Section of the International Joint Commission. An alternative development of this section of the river would be to replace the proposed Rankin Rapids project by two other proposed storage projects at Big Rapids and Lincoln School. Big Rapids, with a head of 230 feet would have an installed capacity of 129,000 kw, while Lincoln School, with a head of 80 feet, would have an installed capacity of 58,000 kw. See Report of the New England-New York Inter-Agency Committee, Saint John River Basin, Maine.

8. See for a more complete statement, together with the relevant New Brunswick decisions, La Forest, Rights of Landowners in New Brunswick respecting Water in Streams on or adjoining Their Lands, (1957) 10 U.N.B. Law Jo., 21.

9. (1921) 11 Geo. V, c. 16.

tenant-Governor in Council for any works in water that might impede the flow of any stream or lake (driving dams on brooks or small streams and water-supply reservoirs being excepted).[10] Similarly today, the Water Storage Act provides that no dam, boom or other work impounding or holding back water is to be constructed until approved by the Lieutenant-Governor in Council.[11]

A furthur restriction on common law riparian rights had its genesis in an Act of 1884[12] which provided that in all future Crown grants there should be reserved a strip of land four rods (66 feet) in width adjacent to certain rivers named therein and such other rivers, lakes and streams as might be declared by proclamation, together with the riparian ownership of the streams. At the present time, by virtue of section 60 of the Crown Lands Act, the Crown reserves in full ownership a strip of land three chains (198 feet) in depth from each bank of any river or lake in the province on or adjoining lands granted after the passing of the Act.[13]

The New Brunswick Electric Power Commission, established in 1920 on the recommendation of the Water Power Commission set up in 1918, has authority to develop various water powers in New Brunswick.[14] Other bodies that play important roles in relation to water power in the province are the recently established Water Resources and Pollution Control Board[15] and the New Brunswick Water Authority.[16] The ten-member board is empowered to study and make recommendations in relation to the use of the water resources. One of its prime duties is to conduct surveys of the major water-sheds in the province to determine the sources of and the degree of pollution therein and the effects of such pollution on public health, fish, wildlife, agriculture, re-

10. But the construction of a driving dam does not give an automatic right to water powers. Thus, where by reason of a dam erected by a stream-driving company, any fall or water power is created, the company shall in no wise have any claim or title to the use of such water. On this point, see Stream Driving Companies Act, R.S.N.B. 1952, c. 219, s. 35.
11. R.S.N.B. 1952, c. 248, s. 1.
12. 47 Vict., c. 7.
13. See R.S.N.B. 1952, c. 53. The increase to three chains (198 feet) was made in section 62 of the Crown Lands Act in 1927 (R.S.N.B. 1927, c. 30). For the history of the successive amendments to the Act of 1884, see La Forest, Rights of Landowners in New Brunswick respecting water in Streams on or adjoining Their Lands (1957) 10 U.N.B. Law Jo. 21, at pp. 28-30.
14. (1920) 10 Geo. V, c. 53, s. 9. See, also, R.S.N.B. 1952, c. 71, s. 8.
15. Water Resources and Pollution Control Act, (1956) 5 Eliz. II, c. 14, s. 1 (1).
16. An Act to Amend the Water Resources and Pollution Control Act, (1958) 7 Eliz. II, c. 23, s. 4.

creation and electric power development.[17] The Water Authority, with a minimum of three members and a maximum of five, has the task of enforcing regulations promulgated under the Water Resources and Pollution Control Act.[18]

(b) Quebec

The Quebec Civil Code provides that a riparian owner on a running stream not forming part of the public domain may make use of it as it passes for the utility of his land, but he must not exercise this right in such a manner as to prevent the exercise of the same right by those to whom it belongs. This provision is made subject to chapter 51 of the Consolidated Statutes for Lower Canada[19] and other special enactments. A riparian owner whose land is crossed by such stream may use it within the whole space of its course through the property, but subject to the obligation of allowing it to take its usual course when it leaves his land.[20]

Conversely, lands on a lower level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man. In line with this principle, the proprietor of the higher land can do nothing to aggravate the servitude of the lower land.[21]

The Crown has extensive rights in Quebec streams. Thus, navigable and floatable rivers and streams and their banks are considered as being dependencies of the Crown domain. The same rule applies to all lakes and non-navigable and non-floatable rivers and streams and their banks bordering on lands alienated by the Crown after February 9, 1918.[22]

The Water-Course Act[23] provides that no floodgate, flume, embankment, dam, dyke or other similar work that will affect public or private property rights shall be constructed or maintained in a watercourse except with the approval of the Lieutenant-Governor in Council.[24] Similar approval is required for the construction and maintenance of reservoirs for the storage of the

17. (1956) 5 Eliz. II, c .14, s. 2 (1).
18. (1958) 7 Eliz. II, c. 23, s. 5.
19. Now the Water-Course Act, R.S.Q., 1941, c. 98.
20. Quebec Civil Code, Article 503.
21. Quebec Civil Code, Article 501.
22. Quebec Civil Code, Article 400. For further information on Crown rights to hydraulic power in the Province of Quebec, see statistical Year Book, Quebec, 1956-57, p. 398 and Encyclopedia Canadiana, Vol. 10, pp. 284-285, Ottawa, 1958.
23. R.S.Q., 1941, c. 98.
24. *Ibid.*, ss. 6 and 9.

water of lakes, ponds, rivers and streams.[25] Projects are submitted for approval through the Department of Hydraulic Resources.[26]

The Quebec Streams Commission, created in 1910,[27] was authorized to develop and exploit the water powers of the province, to make recommendations regarding the control of water resources, and to construct certain storage dams and operate them so as to regulate the flow of streams. The Commission was abolished as from April 1, 1955 and its functions transferred to the Department of Hydraulic Resources.[28] One way in which the Commission and its successor have assisted power companies has been by the regulation of the flow of the principal power streams through the construction of storage dams; in respect of these dams the cost of operation only is charged annually to the interested companies or persons.[29]

The Quebec Hydro-Electric Commission established in 1944[30] has authority regarding the generation of power[31] and may, with the authorization of the Lieutenant-Governor in Council, acquire by expropriation any undeveloped water power.[32] Authority of the Legislature is required for the expropriation of a developed water power of more than 200 H.P.[33]

Under the Exportation of Hydraulic Power Act, every sale, lease or grant of water powers belonging to the province must contain a clause prohibiting the exportation of electric power out of Canada,[34] but the Lieutenant-Governor in Council has power to suspend the prohibition.[35] Prohibitions and restrictions in relation to the alienation of hydraulic power within Quebec are found in the Act respecting the Hydro-Electric Resources of the Province.[36]

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25. *Ibid.*, ss. 57 and 61.
26. Hydraulic Resources Department Act, (1945) 9 Geo. VI, c. 32; also cited as R.S.Q. 1941, c. 97A.
27. See R.S.Q. 1941, c. 98, s. 68.
28. (1954-55) 3-4 Eliz. II, c. 32.
29. R.S.Q. 1941, c. 98, ss. 68-85; see also The Canada Year Book 1955, pp. 563-564.
30. An Act to establish the Quebec Hydro-Electric Commission, (1944) 8 Geo. VI, c. 22. This Act provides for the insertion in R.S.Q. 1941 of Chapter 98A, the Quebec Hydro-Electric Commission Act, section 4 of the latter providing for the establishment of the Commission.
31. R.S.Q. 1941, c. 98A s. 29.
32. *Ibid.*, s. 33.
33. *Ibid.*
34. R.S.Q. 1941, c. 100, s. 1.
35. *Ibid.*, s. 6.
36. (1955-56) 4-5 Eliz. II, c. 27.

(c) Maine

In Maine the common law doctrine of riparian rights applies to the use of streams although, as elsewhere, the doctrine is modified by statutory provisions.[37]

Subject to constitutional restrictions upon interference with property rights, the state has dominion and control, in its sovereign capacity, over the waters within its boundaries. However, with respect to matters affecting interstate and foreign commerce and the control and improvement of navigation, the regulatory power of the state is subject to the paramount authority of the Federal Government.[38]

In so far as non-navigable streams are concerned, the riparian owner has the right to erect and maintain milldams and to divert water by canal for mills,[39] subject to payment of compensation for damages to other persons.[40] No special authorization appears to be required for works upon such streams with the exception of dams erected upon streams whose waters ultimately reach the ocean at a point wholly outside the territorial limits of the United States. In the latter case, the dams must be authorized by act of the legislature or by a decree of the Public Utilities Commission made after public notice and hearing on petition for such authorization.[41]

Prior to the erection of a dam for the purpose of developing any water power in Maine, or the creation or improvement of a water storage basin or reservoir for the purpose of controlling the waters of any of the lakes or rivers of the state, plans and other data must be filed with the Public Utilities Commission[42] which is charged with collecting information relating to water powers of the state.[43]

The Fernald Act whereby the export of power was formerly prohibited has now been repealed.

II. Federal Law

(a) Canada

A Federal licence is required for the construction, operation and maintenance of improvements in international rivers. These are defined in section 2 of the International Rivers Improvements

37. 56 Am. Jur., Waters, s. 284. As to riparian rights in general, see 93 C.J.S. ss. 5-14; 56 Am. Jur., Waters, s. 273 *et seq.*
38. 56 Am. Jur., Waters, ss. 198 and 102.
39. R.S. Maine 1954, c. 180, s. 1.
40. *Ibid.*, s. 5 *et seq.*
41. *Ibid.*, s. 33.
42. R.S. Maine 1954, c. 14, s. 11.
43. *Ibid.*, s. 9.

Act[44] as "water flowing from any place in Canada to any place outside Canada." An international river improvement means, according to the Act, "a dam, obstruction, canal, reservoir or other work the purpose or effect of which is (i) to increase, decrease or alter the natural flow of an international river, and (ii) to interfere with, alter or affect the actual or potential use of the international river outside Canada."[45] In the case of the Saint John River Basin, the most obvious examples of international rivers within the meaning of the Act are some of the trans-boundary tributaries flowing from Quebec into Maine. Other rivers falling within the definition are those tributaries of the Saint John River that flow from the Canadian side into the main stem where it flows along the boundary. One such tributary is the St. Francis[46] which rises in Quebec, becomes a boundary water between New Brunswick and Maine, and finally discharges into the Saint John River at a point where the latter starts its course along the international boundary between New Brunswick and Maine. Part of the waters that come from the Quebec section of the St. Francis flow into that part of the St. Francis lying within the State of Maine where the river courses along the boundary. Therefore, before dams could be erected on the St. Francis or on Boundary Lake in Quebec, it would appear necessary to obtain a Federal licence under the International Rivers Improvements Act. More difficult cases are afforded by tributaries such as the Madawaska which flows from a point in Quebec, through New Brunswick, before emptying into the Saint John River at a point where the latter courses along the international boundary. One commentator has submitted that whether or not such a river would be considered as an international river for the purposes of the Act

> . . . would depend on whether it would be held that water leaving the tributary and entering the Saint John becomes a part of the Saint John immediately on entry, or whether a current coming out of the tributary would retain its identity until it becomes thoroughly merged. In the latter case, it might be argued that water in a current flowing out of the tributary and across the international boundary would be water flowing to a place outside Canada. I think this highly unlikely, but possible.[47]

A somewhat less subtle approach to this situation may be possible and it may not be necessary to apply the identity-of-water rule in order to attract the application of the Act under consid-

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44. (1955) 3-4 Eliz. II, c. 47 See also, International Rivers Improvements Regulations, SOR/56-9, P.C. 1955-1899.

45 (1955) 3-4 Eliz. II, c. 47, s. 2.

46. For a discussion of the status of the St. Francis River under the International Rivers Improvements Act, see Ryan, Saint John River Power Development: Some International Law Problems, (1958) 11 U. N. B. Law Jo. 20, at pp. 24-25.

47. *Ibid.*, at p. 25.

cration. According to testimony given by the Honourable Jean Lesage, former Minister of Northern Affairs and National Resources, before the External Affairs Committee of the House of Commons in 1955, "the tributaries that flow into the St. John river from New Brunswick, into that part of the St. John river which is a boundary water between New Brunswick and the United States, are definitely covered by this Act."[48] By Section 7 (b) of the Act, only the boundary waters themselves are excluded from its operation, and that is because, as will be seen, they come under the jurisdiction of the International Joint Commission.

The effect of the Exportation of Power and Fluids and Importation of Gas Act[49] is that power generated in the Canadian portion of the Saint John River Basin cannot be exported except under licence and subject to such terms and conditions as the Governor in Council may approve.[50] In that Act, "export" means "with reference to power, to send from Canada by a line of wire or other conductor."[51] A licence is obtained through the Minister of Trade and Commerce,[52] and is not valid for more than one year.[53] Power lines or other conductors for the exportation of power may not be constructed except under the authority of, and in accordance with, a licence granted under the Act.[54] A licence to export power may provide that the quantity of power to be exported shall be limited to the surplus remaining after due allowance has been made for distribution to customers for use in Canada during the period of the licence.[55] The price charged by a licensee for power exported by him must not be lower than the price at which power is supplied by him or his supplier in similar quantities and under similar conditions of sale for consumption in Canada.[56]

Lastly, as many sections of the Saint John River Basin located in Canada are navigable, no work may be constructed in the navigable portions without approval of the Governor in Council under the Navigable Waters Protection Act.[57]

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48. Canadian House of Commons, Standing Committee on External Affairs, 22nd. Parl., 2nd. Sess., 6 Minutes of Proceedings and Evidence, p. 192 (March 18, 1955).
49. (1955) 3-4 Eliz. II, c. 14.
50. *Ibid.*, s. 3 (1).
51. *Ibid.*, s. 2 (a).
52. Exportation of Power and Fluids and the Importation of Gas Regulations, P.C. 1955-907, sections 2 (f) and 5 (1).
53. *Ibid.*, s. 7 (1).
54. (1955) 3-4 Eliz. II, c. 14, s. 6 (3).
55. *Ibid.*, s. 32.
56. Exportation of Power and Fluids and the Importation of Gas Regulations, P.C. 1955-907, s. 9.
57. R.S.C., 1952, c. 193.

(b) United States

The Federal Government, by virtue of its constitutional power to regulate interstate and foreign commerce, has paramount control, for that purpose and to the extent necessary, of all the navigable waters of the United States, the regulatory authority of the states being subject to such Federal control for the purpose and to the extent stated.[58]

In the United States, hydro-electric projects on Federal Government lands or on navigable waters of the United States must be licensed by the Federal Power Commission, which is an independent body organized in its present form by an Act approved on June 23, 1930.[59] The navigable portions of the Saint John River Basin in Maine would appear to come under the jurisdiction of the Commission.

As to the export of electric energy, the Federal Power Act provides that no person shall transmit such energy from the United States to a foreign country without first having been authorized to do so by the Federal Power Commission. Such order will be issued if the Commission finds that the proposed transmission will not impair the sufficiency of electric supply within the United States or impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission.[60] The constructon, operation, maintenance, or connection, at the borders of the United States of facilities for the transmission of electric energy between the United States and Canada requires a permit by the Commission with the concurrence of the Secretary of State and the Secretary of Defence. If they cannot agree, the application for a permit is submitted to the President for approval or disapproval.[61]

It may be added that the civil works programme of the Corps of Engineers of the United States Army includes such activities as waterways improvement, flood control, regulation of the use of navigable waters of the United States, approval of plans for construction of bridges and issuance of permits for other works upon navigable waters, and power and irrigation developments.[62] Some of these activities could involve consultation with the Corps of Engineers in relation to the Saint John River Basin.

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58. 56 Am. Jur., Waters, s. 198.

59. 46 Stat. 797.

60. Federal Power Act, as amended up to June 1, 1955, s. 202 (e) (49 Stat. 847, 16 U.S.C. 824a (e)).

61. Executive Order 10485 of September 3, 1953.

62. United States Government Organization Manual 1957-58 (Revised as of June 1, 1957), p. 142. United States Government Printing Office, Washington.

III. International Law

The chief international instruments affecting the Saint John River Basin are the Webster-Ashburton Treaty of 1842,[63] the Treaty of Washington of 1871[64] and the Boundary Waters Treaty of 1909.[65] These must now be considered.

(a) Webster-Ashburton Treaty, 1842

Article III of the Webster-Ashburton Treaty of 1842 provides that where the Saint John River forms the boundary line between the territories of the contracting parties, navigation shall be free and open to both. Produce of the forest or of agriculture grown in such parts of Maine as might be watered by the river or its tributaries are to have free access into and through the Saint John and its tributaries having their source within Maine, to and from the seaport at the mouth of the river, and to and around the falls of the river, by boats, rafts or other conveyance. While within New Brunswick the produce from Maine is to be treated as if it were New Brunswick produce. Produce from the territory of the upper Saint John in Canada is to receive similar treatment where the river runs wholly through Maine. Neither party has the right to interfere with any regulations not inconsistent with the terms of the treaty and made by the Governments of Maine and New Brunswick where both banks belong to the same party.

(b) Treaty of Washington, 1871

The Treaty of Washington of 1871 (which is noteworthy because it established freedom of navigation of the St. Lawrence River for citizens of the United States) contains, in Article XXXI,

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63. Webster-Ashburton Treaty. Signed at Washington, August 9, 1842; entered into force October 13, 1842; 8 Stat. 572; TS 119; I Malloy 650; Treaties and Agreements Affecting Canada, in Force between His Majesty and the United States of America 1814-1925, pp. 18-22, King's Printer, Ottawa, 1927.

64. Treaty for an amicable settlement of all causes of differences between the two countries (Treaty of Washington). (Arts. I-XVII and XXXIV-XLII have been executed; Arts. XVIII-XXV, and XXXII terminated July 1, 1885; Arts. XXVIII and XXIX not considered in force.) Signed at Washington, May 8, 1871; entered into force June 17, 1871. 17 Stat. 863; TS 133; I Malloy 700; Treaties and Agreements Affecting Canada, in Force between His Majesty and the United States of America 1814-1925, pp. 37-49, King's Printer, Ottawa, 1927.

65. Boundary Waters Treaty, 1909. Signed at Washington January 11, 1909; ratification advised by Senate March 3, 1909; ratified by Great Britain March 31, 1910; ratified by President April 1, 1910; ratifications exchanged at Washington May 5, 1910; proclaimed May 13, 1910. 36 Stat. 2448; TS 548; III Redmond 2607; British Treaty Series 1910, No. 23; Treaties and Agreements Affecting Canada, in Force between His Majesty and the United States of America, p. 312, King's Printer, Ottawa, 1927.

an engagement by Great Britain to urge upon the Parliament of the Dominion and the Legislature of New Brunswick that no export or other duty be imposed on lumber cut in that part of Maine drained by the Saint John River and its tributaries and floated down the river to the sea, when such lumber is shipped to the United States from the Province of New Brunswick.

(c) Boundary Waters Treaty, 1909

(i) Summary of Provisions

The Boundary Waters Treaty of 1909 is concerned with three classes of waters: (1) boundary waters; (2) waters flowing from boundary waters or waters at a lower level than the boundary in rivers crossing the boundary; and (3) waters on one side flowing through natural channels across the boundary or into boundary waters.

Boundary waters are defined as:

> . . . the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.[66]

Uses, obstructions and diversions of such waters are dealt with in Article III of the Treaty. According to Article I, navigation of all navigable boundary waters is free and open to the inhabitants of Canada and the United States.

As to waters flowing from boundary waters or waters at a lower level than the boundary in rivers crossing the boundary, Article IV of the Treaty provides rules relating to works, dams and other obstructions in such waters that would have the effect of raising the natural level of the waters on the other side of the boundary.

We come now to waters on one side flowing through natural channels across the boundary or into boundary waters. Under Article II of the Treaty, the federal governments and the appropriate state and provincial governments have "exclusive jurisdiction and control over the use and diversion, whether temporary or permanent," of all such waters on their own side of the line. Parties injured by such use and diversion may claim legal remedies. Moreover, if interference with, or diversions of such waters on one side of the boundary would be productive of material injury to the navigation interests on the other side, the Contracting Party concerned may object.

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66. Preliminary Article.

The Treaty provides for an International Joint Commission, composed of three United States and three Canadian members, which is called upon to play various roles in relation to the waters just mentioned.[67] In relation to boundary waters and waters flowing therefrom, the Commission performs judicial functions and can hand down binding decisions.[68] In the case of trans-boundary waters, or those flowing into boundary waters, the Commission has an investigative role only.[69]

The parties to the Treaty have, each on its own side of the boundary, equal and similar rights in the use of boundary waters.[70] The Treaty establishes an order of precedence in the uses of boundary waters, uses for domestic and sanitary purposes being ranked first, those for navigation, second, and uses for power and irrigation, third.[71]

In exercising its judicial power, the Commission has authority—sometimes permissive and sometimes mandatory—to look after injured interests. Thus it may, in its discretion, "make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provisions, approved by the Commission, be made for the protection and indemnity against injury of any interests on either side of the boundary."[72]

But where the natural level of waters on either side of the line is elevated "as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby."[73]

(ii) International Joint Commission and the Saint John River Basin

With the foregoing summary of the relevant provisions of the treaty in mind, an examination of its application to the Saint John River Basin by the International Joint Commission may now be made. The Commission has had before it in relation to the basin cases arising under Articles III, IV and IX of the treaty.

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67. Article VII.
68. Articles III, IV and VIII.
69. Article IX.
70. Article VIII.
71. *Ibid.*
72. *Ibid.*
73. *Ibid.*

Article III — Lariviere Dam [74]

The only case on the Saint John River Basin involving the application of Article III had its origin in 1933 when Jean Larivière, a Quebec farmer, built a small dam on the international section of the Saint John River between Quebec and Maine. Technically, this was an obstruction of a boundary water and therefore subject to the approval of the International Joint Commission under Article III of the Treaty. It was only in 1935 that Larivière became aware of the fact that he required approval of of the Commission for the dam. Accordingly, he applied for, and was given approval. The order of approval was subject to the mandatory provision, required by Article VIII in the case of the elevation of a boundary water, that the applicant would indemnify riparian owners for damage caused by flooding consequent upon the construction of the dam.

Article IV — Grand Falls Power Dam (Saint John River) [75]

The construction of the power development at Grand Falls, New Brunswick, was made possible by the approval of the International Joint Commission given under Article IV of the Treaty in 1925 and 1926. This development is located on the Saint John River, about three miles below the point where the river leaves the international boundary. The effect of placing a dam at that point was to pond the water back for about thirty-two miles, twenty-nine of which were on the international section of the river between New Brunswick and Maine. In these circumstances, Article IV applied and it was necessary for the applicant, the New Brunswick Electric Power Commission, to go before the Commission for approval of the project.

This case marks the first occasion on which the International Joint Commission was seized of a claim of an upstream country to a right to share power added at a site in a downstream country through raising the level of the water at and above the boundary (i.e., in Maine). The theory advanced by the United States was that the flow of water along the twenty-nine miles of the international section multiplied by the fall of sixteen feet along that section was a potential power to which the two governments had equal rights. Thus, if the 16-foot fall were added to the rest of the fall at Grand Falls and were, therefore, removed from the boundary section, the United States had the right to claim a half share in the amount of power corresponding to the flow past the international boundary multiplied by the fall along the

74. International Joint Commission, Docket No. 33. For summaries of this and other IJC dockets referred to herein, see Bloomfield and FitzGerald, Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912-1958) (Toronto, Carswell, 1958).

75. IJC Docket No. 19. See also IJC Docket No. 22.

international section. Canada and New Brunswick denied this claim. The Commission did not have to decide the issue because the applicant agreed to furnish 2,000 H.P. for use in the State of Maine at a price which was in effect not to be greater than that charged to like consumers of power in the Province of New Brunswick. The Commission noted this agreement and reserved the right of the parties to reopen the question if the 2,000 H.P. should ever cease to be available for use in the United States; the applicant was reserved the liberty to apply to the Commission at any time for relief from its undertaking.[76]

As to the question of injury, the applicant was ordered to make suitable and adequate provision, to the satisfaction of the Commission, for the protection and indemnity against injury of all other interests on either side of the boundary; and the applicant and all parties having claims for injuries in respect of the works (other than parties to certain agreements covering such claims entered into by the applicant) were given the right to apply for such further order, direction or action with reference to such claims as might seem proper.[77]

It only remains to add that in 1926 the Saint John River Power Company, having had transferred to it by the Act to Incorporate the Saint John River Power Company[78] the property rights, powers and privileges of the New Brunswick Electric Power Commission in respect of the Grand Falls project, sought and obtained the approval of the International Joint Commission to carry out the project.

Article IV — Madawaska Company [79]

The relation of the International Joint Commission and the Grand Falls Dam did not end with the orders of approval in 1925 and 1926. In 1932 the Commission heard a complaint of the Madawaska Company as to the alleged effects of the Grand Falls Dam on the company's plant located on the international section of the Saint John River at Van Buren, Maine. The Madawaska Company requested the Commission to give the Saint John River Power Company, owner of the Grand Falls Dam, directions concerning maintenance of levels in the ponded area behind the dam. The chief interest in this case for the lawyer

76. International Joint Commission - In the Matter of the Application of the New Brunswick Electric Power Commission for Permission to Construct and Operate Certain Permanent Works in and Adjacent to the Channel of the River St. John, in the Province of New Brunswick, at a Point on the Said River known as Grand Falls - Order of Approval, Application — Hearings 1925, p. 3, Government Printing Office, Washington, 1926.

77. *Ibid.*

78. (1926) 16 Geo. V, c. 45. See, also, IJC Docket No. 22.

79. IJC Docket No. 31.

is that the Madawaska Company, being a private citizen was denied the right to appear before the Commission, since it had not gone through its government.[80] Of additional interest are the arguments adduced by the Canadian side: To accede to the application of the Madawaska Company would amount to issuing an order in the nature of a mandatory injunction against a Canadian citizen with respect to the use by him of waters entirely within Canada and to the operation of plants wholly within Canada. The Commission had no competence to issue such an order. For the Commission to accede to the application would amount to a review of its order in the Grand Falls case. If it had such a power the conditions of an order would not be definite, and no party would consider constructing a work approved, unless it knew where it stood. If further conditions could be added through revision of the order, this would be directly opposed to the object of the Treaty, which is the better solution of boundary waters problems.

Article IX

Article IX of the Boundary Waters Treaty contains an agreement to refer to the International Joint Commission any other questions or matters of difference arising between Canada and the United States involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other along the common frontier. Where such a reference is made, the Commission performs an investigative function and makes recommendations to the two governments. This function has been exercised in at least two references involving the Saint John River Basin directly, and in two involving it indirectly.

Article IX—Pollution of Boundary Waters [81]

In 1913, in connection with an investigation by the Commission of the pollution of all boundary waters between Canada and the United States, sanitary experts studied this problem on the Saint John River between Edmundston and Grand Falls. The report of the experts was addressed to the Commission under date of January 16, 1914.[82] The Commission eventually drafted a treaty on the subject, but it was not implemented.

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80. See IJC Rule 6(b). For a discussion on this point, see Bloomfield and FitzGerald, Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912-1958) (Toronto, Carswell, 1958), pp. 58-59.

81. IJC Docket No. 4.

82. Water Resources of the Saint John River Basin - Quebec - Maine - New Brunswick - Interim Report to the International Joint Commission (Under the Reference of 7 July, 1952) by the International Saint John Engineering Board, 6 April 1953, p. 17.

Article IX — Water Resources of the Saint John River Basin, Quebec, Maine and New Brunswick [83]

In a reference made in 1950, and amended in 1952, the Governments of Canada and the United States requested the International Joint Commission to recommend in its judgment what projects for the conservation and regulation of the waters in the Saint John River system above tidewater near Fredericton, New Brunswick, would be practical in the public interest. The Commission made an interim report to the two governments early in 1954. A feature of this report is the attention paid to development of resources of the basin as a whole without undue regard being paid to the international boundary. At the same time, the Commission indicated that a number of storage and power development possibilities in the basin have international aspects which may require consideration by it if and when definite proposals are made for construction and operation. Since 1954, the Commission has received annual reports from the International Saint John River Engineering Board covering subsequent developments in the area.

Article IX—Passamaquoddy Tidal Power Reference [84]

This reference is concerned with the question of the development of the international tidal power potential of Passamaquoddy Bay. The Passamaquoddy project is of interest in considering the Saint John River Basin, since proposed storage and power sites in the latter could provide auxiliary power for firming up power from the former. One of these sites is, of course, Rankin Rapids in Maine.

(iii) Rules governing upstream use and diversion of trans-boundary waters and waters flowing into boundary waters

Introduction

As indicated earlier, Article II of the Treaty provides upstream governments with "exclusive jurisdiction and control over the use and diversion, whether temporary or permanent" of waters on their own side of the line in the case of trans-boundary waters and waters flowing into boundary waters.

As early as 1841 a dam and canal were constructed in Maine to divert the run-off from some 240 miles of the upper part of the Allagash River to the Penobscot River. This diversion was detrimental to log-driving interests on the lower Allagash and Saint John Rivers and was the subject of protests from Canada

83. IJC Docket No. 63.

84. IJC Docket No. 72. See also, an earlier reference to the International Joint Commission in IJC Docket No. 60.

and interests in Maine, but it was nevertheless continued.[85]

As further use or diversion of this type could theoretically, take place in the Saint John River Basin, it may be useful to examine Article II which has been much considered in discussions on the Columbia River Basin where Canada, the upstream state, argues that it is in a position to divert.[86] This examination will bear on the right of the upstream State to exclusive use and diversion and the legal remedies provided for downstream parties injured by the exercise of that right.

Right of the upstream State to exclusive use and diversion

In regard to the right to exclusive use and diversion, Article II provides as follows:

> Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.
>
> It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

The Canadian position in regard to the proposed Columbia diversion has been that this language embodies the principle that there is no limitation on the right of an upstream state to divert water while in its own territory, save for the limitation in the case of navigation. The non-limitation principle was stated by Attorney-General Harmon of the United States, in 1895, at a time when the diversion of the water of the Rio Grande by the United States, the upstream state, was questioned by Mexico.[87] The

85. Water Resources of the Saint John River Basin - Quebec - Maine - New Brunswick — Interim Report to the International Joint Commission (Under the Reference of 7 July, 1952) by the International Saint John River Engineering Board, 6 April, 1953, p. 17.

86. Canada has proposed to divert the Kootenay River into the Columbia, and the Columbia into the Fraser with a consequent diminution of flow downstream in the United States.

87. (1895) 21 Opinions of Attorneys-General, 274.

Canadians argue that Article II alone is the law between the two countries on the matter to which it refers,[88] and that the principle of territorial sovereignty set forth therein was included in the treaty on the insistence of the American negotiators.[89] The Canadian position has been stated on many occasions in recent years[90] and has also received support from many commentators[91] on Article II.

On the other hand, the Americans, being in a downstream position on the Columbia River and threatened with a proposal for diversion upstream in Canada, have attacked Article II of the Treaty as no longer embodying a sovereign right of a State to divert, on the following grounds:

(1) the doctrine of riparian rights should apply and thus the United States as the downstream state would receive undiminished the natural flow of the river;[92]

(2) the doctrine of prior appropriation for beneficial use whereby appropriation first in time is first in right should apply, it being argued that the United States has been first in the use of the waters;[93]

(3) the doctrine of "equitable apportionment", which requires that the benefits of river waters within an area or system be shared equitably between states exercising jurisdiction over the system or area, should apply;[94]

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88. Martin, The Diversion of Columbia River Waters, Proceedings of the American Society of International Law (1957), p. 5.

89. McNaughton, Problems of Development of International Rivers on the Pacific Watershed of Canada and the United States, 5th World Power Conference, p. 4. Vienna, 1956. Section O, Paper 182 0/4; Letter of Sir Wilfrid Laurier in Gibbons Papers, C., Vol. 1; Sir Wilfrid Laurier, Debates, House of Commons, December 6, 1910, cols. 911-912.

90. In particular, by General A. G. L. McNaughton, Chairman, Canadian Section, International Joint Commission.

91. See, especially, Bourne, International Law and the Diversion of the Columbia River in Canada, Publication of the University of British Columbia Lecture Series, No. 27 (1956), pp. 17-25 and Ladner, Diversion of Columbia River Waters in International Law, Rivers and Marginal Seas, Publication of the University of British Columbia Lecture Series, No. 27 (1956), pp. 1-16.

92. Martin, The Diversion of Columbia River Waters, Proceedings of the American Society of International Law (1957), p. 4. In this regard, it is observed that the doctrine of riparian rights exists in New Brunswick, Quebec and Maine.

93. *Ibid.* The law of appropriation whereby a person on the banks of a stream has the right to consume or divert the water for a beneficial use is what was applied in the case of the Allagash diversion.

94. Martin, The Diversion of Columbia River Waters, Proceedings of the American Society of International Law (1957), p. 4.

(4) the United States has, in its treaties, provided for the equitable apportionment of waters in international rivers;[95] for example, in the Treaty with Mexico of 1944 on the Utilization of the Waters of the Colorado Tijuana and Lower Rio Grande Rivers, the doctrine of unlimited rights has in no sense applied. The equitable claims of both nations were fully respected;[96]

(5) municipal courts have applied the doctrine of equitable apportionment, and have rejected, in interstate cases, the Harmon doctrine;[97]

(6) the Harmon doctrine was expressly repudiated by Mr. Clayton, counsel for the American Section of the International Boundary Commission, before the Senate Foreign Relations Committee in 1945;[98]

(7) the Harmon doctrine is not a principle of international law and Article II must be interpreted in the context of current international law governing the use of the waters of international rivers.[99]

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95. *Ibid*, p. 5.

96. U.S. Treaty Series 994, 59 Stat. 1219.

97. Martin, The Diversion of Columbia River Waters, Proceedings of the American Society of International Law (1957), p. 5.

98. Hearings before Committee on Foreign Relations on Treaty with Mexico Relating to Utilization of Waters of Certain Rivers, 79th Cong., 1st sess., pt. 1, pp. 97-98 (1945).

99. For further discussions on this point, see Legal Aspects of the Use of Systems of International Waters with reference to Columbia-Kootenay River System under Customary International Law and the Treaty of 1909, Memorandum of the State Department, April 21, 1958, 85th Cong., 2nd sess., Senate, Document No. 118, prepared by William H. Griffin of the Department of State (United States Government Printing Office, Washington, 1958); Griffin, The Use of Waters of International Drainage Basins under Customary International Law, 53 A.J.I.L. 50-80, at pp. 50-55 (1959); Cohen, Some Legal and Policy Aspects of the Columbia River Dispute, (1958), 36 Can. Bar Rev., pp. 25-41; Laylin, Principles of Law Governing the Uses of International Rivers: Contributions from the Indus Basin, Proceedings of the American Society of International Law (1957), pp. 20-36; Laylin and Bianchi, The Rôle of Adjudication in International River Disputes, The Lake Lanoux Case, 53 A.J.I.L. 30-49, at p. 40 (1959). A wealth of material on the point is also to be found in Principles of Law Governing the Uses of International Rivers and Lakes, containing Resolution Adopted by the Inter-American Bar Association at its Tenth Conference held in November, 1957, at Buenos Aires, Argentina, together with Papers Submitted to the Association, 1958 (Library of Congress Catalogue Card Number 58-12112) and in Principles of Law and Recommendations on the Uses of International Rivers, containing a Statement of Principles of Law and Recommendations with a Commentary and Supporting Authorities Submitted to the International Committee of the International Law Association by the Committee on the Uses of International Rivers of the American Branch, 1958 (Library of Congress Catalogue Card Number 58-12111).

However, the American position before the International Joint Commission has not always been in line with the foregoing arguments. Thus, in the Waterton-Belly reference,[100] American counsel argued that, under Article II and the Harmon Doctrine, a country had exclusive jurisdiction over its waters and was not limited by an international servitude.[101] Moreover, in the Waneta Dam case[102], it was at American insistence that the order of approval of the Commission included a reservation of the right of the Americans to divert certain waters of the Pend d'Oreille River lying upstream in the United States. The question of the Chicago Diversion is too well known to require elaboration.[103]

As to the extent to which the upstream state may divert, one Canadian has expressed the view that the upstream state is not limited to diverting surplus waters, but may also divert waters already dedicated to use downstream.[104] In the Waterton-Belly reference, United States counsel submitted to the International Joint Commission that waters upstream in the United States may be diverted even where they cannot be put to advantageous use, and he argued that the fact that the American project for the use of the waters was not economically sound was not Canada's concern.[105]

The arguments are left in balance. But while they have had great significance in the case of the Columbia River Basin, there appears to be no indication that they will require early use in relation to the Saint John River Basin. However, if required, they are available from the stockpile of experience.

(iv) Legal remedies under Article II

In regard to the legal remedies of "injured parties" downstream in the event of interference or diversion upstream, Article II of the Treaty provides that:

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100. IJC Docket No. 57.

101. Bloomfield and FitzGerald, Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912-1958) (Toronto, Carswell, 1958), p. 45.

102. IJC Docket No. 66.

103. For an interesting discussion on the Chicago Diversion, see Report of the Committee on Uses of International Rivers to the Section of International and Comparative Law of the American Bar Association (May 17, 1958), pp. 1-13 (mimeographed).

104. Canadian House of Commons, Standing Committee on External Affairs, 22nd. Parl., 2nd Sess., 6 Minutes of Proceedings and Evidence (Mr. M. H. Wershof, Legal Adviser, Department of External Affairs), p. 203 (March 18, 1955).

105. Bloomfield and FitzGerald, Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912-1958) (Toronto, Carswell, 1958), p. 45.

> . . . any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary shall give rise to the same rights and entitle the injured parties to the same legal[106] remedies as if such injury took place in the country where such diversion or interference occurs.

The Canadian Government was not slow to implement this provision of Article II. Thus, it is provided in section 3 of the International Boundary Waters Treaty Act of 1911[106a] that:

> Any interference with or diversion from their natural channel of any waters in Canada, which in their natural channels would flow across the boundary between Canada and the United States or into boundary waters (as defined in the said treaty) resulting in any injury on the United States side of the boundary, shall give the same rights and entitle the injured parties to the same legal remedies as if such injury took place in that part of Canada where such diversion or interference occurs.

Section 4 of the same Act provides that the Exchequer Court of Canada shall have jurisdiction to hear claims of injured parties.

But discussions in connection with the proposed Columbia River diversion have brought to light a Canadian interpretation of the legal remedies provision of Article II that would reduce it to a nullity. The argument runs as follows:

(1) Article II provides, in effect, that where the injury takes place in the United States, the injured American party will have the same right or remedy as a Canadian would have if the injury had been inflicted in Canada.

(2) But the position of a Canadian claiming in respect of an alleged injury suffered at a point in British Columbia between the place of a diversion of the Columbia River and

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106. Why is the expression "*legal* remedies" used, and not merely the word "remedies"? It will be recalled that the first part of the first sentence of Article II reserves to both sides the "exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters" on their respective sides of the boundary line. Under these circumstances, if the downstream party could enjoin the intended diversion upstream the reservation would be rendered meaningless. Therefore, the remedy of an injunction will not be available, and the only remedy is the *legal*, as distinguished from an *equitable* one of claiming damages. That accounts for the use of the expression "*legal* remedies" in Article II. See, on this point, Scott, The Canadian-American Boundary Waters Treaty: Why Article II? (1958), 36 Can. Bar Rev., 511, at pp. 528-529. But see, for a broader interpretation of Article II as regards the possibility of an injunction, Canadian House of Commons, Standing Committee on External Affairs, 22nd. Parl., 2nd. sess., 6 Minutes of Proceedings and Evidence (Mr. M. H. Wershof, Legal Adviser, Department of External Affairs), pp. 209-210 (March 18, 1955).

106a. 1-2 Geo. V, c. 28.

the American border is that he would have no status to make a claim unless he were a licensed user, since, under the British Columbia Water Act, 1948 only the holder of a licence issued by the B.C. Comptroller of Water Rights has the right to the use and flow of water in any stream in the province. In the absence of such a licence (which he could hardly obtain under the B.C. Act in respect of a downstream use in the United States), the American claimant would be out of court.[107]

The foregoing interpretation in relation to the Columbia situation has not proven to be popular since, while it purports to give a right to claim for injury, it reduces the right to a nullity. One commentator[108] has submitted that the interpreter is under the rules of interpretation required, if at all possible, to give significant meaning to an attempt to agree, so that where a reasonable interpretation giving an affirmative meaning is available, it will be preferred to one that produces a nullity.[109]

On the American side, it does not appear that legislation specifically implementing Article II has ever been enacted. This raises the problem whether existing United States legislation gives American courts jurisdiction over suits under Article II, or whether the article is self-executing.[110] One possibility for the Canadian "injured party" under Article II might be to invoke a provision of the U.S. Code which vests in the Federal District Courts jurisdiction over civil actions brought by aliens for torts in violation of the law of nations or treaty. This provision might

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107. By analogy, a party suffering injury down-stream in New Brunswick due to a diversion in Maine might be out of court if he did not have a licence from the United States Federal Power Commission which he could not in any event get in relation to a use of water at a point in New Brunswick. Similarly, an injured party in Maine would be out of court in relation to a Quebec diversion on a trans-boundary tributary of the Saint John, since he could not obtain a licence under the Canadian International Rivers Improvement Act, 1955 in relation to a use of water at a point in Maine. For a summary of the arguments on this point in relation to the Columbia River Basin, see Cohen, Some Legal and Policy Aspects of the Columbia River Dispute (1958), 36 Can. Bar Rev. 25, at pp. 36-38, and Cohen, International Law and Canadian Practice in Canadian Jurisprudence, The Civil Law and Common Law in Canada (Edited by Edward McWhinney), (1958) p. 343.

108. Scott, The Canadian-American Boundary Waters Treaty: Why Article II?, (1958), 36 Can. Bar Rev. 511, at p. 513.

109. *DeGeofrey v. Riggs* (1890) 133 U.S. 258, at p. 270. As to presumptions against intending what is inconvenient or unreasonable, see Maxwell on Interpretation of Statutes, 10th Ed., (1953), pp. 191-197.

110. Griffin, Problems respecting the Availability of Remedies in Cases relating to the Uses of International Rivers, Proceedings of the American Society of International Law (1957), pp. 38-39.

operate so as to give him a right of action for a tort committed by an upstream American user.[111]

(v) Legal remedies outside the Treaty

It has been suggested that if it can be shown that the injuries downstream occasioned by a diversion are suffered by a sovereign, i.e., where the entity injured is not a private individual but one of the High Contracting Parties (spelled with a capital "P"),[112] then the injured sovereign will not be limited to the redress provided for an injured "party" (with the "p" in lower case) under Article II.[113] A strong argument against this is that a High Contracting Party would be claiming an injury in respect of something in respect of which it is exercising a proprietary function and it could, therefore, hardly expect to be treated on a different footing from private individuals. A further argument is that the treaty is meant to be exhaustive of the legal rules applicable to the two High Contracting Parties in regard to the particular aspect of waters dealt with in Article II. Hence a claim could hardly be brought outside the ambit of Article II in respect of those waters.

Once more, there is no indication that the foregoing arguments will be required for early use in the case of the Saint John River Basin. But they are available if the need arises.

III.
DOWNSTREAM BENEFITS FROM UPSTREAM STORAGE
I. Introduction

General A. G. L. McNaughton, Chairman of the Canadian Section of the International Joint Commission, stated in 1957 that in the event of upstream storage at Rankin Rapids in Maine, the question of downstream benefits would automatically arise.[114] While this subject has strong economic and engineering implications, it is not out of place to discuss it briefly here, since it often comes up in a legal context.

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111. Proceedings of the American Society of International Law (1957), pp. 41-42.

112. E.g., the case of a dam located downstream owned by one of the High Contracting Parties.

113. For summaries of this argument see Cohen, Some Legal and Policy Aspects of the Columbia River Dispute, (1958), 36 Can. Bar Rev. 25, at p. 30; Scott, the Canadian-American Boundary Waters Treaty: Why Article II?, (1958), 36 Can. Bar Rev. 511, at pp. 512-513 and Bloomfield and FitzGerald, Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912-1958) (Toronto, Carswell, 1958), pp. 47-48, 168, 208, 219.

114. Canadian House of Commons, Standing Committee on External Affairs, 23rd. Parl., 1st. Sess., 8 Minutes of Proceedings and Evidence, p. 304 (December 16, 1957).

II. Nature of downstream benefits

It is a question of fact whether or not benefits result downstream from the regulated flow from upstream storage. If they do, then the question of appropriate recompense to the upstream state arises. The benefits and the sharing of them should be distinguished. Power benefits are transportable and can be shared in kind; flood control benefits are not transportable, but can be shared by a money payment.

As to the determination of power benefits, the following comment points out a distinction that must be made between the energy and capacity components:

> It should be noted that there are two components to the power requirements of any electric utility; they are energy and capacity. The economic trend in most interconnected utilities is that hydro plants are operated at lower capacity factors to produce larger capacity components operating at the top of their load duration curves. The calculation of increase in energy component which accrues to downstream plants from upstream storage is a comparatively simple calculation and causes no problem in the development of downstream benefits; the increase in the capacity component to downstream users is the factor which causes engineers so much concern because there are so many continually changing circumstances which affect the determination of the capacity benefits which result to downstream plants from the discharge of water from upstream storage.[115]

III. Sharing of downstream benefits

In 1955, in speaking of the Columbia River Basin, the Honourable Jean Lesage, then Minister of Northern Affairs and National Resources, explained the basis for the sharing of downstream benefits as follows:

> It should be noted that power made available under those particular conditions is a joint product resulting from the joint enterprise of upstream and downstream interests. The downstream areas provide the head which is certainly a valuable resource, but the upstream areas contribute the storage sites which are required to regulate the flow of water and also may permit flooding above the boundary to increase the head below. It cannot be denied that a topography favourable to storage sites is a very valuable asset which can be utilized in perpetuity. It follows therefore that when downstream and upstream areas decide to use their respective physical assets jointly for the generation of power they both have a claim on the end-product. Moreover, they make the contribution in physical terms - even though some expenditures are involved to develop the natural resources - so that they are

115. Tweeddale, Paper presented at Fredericton, N. B., to Canadian Bar Association, Section on Mines, Petroleum and Power, February 20, 1959, p. 10 (mimeographed).

> both entitled to a quantity of the joint product in physical terms.[116]

A prerequisite to the sharing of downstream benefits is the establishment of the value of the additional energy generated downstream by reason of regulated flows from upstream storage. In this regard, it has been submitted that the real value of the power potential inherent in upstream storage is the cost of generating equivalent electric power by the use of steam. In making this submission to the External Affairs Committee of the House of Commons, in 1955, General McNaughton attached an important qualification:

> However, since a good bargain requires that both parties should benefit substantially, it is not to be expected that the upstream state will receive the full value in cash or the equivalent. Equity, of course, requires a division of benefits and so the amount to be paid in cash or in power will be somewhere in between the "value" on the one hand and the "cost" of the storage and its operation on the other. The exact division cannot, I think, be a matter of rule but must be the result of a bargain struck in each instance.
>
> What I do emphasize is that the "value" to be taken into account is that of "on-peak" generation by steam. . .[117]

Late in 1957, speaking of the Columbia, General McNaughton said that

> . . . "recompense" to Canada for the provision of regulated flow would need to be in terms of power determined by an agreement on the basis of a "fair bargain for the value of service rendered."[118]

More recently, it has been suggested that if Canada could not immediately use all the power allocated to it as its share of the downstream benefits on the Columbia, it could sell it back to the United States with a proviso of a right to recapture it when needed.[119] A proviso for recapture of power would imply need for

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116. Water Resource Development in the Pacific Northwest - Address by the Honourable Jean Lesage, Minister of Northern Affairs and National Resources, before the Pacific Northwest Trade Association, Vancouver, British Columbia, Monday, May 9, 1955. Reported in Upper Columbia River Development - Joint Hearings Before the Committee on Foreign Relations United States Senate. 84th Congress, 2nd. Sess., March 22, 26, 28, and May 23, 1956, pp. 375-380 at 377-378. United States Government Printing Office, Washington, 1956.

117. Canadian House of Commons, Standing Committee on External Affairs, 22nd. Parl., 2nd. Sess., 1 Minutes of Proceedings and Evidence, p. 45 (March 9, 1955).

118. Canadian House of Commons, Standing Committee on External Affairs, 23rd. Parl., 2nd. Sess., 6 Minutes of Proceedings and Evidence 249-250 (December 12, 1957).

119. Cohen, Some Legal and Policy Aspects of the Columbia River, (1958), 36 Can. Bar Rev. 25, at p. 40.

the downstream state to prepare for the day of recapture by developing alternative sources of power whether by thermal or nuclear installations. But the proposal to share power in the Columbia River Basin is not an original one. An example of the sharing-of-power formula came up during the hearings on the *Grand Falls Power Dam (Saint John River)* held before the International Joint Commission in 1925. On that occasion, the Attorney General of the State of Maine argued as follows:

> The principle on which we go is that if the property or resources of the State of Maine are used in the development of this power the State of Maine should receive its share of the power in proportion to the amount that the resources of the State of Maine contribute to the development. That is, if one square mile of the State of Maine furnished water, we will say, of the watershed, the principle is just the same whether it is one square mile or one hundred square miles.[120]

In regard to this quotation, it will be recalled, from the history of the Grand Falls development given earlier, that the raising of the level of certain boundary waters in the Saint John River permitted generation of additional power downstream at Grand Falls.

In the *Grand Falls* case, counsel for the United States claimed that the United States was entitled to a certain percentage of the power to be developed at Grand Falls, and counsel for the Canadian and New Brunswick governments denied this right.[121] But the International Joint Commission did not give a ruling on the claim since the applicant, the New Brunswick Electric Power Commission, agreed to furnish 2,000 H.P. for use in the State of Maine at a price which was, in effect, not greater than that charged to like consumers of power in New Brunswick.[122] As already explained, the International Joint Commission recognized the agreement without deciding the issue.

An example of the money-payment, or sharing-of-costs, formula is found in the United States. There, under the Federal Power Act, where a licensee or other power developer benefits directly from a headwater improvement of another licensee, a permitee or the United States, the Federal Power Commission determines the equitable part of the annual charges for interest,

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120. IJC Docket No. 19 - Intervention of Mr. Raymond Fellows, Attorney General, State of Maine, International Joint Commission - In the Matter of the Application of the New Brunswick Electric Power Commission for Permission to Construct and Operate Certain Permanent Works in and Adjacent to the Channel of the River St. John, in the Province of New Brunswick, at a Point on the Said River known as Grand Falls - Order of Approval, Application—Hearings 1925, p. 73. Government Printing Office, Washington, 1926.

121. *Ibid.*, p. 2.

122. *Ibid.*, pp. 2-3.

maintenance and depreciation to be paid to the owner thereof by the power developer benefitted. It is observed, however, that these provisions are concerned with the sharing of the costs of headwater improvements (i.e., the installations themselves) by those downstream riparian owners who benefit within the same country. This limited formula would not necessarily apply where two different countries are involved since it contains no element of recompense to the upstream country for the service performed or the water resources contributed.

IV. Role of the International Joint Commission in the sharing of downstream benefits

What is the role of the International Joint Commission in regard to the sharing of downstream benefits in a particular situation? May it play a judicial role and render a decision binding on the parties? Or is it restricted to making a recommendation to the parties? The answer will vary with circumstances. In the case of the *Grand Falls Power Dam (Saint John River)* [123] it was submitted that the Commission had jurisdiction to rule on the question of downstream benefits in its order of approval. There Article IV of the Boundary Waters Treaty applied because the downstream dam in New Brunswick raised the levels of the Saint John River in the international section upstream, thus affecting the State of Maine since it raised the water level almost to the natural high level. Since the increase in level also affected the New Brunswick side of the international section of the river, part of the increased "head" from that section was, therefore, developed in New Brunswick. In the case of that type of upstream storage, it would appear that the Commission would have judicial power in relation to downstream benefits to the extent that Article VIII specifies that in such a case the Commission shall require, as a condition of its approval of a project, that suitable and adequate provision approved by it be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

In the case of the Columbia River Basin, the International Joint Commission will be restricted to making a recommendation to the parties in regard to the sharing of downstream benefits. Thus, pursuant to the joint reference under Article IX of the Boundary Waters Treaty made by the Canadian and United States Governments to the International Joint Commission in January 1959, that body has been requested to report specially at an early date its recommendation concerning the principles to be applied in determining:

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123. IJC Docket No. 19.

(A) Benefits which will result from cooperative use of storage of waters and electrical inter-connection with the Columbia River System; and

(B) Apportionment between the two countries of such benefits more particularly in regard to electrical generation and flood control.[124]

V. Downstream benefits and the proposed Rankin Rapids storage

It is too soon to predict how the question of downstream benefits will be handled in relation to the proposed Rankin Rapids storage, although General McNaughton has stated in regard to the storage that ". . . in this case we are on the paying end, but an equitable arrangement would be beneficial to both countries."[125] This concept of equity in dealing with international river systems is now enshrined in one of the principles of international law agreed upon by the International Law Association at its New York University Conference in 1958, as follows:

> Except as otherwise provided by treaty or other instruments or customs binding upon the parties, each co-riparian State is entitled to a reasonable and equitable share in the beneficial use of the waters of the drainage basin. What amounts to a reasonable and equitable share is a question to be determined in the light of all the relevant factors in each particular case.[126]

If the question of downstream benefits in relation to the proposed Rankin Rapids storage were to come before the International Joint Commission, then, since the storage would be located upstream wholly in Maine in waters flowing into boundary waters, the Commission could only play whatever role in the settlement of downstream benefits the parties to the Boundary Waters Treaty might wish to assign it. Hence, as in the case of the Columbia, the Commission might merely be asked to make recommendations in the exercise of its investigative role under Article IX of the treaty.

VI. Regional concept of sharing of downstream benefits

This discussion on the sharing of downstream benefits may be closed on a note of caution. A good solution for one river

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124. Department of State Press Release No. 76, January 29, 1959 and Department of External Affairs Press Release No. 9, January 29, 1959. See also, editorial in The Montreal Star, Tuesday, February 3, 1959, p. 10, col. 1 and editorial from The St. Louis Post-Despatch reprinted in The Montreal Star, Tuesday, March 17, 1959, p. 10, col. 4.

125. Canadian House of Commons, Standing Committee on External Affairs, 23rd. Parl., 1st. Sess., 8 Minutes of Proceedings and Evidence, p. 304 (December 16, 1957).

126. International Law Association - New York University Conference (1958) - Resolution No. 1: Agreed Principle of International Law No. 4.

basin may not necessarily apply to another; and a good solution for one portion of a basin may not necessarily apply to another portion of the same basin. The International Joint Commission apparently realized this, in making its interim report of 1954 on the water resources of the Saint John River Basin, when it stated:

> In the matter of headwater storage reservoirs beneficial to downstream hydro-electric plants in the Saint John River basin the Governments of the United States and Canada should, when both are concerned, consider each case *de novo* and separately on its merits, recognizing that a settlement basis adjudged satisfactory in one case might be inequitable in other cases even in the same basin, and more particularly in cases arising in other river basins along the common frontier; hence, there should be an understanding between the two Governments to the effect that decisions with respect to cases of this type in the Saint John River basin should not necessarily be regarded as precedents in the consideration and disposition of other headwater-benefits situations in that basin or in other river basins lying partly in Canada and partly in the United States along the international boundary. This statement relates only to headwater storage reservoirs located entirely within one Country or the other and to situations covered under Article III of the Treaty but not to situations which would arise under Article IV of the Treaty, this latter aspect not having been considered by the Commission in formulating this conclusion.[127]

CONCLUSION

The foregoing represents an attempt to give a brief statement of legal rules that might be applied in relation to the power development of the Saint John River Basin. Some of these rules are clearly applicable to the basin. But the application of others could, as has been seen, give rise to considerable discussion. In this regard, it is, indeed, fortunate that, in the Saint John River Basin, there is such a community of interest on both sides of the boundary as could rule out serious differences of opinion with regard to legal rules applicable to a given situation. Moreover, it is safe to predict that those differences which may arise will be settled on the basis of the preservation of good neighbourly relations. God has blessed Quebec, Maine and New Brunswick with one of the world's most beautiful and useful river basins. We shall be worthy of His bounty if we continue to develop this basin in peace and amity!

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127. IJC Docket No. 63 - Interim Report to the Governments of the United States and Canada on the Water Resources of the Saint John River Basin, Quebec, Maine and New Brunswick, p. 56, January 27, 1954.

SOME ASPECTS OF THE WRIT OF FIERI FACIAS*

G. V. La Forest‡

INTRODUCTION

It may seem somewhat presumptuous of an academic lawyer to speak to a group of practitioners on a matter of such everyday importance as executions. Yet I believe there are few subjects in greater need of academic treatment and reform than this one. For however excellent our substantive law may be, it is only as good as the remedies to enforce it. The need for reform in this field I hope to demonstrate by a discussion of some aspects of the writ of *fieri facias*. Only a few aspects I may say, and those not exhaustively for time does not permit. But I hope to convince you of the need for a thorough study of the matter followed by legislative action.

The writ of *fieri facias* (or *fi fa*) is the maid of all work in the law of execution. So much is this so that in ordinary parlance when we speak of issuing execution we mean the *fieri facias*. It commands the sheriff to cause to be made *(fieri facias)* out of the lands and chattels of a judgment debtor an amount sufficient to pay the judgment creditor with costs.[1] The writ has been the most usual mode of execution for a long time; it is of great antiquity, dating to the earliest days of the common law.[2] This explains many things about the writ. It explains, first of all its extreme technicality, and, as we shall see, it assists in determining what property of the debtor may be seized under the writ. A discussion of problems respecting what property is seizable under the writ comprises the major portion of this talk, but before dealing with this I want to say a few words concerning a matter that is in crying need of reform — the binding effect of the writ.

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‡ The following substantially reproduces a talk delivered as part of a symposium arranged by the Faculty of Law of the University of New Brunswick at the Mid-winter Meeting of the New Brunswick Section of the Canadian Bar Association held at Fredericton, N. B., February 20 and 21, 1959.

1. Rules of the Supreme Court of New Brunswick, 1956 (hereinafter referred to as R.S.C.), App. H, Forms Nos. 1-4.

2. See Plucknett, A Concise History of the Common Law, 4th Ed., p. 369; Pollock and Maitland, History of English Law, vol. II, p. 596; Tidd's Practice, vol. 2, p. 993.

BINDING EFFECT OF WRIT

At common law, the writ had effect from its teste. As soon as it was issued it bound the goods of the execution debtor into whosoever hands they came. So that if an execution debtor sold his goods after the issue of the writ, the execution creditor had a right to seize them even as against a ***bona-fide*** purchaser for value without notice.[3] The English Statute of Frauds[4] made an important alteration to this law. It provided, in effect, that the writ should not bind the goods of an execution debtor until it was delivered to the sheriff to be executed. This provision has been adopted as section 11 of the New Brunswick Statute of Frauds,[5] a necessary provision here because since a solicitor can obtain blank writs and fill them out as occasion requires,[6] it would be extremely difficult to determine just when the writ was issued.

It should be observed that the provision in the Statute of Frauds merely postpones the time when the writ binds the goods of the execution debtor; it does not otherwise alter the law. So that if a judgment debtor sells goods to an innocent purchaser after the writ has been placed in the hands of the sheriff for execution, the sheriff may seize the goods in the hands of the innocent purchaser.[7]

This blemish on the law was removed in England by section 1 of the Mercantile Law Amendment Act, 1856, which provided that no writ of ***fieri facias*** should prejudice the right of any person to goods acquired from an execution debtor in good faith, for valuable consideration and without notice.[8] This section and the provision of the Statute of Frauds just mentioned, were re-enacted by section 26 of the English Sale of Goods Act.[9] Unfortunately when the Sale of Goods Act was adopted by New Brunswick in 1919,[10] section 26 was not reproduced. The effect is that in New Brunswick if a person buys goods from a judgment debtor against whom a writ has been placed in the sheriff's hands for execution, those goods are subject to a lien and the purchaser will be liable to the judgment creditor for the value of the goods if the judgment debtor has not sufficient assets to satisfy the

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3. *Doe d. Nesmith v. Williston* (1844) 4 N.B.R. 459; *Woodland v. Fuller* (1840) 11 Ad. & E. 858; 113 E.R. 641.
4. (1677) 29 Car. II. c. 3, s. 16.
5. R.S.N.B., 1952, c. 218.
6. See R.S.C. Ord. 5, rr. 1, 2; Ord. 61, r. 1.
7. *Doe d. Nesmith v. Williston* (1844) 4 N.B.R. 459; *Woodland v. Fuller* (1840) 11 Ad. & E. 858; 113 E.R. 641.
8. 19 & 20 Vict., c. 97, s. 1.
9. (1893) 56 & 57 Vict., c. 71.
10. 8 Geo. V, c. 4.

debt. Clearly this situation is entirely unfair and I suggest our legislature should remedy the situation by repealing section 11 of the Statute of Frauds and enacting a section similar to section 26 of the English Sale of Goods Act in its stead.

So far we have directed our attention to goods. Under section 5 of the Memorials and Execution Act,[11] lands, too, are bound by the writ from the time it is placed in the hands of the sheriff. There is no objection to this as regards land because when a purchaser buys land he does or should make enquiries to the sheriff. But there is another aspect regarding the binding effect on lands that needs examination. This relates to priority among judgment creditors and the effect of memorials.

At common law, if several writs of *fieri facias* were delivered to the sheriff he had to execute them in accordance with the order in which he received them. Priority as between judgment creditors, therefore, was based on the time they placed their executions in the sheriff's hands.[12] The Creditors' Relief Act altered this. Section 3 of that Act provides that in general there shall be no priority among execution creditors, and section 4 provides that where a sheriff levies money upon a writ, he shall distribute the money rateably amongst all creditors whose writs are in his hands or who deliver writs to him within one month.[13]

But a judgment debtor, of course, does not have to issue a writ of execution. He may instead choose to file a memorial of judgment in the Registry Office. If he does, under section 5 of the Memorials and Executions Act it binds the lands, though not the goods, of the judgment debtor. This gives rise to the following problem. Suppose A, a judgment creditor, files a memorial of execution in the Registry Office against his debtor X. Subsequently, C, D and E issue execution and X's land is sold to a third party Y. Under section 4 of the Creditors Relief Act, C, D and E share rateably in the proceeds of the sale. Y acquires the land but it is a recognized principle that a purchaser at a sheriff's sale acquires the rights of the judgment debtor but no more. Now by virtue of section 5 of the Memorials and Executions Act, this land is bound by A's memorial. Does this mean that A may, following the sheriff's sale, issue execution to seize the lands in the hands of Y, the purchaser under the sheriff's sale? In the absence of judicial legislation, this would appear to follow from the language of the Memorial and Executions Act and common law principle. Surely there should be legislation to clarify the situation.

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11. R.S.N.B., 1952, c. 143.
12. *Hunt v. Hooper* (1844) 12 M. & W. 664; 152 E.R. 1365.
13. R.S.N.B., 1952, c. 50.

WHAT MAY BE SEIZED UNDER THE WRIT

(a) The Common Law Position

I turn now to what may be seized under a writ of *fieri facias*. The first point to observe is that the judgment creditor obtains at most the interest of the judgment debtor in the property seized, so he is subject to previously acquired rights of others relating to it. This can be exemplified by *The Continental Trusts Co. v. The Mineral Products Co.*[14] before Barker, J. There a company executed a mortgage of lands in New Brunswick. The mortgage included the minerals but at the time the minerals were vested in the Crown, not in the company. Later, mining leases were issued to the company by the province, so in equity the minerals were subject to the mortgage. A judgment creditor had the leases seized, bought in at the sheriff's sale and paid the Crown rent overdue under the leases, whereupon the Crown having no knowledge of the mortgage, issued the mining leases in the judgment creditor's own name. It was held that the leases were still subject to the mortgage. In the course of his judgment, Barker, J. said:

> I take it as long since settled that a purchaser at a Sheriff's sale under an execution stands in no better or different position as to the property than the execution debtor did. In *Wickham v. The New Brunswick & Canada Railway Co. . . . Lord* Chelmsford says: "There is no doubt upon principle as well as on the authority of the cases cited in the argument at the Bar, that the right of a judgment creditor under an execution is to take the precise interest, and no more, which the debtor possesses in the property seized, and consequently that such property must be sold by the Sheriff with all the charges and incumbrances, legal and equitable, to which it was subject in the hands of the debtor.[15]

Though sometimes difficult of application, the foregoing principle is well known. What is not so well known are the types of interests that can be seized under the writ. Can, for example, an equity of redemption be seized? Or a joint tenancy? Or the interest of a buyer — or a seller — under a conditional sale?

The best way to answer questions of this kind is to approach the matter historically. I said a few moments ago that the writ is perhaps as old as the common law itself, and this should give us some idea of its original scope. In its origin only goods could be seized under the writ. This is only to be expected, for in feudal times land was much too important a commodity to allow it to be taken by a mere judgment creditor. In those days, it will be remembered, the relation of a man to his land determined his

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14. (1904) 3 N.B. Eq. R. 28.
15. *Ibid.*, at p. 39.

status in society.[16] It was not until 1285 that by the Statute of Westminster II[17] land was made exigible by another writ, the writ of elegit. But this writ did not authorize the land to be seized and sold. Rather, after seizure the land was delivered to the judgment creditor who held it as a tenant by elegit until his debts were paid out of the profit of the land. In so far as Canada and other British possessions are concerned, we shall see that sale of lands was later permitted but that was not so in England. There the writ of elegit continued to be the appropriate remedy available to a judgment creditor against the lands of his judgment debtor until 1956.[18] The important point to notice about this is that the writ of elegit is a very different remedy from the writ of *fi fa* and English cases on executions against land must be read with considerable caution. A second point to note is that seizure of land by *fi fa* must be done under authority of statute.

I also said that the writ was a common law writ. Now as everybody knows equitable interests were not recognized in common law courts. Equitable interests could, therefore, not be seized under a writ of *fi fa*,[19] and any seizure of equitable interests today must consequently be effected under some statute.

A third lesson can be learned from the great age of the writ. At its inception the forms of property were not diverse as they are in our commercial community. Intangible property, such as stocks and patents, was unknown. Only tangible goods, chattels, could be seized under the writ.[20] To the extent that intangible property can be seized today it must be done pursuant to statute.

From the foregoing you can surmise that most of what can be seized under the writ is done as a result of statutory enactment. The scope of the writ has been expanded piecemeal over the centuries as need arose and while it is today very broad, there are surprising and unjustifiable gaps. A study of these followed by a comprehensive statute would remove much unnecessary technicality. The idea stands as an open invitation to those who seek the reform of the law.

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16. For the early common law attitude, see Pollock and Maitland, History of English Law, vol. II, p. 596; Plucknett, A Concise History of the Common Law, 4th Ed., p. 369.

17. 13 Edw. I, c. 18.

18. By the Administration of Justice Act, 1956, 4 & 5 Eliz. II, c. 46 writs of elegit may no longer be issued in England. In *Weidman v. McClary Man. Co.* (1917) 33 D.L.R. 672 it was held that the writ of elegit is no longer applicable to the Northwest Territories, and it is suggested that is true of New Brunswick also.

19. *Scott v. Scholey* (1807) 8 East 467; 103 E.R. 423.

20. See *Harrison v. Paynter* (1840) 6 M. & W. 387; 151 E.R. 462; *Scott v. Scholey* (1807) 8 East 467; 103 E.R. 423.

(b) The Position Today respecting Chattels

Having now examined the scope of the writ at common law, we are in a position to examine the changes wrought by statutes. I will first examine the personal property now seizable under the writ, and then the real property.

As we saw, at common law the only personal property that could be seized under the ***fi fa*** was chattels. Chattels, of course, comprised tangible moveable property but the term also included chattels real or leasehold property, which, as you well know, were not considered to be the real property. Section 23(1) of the Memorials and Executions Act now expressly provides that goods and chattels, including leasehold interests may be seized and sold.[21] A leasehold can be seized even when it contains a covenant against assignment, because as may be seen from *Doe d. Mitchinson v. Carter*,[22] in the absence of clear terms, such a covenant refers to voluntary assignments.

So far we have been concerned with the situation where the judgment debtor owns the chattel seized absolutely. But what if he has given a mortgage on it? A mortgage, as you know, is the transfer of the legal title to goods to the mortgagee. In law, all the mortgagor has left is a contractual right against the mortgagee, but this is not property and cannot be seized. Equity, however, gives him a species of property called an equity of redemption. This, at common law, could not be seized because it was an equitable interest.[23] Now, however, by virtue of section 23(1) of the Memorials and Executions Act an equity of redemption in goods may be seized, and by virtue of section 1(a) of that Act this term includes the interest of a person who has given a second mortgage on the goods.[24] But suppose a writ of *fi fa* is issued? against the mortgagee of a chattel. Can his interest be seized? According to the Ontario Court of Appeal in *Ferrie v. Cleghorn*[25] "the interest of a mortgagee in goods mortgaged to him is not an interest that can be sold under a *fi fa* . . ." It would be necessary to obtain a garnishee order to attach the debt owed to the mortgagee under the mortgage.[26] There is, therefore, a remedy available to the judgment creditor, but I think a simpler procedure than a garnishee order could be devised.

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21. R.S.N.B., 1952, c. 143.
22. (1798) 8 T.R. 57; 101 E.R. 1264.
23. *Scott v. Scholey* (1807) 8 East 467; 103 E.R. 423.
24. R.S.N.B., 1952, c. 143; see also R.S.N.B., 1952, c. 50, s. 30.
25. (1860) 19 U.C.Q.B. 241, at p. 244; see also *Henderson v. Fortune* (1859) 18 U.C.Q.B. 520.
26. See Garnishee Act, R.S.N.B., 1952, c. 97.

Far more common than the chattel mortgagee as a security device is the conditional sale. There A, the conditional seller, transfers possession of a chattel to the conditional buyer, B, but A retains title to the goods. Can the sheriff seize the interest of the conditional buyer in the goods? There is nothing in our statutes, as there is in the statutes of some of the other provinces, permitting the seizure of the interest of a conditional buyer so we must turn to the common law. If it is an equitable interest as some judges suggest,[27] it cannot be seized under a writ of *fieri facias* because equitable interests are not seizable under a *fi fa* in the absence of statute, and even if it is legal the cases of *Ruscheinsky v. Spencer*[28] and *Overby v. McLean*[29] indicate that it cannot be seized. If, therefore, A buys a car worth $3,000 under a conditional sale agreement, it is very doubtful if the car can be seized by A's creditors even if he has paid, say, $2,500. It seems to me that the interest of a conditional buyer should be exigible and that legislation should be passed accordingly.

Let us take the opposite situation. A sells a car to B under a conditional sale. Can the creditors of A, the conditional seller, have the car seized under a *fieri facias* It would appear that the car cannot be seized because the conditional buyer is rightfully in possession. Taking possession under these circumstances would constitute a trespass, and this the sheriff is not empowered to do.[30] However, the creditor should be able to garnishee the debt owing under the conditional sale, but the garnishee is, as you know, rather a complicated remedy.

The principle that the sheriff cannot commit a trespass against a third person applies in other cases as well. Thus if a judgment debtor has pledged or leased goods, they cannot be seized while in the possession of the pledgee or lessee.[31]

As has been mentioned before, at common law an equitable interest in chattels could not be seized under a *fi fa*. This can be exemplified by *Scott v. Schotey*[32] where it was held that a mere equitable interest in a term of years could not be taken into execution under a ***fi fa.*** In the judgment of Lord Ellenborough, there is a passage that gives such an excellent statement of the attitude of the law regarding the *fi fa* as to merit quotation. He says:

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27. See *Ruscheinsky v. Spencer & Co.* [1948] 2 W.W.R. 58, at p. 60.
28. *Ibid.*
29. [1928] 4 D.L.R. 917.
30. See *Kinnear v. Kinnear* (1924) 26 O.W.N. 111.
31. *Young v. Lambert* (1870) L.R. 3 P.C. 142 (pledgee); *Kinnear v. Kinnear* (1924) 26 O.W.N. 111, and *Fraser v. Jenkins* (1888) 20 N.S.R. 494 (lessee).
32. (1807) 8 East 467; 103 E.R. 423.

> The language of these writs and return evidently imports, that the goods and chattels, which are the object of them, are properly of a tangible nature, capable of manual seizure, and of being detained in the sheriff's hands and custody, and such also as are conveniently capable of sale and transfer by the sheriff, to whom the writ is directed, for the satisfaction of a creditor. The legal interest in a term of years, both in respect of the possession of which the leasehold property itself is capable, and also in respect of the instrument by which the term is created and secured, (both of which are capable of delivery to a vendee,) has been always held to answer the description of the writ, and to be saleable thereunder . . . . But no single instance is to be found in the history and practice of the Courts of Common Law, in which an equitable interest in a term of years has ever been recognized as saleable, (seizable of course it cannot be,) under a fieri facias.[33]

To the rule that equitable interests in chattels were not exigible there was one exception, namely, where the debtor was entitled to the whole beneficial interest in the chattel, for there he could if he wished have had the legal title transferred to him.[34] A judgment creditor cannot avoid having goods seized simply by putting them behind a bare trust. But if he does not have the whole beneficial interest in a chattel, it cannot be seized under a *fi fa*, and resort must be had to equitable execution.

Thusfar I have confined myself to tangible personal property. Let us now direct our attention to intangible property. And first of money. At common law money could never be seized under a *fi fa*. The strictness of this rule can be seen in *Fieldhouse v. Croft*[35] where the sheriff held money belonging to the judgment debtor, the surplus of a former execution against the judgment debtor. The money thus in the sheriff's hands could not be seized under a subsequent execution and had to be returned to the judgment debtor. Now section 26(1) of the Memorials and Executions Act provides that "The sheriff on any execution shall seize and take any money including any surplus of a prior execution . . ."[36] The power to seize money is not in general too valuable because there is, for example, no right to search a debtor.[37]

In common with money, other forms of intangible property could not be levied against.[38] Section 26 of the Memorials and Executions Act now provides, however, that cheques, bills of

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33. (1807) 8 East 467, at p. 484; 103 E.R. 423, at p. 429.
34. *Stevens v. Hince* (1914) 110 L.T.R. 935.
35. (1804) 4 East 510; 102 E.R. 926; see also *Bradley v. Hopley and Gault* (1828) 1 N.B.R. 147.
36. R.S.N.B., 1952, c. 143.
37. *Yakimishyn v. Bileski* [1946] 1 W.W.R. 663.
38. *Harrison v. Paynter* (1840) 6 M. & W. 387; 151 E.R. 462.

exchange, promissory notes, bonds, specialities and other securities for money may be seized, and the sheriff may hold these for the benefit of the judgment creditor and maintain an action thereon. Any payment made to the sheriff discharges the party liable under these securities.[39]

Again, at common law debts were not seizable.[40] Now, of course, they can be garnished by the judgment creditor under the Garnishee Act,[41] but in addition where there are several executions, the sheriff may obtain an order attaching the debts himself under section 35 of the Creditors' Relief Act,[42] but I have never heard of this procedure being used in this province.

Even shares and dividends of a stockholder in any incorporated company in New Brunswick may be seized. This is done by the sheriff's serving a copy of the execution upon the company and a notice stating that the judgment creditor's stock in the company is seized, and a simple procedure is provided in section 23 of the Memorials and Executions Act for the sale of these for the benefit of the judgment creditor.[43]

Before going on to interests in land, I might mention goods and chattels that cannot be seized under execution. Section 33 of the Memorials and Executions Act exempts from seizure certain domestic and personal effects, tools and other materials required by the debtor in making a living, and certain government annuities.[44] Again section 39 of the Landlord and Tenant Act, provides that chattels on leased land are not liable to execution unless the judgment creditor pays the landlord any rent then due up to one year's rent. And section 40 provides that standing crops continue to be liable for distress for rent even though they have been sold by the sheriff.[45]

(c) The Position Today respecting Land

Let us now examine the extent to which real property may be seized under the *fieri facias*. As I mentioned earlier, at common law the writ was originally confined to goods and chattels. Land could be executed against by means of the writ of eligit. But in 1732 an English statute provided that lands and other heriditaments and other real estate in the colonies were subject

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39. R.S.N.B., 1952, c. 143.
40. *Harrison v. Paynter* (1840) 6 M. & W. 387; 151 E.R. 462.
41. R.S.N.B., 1952, c. 97.
42. R.S.N.B., 1952, c. 50.
43. R.S.N.B., 1952, c. 143.
44. *Ibid.*
45. R.S.N.B., 1952, c. 126.

to the same remedies as might be used against personal property.[46] Now since the *fieri facias* was the usual process used to recover against personal property, this meant, in effect, that lands became subject to seizure under that writ in British possessions. Further, one of the first statutes passed by the New Brunswick legislature[47] made lands subject to seizure, with one qualification, that personal property must first be seized. This statute was re-enacted from time to time[48] and now appears as section 11 of the Memorials and Executions Act[49] which reads in part as follows:

> 11. The lands of a person may be seized and sold under execution as personal estate to satisfy his debts, . . . but the sheriff to whom the writ of fieri facias is directed shall not sell the lands until the personal estate, if any is found, is exhausted . . .

The scope of this section must depend on the meaning of the word "lands". The term is given a fairly extensive meaning in section 1(d) of the Act. This section provides first of all that lands include the possessory right and right of entry (i.e. the right to possess against a squatter).[50] This means that present legal estates in fee simple or for life can be seized.

In the absence of express provision equitable interests cannot be seized, for it should not be forgotten that the *fi fa* is a common law writ.[51] True the definition of "lands" in the Memorials and Executions Act mentions equitable interests but the definition only includes equitable interest that are otherwise seizable under the Act.[52] Section 12 of the Act looks promising. It reads:

> 12. The right of the party beneficially interested in lands held in trust for him, may be taken in execution for the payment of his debts, in the same manner as if he were seized or possessed of the lands, and his equitable and legal estate shall vest in the purchaser.

However, there is good reason to believe that this section only permits seizing equitable interests when the whole beneficial interest in the land belongs to the judgment debtor; where under the rule in *Saunders v. Vautier*[53] the debtor could require the legal title to be tranferred to him. The last words in the section providing that the purchaser of such interest obtains both the

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46. 5 Geo. II, c. 7.
47. (1786) 26 Geo. III, c. 12.
48. Its early history is discussed in *Doe d. Hazen v. Hazen* (1854) 8 N.B.R 87.
49. R.S.N.B., 1952, c. 143.
50. *Ibid.*, s. 1 (d).
51. *Scott v. Scholey* (1807) 8 East 467; 103 E.R. 423.
52. R.S.N.B., 1952, c. 143, s. 1 (d).
53. (1841) 4 Beav. 115; 49 E.R. 282; affd. Cr. & Ph. 240; 41 E.R. 482.

legal and equitable right suggests this view and it is supported to some extent by authority. In *Doe d. Hull v. Greenhill*[54] a trust in favour of a judgment debtor and another person was held not to fall within a rather similar section in an English statute.[55] It is submitted, therefore, that equitable interests less than the total beneficial interest in the land cannot be seized under a *fi fa*. The appropriate remedy would appear to be equitable execution by means of a receiver.

Let us now turn to lands that are encumbered with a mortgage. Can the interest of the mortgagor be seized, and can that of the mortgagee? As regards a mortgagor, this interest could not have been seized at common law because it existed only in equity, but land as defined in section 1(d) of the Memorials and Executions Act expressly includes the equity of redemption of a mortgagor.[56] And by section 20 the purchaser of an equity of redemption from the sheriff acquires all the rights of the mortgagor, and by making the mortgage payments as and when due he may acquire full title to the land.[57]

But what of the mortgagee's interest: can this be seized? An early New Brunswick case, *Doe d. Vernon v. White*,[58] answers this question in the negative. But sections 24 and 25 of the Memorials and Executions Act now provide an excellent remedy against a judgment debtor who owns a registered mortgage.[59] When a notice in the form set forth in section 24 is registered in the registry office and served on the mortgagee, the mortgage debt is attached and becomes payable to the sheriff — a most efficient procedure. The remedy is, however, available only when the mortgage is registered; otherwise one must resort to garnishee proceedings. The remedy should be extended to unregistered mortgages, though I quite understand that the judgment creditor is not as likely to know of the existence of such mortgages. A similar remedy should also be devised covering the interests of chattel mortgagees and conditional sellers.

Sometimes, instead of giving a deed and taking a mortgage in return, a vendor of land will enter an agreement of sale under which he retains the title but gives up possession to the buyer and agrees to transfer the title to the buyer when a number of monthly or yearly instalments have been paid (a transaction relating to land that resembles a conditional sale of goods). As a secur-

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54. 4 B. & Ad. 684; 106 E.R. 1087.
55. (1677) 29 Car. II, c. 3, s. 10.
56. R.S.N.B., 1952, c. 143.
57. *Ibid.*, s. 20; see also, s. 21.
58. (1859) 9 N.B.R. 314.
59. R.S.N.B., 1952, c. 143.

ity device this seems as good as a mortgage. The vendor has the title until the instalments are paid and the buyer has an equity in the lands. But the important point to note for our purpose is that the buyer's interest is not an equity of redemption, so it does not fall within the definition of "lands" in the Memorials and Executions Act. Nor is it a trust. The effect is that this interest cannot be seized under a *fieri facias*; it would be necessary to seek the appointment of a receiver.[60] Further the vendor is not a mortgagor so that the convenient remedy I mentioned above is not available against him if he is a judgment debtor. But he has the legal title and this, it would seem, can be sold by the sheriff without making an actual physical seizure of the land.[61] The buyer under the sheriff's sale would then be entitled to the payments owing under the agreement.[61a] It is submitted that provisions should be made placing these agreements for sale in virtually the same position as mortgages.

Lands, of course, are often held concurrently with others in joint tenancy or as a tenancy in common. Can the interest of a joint tenant or tenant in common be seized? Land, we saw, includes all possessory rights,[62] and this would seem to include such concurrent interests. Further there is authority in other jurisdictions supporting the view that such interests can be seized.[63] But in the case of a joint tenancy, if the judgment debtor dies before his interest is sold his joint tenant will take the interest by survivorship in priority to the judgment creditor.[64]

Up to now the interests of which I have spoken have been for the most part present interests. I want to say a word now of future interests. Suppose, for example, that A has an estate for life in a piece of land, and the remainder or reversion of the fee simple belongs to B, a judgment debtor. Can B's interest be sold under a *fi fa*? There is an early New Brunswick case, *Doe d. Hazen v. Hazen*,[65] holding that such interests could be sold under execution under the Act of 1786, and while the court there relied to some extent on the fact that that statute permitted seizure of any heriditament, other reasoning in the case indicates that the law would be the same today.

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60. *Kimniak v. Anderson* 63 O.L.R. 428; [1929] 2 D.L.R. 904.

61. *Weidman v. McClary Man. Co.* (1917) 33 D.L.R. 672; *cf., Parke v. Riley* (1866) 3 E. & A. 215, aff. 12 Gr. 69. See also *Doe d. Hazen v. Hazen* (1854) 8 N.B.R. 87, at p. 98 and Sale of Lands Publication Act, R.S.N.B., 1952, c. 200.

61a. See *Morton and Cowell v. Hoffert* [1924] 2 W.W.R. 529; *sub nom. Re Smith* [1924] 3 D.L.R. 16.

62. Memorials and Executions Act, R.S.N.B., 1952, c. 143, s. 1(d).

63. *Re Craig* 63 O.L.R. 192; [1929] 1 D.L.R. 142.

64. *Power v. Grace* [1932] O.R. 357; [1932] 2 D.L.R. 793.

65. (1854) 8 N.B.R. 87; see also *Doe d. Cameron v. Robinson* (1850) 7 U.C.Q.B. 335.

It is possible that other interests in land may be seized. For example, it has been suggested in an Ontario case that a profit a prendre may be sold under execution.[66] I think that would be true here, especially if, as may well be the case, the English statute of 1732 is in force in this province.[67]

Finally, the broad definitions of "goods", "lands", and "property" in section 38 of the Interpretation Act[68] should not be overlooked. If these apply to the Memorials and Executions Act, it is difficult to imagine what interests cannot be seized under a *fi fa*. But these definitions, it should be observed, apply only if the context is not inconsistent with the statute concerned,[69] and if they are applicable to the Memorials and Executions Act, it is not easy to understand why it is felt necessary to set forth in detail various types of interest that could not be seized at common law or to define "lands". What is more, there is no adequate procedure spelled out for seizing many interests. The better view would appear to be that these definitions are not applicable to the Memorials and Executions Act, but there is clearly room for argument.

CONCLUSION

The end result, then, would appear to be that the *fi fa* has a very wide scope, probably much wider than the average practitioner suspects. But there are gaps that cannot be justified on any ground of rational policy. It seems incredible that in the new world and in the twentieth century we are still relying on a method of execution that was found wanting in the thirteenth. The ideal should surely be that no debtor should be able to deprive his creditors of their just claims simply because he is shrewd enough or lucky enough to have his property in one form rather than another.

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66. *Totten v. Halligan* (1863) 13 U.C.C.P. 567.
67. 5 Geo. II, c. 7. In *Doe d. Hazen v. Hazen* (1854) 8 N.B.R. 87, it appears to be assumed that this statute continues in force.
68. R.S.N.B., 1952, c. 114, s. 38(13), (17).
69. *Ibid.*, s. 1.

The advantage that might result to the science of the law itself, when a little more attended to in these seats of knowledge, perhaps would be very considerable. The leisure and ability of the learned in these retirements might either suggest expedients, or execute those dictated by wiser heads, for improving its method, retrenching its superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system; a task which those who are deeply employed in business, and the more active scenes of the profession, can hardly condescend to engage in.

—Sir William Blackstone, at the opening of the Vinerian lectures on the common law at the University of Oxford, October 25, 1758.

THE NEW BRUNSWICK UNSATISFIED JUDGMENT FUND.*

Franklin O. Leger‡

The time allotted for this talk precludes a full discussion of the Unsatisfied Judgment Fund of this province;[1] however, I propose setting out briefly some of its major provisions.

The Unsatisfied Judgment Fund was first established in New Brunswick by legislation in 1951,[2] but it was not proclaimed until February, 1953. It is now provided for in sections 286-303 of The Motor Vehicle Act 1955.[3]

Under section 286, a fee, not exceeding one dollar, is paid by every person to whom a licence or renewal is issued. These fees, called unsatisfied judgment fees, constitute a fund known as the Unsatisfied Judgment Fund. The payment of the fees may be suspended from time to time by the Lieutenant-Governor in Council having regard to the amount of the Fund.

Scope and Purpose of the Fund.

Recourse may be had to the Unsatisfied Judgment Fund where a person obtains in any court in New Brunswick a judgment

> (a) against an owner of a motor vehicle or a driver of a motor vehicle other than a motor vehicle owned by or under the care or control of the person, for damages for injuries to or the death of any person or damage to property, arising out of the operation, care or control of the motor vehicle in the Province; or

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1. Little, for example, will be said of actions against persons unknown.
2. (1951) 15 Geo. VI, c. 22, s. 17.
3. (1955) 4 Eliz. II, c. 13, Part VIII.

> (b) against a Party Unknown, as contemplated by section 293, for damages for injury to or the death of any person arising out of the operation, care or control of a motor vehicle in the Province.[4]

By section 1(29) of the Motor Vehicle Act 1955, "motor vehicle" is defined as "every vehicle which is self propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, and not operated upon rails, but does not include a farm tractor"; however, for the purposes of the Unsatisfied Judgment provisions, "motor vehicle" includes farm tractor.[5]

Judicial exposition of the purpose of an Unsatisfied Judgment Fund is to be found in several reported cases. For example, when considering the Ontario legislation in *Re MacBeth v. Curran*,[6] Gale, J. of the Ontario High Court said:

> Its language shows that it was passed to establish a government-sponsored benefit fund for the protection of certain unfortunate individuals who have suffered as the result of the operation of the motor vehicles in Ontario. The first requisite is that the person who sustains the loss is to obtain a judgment, and surely it is not the right of this Court or its duty to go behind the judgment on an application of this kind. This is beneficial legislation passed for the protection of the public and the court should take care to see that the rights thereby created are not frittered away by narrow judicial interpretation. When the object of a statute is plainly for the advantage of the public the Court must strive to interpret the words in such a way as to accomplish the desired result.

In *Telfer v. Kerr*[7] McRuer, C.J.H.C. enlarged upon the principles expounded by Gale, J. saying:

> With the principles there outlined I entirely agree, but there are other principles of a converse nature that I would add. While this legislation is beneficial in character and "the rights created are not to be frittered away by narrow judicial interpretation", it is at the same time to be remembered that the object of the legislation is to relieve against hardship and not to provide a fund in the nature of a free reinsurance scheme for insurers of those who have suffered damage as the result of the operation of motor vehicles, or any means by which insured persons may be twice compensated for injuries sustained. As I indicated on the argument, this is a public fund set up by means of a levy on all licensed operators of automobiles, and is to be regarded as a *sort of last resort*.[8]

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4. The Motor Vehicle Act 1955, s. 287, as enacted by (1958) 7 Eliz. II, c. 19, s. 16.
5. The Motor Vehicle Act 1955, s. 285 (c), as enacted by (1958) 7 Eliz. II, c. 19, s. 15.
6. [1948] 3 D.L.R. 85, at pp. 87-8.
7. [1949] 2 D.L.R. 627.
8. *Ibid.*, at p. 629 (Italics mine).

How broadly should the words "for damages for injuries to or the death of any person", which appear in section 287, be interpreted? The Ontario Court of Appeal, in *Klebanoff v. Price*,[9] held that similar words included damages recovered by a company for the loss of services of its president occasioned by injuries suffered by him in an automobile collision, since such damages were "on account of injury to" the company officer. Similarly, in *Re Brady v. Ferrill*,[10] it was held by Ferguson, J. of the Ontario High Court that recourse could be had to the Fund by a husband who had recovered damages for loss of *consortium* in an action arising from an automobile accident in which his wife was injured.

Procedure on Application

The procedure on application for payment out of the Fund underwent important changes by amendments to The Motor Vehicle Act in 1958. Formerly, once a judgment was obtained and certain requirements met, the person applied in the first instance by way of motion to a Judge of the Supreme Court for an order for payment out of the Fund upon giving notice to the Provincial Secretary-Treasurer.[11] By the former section 288,[12] the Judge could make an order directed to the Provincial Secretary-Treasurer for payment out of the Fund, provided the requirements therein set out were satisfied. From the applicant's point of view, this procedure was not particularly cumbersome or impractical, but some of the requisites for the application could unnecessarily delay eventual payment from the Fund.

Under the 1958 amendments, the new procedure is briefly as follows. Upon the determination of all proceedings, including appeals, application is made to the Provincial Secretary-Treasurer (who is referred to as "the Minister") for payment out of the Fund of the amounts in respect of the judgment to which the applicant is entitled.[13]

A new section 287A sets out the prerequisites for payment out of the Fund by the Minister. It provides that the person applying must make an affidavit setting out

(1) the amount he has recovered or is entitled to recover, from any source, for or in respect of any injury, death or damage to person or property arising out of the operation, care or control

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9. [1949] 2 D.L.R. 575.
10. [1954] 2 D.L.R. 253.
11. The Motor Vehicle Act 1955, 4 Eliz. II, c. 13, s. 287.
12. *Ibid.*, s. 288.
13. The Motor Vehicle Act 1955, s. 287, as enacted by (1958) 7 Eliz. II, c. 19, s. 16.

of the motor vehicle by the owner or driver thereof against whom the judgment was obtained, whether or not in the action damages were claimed for or in respect of the injury, death or damage, and also any compensation or services or benefits with a pecuniary value he has recovered or received or is entitled to recover or receive for or in respect of the injury, death or damage;

(2) that the application is not made by or on behalf of an insurer, or in lieu of a claim against an insurer, and no amount will be paid to reimburse an insurer.[14]

The solicitor for the person must make an affidavit

(1) that the judgment is a judgment as described in section 287;

(2) giving particulars of the amount of damages for or in respect of injury or death, damage to property and the costs included in the judgment;

(3) that in so far as he was advised by any person and learned of any facts during the litigation,

(a) he has commenced action against all persons against whom the person might reasonably be considered as having a cause of action for or in respect of the injury, death or damage to person or property as described in clause (1) above of the applicant's affidavit,

(b) the application is not made by or on behalf of an insurer, or in lieu of a claim against an insurer and no amount will be paid to reimburse an insurer, and

(c) except as disclosed in the applicant's affidavit, the person is not entitled to recover from any source, nor to receive compensation or services or benefits with a pecuniary value, for or in respect of any injury, death or damage to person or property as described in clause (1) above of the applicant's affidavit;

(4) that he has filed with the Registrar of Motor Vehicles a certificate of judgment and affidavit of non-satisfaction pursuant to section 259;

(5) that the action was defended throughout to judgment or that there was a default or a consent or agreement by or on behalf of the defendant and that he complied with section 289.[15]

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14. The Motor Vehicle Act 1955, s. 287A (1), (2), as enacted by (1958) 7 Eliz. II, c. 19, s. 17. This requirement is almost identical with the former s. 288 (1) (c).

15. The Motor Vehicle Act 1955, s. 287A (1) (b), as enacted by (1958) 7 Eliz. II, c. 19, s. 17.

Under section 289, written notice must be given to the Minister if the defendant fails to file an appearance or a statement of defence, fails to appear in person or by counsel at the trial, or consents or agrees to the entering of judgment.

The two affidavits, together with a copy of the statement of claim, a certified copy of the judgment docket and the assignment of judgment, are forwarded to the Solicitor for the Unsatisfied Judgment Fund. If the amount of the judgment and costs is then paid by the Minister, he may also pay to the person for costs of the application the sum of twenty-five dollars.[16]

For any of the reasons enumerated in the new section 287B, the Minister may delay payment and forthwith advise the person of his objections. Then if such objections are not remedied to his satisfaction, the Minister may advise the person that he must obtain an order of a Judge of the Supreme Court to obtain payment out of the Fund. If the person is so advised, he may, on notifying the Minister, apply to a judge by way of summons for an order directing payment out of the Fund.[17]

It will be noted that when applying to the Minister for payment out of the Fund, it is not a requisite for payment that the applicant show that "he has taken all reasonable steps available to him to recover upon every judgment so obtained, stating the specific steps so taken" as was formerly the case.[18] Since this provision has been repealed, it would appear that it is no longer necessary for the judgment creditor to avail himself of the various means by which he might attempt to realize upon his judgment, including issuing execution, examining the defendant as a judgment debtor and making exhaustive inquiries to determine whether the defendant has any exigible assets. The necessity for taking all reasonable steps to recover on the judgment has been the source of considerable litigation reflected in reported decisions in other provinces. In view of this amendment, it might well be questioned whether the New Brunswick Unsatisfied Judgment Fund remains "a sort of last resort" in the sense in which this phrase was used by McRuer, C.J.H.C. in the ***Telfer*** case,[19] bearing in mind that a judgment debtor can have his driver's licence or owner's permit reinstated by making satisfactory instalment payments on the judgment and interest to the Minister.[20]

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16. The Motor Vehicle Act 1955, s. 287A (1) (c), as enacted by (1958) 7 Eliz. II, c. 19, s. 17.
17. The Motor Vehicle Act 1955, ss. 287B, 287C, as enacted by (1958) 7 Eliz. II, c. 19, s. 17.
18. The Motor Vehicle Act 1955, 4 Eliz. II, c. 13, s. 288 (1) (b) (iii), repealed by (1958) 7 Eliz. II, c. 19, s. 18.
19. [1949] 2 D.L.R. 627.
20. The Motor Vehicle Act 1955, s. 303A, as enacted by (1957) 6 Eliz. II, c. 21, s. 31.

In this regard much, of course, will depend upon the attitude and policy of those charged with the administration of the Fund —more so than ever before. It would certainly appear that any determination of the defendant's ability to satisfy a judgment against him has become primarily the responsibility of the Minister, although the statute is silent on the scope of his responsibility in this regard.

If application is required to be made to a Judge of the Supreme Court to obtain payment out of the Fund, the applicant must satisfy the judge that he has met the requirements set out in section 288, as amended in 1958. The Minister may appear and be heard on the application and may show cause why the order should not be made.[21]

Limits to Payment out of the Fund.

There are certain limits, monetary and otherwise, to payment out of the Fund. For example, section 299(1)(a) provides that no amount for interest on a judgment or interest on costs may be paid out of the Fund. Section 299(1) (b) states that there may not be paid out of the Fund

> any amount in respect of a judgment in favour of a person who ordinarily resides outside of New Brunswick, unless such person resides in a jurisdiction which provides substantially the same benefits to persons who ordinarily reside in New Brunswick;

The meaning of "ordinarily resides" has been considered in two Ontario decisions. In *Service Fire Insurance Co. of New York v. Eggens*[22] it was argued that the plaintiff was precluded from recovering from the Ontario Unsatisfied Judgment Fund because it ordinarily resided outside of Ontario, the plaintiff being a company with its head office in the State of New York. Gale, J. in an oral judgment, held that the plaintiff did not "ordinarily reside out of Ontario" as that expression is used in section 98(5b) of the Highway Traffic Act.[23] In the course of his judgment the learned judge said:

> . . . my main task is to ascertain, if I can, the purpose and scope of the subsection in question. That being so, I am persuaded that it was intended to exclude from the benefits bestowed by Part XIV of the Act only those persons who have in no way contributed to the creation and maintenance of the Fund from which those benefits are obtained. For example,

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21. The Motor Vehicle Act 1955, s. 288, as amended by (1958) 7 Eliz. II, c. 19, s. 18.

22. [1955] 4 D.L.R. 388.

23. R.S.O., 1950, c. 16, s. 98 (5b), as enacted by (1953) 1 Eliz. II, c. 46, s. 20 (4).

> the Act would not be available to a person who simply comes to this Province temporarily on holidays, or to a company which does not carry on business in this Province but merely has vehicles within its confines on occasions, even for business purposes.
>
> On the other hand, I am of the opinion the new subsection was not meant to exclude from the advantages of the Act companies such as the applicant and other similar organizations which regularly carry on business in Ontario and contribute to the welfare of this Province.[24]

In a recent case, *Mester v. Kummu*,[25] the plaintiff at the time of the accident giving rise to the proceedings was living in Sudbury. He was at the time a student at McGill University and during his attendance there he resided with his parents in Montreal. During his vacation he was engaged in summer employment in Sudbury, Ontario. Counsel for the Minister referred to the above-quoted statement of Gale, J. in the *Service Fire Insurance* case that ". . . it was intended to exclude from the benefits bestowed by Part XIV of the Act only those persons who have in no way contributed to the creation and maintenance of the Fund from which those benefits are obtained". Wells, J. was of opinion that this statement did not truly reflect the judgment of Gale, J. but that "the persons meant to be excluded were those whose ordinary residence was outside of Ontario in the sense that they were not in Ontario for any permanent period but were as it were, transients or casual visitors".[26] He therefore held that the plaintiff had an ordinary residence in Ontario as well as in Quebec and thus was not ordinarily resident outside Ontario at the pertinent time.

In both the *Service Fire Insurance* case and the *Mester* case the plaintiff had a residence in a jurisdiction which did not provide a recourse of a substantially similar character to that provided by the Ontario Unsatisfied Judgment Fund. In each case, therefore, the Minister attempted to show that the plaintiff was ordinarily resident outside Ontario.

The necessary degree of similarity of legislation to enable a person resident in another jurisdiction to recover has been considered by the courts on several occasions, but a clear picture cannot be drawn from the reported decisions. A resident of Massachusetts cannot obtain payment out of the Ontario or Nova Scotia Unsatisfied Judgment Funds since it was shown in *Beane v. Hil*[27] and *Sampson et al v. MacKenzie*,[28] respectively, that the

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24. [1955] 4 D.L.R. 388, at pp. 389-390.
25. (1958) 11 D.L.R. (2d) 217.
26. *Ibid.*, at p. 223.
27. (1957) 7 D.L.R. (2d) 135.
28. (1957) 7 D.L.R. (2d) 461.

scheme of compulsory insurance existing in that state does not provide a recourse of a substantially similar character. It would appear that the same would hold true in this province, although our statute differs slightly from those of Ontario and Nova Scotia. The New Brunswick statute speaks of other jurisdictions providing "substantially the same benefits" to New Brunswick residents, while the phrase "recourse of a substantially similar character" is used in Ontario and Nova Scotia.[29]

An application by a Prince Edward Island resident for payment out of the Nova Scotia Unsatisfied Judgment Fund was granted in *MacKinnon v. White,*[30] even though the P.E.I. statute did not adopt the test of reciprocal treatment. The P.E.I. statute[31] does permit recovery by a non-resident creditor against a P.E.I. judgment debtor but not, for example, recovery by a Nova Scotia judgment creditor against a New Brunswick judgment debtor for damages sustained in P.E.I. Nevertheless Doull, J. held, with the rest of the Court concurring, that the P.E.I. legislation "is of a substantially similar character. It is of the same kind and for the same purpose and in the main, it is administered on like principles".[32]

Section 299(1) further states that there may not be paid out of the Fund

> (c) (i) more than Five Thousand Dollars, exclusive of costs, for injury to or the death of one person, and, subject to such limit for any one person so injured or killed, more than Ten Thousand Dollars, exclusive of costs, for injury to or the death of two or more persons in any one accident; or
>
> (ii) more than One Thousand Dollars, exclusive of costs, for damage to property resulting from any one accident;

The words "any one accident" have been judicially interpreted in several cases. In *Hopkins v. White,*[33] a car struck three small children one after the other while being driven recklessly along a street. Urquhart J. of the Ontario High Court held that there was only one accident and hence the maximum recovery out of the Fund (exclusive of costs) was $10,000.00. It was immaterial that three separate actions had been brought and separately pursued to judgment. The word "accident" does not refer to an individual injury but rather to an occurrence, incident or event that

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29. *Cf.* The Motor Vehicle Act, 4 Eliz. II, c. 13, s. 299(1)(b) with R.S.O., 1950, c. 167, s. 98 (5b), as enacted by (1953) 1 Eliz. II, c. 46, s. 20(1) and R.S.N.B., 1954, c. 184, s. 179(11).

30. (1956) 5 D.L.R. (2d) 766.

31. R.S.P.E.I., 1951, c. 73, s. 115(1).

32. (1956) 5 D.L.R. (2d) 766, at p. 769.

33. [1950] 4 D.L.R. 679.

may result in injury to several individuals. In the words of Urquhart, J.:

> I have no doubt that the Legislature had in its mind's eye any accident (so called) in which a number of persons might be killed or injured by one act of negligence. In fact the concluding words of section 93b (5) (a) in themselves show that intention: "on account of injury to or the death of two or more persons in any one accident". If each individual injury constituted an accident, the words preceding the word "accident" would have little meaning; about the only occasion when one accident would cover two or more persons injured would be when they were in the motor car itself and practically every form of street accident would be excluded.[34]

Hopkins v. White was distinguished by Dunfield, J. of the Newfoundland Supreme Court in *Re Carroll and Furlong*,[35] where three cars were struck in quick succession by a drunken driver, the collisions being spread over about 250 yards of street. The learned judge held that there were three distinct accidents, although it is difficult to see an adequate distinction between these facts and those in the *Hopkins* case.

A broad interpretation was again placed on the phrase "one accident" by the Newfoundland Supreme Court in *United Towns Electric Co. Ltd. v. Bishop*[36] where Walsh, C. J. held that there were two accidents in the following circumstances. While driving on the wrong side of the highway the defendant collided with a car driven by B who was proceeding in the opposite direction. After the impact with B's car, the defendant's car swung to its right and into its proper lane and then back again onto the wrong side of the highway where it collided with the plaintiff's car which was following behind B. B recovered judgment for $780.00 and was paid that amount out of the Unsatisfied Judgment Fund. The plaintiff also recovered judgment and applied for an order for payment of $905.00 out of the Fund. Walsh, C. J. was of opinion that "after the first collision, there was separate and distinct negligence on the part of the defendant in the operation and management of the car and that a new act of negligence caused the damage to the property of the plaintiff".[37] These three cases are especially interesting in that one would have expected the personal injuries in the *Hopkins* case to have prompted a decision favourable to the plaintiff rather than the property damage in the two Newfoundland decisions.

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34. *Ibid.*, at pp. 683-4.
35. [1955] 3 D.L.R. 279.
36. [1955] 5 D.L.R. 782.
37. *Ibid.*, at p. 785.

By section 299(1)(c)(i) recovery is limited to $5,000.00 for injury to or the death of one person. In *Klebanoff v. Price*[38] the company plaintiff recovered $2,000.00 for loss of services of its president, who, also a plaintiff in the action, was awarded damages in the sum of $3,581.26, making a total of $5,581.26 awarded to both plaintiffs. The Court directed an apportionment, holding that only $5,000.00 was available from the Fund. In *Re Brady v. Ferrill*[39] a woman received injuries in an automobile accident and recovered judgment for $5,392.60. Her husband was awarded damages in the sum of $1,231.00 for loss of *consortium* and other damages. Since his wife's damages exceeded the $5,000.00 limit, the husband argued that not only were the wife's injuries occasioned by a motor vehicle but the damages he suffered, including loss of *consortium*, were also occasioned by a motor vehicle, and therefore there was injury to two persons and that part of the award to him for loss of *consortium* should not form part of the amount paid out on account of the wife's injuries. The court, in rejecting the argument, followed *Klebanoff v. Price*, and held that "injury" was used in the sense of physical injury.

Section 299(1) was amended in 1958 by striking out the proviso thereto and substituting another[40] which, I must admit, I find difficult to follow. The intention of the new proviso is fairly apparent, but a close reading of it discloses certain omissions and faults in draftsmanship. For example, it reads in part as follows:

> . . . where he receives or is entitled to receive, from any source, compensation or services or benefits with a pecuniary value for or in respect of the injury, death or damage . . . the pecuniary value of any services or benefits received or which he is entitled to receive . . .

shall be taken into consideration as therein set out in computing the amount payable from the Fund. It will be observed in this excerpt that in one place mention is made of "compensation, or services or benefits" but further on only the words "services or benefits" are used. Under the present wording it could be argued that *compensation* with a pecuniary value need not be taken into consideration, since the operative part of the section states that "the pecuniary value of any services or benefits" are to be considered, with the word "compensation" omitted at this point.

New Brunswick Decisions

A few comments should be made on the reported decisions on our Unsatisfied Judgment legislation. I have found only three

38. [1949] 2 D.L.R. 575.

39. [1954] 2 D.L.R. 253.

40. The Motor Vehicle Act 1955, 4 Eliz. II, c. 13, s. 299(1), as amended by (1958) 7 Eliz. II, c. 19, s. 19.

such cases. In *Saunders v. Smith*[41] it was held that the plaintiff was entitled to the costs of the examination of the judgment debtor under the Arrests and Examinations Act, since, under the Unsatisfied Judgment Fund, the costs allowable are those taxed as between party and party and payable by the judgment debtor to the judgment creditor.

The two other cases involved the construction of the statute from the point of view of retroactivity. In ***Re Trites***,[42] the Court of Appeal decided that a judgment creditor whose cause of action arose before February 1, 1953, the date of proclamation of the Unsatisfied Judgment Fund provisions, has no right of recourse to the Fund, since the legislation is not retrospective; it is not sufficient that the judgment is obtained after that date. Similarly, in ***Provincial Secretary-Treasurer v. Hastie et al***,[43] the Court of Appeal held that an amendment to the provisions of the Fund should not be given a retroactive effect.

Conclusion

In common with most legislative schemes, by usage the Fund has been found wanting. It is hoped that the latest amendments will facilitate payment in deserving cases, while the Fund will not, at the same time, become accessible to a judgment creditor when reasonably thorough investigation would reveal that the judgment debtor has ample ability to pay. In other words, the Fund should not become simply a convenient means of instalment payment for solvent judgment debtors.

Perhaps consideration should be given to raising the maximum amounts payable out of the Fund. My only comment here is this. In 1957 the maximum amounts payable under the Ontario Unsatisfied Judgment Fund were raised (in the case of accidents occurring on or after January 1, 1958) to $10,000.00, exclusive of costs, on account of injury to or the death of one person, and subject to such limit for any one person so injured or killed, to $20,000.00, exclusive of costs, on account of injury to or the death of two or more persons in any one accident, and $2,000.00, exclusive of costs, for damage to property resulting from any one accident.[44] The provisions for proof of financial responsibility were also amended by raising the minimum limts to $10,000.00,

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41. (1954) 34 M.P.R. 138.
42. (1954) 34 M.P.R. 197.
43. (1955) 37 M.P.R. 211.
44. (1957) 5 & 6 Eliz. II, c. 44, s. 20 (2), (3), amending R.S.O., 1905, c. 167, s. 98 (5) (a), (b).

$20,000.00 and $5,000.00, respectively.[45] It might well be asked whether, in view of this amendment to the Ontario statute, a New Brunswick resident suffering damage in Ontario could obtain payment out of the Ontario Fund. Does the New Brunswick Unsatisfied Judgment Fund still provide a "recourse of a substantially similar character" despite the fact that an Ontario resident suffering damages in New Brunswick would be faced with limits of one-half the amount existing in his own province? It was pointed out earlier that the reported cases do not reveal the precise degree of similarity of legislation that must exist to permit recovery by a non-resident. But surely, one of the most important provisions in an Unsatisfied Judgment Fund is that setting the maximum amounts recoverable. It would therefore appear questionable whether a New Brunswick resident suffering injury or damage in Ontario could successfully recoup his loss from the Ontario Fund, at least to the extent to which the Ontario maximum limits now exceed those existing in New Brunswick.

Problems of this nature will continue to arise when provinces attempt to insert reciprocal provisions in their statutes without any apparent regard for the provisions in other jurisdictions. Since we are to a great extent a "generation on wheels", closer co-operation between the provinces with a view to secure uniform legislation would remove much of the doubt surrounding payment from an Unsatisfied Judgment Fund to a plaintiff who lives outside the jurisdiction where his cause of action arises.

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45. (1957) 5 & 6 Eliz. II. c. 44, s. 16 (1), (2), amending R.S.O., 1950, c. 167, s. 86.

WARD CHIPMAN SR.: AN EARLY NEW BRUNSWICK JUDGE

Patricia A. Ryder*

The story of Ward Chipman is not only that of a distinguished early New Brunswick judge. To a considerable degree, it mirrors the history of the first fifty years of the province — from 1784 to 1824.

From his early appointment as the first Solicitor-General of New Brunswick until his death while President of the Province, Ward Chipman was involved in practically all important affairs of the province. It was Chipman, along with a few associates, who drafted our first provincial laws. It was he, with six others, who petitioned for the first college, later to be named the University of New Brunswick. And it was Chipman who was responsible for establishing the Maine-New Brunswick boundary at the St. Croix in preference to the Magagaudavic as had been proposed by the Americans. It was he, too, who trained some of the finest of British North America's lawyers, including Jonathan Sewall Jr. and Ward Chipman Jr. He may well be called the father of the Bar of New Brunswick. In his declining years, while semi-retired, Judge Chipman played the role of "elder statesman", being the centre of a large party and the constant guide of his prominent in-laws, the Hazens, Botsfords and Murrays.

Ward Chipman Sr. was born in Marblehead, Massachusetts, in July, 1754. His family had lived in America for more than one hundred years and his father, John Chipman, was one of the foremost lawyers of his days. Following John Chipman's death in 1768 while pleading a case in Portland, his colleagues had a monument erected there in his honour.

After John Chipman's untimely death, his family, consisting of a wife and six children, found themselves in comparatively straitened circumstances. Friends of the deceased were quick to lend aid. One in particular, Jonathan Sewall, Attorney-General of Massachusetts and Admiralty Judge for Halifax, later greatly influenced the young Ward Chipman. Judge Sewall realized the worth of the youth and arranged for him to continue his studies at Harvard College.

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Apart from a reference of Chipman winning a prize, the Harvard College records tell little of his ability as a scholar. It was the custom of the day to list the names of students in order of social prominence rather than in academic order. Ward Chipman was given sixth place in his class roster, following the sons of people such as Governor Hutchinson, but preceding Samuel Adams.

Following his graduation from Harvard in 1770, financial problems plagued the young man and although his thoughts and hopes were with the legal profession, he was forced to teach school for a year. The following year he returned to Boston and began to study law under Jonathan Sewall and the Hon. John Leonard, two of the ablest lawyers in Massachusetts. The influence of these men was to completely change Ward Chipman's way of life.

Until 1775, Chipman had been leading a comfortable life as a member of a distinguished Massachusetts family. His sisters had married well. One, Elizabeth, was the wife of William Grey, a prominent ship builder who later became Lieutenant-Governor of the state. Chipman himself was already beginning to show much promise as a lawyer.

But storm clouds were gathering in North America. Men in high positions in His Majesty's Government found themselves less powerful than formerly. Many were beginning to be ostracized for refusing to sever their allegiance to England. Among these were Jonathan Sewall and the Hon. Daniel Leonard. Ward Chipman, by this time a clerk solicitor in the Boston Customs House, was also in disfavour. Although by the year 1775 he had not definitely decided which side to follow in the growing rebellion against English rule, he became a marked man when he helped Judge Sewall when the latter's home in Cambridge was mobbed by the rebels. Shortly afterwards, Chipman, at the age of twenty-two, signed the Loyal petition to General Gage and sailed to England, determined regardless of hardship to maintain his allegiance to the Crown.

On his arrival in England, Chipman found himself for the first time having to compete with others. He was but one of a group of young men as well qualified in the legal profession as himself. He no longer had position and family influence to help him.

Chipman's stay in England was brief—less than a year. Lawyers were far too plentiful and cases too few. Service to the King was one way to keep from starving and Chipman returned to his native country, joining the King's troops in New York. During the remainder of the war he was employed as Deputy Muster Master General of Loyalist troops in New York with a salary of five shillings per day. In this position he met another man who

was destined to play an important part in the history of New Brunswick. The Muster Master General was Edward Winslow, and the two men formed a friendship which was to last for many years.

To augment his meagre salary, Chipman secured several additional minor positions. He was appointed scribe to the Admiralty Court for Rhode Island and later procured a licence to practise in the Supreme Court of New York. He was also paymaster for the Queen's American Dragoons. These various positions kept him busy at a time when he most needed to be busy. It had been several years since he had seen or heard from his family. Only once during his stay in New York did he see his mother and sisters. This he accomplished by a stealthy visit to his old home behind enemy lines.

At the end of the war, Chipman busied himself with the settling of Loyalist emigrants and then returned to England. There were various reasons for this voyage. Many of his friends had found new homes in British North America, but all the important government positions in Nova Scotia, then comprising what is now Nova Scotia, New Brunswick and part of Maine, were filled. There did not appear to be much future in the area for a young lawyer, although it could always be considered as a possibility.

It was at this time that Ward Chipman and some of his fellow sufferers began to agitate for a new province to be carved out of Nova Scotia. Letters began to arrive to Chipman in England from men such as Edward Winslow who had settled in Nova Scotia. The Loyalists were dissatisfied with life under the existing administration. They felt they were not being given the rights they deserved as men who had lost so much. Many were brilliant men who had been leaders in their own colonies and the idea of being governed by people who had played so small a part in the recent war was not to their liking.

As soon as the idea of a new province materialized, Ward Chipman and Edward Winslow began to plan for their future there. They held high hopes that General Fox, a man with whom they were on very good terms, would be chosen as the first Governor. In that event Chipman would be assured of the post of Attorney-General of the new colony; Winslow aspired to be the Governor's secretary. Unfortunately General Fox refused the appointment and Thomas Carleton, brother of Lord Dorchester, became Govenor of New Brunswick, the name given the new province. Governor Carleton had his own views regarding his administrative staff. Instead of Ward Chipman as Attorney-General, Sampson Blowers was chosen; Jonathan Odell became the Governor's secretary. Although bitterly disappointed, Chipman decided to cast his lot with his friends and made plans to go to

New Brunswick. Lawyers were not in demand in England and he hoped, with his pension of £91 per annum for his war service, to make a living as a lawyer in the new province.

Chipman arrived with Governor Carleton in November, 1784, and immediately settled in Saint John, or Parrtown as it was then called. At first he still nurtured hopes that he might after all become Attorney General. Sampson Blowers had declined the honour in order to fill the similar position in Nova Scotia. Chipman was Acting Attorney General for six months until Jonathan Bliss arrived to take over the duties. Chipman was then appointed Solicitor-General. Unfortunately this was not a paying position.

Chipman immediately began to acquire clients. He became the representative of various people in England and Nova Scotia who were anxious to protect their property rights in New Brunswick.

Ward Chipman was a hard worker for personal benefit, but he also showed an immediate interest in the welfare of New Brunswick. One of his first tasks was to sign a petition for an Academy. The Loyalists, although unable to afford to send their sons to be educated in the schools and colleges of England, nevertheless desired a good education for them. The Academy was to become the University of New Brunswick, and Ward Chipman was one of its first trustees.

During his first year in New Brunswick, Chipman also became known as an excellent law teacher. One of his first pupils was Jonathan Sewall Jr., whom he had tutored as a child in Boston. Young Sewall was delighted at being sent from England by his father to study under his beloved "Chippy". It is interesting to read an extract from the young man's letter home regarding the law practice of his tutor:

> Chipman has as great a share of business as any other practitioner in Saint John - our office hours are from eight in the morning till three in the afternoon.

When, in 1785, Fredericton was chosen as the capital of the province, Chipman was asked to draw up the Charter for Saint John which was being declared a city. Most of this charter was derived from that of the City of New York when it had been under British rule. There were to be aldermen and assistants, who along with the constables would be chosen annually from various wards by the citizens. The Mayor and Recorder and City Clerk were appointed by the Governor. Chipman himself became the first Recorder and City Clerk and Gabriel Ludlow, the first Mayor. When he was sending in the first draft of the Charter, Chipman suggested the new city should be called Saint John, instead of Saint John's as had been originally intended, and this suggestion was adopted.

Chipman was keenly interested in his adopted land and from the first participated in all public affairs. It is not surprising, therefore, that he announced himself as a candidate for the first provincial election. Unlike many of the provincial executive, the Solicitor-General was not a member of the Executive Council and he was eligible to stand as a representative in the House of Assembly.

The first election in the City of Saint John had all the aspects of a rough political campaign. Two parties declared themselves. One, commonly called the "Lower Covers" was regarded by the aristocratic citizens as consisting of undesirables. The other, called the "Upper Covers", comprised the more prominent members of the city. Agreement between the two groups was impossible. On one side was the "Old School Tie" group; on the other, adherents to the new idea of government by the people. In an age when democratic government was unpopular, the "Lower Covers" were considered radicals. Chipman and others who had suffered much from radical ideas in the past wished to avoid repetition of the experience. Before the "Upper Covers" are censured for their ideas, it must be remembered that they were men trained to administer, and the new province had need of their training in its first government.

Elections were held over several days and were not by secret ballot. The ballot box was moved from one part of the city to another and it was known daily how the votes were cast. All males of age who had been in the province for three months were eligible to vote. To add to the confusion taverns were open and riots frequent.

When the results were finally announced, the furore was accentuated. Apparently the Upper Covers (Chipman and his running mates) had demanded a recount, and as a result were declared the victors. The opposition then claimed that 1089 ballots had been discarded. In reply they were told they had neglected to provide a scrutineer during the recount and their protest was invalid. The "Lower Covers" protested to the House of Assembly when it met in January, 1786, but the House decided in favour of the "Upper Covers", and Chipman took his seat in the House. Later the Colonial Secretary, Lord Sydney, agreed with the House's decision, and a petition by the losers to dissolve the House only led to a statute providing that no more than twenty persons could sign a complaint or petition to the Governor, Council or Assembly for altering matters established by law in church or state except with the consent of three or more County Judges, or a majority of the county grand jury. Chipman had won a victory, but it was not complete. The matter was not forgotten by his enemies for many years, and he was never again to win an election in Saint John City.

As soon as the House had assembled, Chipman indicated his desire to participate actively in the government. He and others prepared the reply to the speech from the throne, drew up the rules of the House, and were on a committee to prepare better roads and to confer with the Provincial Council. A perusal of the first pages of the Journal of the House will show how hard the young Solicitor-General worked for the Province and how valuable he was to the administration.

In 1786 Chipman married Elizabeth Hazen, daughter of William Hazen, a member of the Provincial Council and a pre-loyalist of high standing. This connection with the Hazen family resulted in his being related to other prominent New Brunswick families including the Murrays and Botsfords.

Soon after his marriage Chipman had a house built in the middle of a plot of land extending 200 feet on Union Street and four hundred feet back. The house was located approximately where the Saint John Public Library stands now. From this position, Chipman expanded his holdings to an area which at his death was a vast estate.

On July 10, 1787, a son, Ward Chipman Jr., was born, who was to be his only child. Chipman began to work even more energetically in his practice in order to provide for the child whom he hoped would follow in his footsteps.

One of Chipman's first cases was that of *Finucane v. Stelle*, the first ejectment trial in New Brunswick. In 1783, Chief Justice Finucane of Nova Scotia had visited New Brunswick, supposedly to aid the Loyalists. He became interested himself in fertile Sugar Island, about eight miles above Fredericton. The land had already been alloted to the disbanded Prince of Wales Regiment who had taken possession. Finucane's heirs protested. The dispute was not only one over ownership of excellent land; it also involved the rights of the pre-loyalist absentee landowners and the new settlers. Judge Allen decided in favour of Stelle, but Bliss and Hardy, Finucane's lawyers, appealed and the decision was reversed. Chipman then appealed on behalf of Stelle to the King in Council and the original decision was restored.

Cases of this kind gave Chipman a reputation as one of the finest lawyers in New Brunswick. His opponent, both in business and politics was often Elias Hardy, and the courtroom as well as the House of Assembly reverberated with their battles for nearly fifteen years. Jonathan Bliss, although he shared the same political views as Chipman, was also a court-room opponent and rival.

Law did not give Chipman a sufficient income. He and the Hazens became involved in a grist mill to supplement their income. In this they were aided by Chipman's brother-in-law,

William Gray of Boston. Since Chipman's sister had benefited from property rights he had lost in Massachusetts, it was only natural that she should help him in time of need. The Navigation Acts were another aid in the grist mill project. The lifting of the embargo on grain enabled Gray to send Chipman the Indian corn he required. Until the Act was repealed, the business flourished. Chipman was also interested in the Society for Propagating the Gospel. The aim of the group was to educate Indian children. As secretary of the Sussex School, Chipman earned £50 per year, a help to the struggling lawyer.

These side-lines were financially necessary. For some cases he received little or no remuneration. In others he was paid in kind. Of these may be mentioned a debt case in which his clients, cabinet makers, repaid Chipman with furniture made during their stay in the Fredericton gaol.

In spite of hardships, Chipman took a stand in the House of Assembly against paying members. His reasons were three: (1) only those who could afford it should enter politics; (2) payment would induce the poorer and more radical elements to enter politics; and (3) the British House members being unpaid, the colonials should not demand payment. The debate on payment lasted for a considerable time. Twenty-three motions were made in three days. Only the Saint John group, who had campaigned for non-payment at election time, opposed the idea. Following a hard fought battle, those who favoured payment succeeded.

In spite of politics and business, Chipman found time for his old friends — the Winslows, Botsfords, Leonards, the Sewalls and even the Benedict Arnolds. It was Chipman and Jonathan Bliss who supported Benedict Arnold in his defamation action against Munson Hoyt. The case, although won by Arnold, was not a complete victory; instead of the £5000 damages demanded, the Judge awarded the General two shillings, six pence.

The years passed quickly. Chipman still hoped that his luck would change and his practice improve. In 1793, he wrote:

> I never yet have business enough to employ half my time and this to me of my indolent turn will be a perpetual source of procrastination; while I was a student I could apply myself without intermission, since that I have scarce had business to retain what little I then learnt. When my business was most lucrative which was at New York, great fees were received for very little and without the smallest variety in the objects. I look forward to business to employ me sometime or other, but it is much like my dependence for many years upon a state lottery and will not happen. [1]

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1. Raymond, W.O., *Winslow papers* A.D. 1766-1826 (printed under the auspices of the New Brunswick Historical Society, Ed. by Rev. W. O. Raymond, M.A., Saint John, N. B., the Sun Printing Co. 1901, p. 401.)

In 1793 Chipman even lost his interest in politics. His seat in Saint John was won by the "radicals". He was instead elected as a representative from Northumberland County. He was also disappointed in not being chosen speaker. In that year, his request for the office of pay-master of the New Brunswick Regiment was refused and he was forced to ask the House of Assembly for an allowance as Clerk of the Circuit. To his surprise, he was granted £75 a term.

In spite of continued financial difficulties, Chipman was still firm in his views regarding life under British rule. Although his sister, Elizabeth Gray, offered him a fine future in Massachusetts, he refused a life of ease and the influence of William Gray because it involved living in the republic.

Ward Chipman's New Brunswick in-laws could not promise him wealth, but could provide him with business. One case in which Chipman represented the Hazens lasted for twenty-five years! This was the famous Simonds, Hazen and White fisheries dispute. The firm claimed the sole right to fish opposite its land at Portland Point. This area situated between the harbour and the river was also fancied by other townsmen, and the company having refused to relinquish its rights, litigation arose. Ward Chipman, as William Hazen's son-in-law, was chosen to represent the firm. As early as 1792 he began to work for legislation to benefit his clients. Bills to regulate fisheries became quite prevalent in the Assembly. One amendment of interest stated that any British subject with property on a river, cove or creek had the sole right to fish as far as the low water mark. No unauthorized person could infringe on these rights. The vote of the Assembly went 9-9 (Chipman voting yea). The speaker of the House, Amos Botsford, another Hazen son-in-law, cast the deciding vote in favour of the amendment.

Although the dispute was to continue for some time, there were quicker methods of temporarily settling it. It will be remembered that Chipman was the Saint John Recorder. Apparently in 1795 he decided to resign. The Governor did not favour this as a suitable successor could not be found. In April 1795, Jonathan Odell, Provincial Secretary, wrote:

> He (the Governor) was pleased with Mr. Campbell's declaration on that subject when I added the information of your having consented to remain in office on condition of ending the fishery dispute as had been proposed and provided some reasonable salary was allowed by the Corporation, he expressed satisfaction and highly approved the idea.[2]

This ended the dispute for a few years.

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2. N. B. Museum, Hazen Collection, Volume II, April 6, 1795.

During this time, Chipman experienced a great personal satisfaction. In 1794, he was host to the Duke of Kent, later Queen Victoria's father. Chipman was delighted although his American sister wrote that in her country people were freed from such cares as entertaining royalty since "all are Princes alike".

By 1796 Chipman, at 42, was in despair; instead of being at the peak of his career, he had yet to find reasonably remunerative employment. He even considered moving to another British colony and applied for the position of Chief Justice of Upper Canada, but it was granted instead to an English lawyer, William Osgoode.

Chipman's disappointment did not last long. Soon he was compensated by a post which, although temporary, was rewarding. Since 1784 there had been Anglo-American disputes regarding the Maine-New Brunswick border. Following the Revolutionary War, loyalists from Northern Massachusetts had crossed the Passamaquoddy Bay claiming the international boundary was the Scoodiac (as the present St. Croix was then called). The Americans protested that the Magaguadavic River was the boundary.

In an effort to settle the question, a commission was formed of representatives of Britain and the United States. When Governor Carleton was asked to choose a representative, he selected Ward Chipman ". . . in whose abilities and talents I have reason to confide from the long experience I had long had of his services in this province. Services for which he has hitherto received very little emolument" (*sic*).[3]

The honour came to Chipman at an opportune time. At last he could prove his capabilities and add to his income. He immediately accepted the offer and stated he would devote his full time to the problem. The salary must have looked most generous to him. He was to receive £960 per year plus expenses. At the same time he was still allowed to claim the £91 yearly half-pay allowances for war service.

Chipman was in the unusual position of being a colonial representative for the British government at a time when colonial representatives were not common on international commissions. For this reason, although he was just as well educated as his fellow members, Chipman knew he would have a hard time proving his worth. That he was able to do so is a tribute to his ability.

Chipman's first step was to collect all the data possible concerning the St. Croix as described by St. Croix in his voyage there. The Americans were using as evidence Mitchell's map of 1744, which they claimed had been used in the 1783 treaty negotiations.

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3. N. B. Museum, Boundary Papers, Carleton to Portland, April 30, 1796.

This map listed the Magaguadavic river as the true St. Croix. It was up to Chipman to prove by even earlier material that this claim was false and that the Scoodiac was the St. Croix. In 1797 Chipman's search was rewarded. A map of St. Croix Island was sent to him. He promptly sent it to Robert Pagan of St. Andrews with instructions to compare the islands on the map with Douchet's Island in the Scoodiac. They were found to be the same. With this evidence it was certain that the Scoodiac was the true St. Croix. As a result the Americans lost an area of land 200 miles long and 30 miles wide. Chipman always believed that the judgment of that part of the dispute was won by diligent research. He wrote, "I claim no merit than industry and when I look back, I wonder how I have been able to collect so much on the subject."[4]

The Boundary Commission had given Chipman some of the recognition he had been seeking. The King and the Duke of Portland were very pleased. Complete success was still elusive, however, and Chipman returned home still seeking a large practice to keep him busy.

The Boundary dispute did result in some new business interests for Chipman, although they were not in the professional line. The recent work had necessitated occasional trips to Boston. There Chipman renewed his family ties. Since William Gray, his brother-in-law, was a wealthy ship owner, Chipman grew interested in the subject. By 1796 he had found enough money to invest in the Gray cargoes.

Ward Chipman Jr. was also making the acquaintance of his American relatives at this time. He had been sent to Cambridge to study there. Like his father and grandfather, he was to receive a degree from Harvard. The youngster also followed his father's political beliefs. His feelings regarding his British citizenship were as strong as the older man's.

Apart from the Boundary Commission, Chipman did not often seem to receive remuneration for his cases. He took a great interest in test cases that offered nothing more than personal satisfaction. For this reason he was one of the two lawyers who defended the slave, Nancy Morton, in the first slave trial in 1800. The case offered, instead of monetary reward, the opportunity to try his legal skill on an international question that was just beginning to become controversial. Although two judges decided for, and two against Chipman's contentions, Chipman distinguished himself. He once more proved his capabilities and showed that, given the opportunity, he was one of the best men in his profession. A review of Chipman's brief states:

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4. Lawrence, J. W., *Judges of New Brunswick and Their Times*, Saint John, A. A. Stockton, 1907, Chipman to Jonathan Sewall, p. 194.

> . . . It forms a conspicuous proof of the standards of knowledge of law attainable by American Colonists and in a department somewhat outside the routine of a regular practitioner . . . Surely had Shakespeare ever heard of so large an excellent piece of gratuitous work by a member of the bar he would never even have insinuated that "the breath of an unfied *(sic)* lawyer is valueless."[5]

The case did not arouse much interest among the colonists. The ***Royal Gazette*** barely mentioned it. In fact, that particular issue was more concerned with George Washington's obituary and the evacuation of Holland than with local affairs. It is small wonder that Chipman's abilities were not appreciated by the local citizens. The press neglected to mention them, and his enemies were anxious to give biased accounts.

Cases, free or otherwise, were few at the beginning of the 19th century. Chipman, very disheartened by the situation, wrote:

> There are not nor have there ever been many of them (lawyers) at any time in the province and so far from accumulating fortunes, not one of them has obtained more than a moderate subsistence by his practice, most of them have been and are poor and most of the young gentlemen educated to the bar in New Brunswick have been obliged to quit it for want of business . . . A very great proportion of the debts in this province is under £20.
>
> I had hoped to leave a successor in the same path in the province, but if the situation of things remain as at the present, I shall entertain other designs with regard to his future destination. [6]

Chipman's hopes of finding a better situation continued. He strove for the position of British Consul in Boston. This would be an ideal compromise. He would return to his home and its wealth and still live under the British flag. But this hope was shattered; he was not appointed.

His son's education was another important matter in the family finances. It is probably safe to assume that the William Grays assisted during the youth's stay in Cambridge, but his father had even greater ambitions for the boy and these could only be realized by further expenditure. The solution was that both father and son decided to save their money so that Ward Jr. could attain both his and his father's ambition to study at the Inns of Court in London.

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5. Jack, I. A. *The Loyalists and Slavery in New Brunswick* (Transactions of the Royal Society of Canada, 2nd series 1888-89) Vol. IV, Section II, pp. 146-147.
6. N. B. Museum, Hazen Collection, Vol. IV, Various letters from Chipman to Jonathan Odell in 1802.

During this dark period of Chipman's life, there seemed very little hope. He had lost the Saint John election again, and Judge Ludlow had re-opened the fisheries question. Chipman's position was precarious. He could point with pride to his thirty years' service for the province, yet although a member of aristocratic circles, he was not included in the safest and innermost government circle, the Legislative Council. Chipman, who was viewing with alarm the behaviour of the growing radical elements of the province, wanted the security of membership in the Council. Having witnessed the destructiveness caused by this new radicalism in two revolutions during the past thirty years, he wanted to be in a position where he could take a definite stand against it.

Although a judgeship would have been an even better appointment, Chipman would not even consider the position in 1806. He felt the salary of £300 per year insufficient and thought he could earn more on his own. Winslow, who had no legal training, was appointed to the bench in his place. Chipman accepted a position on the Council.

Ward Chipman had become a member of the Council at a very interesting time. Governor Carleton's leave of absence in England had been extended to four years and he showed little inclination to return. As a result the province was left in the hands of various officials. Politics played an even greater part in the administration and since Judge Ludlow, who had been named President of the province, preferred to live in seclusion, affairs were aparently controlled by the judges. Chipman did not approve of the situation and was most vehement concerning it in his personal letters. Duty was stronger than personal dislikes, nonetheless, and Chipman proved this during these first trying years. He exerted himself on various committees and his abilities were recognized by his fellow councillors. At last he was receiving some recognition.

Life became easier. First there was the Council appointment, then came an annual allowance from his sister, Mrs. William Gray. Last, but not least, Chipman Jr. finally returned home to study under his father. There had been other offers to instruct the youth in law, but his father and he agreed they would rather work together. One of the aspiring teachers was Jonathan Sewall, Ward Chipman Sr.'s first pupil. Sewall had become the Chief Justice of Quebec and was anxious for the boy to study under him. Perhaps the realization that in 1807, according to Sewall, an English lawyer needed a thorough knowledge of English Common Law, French Civil Law, French history and the French language did not appeal to the youth. At any rate, the deep affection between father and son was strong enough to keep the youth home.

During the next few years, Chipman began to realize his hopes. President Ludlow died and Edward Winslow, Chipman's

close friend, was appointed temporary President. Owing to Chipman's persuasion, Winslow's first action was to recall the militia which had been summoned by Ludlow who feared war with the United States. The recall enabled many young men to return to their occupations and a satisfactory New Brunswick economy was once more revived.

At this time, Chipman began to aspire to a judgeship. The salaries had been raised to £500 per annum. Although Chipman was apparently making more than this, he decided it would be wiser at his age to procure a seat on the bench. Two vacancies—the Chief Justiceship and a puisne judgeship—arose in 1809. Chipman and Jonathan Bliss were both considered for the higher honour, but Bliss received it. Since Chipman had originally applied for the puisne judgeship, he had to be content.

The new position had its disadvantages. Relatives and total strangers began to seek his patronage. He was asked to find positions for Hazens and even asked to recommend a Boston bookshop to his friends. Chipman's ambitions were not for these people, however; his one anxiety was to establish his son.

The younger Chipman had already begun to show signs of becoming as great a lawyer as his father. This ability the older man fostered by recommending his son to his former clients. Finally, the great ambition of the family was realized; its financial position had improved to the extent that the young man was able to study in England.

Before the young man could travel, there were many arrangements to be made. A leave of absence from his official duties had to be granted by the Governor. Ward Chipman Sr. had a strange request to make to his friend Sampson Blowers, now Chief Justice of Nova Scotia:

> . . . from all the information I can procure, I think it probable that he would derive great advantage in point of time if he could obtain the degree of Master of Arts at some University on the British domains of Royal Foundation before entering himself at any of the inns of Court, he has already taken (lleg) degree at Harvard College, of which he has sent a diploma, and the object of this application to you is to know whether he can be honoured with this same degree at Kings College at Windsor upon producing such diploma . . . [7]

Whether or not the youth received this degree from Kings cannot be said. Inquiry has failed to reveal any record.

When Chipman Jr. returned from England in 1813, he undoubtedly found many changes. His father's property now included thirty-four acres of land extending from what is now Carleton

7. N. B. Museum, Hazen Collection, Chipman to Blowers, Sept. 6, 1810, Vol. III.

Street at the head of Wellington Row, past St. Paul's Church, northwest to Cedar Grove Crescent and south again to Stone Church. The war of 1812 had wrought changes. He found his father involved in many interesting cases arising out of the war. One of these was *The General Smythe v. The Reward.* The Reward was an American ship which had been intercepted by the General Smythe for her cargo valued at $14,500., although the victim carried a letter of safe passage to Portugal. Judge Chipman had to seek the advice of the Governor in this case. It was finally decided the owners were to deliver up the cargo to the Master who would dispose of it as he saw fit.

Cargoes such as these were needed in the City of Saint John which was suffering greatly from the war. Because of this, many unarmed American ships were allowed to enter the harbour. The Hazen family profited from the prize vessels by selling the cargoes and Chipman profited by his direct contact with the sellers.

Upon Ward Jr.'s return from England, Chipman began to keep in the background in order to further his son's career. In return the youth helped his father. When the judge was ill with gout (from which he frequently suffered), Ward Jr. wrote his business correspondence. As the judge grew older, his gout grew worse. At times he had to refuse to preside over very interesting cases in which he would have delighted if he had been in good health.

In 1816, Judge Chipman was once more drawn into boundary disputes. The Treaty of Ghent required further settlement of the Maine-New Brunswick boundary, and Chipman was once more chosen as agent. This time age prevented him from becoming overly active in the settlement, and the story belongs more properly in a biography of Ward Chipman Jr., who with his father was created agent "jointly and separately".

Age was not to be a complete deterrent to the judge. He continued to work actively for New Brunswick's welfare. It was he who suggested that the negro immigration problem be settled by a grant of land at Loch Lomond. Each negro would have his own twenty acres and at the same time be close enough to Saint John to provide a needed labour force.

It was unfortunate that age was beginning to curtail Chipman's active participation in provincial affairs. In 1818 a great controversy was raging between the Governor, General Smythe, and the government. General Smythe had issued a tax of twenty shillings per thousand feet on pine timber. The revenue was for the benefit of the Legislative Council. The Assembly was dissolved when it refused to approve the tax. The Chipman family was directly involved in the dispute. William Botsford, a brother-in-law of the judge, had openly stated his feelings against the measure and young Ward Chipman, who was making his first appear-

ance in provincial politics, became known for his stands against the Governor. The judge remained publicly out of the scandal, but it can safely be assumed that he played the role of "elder statesman" — discussing the case and stating his views among his circle of family and friends.

Gout and age began to exact their toll on Chipman Sr. He became more concerned with spiritual matters, and in 1822 this concern took a practical turn. There had been much debate whether to build the new Anglican Church in Saint John on land adjoining the Loyalist Burial Ground. The qualifications attached to this plot were considered too great and the idea was discarded. Instead Judge Chipman offered part of his land. The only qualification to the gift was that a pew on the ground floor and one in the gallery be reserved rent free for the use of the Chipmans. The judge's gift was accepted and Saint John's (Stone) Church was built. Unfortunately, the judge died before he could take his "Squire's" pew, but Ward Chipman Jr. was a regular attendant until his death.

In spite of apparent inactivity, old Ward Chipman still showed the interest and far-sightedness that had been his life-long characteristics. He even concerned himself with a matter that is still debated in New Brunswick politics. In 1822, he chaired a meeting that drafted several resolutions in favour of the Chignecto Canal and wrote that the best way to enlarge the City of Saint John was by the construction of such a canal!

At the age of 68, Judge Chipman decided to retire. He longed to replace the years of service with the peace of his home and garden. Public duty was to prove too strong for him, however, and in 1823 he became more involved in provincial affairs than ever. Indeed he was not to be known as "the retired Judge Chipman", but as "Ward Chipman, President and Commander in Chief of the Province of New Brunswick."

The honour did not come easily to Chipman. Just as he had struggled in his early life with rivals, so he did in his last years. In fact the final controversy surpassed any of Chipman's earlier battles.

On March 27, 1823, Governor Smythe died. It was the custom in such a case for the senior member of the Legislative Council to undertake the position of President until a new Governor arrived from England. George Leonard was the senior member, but he refused to serve because of advanced age. Christopher Billop, the next in seniority, was approached and accepted on condition that he be sworn in at Saint John as ill health would not permit him to travel to Fredericton. The Council did not approve of this and Judge Chipman was approached. He accepted and the controversy began.

Billop decided to maintain his rights. There ensued a fierce battle. Judge Chipman would issue proclamations only to have Billop issue conflicting orders. The administration was in a turmoil and since overseas communication was slow, the question could not be settled immediately. On April 22, 1823, placards in Saint John advertised a public meeting in support of Christopher Billop. When the group gathered, they discovered they were not to have any say in the matter. A loyalty petition had already been devised and only awaited a vote of approval. Whether those present were disgruntled about this or whether they were Chipman's followers present to hear the opposition is difficult to say. At any rate, instead of Billop emerging victorious, a congratulatory letter was sent to Chipman.

In spite of this vote of confidence, the struggle was not finished. Billop continued to issue proclamations and Chipman was faced with the added problem that if the conflicting orders were discovered by the Americans, they could be used to disadvantage. He decided to call a Council meeting to obtain their support. Billop did likewise and called a meeting at Saint John. Odell, the Provincial Secretary, ignored Billop and on April 30, the group met in Fredericton. There were a few dissenters, including William Black, Billop's son-in-law, but they were not strong enough to overcome Chipman's followers.

George Leonard, the senior member, complicated the matter further. He decided that if he were to take the office of President, Billop could not dissent. He would hold the title but Chipman could transact the business as his deputy. Before this idea could be carried out, official word was received from England. Chipman was reprimanded for his behaviour, but appointed President.

Although this honour was the greatest received by Ward Chipman Sr., he could not fully enjoy it as most of his contemporaries had died and there were few left to share his glory. As the year passed the death toll mounted. When his favorite sister, Elizabeth Gray, died and another sister began to decline, Chipman himself, although in excellent health, became preoccupied with thoughts of death.

The fall and early winter of 1823 found Chipman Sr. busy with provincial affairs. The Colonial Office was evidently satisfied with his administration, for it postponed the arrival of the new Governor, Sir Howard Douglas, until spring.

This presented new difficulties. The Assembly had been postponed too long and Chipman would have to call a meeting for January. This would necessitate his moving to Fredericton for the session. There were some compensations. Ward Chipman Jr., a member of the House, and his wife would keep him company. In January 1824, the trio moved into a house on the corner of Queen and St. John Streets in Fredericton. Mrs. Chipman Sr. remained in Saint John.

The House met on January 21, 1824. It was a day of triumph for the Chipman family. William Botsford had resigned as Speaker of the Assembly and Ward Chipman Jr. "being a man of Superior Abilities and well-acquainted with the orders and usages of the House and well-qualified for so great a trust"[8] was chosen to take his place. Once Ward Chipman Jr. had been established in his seat of honour, it was his father's turn. After years of struggling to attain renown, the first Solicitor-General had succeeded. His loyalty and intense patriotism were rewarded. As he stood before the House as its temporary leader, his thoughts no doubt reverted to the first days of the province and his life-long struggle for personal and provincial advancement.

The presidential speech was characteristic of Chipman. It pledged loyalty and patriotism to New Brunswick and England and stressed the growing importance of the province in its relations with the other British North American colonies. And it did not fail to give credit to the group of which President Chipman was one of the few remaining members — the United Empire Loyalists — the men who had founded New Brunswick and helped it grow from a barren wilderness. The speech also stressed two of Chipman's favourite projects, road-building and the Academy at Fredericton. It ended on a note of good will with Chipman promising to co-operate with the House.

After years of political activity, Chipman had reached the highest office in the province. But he was only allowed a few days of authority, for on February 9, 1824, he died in his sixty-ninth year.

Ward Chipman was given a burial worthy of his rank. Newspapers gave fitting epitaphs to the man who had spent fifty years in the service of the province. He was esteemed as "great by reason of his public conduct and brilliant talents" by the Saint John *Gazette* and a "real benefactor to the province" by the Saint John *Star*. The funeral itself was worthy of a governor. The troops, the Academy students, the members of the Bar, the civic and public officials as well as the members of the Council paraded, with many others.

Unfortunately, Chipman's body was not to rest in peace. He was buried first in Fredericton. In the spring he was taken to the Loyalist Burial Ground in Saint John. Then he was removed in 1840 to the Church of England cemetery on the Westmorland Road. When Fernhill Cemetery was opened in the late 1840's, Chipman was once more moved. His body has remained in Fernhill. The lengthy inscription on his monument there includes the following words: "Distinguished during the whole of his varied

8. Journal of House of Assembly, 1824-1827, p. 1.

and active life for genuine integrity and singular humanity and benevolence."

As Ward Chipman Jr. died without issue, there are no direct descendants of the first Solicitor-General, yet the great family's legal abilities were carried on. His son distinguished himself by becoming Chief Justice of New Brunswick and among the long line of nephews and grand-nephews of Ward Chipman Sr. may be found the famous John Chipman Gray, professor of law at Harvard University, and Ward Chipman Hazen Grimmer, Judge of the Supreme Court of New Brunswick.

Case and Comment

EXPROPRIATION — VALUE — INJURIOUS AFFECTION — SECTIONS 11-13, N. B. EXPROPRIATION ACT.

The recent case of *Charles H. Llewlyn and A. Ross Walker v. The Crown In The Right of The Province of New Brunswick*[1] is of practical importance for future expropriation hearings. It also shows the inadequacies of certain provisions of the New Brunswick Expropriation Act.[2]

The Lieutenant-Governor in Council, pursuant to this Act, authorized the expropriation of a large tract of the claimants' land in the City of Fredericton. The purpose of the expropriation was the construction of the Trans-Canada highway. The claimants' remaining land was completely severed by the highway. Approximately seven weeks after the order in council authorizing the expropriation was recorded in the Registry Office for the County of York, the Lieutenant-Governor in Council ordered that this portion of the highway be designated as a controlled access highway. Section 13B of the Highway Act[3] provides that no person shall, without first obtaining a permit from the Minister:

> (a) construct, use or allow the use of any private road, private entranceway or gate which, or any part of which, is connected or opens on a controlled access highway;
>
> (b) sell or offer or expose for sale any vegetables, fruit, meat, fish or other produce or any goods, wares or merchandise upon or within one hundred and fifty feet of the limit of the controlled access highway; and
>
> (c) place, erect or alter any building, structure or fence or any part thereof or place any tree, shrub or hedge or any part thereof upon or within one hundred feet of any limit of a controlled access highway[4]

The claimants, who were subdividers and contractors, claimed compensation on the basis of the land actually taken and damages for severance and the restricted use they could make of their remaining land. They were awarded compensation for the

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1. Not reported.
2. R.S.N.B., 1952, c. 77.
3. R.S.N.B., 1952, c. 103.
4. As enacted by (1955) 4 Eliz. II, c. 52, s. 2, as amended by (1957) 7 Eliz. II, c. 41, s. 4.

land taken and damages for severance, but the arbitrators were unanimous in holding that they could not award compensation respecting the land injuriously affected by the highway being declared a controlled access highway. They said:

> While the public work for the construction of which the acquisition of the expropriated land was deemed necessary was the by-pass, there is no evidence before us of the existence, as of August 17, 1957,[5] of any likelihood that the by-pass would be declared a controlled access highway. That declaration was made seven weeks after the effective date of the expropriation. The by-pass could have been carried through to completion without any such declaration having been made. See *The King v. Halin*, (1944) S.C.R.

In *Halin v. The King*,[6] the Crown expropriated a portion of the claimant's land surrounding an airport to enlarge its runways. The claimant sought compensation for the land taken and for damages alleged to have been caused to the remainder of his lands. The damages resulted from certain orders in council and zoning regulations passed by the federal authorities setting restrictions on the height of buildings on land adjoining airports. It was held, however, that it was not the expropriation that had injuriously affected the claimant's adjoining land, but regulations passed under another statute. Thus the claimant was not entitled to damages resulting to the residue of his property.

The decision in the instant case is obviously of great practical importance when one considers the rapid expansion of highways in this province and the desirability of having certain portions declared controlled access highways.

Also of interest is the method of assessing compensation to be awarded a claimant. In the instant case the arbitrators followed the *Halin* case, but that case it should be observed was concerned with the federal Expropriation Act, a statute that, unlike the New Brunswick statute, deals with compensation in general language. Under the federal statute compensation is made up of the value of the land actually taken and damages to any remaining land.[7] There is no set procedure in the Act for determining the value of the land actually taken, but the courts have evolved certain tests. Under these, the value of the lands taken is to be determined as of the date of the expropriation. It is the fair value to the owner of the land, not the value to the taker. Rumours of an intended expropriation and the public work often enhance the value of the land in that vicinity, but this enhancement is not

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5. Date of recording of the order in council authorizing the expropriation.
6. [1944] S.C.R. 119; [1944] 1 D.L.R. 625.
7. *Irving Oil Co. Ltd. v. The King* [1946] S.C.R. 551; [1946] 4 D.L.R. 625, per Estey, J.

to be taken into account in determining the value of the land taken. In *Lucas and the Chesterfield Gas and Water Board*,[8] it was said:

> The decided cases . . . lay down the principle that where the special value exists only for the intended purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it.

In *Cedar Rapids Manufacturing and Power Company v. Lacoste*,[9] the Privy Council in discussing value to the owner states that the

> . . . price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any such undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

The public work, then, can neither diminish or enhance the value of the claimant's land. However, in *Sidney v. North Eastern Railway*,[10] it was argued that land suitable for a reservoir may have an enhanced value because only that land was suitable for a reservoir for any intending purchaser. In his judgment Rowlatt, J. said:

> But the value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the requirements of other persons for other purposes give to it as a marketable commodity, provided that the existence of the scheme for which it is taken is not allowed to add to the value.[11]

Thus, the value of the land taken is to be determined before any scheme has been proposed, or ignoring the scheme and bearing in mind that the land may have been bought for that particular purpose by other persons and enhanced by any normal increase in value up to the date of the actual recording of the order in council. Bearing these principles in mind, a good test to apply is: What would the owner as a prudent man at the moment of expropriation pay for the property rather than be ejected from it?[12]

Are any of these principles affected by the New Brunswick Expropriation Act? The relevant sections read:

> 11. The arbitrators shall appraise and determine the fair value of each parcel of the land as of the date of the recording

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8. [1909] 1 K.B. 16, per Fletcher Moulton, L. J., at p. 31.
9. [1914] A.C. 569, at p. 576.
10. [1914] 3 K.B. 629.
11. *Ibid.*, at p. 636.
12. *Diggon-Hibben Ltd. v. The King* [1949] S.C.R. 712; [1949] 4 D.L.R. 785.

> of the Order in Council; and the owner or owners thereof shall be entitled to be paid the sum awarded by the arbitrators, whose decision shall be final and not subject to appeal except on a matter of law.
>
> 12. The arbitrators shall consider the advantage, as well as the disadvantage, of the public work as respects the land of any person through which the same passes, or to which it is contiguous or as regards any claim for compensation for damages caused thereby; and shall in assessing the value of any property taken or in awarding the amount of damages, take into consideration the advantages accrued or likely to accrue to such person or his estate, as well as the injury or damages occasioned by the public work.
>
> 13. The arbitrators in awarding the amount to any claimant for injury done to the land, and in estimating the amount to be paid for lands taken shall assess the value thereof as at the time when the injury complained of was occasioned or the lands taken, and not according to the value of adjoining lands at the time of making the award.[13]

Sections 11 and 13 and the first portion of section 12 appear to codify the principles enunciated above, but the latter portion of section 12 appears to introduce a new principle. In part it says that the arbitrators shall, in assessing the *value of any property taken* or in awarding the amount of damages, take into consideration the advantages accrued or likely to accrue to such person or his estate, as well as the injury or damages occasioned by the public works. Thus, the arbitrators in assessing the value of the land actually taken, must consider the advantages accrued or likely to accrue to such person, but only consider injuries already accrued. The Act does not mention injuries or damages likely to accrue to such person.

Thus, at the date of the expropriation the arbitrators could come to the conclusion that the highway will be an advantage to the claimant in opening that area for development and reduce the assessment of the value of land taken accordingly. This would be extremely unfair to the claimant, especially if at the date of the hearing the highway had already been deemed a controlled access highway. The arbitrators would not be able to take this into consideration since the value of the land is determined at the date of the recording of the order in council and this was not an injury already occasioned.

In the present case, although the evidence was not presented from this point of view, the arbitrators were of the opinion that there was no enhancement because of the highway, but this might well be different under slightly altered circumstances, especially if the land was inaccessible from another existing highway. Hodgins, J. A. in *Re Toronto and Hamilton Highway Com-*

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13. R.S.N.B., 1952, c. 77.

mission and Crabb[14] thought access to a highway was a benefit to a person or his estate and even thought there was an advantage gained by proximity.

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II Law, U.N.B.

BAILEES — POWER OF SALE — LIENS — SECTIONS 5-9, LIENS ON GOODS AND CHATTELS ACT — R.S.C. ORD. 50, R. 2.

The purpose of this note is to discuss certain defects in the law regarding the rights of bailees to sell bailed property. The facts of *Sachs v. Miklos*[1] provide a convenient point of departure. In 1940 the defendant consented to store in her house furniture belonging to the plaintiff without making any charge for the service. In 1943 the defendant required the room in which the furniture was stored. She obtained from the plaintiff's bank manager an address where he might be found, wrote to him twice and attempted more than once to communicate with him by telephone. The letters having been returned to her, she sent the furniture to the second defendants, a firm of auctioneers, who sold it for £15. In 1946 the plaintiff demanded the return of his furniture and then brought action. The defendants, the bailee and the auctioneers, were both found liable in conversion because they were found not to be agents of necessity, since there was no emergency and the goods were not perishable.

At common law a bailee's power of sale was restricted to situations of necessity and possibly only to carriers. Further, the power was limited to perishable goods and could only be exercised in the best interests of the owner, not of the bailee. In addition a real necessity had to exist for the sale and it had to be practically (commercially) impossible to get the owner's instructions in time as to what should be done.[2]

Recent statutes, however, have made provision giving powers of sale to certain bailees. Examples are the Inn-Keepers Act[3] and the Warehouseman's Lien Act.[4] The Liens on Goods and Chattels Act[5] contains more general provisions. It first gives a lien to persons who have done work on chattels, jewellers, wharfingers and gratuitous bailees, and then provides a power of sale for these persons. The lien of the gratuitous bailee and the power of sale

14. (1916) 37 O.L.R. 656.

1. [1948] 2 K.B. 43.

2. *Sims v. Midland Ry.* [1913] 1 K.B. 103; for a discussion of agency of necessity, see Cheshire and Fifoot, The Law of Contract (1956), 4th ed., pp. 387-8.

3. R.S.N.B., 1952, c. 111, s. 2.

4. R.S.N.B., 1952, c. 247, s. 4.

5. R.S.N.B., 1952, c. 131, ss. 2, 3, 4, 5 and 9.

require more detailed discussion. The problem concerning the power of sale affects other bailees given liens under the Act, but for simplicity it will be dealt with only in connection with gratuitous bailees.

Section 5(1) of the Act reads as follows:

> A gratuitous bailee of goods shall have a particular lien on the same for his reasonable charges for caring for them after the expiration of the time mentioned in a notice given by him to the bailor to take possession of the goods.

Section 5(2) gives a judge power to dispense with the notice if the bailor's address or whereabouts is unknown. After the bailee has acquired a lien under section 5, section 9(1) gives him a right of sale. It provides that if the goods are not taken away by the bailor pursuant to section 4 (here section 5 is obviously intended) then,

> . . . the lien holder may give notice to the debtor by registered post or personal service, specifying a reasonable time and place for payment, the amount owing and the property detained, and stating that in default of payment an application will be made to a judge at a time and place to be mentioned therein for leave to sell such goods.

If, however, the lien was acquired because notice was dispensed with under section 5(2) owing to the bailor's absence, it will also be necessary to dispense with the notice in section 9(1). Unfortunately there is no express provision in the Act to enable a judge to dispense with the notice required by section 9(1). Therefore, it would appear that the bailee, although endowed with a statutory lien under section 5, only has a passive right of retention if the bailor cannot be found.

It might be argued that a judge on hearing an application for leave to sell the goods pursuant to section 9 has the implied power under section 9(3) to dispense with the notice required by section 9(1). Section 9(3) reads as follows:

> On the hearing of the application the judge may make such order as he deems just.

It is submitted, however, that notice is a condition precedent to the use of section 9(3).

Another answer to the problem might be found in section 23 of the Interpretation Act,[6] which provides that where an enactment authorizes or requires a document to be served or delivered by post, then, unless the contrary is proved, service or delivery is deemed to have been afforded at the time at which the letter would be delivered in the ordinary course of post. But section 23

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6. R.S.N.B., 1952, c. 114.

of the Interpretation Act speaks of "properly addressing" such letters. It is submitted that these words presuppose a definite knowledge of the person's whereabouts and so render the section useless in interpreting section 9(1) of the Liens on Goods and Chattels Act.

It may also be argued that the notice required by section 9(1) of the Liens on Goods and Chattels Act may be served under Order 67, rule 6 of the Rules of the Supreme Court. That rule reads as follows:

> 6. Where personal service of any writ, notice, pleading, summons, order, or other document, proceeding, or written communication is required by these Rules or otherwise, and it is made to appear to the Court or a Judge that prompt personal service cannot be effected, the Court or Judge may make such order for substituted or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just.

It is submitted, however, that if the notice required by section 9(1) could be deemed to be served under this rule, then the power to dispense with the notice required by section 5 of the Act would be superfluous. Since the Legislature should not be deemed to intend a superfluity, it would appear that there has been an intentional omission to enact an express power enabling a judge to dispense with the notice required by section 9(1)—*expressio unius, exclusio alterius.*

If, as has been suggested in the foregoing, section 9 of the Liens on Goods and Chattels Act does not provide a comprehensive power of sale for a bailee where the bailor cannot be found, then conceivably the bailee might rely on Order 50, rule 2 of the Rules of the Supreme Court to dispose of the goods. That rule reads as follows:

> The Court or a Judge, upon the application of any party, may make an order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the Court or Judge may think desirable, of any goods, wares, or merchandise which may be of a perishable nature, or likely to injure for keeping, which for any other just and sufficient reason it may be desirable to have sold at once.

The cases on the rule are few; it has been used primarily for the sale of perishable goods.[7] When it has been invoked to order the sale of non-perishable goods, the courts have held that they are empowered to order a sale irrespective of the rights of the parties,[8] but it has been noted that "The rule ought to be construed with a very tender regard to the persons in whom the legal property

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7. Note that the Liens on Goods and Chattels Act, R.S.N.B., 1952, c. 131 s. 8(2) also provides for the sale of perishable goods.

8. *Larner v. Fawcett* [1950] 2 All E.R. 727.

is vested."[9] The rule's most common use occurs in actions where neither party's interest would be adversely affected by the disposition of the goods concerned. For example, in *Bartholomew v. Freeman*,[10] the subject matter was a horse of no exceptional value that neither party wanted and whose upkeep was costly to the person seeking the order for sale. In this case, Grove, J. said:

> The case comes sufficiently within the final clause of Order LII., Rule 2. There seems "just and sufficient reason" why it may be desirable to have the animal sold at once. I certainly should not make such an order if the horse were a valuable one for which either party particularly cared. But here neither of them values it per se nor wishes to keep it.[11]

And Singleton, L. J., in *Larner v. Fawcett*,[12] said:

> . . . but, in view of (the owner's) obvious reluctance to take any step to recover the filly, I think it would be deplorable if this court . . . having the power, . . . did not exercise it.

Evans v. Davies,[13] where an order was made for the sale of shares in a limited company, indicates that the rule can be invoked for the sale of any type of chattel, provided, of course, that the circumstances of the application are sufficient to satisfy the rule.

The Annual Practice[14] cites *Dawn v. Herring*,[15] as authority for the statement that an application under Order 50, rule 2, should not be made *ex parte*. A review of several reports of that case has revealed no basis for the statement in The Annual Practice, but whether or not the statement is authoritative, it should be noted that it is merely directive, not mandatory. If it is found, however, that an application under Order 50, rule 2, cannot be made *ex parte*, then if the address or whereabouts of the bailor is unknown, a solution in accordance with *The Hercules*[16] might be available. In that case there was a motion by the plaintiff for the appraisement and sale of a vessel. The plaintiffs had begun an action *in rem* against The Hercules for damage by collision, but no appearance was made. Butt, J. said:

> I cannot grant an application to sell a foreign ship on such materials as are at present before me. But I will make the required order, subject to the plaintiff's filing an affidavit in the registry verifying their cause of action, and stating also

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9. *Dangar v. Gospel Oak Iron Co.* (1890) 6 T.R. 260, Per Denman, J. at p. 261.
10. (1878) L.R. 3 C.P. 316.
11. *Ibid.*, at p. 318.
12. [1950] 2 All E.R. 727, at p. 732.
13. [1893] 2 Ch. 216.
14. 1953 edition, at p. 877.
15. (1891) 35 S.J. 752.
16. (1886) L.R. 11 P.D. 10.

> that an appearance has not been entered on behalf of the ship.[17]

On the basis of *The Hercules* it would appear that the most certain procedure to effect a sale is to begin an action for the charges arising under section 5 of the Liens on Goods and Chattels Act,[18] and, where the address or whereabouts of the bailor is unknown, apply for an order to give notice of the writ by advertisement under Order 9, rule 2(4). Having obtained such order and having advertised in the prescribed manner, the bailee would, then, if an appearance were not made, be in a position to apply to the court pursuant to Order 50, rule 2, and if he supported his application with proper affidivits, an order for sale could be obtained.

As can be seen from the foregoing, the law regarding the power of sale of gratuitous bailees and other bailees given a lien under the Liens on Goods and Chattels Act is defective. A more serious defect, however, exists in the law regarding most bailees for hire. At common law even where money was owing a bailee in respect of the bailed goods, he had no right of sale. In certain situations, the law allowed a bailee a lien, the most common being the innkeepers' lien,[19] the common carriers' lien[20] and the lien of a person who has done work on an article.[21] But as Grose, J. explains in *Hammonds v. Barclay*[22] a lien is merely

> . . . a right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied.

It confers no right of action;[23] it is mere passive right of detention until the debt is paid, and so no claim can be made for storage or keep[24] unless, of course, there is a contract to the contrary. Although it was argued in *The Thomas Iron Works Company v. The Patent Derrick Company*[25] that such a right of retainer without a power of sale seems of little utility and renders the goods subject to the lien utterly useless to both parties, that is the common law and, except in cases of necessity, one has to rely on statutory provisions to obtain a power of sale.

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17. *Ibid.*, at p. 11.
18. R.S.N.B., 1952, c. 131.
19. *Thompson v. Lacy* (1820) 3 B. & Ald. 283; 106 E.R. 667; now codified by the Inn-Keepers Act, R.S.N.B., 1952, c. 111, s. 2.
20. *Rushforth v. Hadfield* (1805), 6 East 519; 102 E.R. 1386.
21. See, for example, *Keene v. Thomas* [1905] 1 K.B. 136; now codified by the Liens on Goods and Chattels Act, R.S.N.B., 1952, c. 131, s. 2.
22. (1802) 2 East 227, at p. 235; 102 E.R. 356, at 359.
23. *Higgins v. Scott* (1831), 2 B. & Ad. 413; 109 E.R. 1196.
24. *Spears v. Hartly* (1880) 3 Esp. 81; 170 E.R. 545.
25. (1860) 1 J. & H. 93; 70 E.R. 676.

No general provision appears in the Liens on Goods and Chattels Act or elsewhere for granting a lien to bailees for hire, let alone a power of sale. This is strange indeed since in the Liens on Goods and Chattels Act in the Revised Statutes of 1927, it was provided that

> A bailee for hire shall have a particular lien on the goods bailed to him by the owner for any charges which may be due the bailee under the bailment.[26]

Since there appears to be a higher duty imposed on a bailee for hire than on a gratuitous bailee,[27] the former would seem to be entitled to a lien more than a gratuitous bailee. Perhaps in preparing the 1952 statute[28] the draftsman felt that a bailee for hire was entitled to a lien at common law, and, consequently that the section in the 1927 Act just quoted was unnecessary. This is, however, not the law. In the absence of statute[29] no lien can be exercised in respect of things delivered but on which no work is done.[30]

It is suggested that the Liens on Goods and Chattels Act should be amended to give a comprehensive power of sale to bailees, whether gratuitous or for hire, and whether or not the bailee can be located.

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26. R.S.N.B., 1927, c. 164, s. 4 (1).
27. See *Giblin v. McMullen* (1869) L.R. 2 P.C. 317; *Cf. Wilson v. Brett* (1843) 11 M. & W. 113; 152 E.R. 737, per Rolfe, B.
28. R.S.N.B., 1952, c. 131.
29. Such as, for example, the exceptions already mentioned appearing in the Liens on Goods and Chattels Act, R.S.N.B., 1952, c. 131 and the Warehouseman's Lien Act, R.S.N.B., 1952, c. 247. The latter statute may at first sight look fairly broad but it should be noted that by s. 1 (b) its application is limited to persons engaged in the business of storage.
30. See *Hatton v. Car Maintenance Co., Ltd.* [1915] 1 Ch. 621.