UNIVERSITY OF

NEW BRUNSWICK LAW JOURNAL

VOLUME 9

1956

UNIVERSITY OF NEW BRUNSWICK

LAW JOURNAL

VOL. IX May, 1956

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Published by

THE UNIVERSITY OF NEW BRUNSWICK LAW STUDENTS' SOCIETY

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AND

MEMBERS OF THE COMMON COUNCIL

OF THE

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LAW JOURNAL

Vol. IX May, 1956

Published during the academic year
by the University of New Brunswick Law Students' Society,
Beaverbrook House, Saint John, N. B.

Advertising rates may be obtained by writing the Business Manager,
c/o Beaverbrook House, Saint John, N. B.

THE HONOURABLE WILLIAM HENRY HARRISON, D.S.O., LL.D.

Dean of the Faculty of Law 1947-1955

THE HONOURABLE WILLIAM HENRY HARRISON, D.S.O., LL.D.

Dean of the Faculty of Law 1947 — 1955

The Honourable William Henry Harrison, D.S.O., LL.D., Justice of the Supreme Court of New Brunswick and Dean of the Faculty of Law of the University of New Brunswick died on July 18th, 1955. Mr. Justice Harrison was appointed to the Deanship in 1947. He was then and until his death a member of the Court of Appeal and Chancery Division. Before and after his appointment to the Deanship he lectured on Equity and Trusts. During his tenure and under his leadership the Faculty of Law made substantial progress: the teaching staff was expanded and a splendid building, Lord Beaverbrook House, and an outstanding library were acquired.

At a special meeting of the Saint John Law Society on the occasion of Mr. Justice Harrison's death, Arthur N. Carter, Q. C., LL.D., delivered this tribute:

Mr. President and members of the Saint John Law Society:

On August 22, 1935 it was my privilege, as President of this Society, to extend to the late Mr. Justice Harrison congratulations on his appointment to the Bench. To-day, at your request, Mr. President, I express the sadness and sense of irreparable loss which we all feel in his death.

Mr. Justice Harrison by any standard was a great man: by any standard, too, he was a great citizen and a great Judge. At this gathering of lawyers it is appropriate that we recall the place he has held as a member of our Profession. And deeply attached, though he was, to a multitude of interests and causes, to each of which he gave devoted and inspiring service and leadership, the interest which held the special place in his mind and in his heart was the Law and the administration of Justice, fearless, impartial and unsullied. It would be as a Judge, respected by laymen and revered by his fellow lawyers that he would, I believe, have wished to be remembered. That wish will be realized to the full. His place as one of the great Judges of this Province is secure. He had every quality that a great Judge should have: patience and courtesy in hearing argument; quick appreciation of the value of evidence and an inevitable sense of the right application of legal principles to facts. Moreover, he was a Judge who was also a learned lawyer — of the stature of Chief Justice Barker, and Chief Justice Baxter.

Although this is not the time or the place to refer to the many facets of Mr. Justice Harrison's full life: to his whole hearted devotion to his church, to his University, and to the numerous organizations which he supported and advanced, or to his military career which was distinguished and marked by four years of active service, it is fitting,

I think, that I should refer to his keen interest in young people. For years he was a leader of the Boy Scouts; he assumed a main burden in planning and raising funds for the new Y. M. C. A. building in this City; and for some fifteen years he lectured in the subjects of Trusts and Equity, which were peculiarly his own, at the University of New Brunswick Law School. Of the Law School, too, he was Dean for the last eight years of his life. It is impossible to assess the value of such service as that; of the effect on young men in their formative years of coming into close association with a mind as alert, as well-stored, and as well-disciplined as Mr. Justice Harrison's and with a character as straightforward and as upright as his. We do know that his influence on the young men of the latter generations has been immense and immensely good. Such may well be, although intangible, his most enduring memorial.

Although we who were privileged to enjoy his friendship will recall with pride the distinction with which he graced every field of endeavour in which he engaged, we will recall more often and with sorrowful affection the warm hearted and bouyant companion, so full of keenness for the good things in life, so full of humour, and so ready to help those in trouble. Few by their life have left an example as difficult to emulate or by their death a gap as hard to fill.

> "His life was gentle, and the elements
> "So mixed in him that Nature might stand up
> "And say to all the world 'This was a man'."

The Faculty of Law of the University of New Brunswick passed this resolution:

> "WHEREAS The Honourable William Henry Harrison, D.S.O., LL.D. served as Dean of the Faculty of Law of the University of New Brunswick from 1947 to 1955 with distinction, contributing in great measure to the enhancement of its reputation and the improvement of its facilities; and
>
> WHEREAS during that period he lectured in Equity and Trusts, stimulating the thought and interest of the students and winning their abiding respect and affection; and
>
> WHEREAS he inspired the Faculty members with his initiative and scholarship and won their devotion through his understanding.
>
> NOW THEREFORE the Faculty wish to record their profound regret at the death of Dean Harrison and to express their appreciation of his services to the Faculty of Law of The University of New Brunswick and to legal education in this Province."

OPTIONS TO BUY AND LEASE LAND AND THE RULE AGAINST PERPETUITIES

Introduction

Does the rule against perpetuities apply to options to buy or lease land, and if so to what extent? If it does apply, is there any way of circumventing the rule? And what remedies, if any, are available to enforce an option that may in terms be exercised after the expiration of the perpetuity period? These are the types of questions that it is proposed to examine in this article.

The rule against perpetuities, as is well known, is one of the more recent of the many rules developed by the law to prevent property from being indefinitely tied up and removed from commerce. The rule may be simply stated by saying that a perpetuity is void *ab initio* but this is none too helpful unless an adequate definition of a perpetuity can be found. Such a definition, including all necessary aspects, is difficult to formulate, but perhaps the best is the following given by Lewis in his work on perpetuities:

> "In other words, a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest till after the expiration of, or will not necessarily vest within, the period prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation." [1]

It needs to be added that the period prescribed by the law is the period of an ascertained life or lives in being and twenty-one years, or if no lives are mentioned in the limitation, a period of twenty-one years only.[2]

The ordinary option to buy or lease land is an offer by its owner to sell or lease the land to another for a named consideration within a short period of time, usually a few months. Because of the short period during which such options are operative, the rule against perpetuities in no way affects them. An inexpertly drawn option may, however, fail to state a time limit for its operation, but apart from this there are several not uncommon uses of options that merit examination with relation to the rule. For instance, an option in terms perpetual or for an indefinite period sometimes appears in a conveyance of land

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1. Quoted with approval by Jessel, M. R., in **London and South Western Railway Company v. Gomm**, (1881-2) 20 Ch. 562, at pp. 581-2.

2. This is of course the modern rule against perpetuities finally settled by the House of Lords in **Cadell v. Palmer**, (1833) 1 Cl. & F. 372; 6 E. R. 956; the old rule against perpetuities is now usually referred to as the rule in **Whitby v. Mitchell**, (1890) 44 Ch. 85; in this article, therefore, the modern rule is simply called the rule against perpetuities.

where the grantor desires to restrain the purchaser from alienating the land or to retain the power of getting the land back at a future time if he chooses to do so. More commonly an option that may operate at a time beyond the perpetuity period appears in a lease. Options for renewal in long term leases and perpetual renewal clauses immediately come to mind in this connection. Less frequently, but by no means rarely, one of the clauses of a long term lease will give the lessee the option to purchase the freehold during the term of the lease or a renewal thereof. This last type of option may take the form of an offer to sell for a named consideration or a consideration based on market value where the lessor has no objection to selling for such a consideration. It will take the form of a right of pre-emption where the lessor does not wish to be bound to sell for a named consideration, or at all, but the lessee is desirous of having the first opportunity of buying if the lessor ever seeks to sell.

In examining the effect of the rule against perpetuities on an option, different matters will have to be taken into account according to the nature of the rights sought to be given under the option and the document in which it is found. Thus different questions have arisen in this connection in relation to options intended to create contractual obligations only and options intended to run with land only and those with both these ends in view. Further, options in leases give rise to special problems that merit separate consideration. For these reasons it has been found convenient to deal with the subject under the following headings:

(a) Options creating contractual obligations only;
(b) Options purporting to bind the land;
(c) Options purporting to create contractual obligations and also to bind the land;
(d) Options in leases.

Options Creating Contractual Obligations Only

It is settled law that the rule against perpetuities is concerned with property, not with contract.[3] A contract giving rights upon the occurrence of a contingent event that may arise after the expiration of the perpetuity period will be upheld even when the contract relates to property.[4] An optionee may, therefore, obtain specific performance of an option created by a contract so long as the optionor retains the land, notwithstanding that the option may in terms be capable of operating at a remote time .[5] And damages for breach of contract may in any case be awarded if the optionor is unwilling or unable to fulfill

3. **Walsh v. Secretary of State for India,** (1863) 10 H. L. C. 367; 11 E. R. 1068; **Witham v. Vane,** (1883) Challis on Real Property, 2nd Ed., App. V. p. 401.

4. **Witham v. Vane,** (1883) Challis on Real Property, 2nd Ed., App. V. p. 401; **London and South Western Railway Company v. Gomm,** (1881-2) Ch. 562 per Kay, J., at p. 575 and Jessel, M. R., at p. 580; **Worthing Corporation v. Heather,** [1906] 2 Ch. 532; **Hutton v. Watling,** [1948] Ch. 26.

5. **Hutton v. Watling,** [1948] Ch. 26.

his obligations under the option.[6] Further, it was held in one case that an optionee could obtain an injunction against a third party who interfered with his rights under a long term contract giving him a right of "first refusal."[7] It is submitted also that a person knowingly interfering with such an option might lay himself open to an action in tort for inducing a breach of contract notwithstanding the fact that rights under it might be exercised at a remote time.

It can be seen, then, that an optionee has many remedies available to him to enforce long term options created by contract. What is more, these contractual rights may, it is submitted, be assigned voluntarily in the same way as other contractual rights and involuntarily by death or bankruptcy. And they may be enforced not only against the optionor himself but also against his personal representatives and beneficiaries[8] and his trustees in bankruptcy.[9]

But notwithstanding the existence of these many remedies, the fact remains that once an optionor has disposed of land subject to an option that is a mere contract, the optionee loses his right to have the land conveyed to him and must content himself with an action for damages. It is usual, therefore, to insert a clause for the purpose of making the option bind the land, and it is to options intended to bind the land that we must now turn our attention.

Options Purporting to Bind the Land

An option to purchase or lease land for a named consideration may, if it is framed so as to enure to the benefit of, and to be binding upon the heirs, successors and assigns of the parties, amount to an interest in land, and that interest is subject to the rule against perpetuities. The leading case on this point is *London and South Western Railway Company v. Gomm*,[10] the facts of which, in so far as they are relevant here, are as follows. By deed dated August 10, 1865, the plaintiff company conveyed lands no longer needed by it to one, Powell, for a consideration of £100, and Powell covenanted with the company that he, his heirs or assigns would, at any time thereafter when the lands might be required by the company for its railway works and whenever so requested by the company and on receiving £100, reconvey the land to the company. In 1879 the defendant purchased the land from Powell with notice of the covenant. The following year the company gave the defendant notice to reconvey the land pursuant to the covenant, and upon his refusal to do so, brought an action for specific performance of the covenant. Kay, J., who heard the case, held that the option did not amount to an interest in land so the rule against perpetuities had no application, and he

6. **Worthing Corporation v. Heather,** [1906] 2 Ch. 532.
7. **Manchester Ship Canal Company v. Manchester Racecourse Company,** [1901] 2 Ch. 37, at p. 51.
8. **Worthing Corporation v. Heather,** [1906] 2 Ch. 532.
9. **Borland's Trustee v. Steel Brothers & Co., Limited,** [1901] 1 Ch. 279.
10. (1881-2) 20 Ch. 562.

decreed specific performance on a ground that will be discussed later. The Court of Appeal (Jessel, M.R., Sir James Hannen and Lindley, L. J.) reversed Kay J.'s ruling on this question. Jessel, M. R., had this to say:

> "If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present Appellant can be bound. He did not enter the contract, but is only a purchaser from *Powell* who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.
>
> It appears to me therefore that this covenant plainly gives the company an interest in the land, and as regards remoteness there is no distinction that I know of (unless the case falls within one of the recognized exceptions, such as charities) between one kind of equitable interest and another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period."[11]

So too, an option in a conveyance giving the heirs of the grantor an option of obtaining a lease of part of the land conveyed after the expiration of a ninety-nine year lease has been held void for remoteness.[12]

The cases respecting the right of pre-emption are not so straightforward. Thus Fry, J., in *Birmingham Canal Company v. Cartwright*[13] thought the rule was inapplicable because it was possible for all the parties interested in the land to dispose of it absolutely, but this reasoning was rejected in the *Gomm* case and Fry, J.'s judgment overruled.[14] In *Manchester Ship Canal Company v. Manchester Racecourse* Company,[15] Farwell, J., interpreted an inartistically framed right of "first refusal" purporting to be binding on the heirs and assigns of the parties that appeared in a contract validated by statute

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11. **Ibid.**, at pp. 580-1.
12. **Hope v. The Mayor, Aldermen and Citizens of the City of Gloucester, (1855) 7 De G., M. &. G. 647; 44 E. R. 252.**
13. **(1879) 11 Ch. 421, at pp. 432-3.**
14. **(1881-2) 20 Ch. 562, at pp. 572-3, 582 and 588.**
15. **[1900] 2 Ch. 352; [1901] 2 Ch. 37.**

as a right of pre-emption, which he believed fell within the reasoning of the *Gomm* case and therefore amounted to an interest in land,[16] but the Court of Appeal (Rigby, Vaughan Williams and Stirling, L.JJ.) did not think this right of first refusal was an interest in land.[17] Subsequently, it was held by Sutherland, J., in an Ontario case, *United Fuel Supply Co. v. Volcanic Oil and Gas Co.*,[18] that a perpetual right of pre-emption to a *profit a prendre* was an interest in land but was void because of its perpetual nature.

It is submitted that the decision in the *Volcanic* case correctly expresses the law; that the right of pre-emption is an interest in land and that interest is subject to the rule against perpetuities. Any other view would demand that one draw a distinction between an ordinary option and a right of pre-emption or question the correctness of the *Gomm* case and the many cases that have followed it. Though the events bringing the rights into operation are somewhat different, there appears to be no valid reason for considering options and rights of pre-emption as interests of a different nature. And it seems inconceivable that a long established case like the *Gomm* case, decided as it was by a strong court, should ever be overruled, especially since it meets a commercial need.[19] Had the court in the *Manchester Canal* case intended to cast doubt upon such an important decision, it would, it is suggested, have done so in unmistakeable terms. The remark in the *Manchester Canal* case must be regarded in the light of the peculiar facts of the case, which turned upon the construction of a contract that the court might well have held void for uncertainty had it not been declared by statute "to be valid and binding upon the parties thereto."

In an effort to validate the option in the *Gomm* case notwithstanding the perpetuity rule, Kay, J., had interpreted it as a covenant running with the land under the doctrine set forth in *Tulk v. Moxhay*,[20] and decreed specific performance of the option on that ground, but his judgment was set aside by the Court of Appeal on the ground that the doctrine applies to restrictive, not positive, covenants. The reasoning of the Court of Appeal does not appear to extend to the right of pre-emption, which is in substance a negative contract.[21] The right of pre-emption would, however, appear to fall outside the doctrine in *Tulk v. Moxhay* for another reason. In *Noble and Wolf*

16. [1900] 2 Ch. 352, at pp. 363, 366.

17. [1901] 2 Ch. 37, at p. 50.

18. (1911-2) 3 O. W. N. 93; see also **Rutherford v. Rispin**, [1926] 4 D. L. R. 822; 59 O. L. R. 506.

19. Some writers have questioned whether an option is an interest in land; the question has been discussed in (1895) 39 Sol. J. 618; (1896) 15 C. L. T. 218; (1898) 42 Sol. J. 628; (1915) 35 C. L. T. 798; (1916) 36 C. L. T. 446; (1918) 38 C. L. T. 242, 322; but none have questioned that if it is an interest in land, the rule against perpetuities applies to it. An option does not appear to be an interest in land in the United States but the courts have found other remedies to prevent third parties from acquiring rights to land subject to an option: 66 C. J. 406-7, 493-4.

20. (1848) 2 Ph. 774; 41 E. R. 1143.

21. See **Manchester Ship Canal Company v. Manchester Racecourse Company**, [1901] 2 Ch. 37, where a right of first refusal was held to be a negative contract.

v. Alley et al,[22] the Supreme Court of Canada held that the doctrine is concerned with user of land, not with alienation.

One other question that may possibly be raised is whether an option might not, in a proper case, be considered as a vendor-purchaser covenant, the benefit of which (though not the burden) runs with the land, for these covenants are not affected by the rule against perpetuities.[23] But in the rare case where such a contention could be made, it is suggested that it could be successfully resisted, if the reasoning in connection with related doctrines may be applied here, on the ground that an option does not "touch and concern the land."[24]

Options Purporting to Create Contractual Obligations and also to Bind the Land

We have seen that the rule against perpetuities applies to options purporting to bind the land but not to options that are enforceable merely as contracts. Now some options are contracts only, and not interests in land, and some options that are interests in land arise under transactions other than contracts, such as, for instance, wills. But most options by far are interests in land that are the creatures of contracts. It remains to be seen, then, whether options that are void as interests in land may not be enforced by means of contractual remedies. In dealing with this problem, the judges have found themselves faced with two separate difficulties. One was that they were accustomed to view the law of land and the law of contracts as logic-tight compartments, a counterpart of the view taken of the law of contract and the law of torts before *Donoghue v. Stevenson*.[25] The second difficulty is that in enforcing a contract that creates an option that is obnoxious to the perpetuity rule, the courts appear to be enforcing indirectly an interest that they have declared void.

Dicta in some earlier cases would lead to the belief that contractual remedies are unavailable to enforce options that amount to interests in land that are void for remoteness. Thus Kay, J., in the *Gomm* case, apparently affected by the first of the difficulties mentioned in the last paragraph, found it necessary to decide that the option in that case was not an interest in land before he would decree specific performance of it.[26] And Warrington, J., in *Woodall v. Clifton*,[27] makes remarks that might lead to a similar conclusion. The matter came up for decision in the case of *Worthing Corporation v. Heather*.[28] In that case an action was brought against the estate of

22. [1951] 1 D.L.R. 321.
23. **Per Brougham, L. C., in Keppell v. Bailey, (1834) 2 My. & K. 517, at p. 578; 39 E. R. 1042, at p. 1046.**
24. **Noble and Wolf v. Alley, [1951] 1 D. L. R. 321 as to restrictive covenants; Woodall v. Clifton, [1905] 2 Ch. 257 as to covenants in leases.**
25. [1932] A. C. 562.
26. **London and South Western Railway Company v. Gomm, (1881-2) 20 Ch. 562 at pp. 575 - 6.**
27. [1905] 2 Ch. 257, at p. 261.
28. [1906] 2 Ch. 532.

an optionor for specific performance of an option providing that at any time during the currency of a thirty year lease, the optionor, her heirs or assigns would, on receiving notice of the plaintiffs' desire to purchase the land subject to the lease, convey the land to them for £1325. The plaintiffs further prayed that if specific performance could not be granted, damages should be given. During the course of the argument, the plaintiffs admitted that since the option created an interest in land that was void for perpetuities, specific performance could not be granted, but they persisted in their demand for damages for breach of contract. The defendants argued that the option was not a mere personal contract but gave an interest in land that was void under the rule against perpetuities. The rule, they contended, was based on public policy and a contract opposed to public policy was illegal. If therefore the court enforced the interest indirectly by awarding damages it would, they averred, be giving effect to an illegal contract. Warrington, J., who heard the case, stated that the *Gomm* case and *Woodall v. Clifton* showed that specific performance could not be given, as was admitted by the plaintiffs, and confined his judgment largely to the action for breach of contract. That action, he believed, could not be defeated on the ground of illegality. It was only the equitable interest in land that was void. This prevented the enforcement of the option by the supplementary remedies evolved by equity to give effect to equitable interests, but there was nothing to compel the court to consider the option merely as creating an equitable interest. In enforcing the contract, a court of law was not doing indirectly what it would not do directly; the defendants were not compelled to convey the land though they might find it advantageous to do so. The judge therefore awarded damages for breach of contract.

The decision to award damages in *Worthing Corporation v. Heather* did not escape criticism,[29] but without going into the technicalities of the problem it may be said that it is one thing for the law to devise rules preventing the tying up of property in perpetuity but it is quite another for it to become a destroyer of bargains. Further, a contract such as that which existed in *Witham v. Vane*,[30] though not creating an interest in land, would certainly inhibit alienation but it was enforced by the House of Lords. Why should the law treat the matter differently on the technical ground that an interest in land is created?

Warrington, J's view, based on an admission of counsel, that specific performance of an option that offended the rule against perpetuities would not be given, even as between the original parties or their representatives, was not questioned for many years. Objection to this view might well have been taken in *Rider v. Ford*,[31] in 1923 but counsel conceded the point. That such a concession should have been

29. See (1907) 51 Sol. J. 648, 669; (1909) 29 C.L.T. 759; Cheshire's Modern Real Property, (1944) 5th Ed., p. 492.

30. (1883) Challis on Real Property, 2nd Ed., App. V, p. 401.

31. [1923] 1 Ch. 541.

made is surprising in the light of the decision in *South East Railway v. Associated Portland Cement Manufacturers Limited*,[32] decided in 1909. That case, it is true, was not concerned with options but the reasoning upon which it proceeded was clearly applicable. The right in question was one to make a tunnel through the plaintiff company's land at a time to be selected by the grantee. This right is capable of being considered as an easement and was so regarded by the trial judge, Swinfen-Eady, J., but his judgment as well as those of the Court of Appeal (Cozens Hardy, M. R., Fletcher Moulton and Farwell, L.JJ.) also proceeded on the basis that the right was a future interest. All the judges were agreed that the rule against perpetuities has nothing to do with an action based on a contract between the original parties, but applied only when the action was based on an interest in land. We may quote here from the judgment of Farwell, J. Having first stated that "It is settled beyond argument that an agreement merely personal not creating an interest in land is not within the rule against perpetuities," he later continued:

> "But the fact that there is some connection with or reference to land does not make a personal contract by A. less a personal contract binding on him, with all the remedies arising thereout, unless the Court can by construction turn it from a personal contract into a limitation of land, *and a limitation of land only*. As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant.
>
> The real answer to the argument founded on the inconvenience of tying up land is that the action upon the covenant sounds in damages only unless the defendant has still got the land to which the covenant relates. If he has still the land, then in an action on the covenant the plaintiff may claim specific performance . . . . ."[33]

The application to options of the principles enunciated in the *Portland Cement* case came up for consideration in 1947 in *Hutton v. Watling*.[34] In that case the original optionee brought action against the original optionor to enforce an option that was perpetual in terms. The optionor pleaded, *inter alia*, the rule against perpetuities, and on this occasion there was no admission by the plaintiff that the rule prevented him from obtaining specific performance. The agreement was rather poorly drawn up and it is difficult to say whether the option was intended to be a personal obligation only or to create an interest in land. But Jenkins, J., who heard the case, found it unnecessary to express any opinion on this point. He was bound, he said, by the *Portland Cement* case and held the option specifically enforceable whether or not it created an interest in land. Here, in part, is what he said:

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32. [1910] 1 Ch. 12.
33. Ibid., at pp. 33-4; (italics mine).
34. [1948] Ch. 26.

> "The *Associated Portland Cement Manufacturers* case therefore, appears to me to provide clear authority, which is, of course, binding on me, to the effect that an option to purchase land without limit as regards time is specifically enforceable as a matter of personal contract against the original grantor of the option, and that the rule against perpetuities has no relevance to such a case, as distinct from a case in which such an option is sought to be enforced against some successor in title of the original grantor, not by virtue of any contractual obligation on the part of the successor in title, but by virtue of the equitable interest in land conferred on the grantee by the option agreement."[35]

Then having referred to doubts regarding the principles upon which he was acting in certain well known textbooks,[36] he explained the basis upon which specific performance could be given in such a case in clear terms, as follows:

> "These doubts appear to me to be ill founded, as I understand the jurisdiction to grant specific performance of a contract for the sale of land to be founded not on the equitable interest in the land which the contract is regarded as conferring upon the purchaser, but on the simple ground that damages will not afford an adequate remedy; in other words, specific performance is merely an equitable mode of enforcing a personal obligation with which the rule against perpetuities has nothing to do."[37]

It has now been decided, therefore, that as between the original parties specific performance or damages may be given of an option in a contract that amounts to an interest in land that is obnoxious to the rule against perpetuities, unless it appears that the option was intended to confer an interest in land only. Such an intent, it is suggested, would have to be clearly shown to resist an action on this ground, for most options created by contract are certainly intended to bind the original parties personally. Nor should it be forgotten that third parties may to a considerable extent partake of the benefits of contractual remedies by virtue of assignments, powers of attorney and other devices, not to mention death or bankruptcy. And to a lesser extent too, the burden of an option may fall to be performed by a person other than the original party, as occurred in *Worthing Corporation v. Heather* where damages were awarded against the executor and devisees of the original party.

The advantages of options that are interests in land over options that are contracts are that the right to have them specifically enforced is not so perishable and they are more easily assignable. The advantage of the option as a contract is that it is not limited as to time. The advantage of the contract over the interest may not be unimportant where both parties, or at least the optionor, are corporations, for the

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35. **Ibid.**, at pp. 35 - 6.
36. Williams on Vendors and Purchasers, 4th Ed., p. 424, n. (1); Gray on Perpetuities, 4th Ed., pp. 366-7.
37. [1948] Ch. 26, at p. 36; it is interesting to note that the case was appealed but not on this point: [1948] Ch. 398, at p. 400; for criticisms of the case, see (1948) 12 Conveyancer (N. S.) 258.

optionor may continue in being and be capable of being sued long after the expiration of the perpetuity period. In such a case, it should be possible to have the benefit of an interest in land for as long as the perpetuity period will allow and the benefit of the contractual remedies in perpetuity. This can be done by an agreement giving in one clause an option to the land binding on the parties, their heirs and assigns for the period of a named life or lives in being and twenty-one years, and in another clause, not expressed to be binding on the heirs and assigns, giving a perpetual option to the land not sold under the previous clause. Such an agreement will go a long way towards circumventing the rule, and more can perhaps be done by contracts calling for options that are interests in land to be given from time to time.[38]

Options in Leases

As was said above, there are a number of matters peculiar to options in leases that merit separate consideration. One of these concerns the option for renewal, which is, of course, the option most commonly found in leases. Though, as we have seen, an independent option to obtain a lease is subject to the rule against perpetuities, the option for renewal in a lease has long been treated as an exception to the rule.[39] This is so even when the option is one for perpetual renewal,[40] though the courts will lean against construing such an option as perpetual.[41] And the renewal called for need not be in the same terms as the original lease for the exception to apply,[42] but it must actually be a renewal — the exception will not be extended to closely related cases,[43] though the fact that the language used is not that of a renewal will not prevent an option from falling within the exception if it is truly a renewal.[44] Some attempt has been made to find a reason in principle for the exception by saying that the renewal forms part of the original estate of the tenant but the true reason for the exception appears to be that it was developed long before the perpetuity rule.[45]

In addition to an option for renewal, it is not uncommon, as was mentioned before, for an option to purchase the freehold to be inserted in a lease. Where the lease is for a term of over twenty-one years, the possible conflict of the option with the rule against perpe

38. Such devices would not appear to constitute void restraints on alienation if they do not immediately create interests in land; as early as Coke it was said: "If the feofee be bound in bond, that the feofee or his heiress shall not alien, this is good for he may notwithstanding alien if he will forfeit his bond that he himself hath made." Co Litt. 206b; see, however, T. Cyprian Williams in (1907) 51 Sol. J. 648. 669.

39 **Furnival v. Crew**, (1744) 3 Atk. 83; 26 E.R. 851;**Woodall v. Clifton**, (1905) 2 Ch. 257.

40. **Bridges v. Hitchcock**, (1715) 5 Bro. P. C. 6; 2 E.R. 498.

41. **Baynham v. Guy's Hospital**, (1796) 3 Ves. 295; 30 E.R. 1019.

42. **Rider v. Ford**, [1923] 1 Ch. 541.

43. **Muller v. Trafford**, [1901] 1 Ch. 54.

44. **Rider v. Ford**, [1923] 1 Ch. 541.

45. See **Muller v. Trafford**, [1901] 1 Ch. 54, at p. 61; **Woodall v. Clifton**, [1905] 2 Ch. 251, at pp. 265, 279.

tuities is immediately apparent. Such a situation arose in *Woodall v. Clifton*.[46] There a lease for ninety-nine years contained a proviso that if the lessee, his heirs or assigns should at any time during the term be desirous of purchasing the fee simple of the land or any part thereof at the rate of £500 per acre, the lessor, his heirs or assigns would, on receipt of the purchase money, execute a conveyance of the land in favour of the lessee, his heirs and assigns. The plaintiff, an assignee of the original lessee, claimed the benefit of the option. There were two possible grounds on which he could do this. One was that the option amounted to an interest in land, but the trial judge, Warrington, J., (and apparently the Court of Appeal also—Romer, Vaughan Williams and Stirling, L.JJ.) had no difficulty in rejecting the plaintiff's claim on this ground; following the *Gomm* case he held that the option was obnoxious to the rule against perpetuities and so void. The second ground upon which the plaintiff sought to justify his claim is one that is peculiar to leases; this ground was that the option was a covenant running with the land by virtue of the statute 32 Henry VIII, Cap. 32, and to support this contention cases dealing with options for renewal were cited. To this Warrington, J., said that whether or not the option was a covenant running with the land, the rule against perpetuities applied to it. The Court of Appeal's reason for rejecting the contention was that the option was not a covenant running with the land under the statute,[47] and it treated the rule respecting covenants for renewal, as Warrington, J., had done in the court below, as an anomaly.

The application of the rule against perpetuities to options in leases, where the term alone does not exceed the perpetuity period but the term if continued may, poses somewhat subtle problems. In the first place, if nothing is said in a lease about renewal and a tenant stays on the land after the expiration of the term, a tenancy from year to year, from month to month or from week to week is created which may last forever unless terminated by the parties. This straightforward situation will not cause difficulty so far as perpetuities are concerned because it has been held that an option to purchase is collateral to the relationship of landlord and tenant and will not be incorporated as part of a tenancy from year to year created by the tenant's holding over after the expiration of the original term.[48] The option may, however, be so worded as to operate not only during the term but also during any continuation thereof. A situation of this kind arose in *Auld v. Scales*,[49] decided in 1947 by the Supreme Court of Canada. There the tenancy from year to year arose under an express provision in the lease but this in no way affects the principle upon which the case was decided. The relevant facts for our purposes are as follows. A lease, dated August 1, 1926, by which the lessor leased land to the lessee for a term of ten years "provided . . . that at

46. [1905] 2 Ch. 257; see also Tormey v. The King, [1930] Ex. C.R. 178.
47. In the United States an option to purchase in a lease has been held to run with the land: 35 C.J. 1039; in England and in this country Woodall v. Clifton has generally been approved; see, however, (1911) 31 C. L. T. 367.
48. Re Leeds and Batley Breweries, and Bradbury's Lease, Bradbury v. Grimble, [1920] 2 Ch. 548; Tormey v. The King, [1930] Ex. C.R. 178.
49. [1947] S. C. R. 543.

the expiration of the ten year term . . . this demise and everything herein shall at the option of the . . . lessee continue as a demise . . . from year to year . . . at the same . . . rent . . . and subject to the same terms and conditions." The lease also contained a clause giving the lessee an option to purchase the freehold "at all times during the continuance of the . . . term or the continuation thereof . . ." The Court held that after the expiration of the ten year term the lease was one from year to year which could be terminated at any time by the lessor, and that the rule against perpetuities has no application to such a case. The following passage from the judgment of Kellock, J., (giving the judgment of himself, Chief Justice Rinfret and Taschereau, J.) sets out the reasoning of the court respecting the question of perpetuities:

> "It is next contended that the terms of the lease with respect to the option offend the rule against perpetuities as the option, like all other terms of the lease, 'shall respectively enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators and assigns, respectively.'
>
> . . . . . .
>
> "It is said on behalf of the respondent that a tenancy from year to year, unless terminated by notice, is capable of going on indefinitely, and that consequently, as the period of time which was set for the operation of the option here in question was entirely indefinite it is void."

The learned judge then noted Jessel, M. R.'s approval in the *Gomm* case of the definition of a perpetuity given at the beginning of this article, and after quoting that definition with the following words italicized: "and which is not destructible by the persons for the time being entitled to the property subject to the future limitation," he continued:

> "Applying the above to the case at bar, it is clear in my opinion, that the option to purchase does not offend against the rule. 'The person for the time being entitled to the property subject to the future limitation,' namely, the respondent as owner, may destroy the option by terminating the lease by due notice in accordance with the relevant law without 'the concurrence of the individual interested under that limitation,' namely, the appellant or those claiming under him."[50]

Rand and Estey, JJ., gave similar opinions on this point.

Thusfar in our examination of the effect of the perpetuity rule on an option to purchase contained in a lease where the tenancy continues after the expiration of the term, we have focussed our attention mainly on the situation where the tenancy continues by virtue of the tenant's holding over after the expiration of the term. We must now take a closer look at the situation where the tenancy continues by virtue of a covenant for renewal. The option or the renewal clause may, of course, be so worded that the option operates only during the

50. Ibid., at p. 549.

original term.[51] But what of the case where an option that is an interest in land or a renewal clause is so worded that the option is to continue during the renewal or renewals? Authority on the question seems lacking and it raises problems that are both numerous and complex. The following remarks are, therefore, intended rather to indicate some of these problems and a few of the avenues that must be explored in attempting to solve them than to suggest any definite conclusions. Different considerations may possibly apply to the case where the option is expressed to continue during the term and its renewal than to the case where the option is expressed to continue during the term only but the scope of the renewal clause is such that it includes the option. Far more may depend upon the nature of the renewal clause. That clause may come into operation at the option of the lessor or the lessee,[52] or either or both of them; or it may call for automatic renewal of the lease unless one or other of the parties gives a notice of termination. Each of these situations may give rise to different problems, but one of the crucial matters, it is suggested, is whether or not the renewal clause can operate without the concurrence of the lessor. If such concurrence is necessary, a strong argument can be made that the rule against perpetuities is not infringed because the lessor has it within his power to prevent the option from operating for longer than the perpetuity period. The situation is not exactly parallel to that in *Auld v. Scales*. In that case the facts were, and the Supreme Court of Canada based its decision on the ground that the lessor had the power to cancel the lease and thereby revoke the option at any time, whereas here the lessor has but one opportunity to cancel the option — at the expiration of the original term. But it should be noted that in *Auld v. Scales* there was a period during which the option would be operative without the consent of the lessor, namely, the period between the issuance of a notice of termination and the time when it took effect. If, on the other hand, the renewal clause may operate without the concurrence of the lessor and the original term when added to the renewed term or terms together exceed the perpetuity period, it can certainly be argued, in the words of the definition of a perpetuity above given, that this is from the beginning "a future limitation . . . which will not necessarily vest within the period . . ., and which is not destructible by the persons for the time being entitled to the property subject to the limitation, except with the concurrence of the individual interested under the limitation," and is therefore void. But against this, may it not be contended, especially where the option is expressed to run for the term only, that the renewal clause can only be enforced in so far as the option is

51. Some **dicta in Sherwood v. Tucker, [1924] 2 Ch. 440, at pp. 444, 447** seem to suggest that an option to purchase, being collateral to the relationship of landlord and tenant, the renewal would have to clearly indicate its inclusion to make it a clause of the new tenancy; the case dealt with an independent agreement to extend the lease, not a renewal clause.

52. **And in this connection it should be remembered that if the renewal clause does not state at whose option it is exercisable, it is at the option of the lessee: Lewis v. Stephenson, [1898] 67 L. J. (Q.B.) 296.**

concerned (such option being collateral to the relationship of landlord and tenant) as a contract, and that, therefore, the option is a valid interest in land during the term and the renewal clause a mere contractual right to give a new option that is an interest in land at the expiration of the original term?

The answers to questions such as those set forth in the preceding paragraph will, in a proper case, tax the ingenuity of counsel and judges. But the problem facing the solicitor may be not so much to find answers to these questions as to devise means of preventing them from arising. A practical solution to most cases that are likely to arise may be found by providing that the option is to continue during the term of the lease and its renewal unless that exceeds the period of a named life or lives in being and twenty-one years, in which case the option is to continue during the period of that life or lives in being and twenty-one years. Such a limitation cannot be void for exceeding the perpetuity period, yet the lessor will be certain that the option will not be exercisable after the termination of the tenancy. This device will not afford a complete solution if the option is contained in a lease for a very long term or one that is perpetually renewable, but the existence of an option in such a lease seems unlikely to arise in practice. If it ever did, other means to re-enforce the limitation could be found, such as, for instance, a clause creating a contractual obligation upon the lessor to give new options from time to time enuring to the benefit of and binding upon the parties, their heirs and assigns.

Summary

An option to purchase or lease land or a right of pre-emption to land may be simply a contract, in which case the rule against perpetuities has no application to it. On the other hand, an option to purchase or lease land may create an equitable interest in land which vests on the exercise of the option and upon payment of the purchase price therein set out. The right of pre-emption would appear capable of creating a similar interest, though the optionee can only call for a conveyance when the optionor is willing to sell at a given price to a third party. To an interest in land so created, the rule against perpetuities applies, and therefore if the option is capable of being exercised after the expiration of the perpetuity period, it is void *ab initio* as an interest in land. But its invalidity as an interest in land will not interfere with its enforceability by means of contractual remedies if it is, as is usually the case, a contract also. And by a judicious use in an agreement of clauses creating interests in land and clauses creating contractual obligations only, a solicitor can do much to avoid the rigours of the rule.

An option, it appears, will not be construed as a covenant running with the land either at law or in equity, so no evasion of the rule against perpetuities is possible by this means. There is one exception to this. An option in a lease for the renewal of the term runs with

the land and may be exercised, notwithstanding that its operation may be postponed to a remote period, by assignees of the lessee against assignees of the lessor, and this is so even if such option is one for perpetual renewal. This exception will not be extended and does not apply to options to purchase the freehold that are frequently found in leases. In practice, it is usually possible to prevent conflict with the rule by limiting the operation of such options to purchase for the lesser of two alternative periods, one being the term of the lease (and its renewal or renewals if applicable) and the other a period allowed by the rule. Simply because a tenancy may continue as one from year to year after the expiration of a lease will not cause an option to purchase contained in the lease to be void for perpetuities even if the option is intended to continue during such tenancy. More difficult problems will arise when, by virtue of a renewal clause in a lease containing an option to purchase, a new term or terms may be created which with the original term may continue for a period longer than is allowed by the rule. Without hazarding a guess as to what the solution to any of these problems may be, it is submitted that much may depend on whether or not the renewal may be exercised without the concurrence of the lessor.[53]

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53. Since this article was written **Re Albay Realty Limited and Dufferin-Lawrence Developments Limited** has been reported: [1956] 2 D.L.R. 604: [1956] O. W. N. 302. In that case, Gale, J., held in an oral judgment in the Ontario High Court that a right of first refusal, unlimited in time, was invalid as between assignees of the original parties. The decision is undoubtedly correct but the reasons for judgment are rather confusing. For instance, after holding that the right was a personal one, the learned judge continues by saying that in addition it offended the rule against perpetuities. He may, however, have meant that if he was mistaken in holding that the right was a personal one, then it was void as offending the rule. The case gives some support for views expressed in the article relating to vendor-purchaser covenants and the assignability of options that are contracts only.

This article attempts to state the law, not to criticize it; for weighty criticisms and suggestions for reform, see W. Barton Leach, "Perpetuities: Staying the Slaughter of the Innocents" in (1952) 68 L.Q.R. 35 at pp. 53-55 and 59.

THE MID-WINTER MEETING OF THE NEW BRUNSWICK MEMBERS OF THE CANADIAN BAR ASSOCIATION

The New Brunswick members of the Canadian Bar Association held a mid-winter meeting in Fredericton on February twenty-fourth and twenty-fifth, 1956. The organizing committee consisted of H. A. Hanson, Q.C., W. G. Stewart, Q.C., and E. N. McKelvey. There was a large, enthusiastic attendance. The decision to hold a similar meeting next year in Saint John, taken at the closing business session presided over by Adrian B. Gilbert, Q.C., New Brunswick Vice-President of the Association, is evidence of the success of the gathering.

Discussion at the conference was organized in sections. On Friday evening, the twenty-fourth, the Insurance, Commercial Law and Administration of Civil Justice sub-sections met; Saturday morning there were meetings of the Administration of Criminal Justice, Labour Relations, Taxation, Civil Liberties and Junior Bar sub-sections. In the afternoon a symposium on current legal problems was held. A dinner Saturday evening was addressed by Mr. Justice Charles T. Jones of the Supreme Court of New Brunswick; R. D. Mitton, Q.C., President of the Barristers' Society of New Brunswick presided.

Meetings of the sub-sections took various forms. In the Insurance section, a panel of lawyers under the chairmanship of Donald M. Gillis answered a list of questions on practical insurance problems. This subsection also passed resolutions supporting an amendment to section 104 of the Bankruptcy Act, proposed last year by the Ontario sub-section, to extend to a person with a claim against a bankrupt in respect of which the bankrupt is indemnified by any form of liability insurance the same right to have the proceeds of the policy applied to his claim as a claimant now has where the bankrupt is covered by a motor vehicle liability policy; suggesting that the Council of the Barristers' Society consider recommending to the Attorney General an amendment to the Insurance Act to insert a section similar to section 93 of the Ontario Act: this change would extend to judgment creditors of persons covered by any form of liability insurance a remedy against the insurer comparable to that provided by section 211 against the motor vehicle liability insurer; and requesting the Insurance Law Section of the Canadian Bar Association to consider the desirability of raising the standard minimum limits of motor vehicle liability insurance to $10,000 and $20,000 for personal injuries and $3,000 for property damage. The Taxation subsection also had a panel discussion. This was chaired by M. Gerald Teed, Q.C., and the participants were C. J. A. Hughes, Q.C., H. A. Hanson, Q.C., Wallace D. Macaulay, Thomas L. McGloan and Thomas B. Drummie. "The Diverting History of John B. Stubborn—a Reluctant Taxpayer" was discussed: a detailed narrative had been distributed on registration. The Administration of Civil Justice sub-section also used the panel technique. Chaired by J. P. Palmer, F. Dodd Tweedie, Q.C., W. G. Stewart, Q.C., W. A. Gibbon and David M. Dickson examined

the interim report of the New Brunswick Barristers' Society Committee on the Administration of Justice.

Other sub-sections centered discussion, in which all present were asked to share, around pre-announced topics. The Commercial Law sub-section considered zoning problems under the chairmanship of J. Edward Murphy, Q.C. The Administration of Criminal Justice Sub-section of which John T. Carvell is chairman dealt with a proposal for payment to barristers on appeals for indigents convicted of capital offences; abolition of the right of prosecutors to stand jurors aside, giving them the same privilege of peremptory challenge as is available to the accused; amendment of the Criminal Code to make a magistrate who has drafted a charge or information incompetent to sit on the hearing, and to empower clerks of the peace and Crown prosecutors to swear informations; and an amendment to provide for discharge of the accused on a "not proven" verdict if eight jurors agree on a "not guilty" verdict. The meeting of the Labour Relations sub-section at which David M. Dickson presided examined the rights and responsibilities of trade unions, while the Civil Liberties sub-section chaired by William A. Gibbon discussed legislation to provide for judicial review of administrative decisions. A well attended meeting of the Junior Bar sub-section decided to invite junior barristers of the Maritime Provinces to a joint convention this autumn; C. T. Gilbert was chairman.

Saturday afternoon the New Brunswick sub-section on Legal Education and Training and the Faculty of Law of the University of New Brunswick sponsored a symposium on current developments in the law. Talks were given by J. Paul Barry, Q.C., Norwood Carter, D. M. Gillis, and W. F. Ryan. The purpose of the symposium was not to present technical papers based on extensive research; it was rather to bring to the attention of the busy practitioner in a somewhat informal way recent cases and statutes in selected areas of the law which might be missed in the pressure of day to day practice. These talks are reproduced below substantially as delivered.

I

Some Aspects Of The New Criminal Code

Since April 1, 1955, we have been operating under the revised and shortened Criminal Code. It is an improvement in length and conciseness, but has made few changes in substantive law. The purpose of my remarks is to note some changes of which we should be cognizant in our daily practice.

The terms of reference to the Commission, as they appear in the Report printed in Hansard on May 14, 1952, show that it was not intended that important substantive legal changes should be considered: other commissions are dealing with such matters as insanity and capital punishment, lotteries and corporal punishment.

Sir James Stephen, author of the Digest of the Criminal Law of England, was the compiler of the Code which was rejected in England but adopted in Canada in 1892 with some changes. With all of the amendments made since that time, a change was necessary to consolidate and simplify the Code as well as to incorporate rules of practice which have become rules of law.

The code as adopted in Canada was based upon the English common law system, but because of the wording of our sections, judicial interpretation has resulted in important differences between English and Canadian criminal law. Examples are provocation, provocation combined with drunkeness, false pretences, and sedition. There appears to be a growing tendency on the part of our Canadian Supreme Court to philosophize rather than interpret, especially since becoming a Court of last resort in all cases. I am not too sure that this attitude is a beneficial one.

The Commission made several recommendations which were not adopted, for instance the abolition of minimum punishments except in murder, and the permission to convict on false pretences when that offence is proven in a theft charge or vice-versa. In my opinion, the recommendations were good ones: it is difficult to tie the hands of a judge in sentencing (for example one year for car theft) or to require the Crown to insert the other count in a theft or false pretence charge. Minimum punishments are retained in driving while impaired or intoxicated, theft from the mails, and sexual psycopathy.

Changes in the law with respect to the defence of insanity, capital punishment, corporal punishment and lotteries have been left to other bodies as I have said. The problem of criminal sexual psycopaths is also being considered by a special commission, as is the problem of remission and parole. You will see therefore that substantive changes in the Criminal Law are yet to come.

But what has been done? Here are a few of the changes:

(1) The number of sections is cut from over eleven hundred to seven hundred and fifty.

(2) Sentences are grouped, with maximums of (a) death, (b) life, (c) 14 years, (d) 10 years, (e) 5 years, and (f) 2 years.

(3) There are no common law offences now. The Code is all inclusive: adultery is therefore no longer a crime in New Brunswick. However, the new code still continues common law defences, common law procedure and punishment for contempt of court where not provided for in the Code.

(4) Instructions on the necessity for corroboration in certain cases, long a rule of practice, has been made a rule of law in rape cases.

(5) Degrees of negligence in criminal law are abolished. This is a major change. Since the **Andrews** case[1] degrees of negligence in crime were recognized as follows: (1) civil negligence (2) gross negligence or wanton misconduct and (3) "something in between" which in 1938 our Code called "reckless driving." This recognition, in my opinion, was illogical in making "reckless driving" while criminal a lesser offence to motor manslaughter. It was a method of avoiding a conviction for manslaughter. Now section 191 provides for criminal negligence in recklessly omitting to observe a duty or in doing something. Duty means a legal duty imposed by law but the code is silent on whether this means statutory law or common law. It remains to be seen whether the sections will be effective. The new section is exactly the same as manslaughter but does not use the word. Parliament also eliminated part of the recommended definition of "duty."

(6) Constructive murder is continued in the definition of murder. The words in the section were changed but the meaning is still retained so that a person with a gun in his possession in the course of committing a major crime is guilty of murder if death results under certain circumstances. This branch of the law of "mens rea" is always debatable: *Rex v. Robichaud*[2] and *Rex v. Hughes.*[3]

(7) "Receiving or Retaining" no longer exists. The offence is now "having": *Rex v. Clay.*[4]

(8) The sentence for nudity in public is six months rather than five years.

(9) Probation orders re driving may be made by the court in motor vehicle offences.

(10) There is a standard maximum penalty in summary conviction cases of 6 months or $500.00.

(11) The Crown does not have to consent to a suspended sentence.

(12) The limitation section has been repealed except in capital, sexual and summary conviction cases.

(13 "Magistrate" has been newly defined.

(14) The Court may now amend a defective indictment which formerly would have been a nullity; s. 510.

(15) An information in a summary conviction matter may now include more than one offence: s. 696 and s. 708 (4).

1. **Andrews v. Director of Public Prosecutions,** [1937] A.C. 576.
2. [1938] 13 M. P. R. 23 (N.B. C. A.).
3. [1942] S.C.R. 517.
4. [1952] 1 S.C.R. 170.

Procedure

The new code retains the right to trial by jury in serious cases but in some cases indictable offences will be tried by magistrates having absolute jurisdiction. This tendency to take away the right to a jury trial has been criticized as an admission of weakness in a jury system, one of our fundamental protections. The Commission wished to abolish Grand Juries as five provinces have now done but did not recommend it. In a five year period, ninety-two percent of all indictable offences were tried by magistrates, six percent by judges alone and two percent by judges with juries. However, an accused may still elect a jury trial before a magistrate and change his mind and elect a speedy trial later. The Commission wished to abolish trial de novo but the recommendation was rejected. Apparently the members of the House of Commons are aware of the weakness of some magistrates.

Formerly an accused charged with murder and convicted of manslaughter could appeal without risk. Now the Crown can appeal from the acquittal of the major charge and the accused could be still tried on the murder charge at a second trial.

We should realize that the Canadian Bar Association started making suggestions to revise the Code in 1943 and continued doing so until the Government assumed the responsibility. Some credit is due to our organization for the improvements made. But there are lawyers who feel that the public generally were not sufficiently represented at the hearings of the commission. That, if true, was not the fault of the commissions as public hearings were held, but it is too much to expect that individual lawyers at their own expense should devote the necessary time and effort to study the matter as do paid members of the staff and commission. Nevertheless, members of the House of Commons did take an active part in the discussion of the bill. There is a tendency even there to allow the civil servants to do the work

Crown prosecutors still have procedural advantages at the trial. Time and interpretative decisions must decide on the Code's weaknesses and strengths.

It remains to be seen how Courts will interpret the meaning of "duty" in criminal negligence cases or the constructive murder subsection of the Code concerning death resulting in the course of the commission of a crime where the accused has a weapon in his possession though not used or the section permitting prosecution with the consent of the Attorney-General of a person who tells two different stories at a trial.

If Crown counsel take their duty seriously and follow the old common law rules governing their conduct (as most of our counsel do) the accused will obtain a fair trial. If Crown Counsel commence to feel and act as if their duty is to obtain a conviction rather than to present the case fairly, difficulties will be encountered.

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II

Charitable Trusts And Legislation To Make Them Valid

The basic premise of this paper is that charitable trusts benefit a country. Therefore legislation should be passed to cut away the undergrowth of 150 years of technical decisions and remove the peril of invalidity to which charitable trusts today are constantly exposed.

The law looks with favour on charitable trusts — at least the judges say so. The origin of this rule lies probably in medieval law when persons gave a tenth of their income to the church. Today, while religious groups still receive a large proportion of charitable gifts, the conception of charity is broader. I feel that one of the strongest arguments in favour of charitable trusts is that they can carry out projects beneficial to the community which no government would dare to carry out. They can experiment, lead the way, as the Carnegie and Rockefeller Foundations have done. They can support unpopular or controversial ideas as the Ford Fund for the Republic or the various Temperance trusts do. They have much greater freedom than governments and can stimulate the life of a country as well as alleviate suffering and aid merit.

Because charitable trusts are favoured by the law, they have been given two great concessions.

Firstly, provided that the words which create them come within the legal definition of charity, they will create a valid trust even though the words used are so vague and uncertain that they would not ordinarily create a valid trust — e.g. the words "a trust for religious purposes" create a valid charitable trust although "religious" may mean any one of a large number of things. On the other hand the words "a trust for benevolent purposes" create no trust at all. The word "benevolent" does not fall within the legal definition of charity and it is too vague and uncertain to be recognized by a court unless it does.

Secondly, charitable trusts are relieved in part from the operation of the Rule against Perpetuities. They must, as is normal, vest within the perpetuity period, but the capital of the charity may be preserved forever and the income only used, and a gift over from one charity to another after the perpetuity period is valid.

The problem always has been — and remains today — what is a charity? No statute has laid down a definition but from early times the Courts of Equity referred as a guide to the preamble to a statute of 43 Elizabeth I., Chapter 4., which set out various purposes considered in those days to be charitable — e.g. the relief of poverty, education of orphans, support of schools — and repair of bridges and maintenance of houses of correction.

Then in 1805, Lord Eldon, in his successful attempt to inflict the doctrine of strict precedent on equity, decided in the case of *Morice v. Durham,*[1] that a bequest to objects of "benevolence and liberality" was bad because of uncertainty. That case is still quoted today as a leading authority. The next landmark is *Pemsel's Case,*[2] where Lord Macnaghten said that charity in its legal sense comprises four principal divisions—trusts for the relief of poverty, for the advancement of religion, for the advancement of education, and for other purposes beneficial to the community. Surely that was a wide and sound definition. Except in trusts for the relief of poverty, the group to be benefited must be members of the public in general; e.g. they cannot be employees of a company. In 1944, however, in the Chichester case[3] (better known as the Diplock case) the House of Lords held that a trust for charitable or benvolent objects was invalid as the trust monies might be applied for certain benevolent purposes which were not charitable and were too uncertain. This decision was followed in 1955 by the Supreme Court of Canada in a New Brunswick case *Brewer v. McCauley.*[4] In the Chichester case the intestacy created by the House of Lords, it is reported made a third cousin of the testator over a million dollars richer and also cost his executors $250,000 personally because they had distributed his estate to charities before the action began.

The law of charities is full of such decisions. A gift to a vicar of a church for such objects connected with the church as he shall see fit is charitable *Re Bain,*[5] a gift to a vicar for parish work is not charitable, because it might be used for non-charitable parish purposes.[6]

A gift for the benefit of Welsh people in London by creating a centre to promote their moral, social, spiritual and educational welfare is bad for the same reason.[7]

A gift for the religious, moral, social and physical improvement of a community is bad. It might be used for non-charitable purposes.[8]

Even a gift — for charitable purposes only, the persons to benefit being employees of the Canada Life Insurance Co. — was held by the Judicial Committee of the Privy Council to be bad.[9] The gift lacked the element of public benefit necessary and was not restricted to the relief of poverty. The same principle was applied in *Oppenheim v. Tobacco Securities Trust*[10] when a trust for the education of children of employees of a Company employing more than 100,000 persons was held invalid.

1. [1855] 10 Ves. Jun. 522; 32 E.R. 947.
2. **The Commissioners for Special Purposes of the Income Tax v. Pemsel,** [1891] A.C. 531.
3. **Chichester Diocesan Fund and Board of Finance v. Simpson,** [1944] A.C. 341.
4. [1955] 1 D.L.R. 415.
5. [1930] 1 Ch. 224.
6. **Farley v. Westminster Bank,** [1939] A.C. 430.
7. **Williams' Trustees v. I. R. C.,** [1947] A.C. 447.
8. **I. R. C. v. Baddeley,** [1955] A.C. 572.
9. **Baker v. National Trust,** [1955] A.C. 627.
10. [1951] A.C. 297.

The courts are not becoming more broadminded in their approach to charities as the above recent cases show. They are becoming narrower, more bound by precedent, less inclined to look at the intention of the testator. Who can doubt that in all the above cases the testator intended charitable gifts? He did not intend to die intestate. He wished the purposes for which he left his money to be carried out as far as legally possible.

I shudder to think how many invalid charitable trusts are probably being administered in New Brunswick today. That makes the problem pressing. What can be done?

The courts could have dealt with the problem realistically by holding that, where trusts were set up which included in their objects some which were not charitable, the objects would be limited to the legally charitable ones. The courts have power to direct a scheme, when applying the cy-pres doctrine, that is, to approve specifically the objects to which trust monies are applied. They could have directed a scheme in other cases as well. They did not. They cannot do so now as they are caught in the web of precedent. Only the legislature can correct the present situation.

Several jurisdictions have passed legislation for this purpose. In England the Charitable Trusts (Validation) Act 1954 validates dispositions of property for objects not exclusively charitable which took effect before December 16, 1952. The objects are restricted to the charitable objects. This Act is useful to protect charitable trusts at present being administered, but does not extend any protection to trusts set up after the date of the Act. For some strange reason Parliament must have thought that no trust set up in the future would clash with the technical rules of charitable trusts.

Victoria and South Wales in Australia, and New Zealand, have enacted similar legislation which extends to all trusts, past and future, which have not been declared invalid by a Court order. This approach, it is submitted, is more satisfactory. The British Columbia civil justice sub-section of the Canadian Bar Association recommended in its report in 1955 that the same legislation be enacted in British Columbia. It provides as follows:

"Sec. 1 (1) No trust shall be held to be invalid by reason that some non-charitable and invalid purposes as well as some charitable purposes are or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by trust directed or allowed.

(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.

(3) This section shall not affect any trust which has been declared invalid by order of a court prior to the commencement of this section."

I hesitate to comment on the effectiveness of such an Act. Much would depend on the attitude of the Courts, but such an Act would probably render valid the trusts in cases similar to the *Chichester* and *Brewer* cases and perhaps even in cases similar to *Morice v. Durham,* although that is more doubtful. It would not render valid trusts such as those in the *Baker* and *Oppenheim* cases where the element of public benefit is lacking, but perhaps such trusts should not be permitted. Yet there is much to be said for the proposition that trusts for the education of employees of a company, for example, should be made valid, unless there is a blood relationship between the donor and the donees.

Such an Act would not render valid gifts to a person by virtue of his office unless such office is held by the Courts to be an exclusively charitable one, such as a bishop.[11] It would not validate the gift in *Re Spensley,* [12] where a bequest was made to the National Trust to provide a residence for the High Commissioner of Australia. This was held by the Court of Appeal not to be a charitable gift. Why, even a bequest to the New Brunswick Barristers' Society to use the income forever might not be charitable.

One cannot, however, obtain perfection, especially in a highly technical subject, and the Act as proposed by the British Columbia sub-section has much to recommend it. It would not validate gifts for political purposes or for the promotion of the teaching of atheism if they infringed the rule against perpetuities or were uncertain. These gifts, say the courts, lack the element of public benefit as do gifts to employees.

I would recommend that an Act be drafted similar to the New Zealand Act validating charitable trusts. If such an Act becomes law in New Brunswick we can at least hope that our courts will give effect to its spirit.

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11. See Re Rumball, [1955] 3 All E.R. 73.
12. [1954] 1 Ch. 233.

III

Recent Developments In The Law Of Evidence

I have been asked to speak to you for a few minutes this afternoon on recent developments in the law of evidence. I would ask that you keep in mind that the word "recent" is a relative term; much of our law of evidence has evolved through the common law and the authorities in some instances are centuries old.

I think the law relating to blood tests could be considered a recent development. As to the weight to be given such evidence, the decision of the Supreme Court of Canada in *Welstead v. Brown*,[1] is important. In that case the legitimacy of a child was in question. Evidence of the chemical analysis of blood samples taken from the husband, the wife and the child indicated it would be impossible for the husband to be the father of the child. Mr. Justice Cartwright, referring to this evidence at p. 474, stated:

> "In this case, however, the evidence of two qualified medical practitioners was to the effect that tests carried out with samples of the blood of the appellant, of his wife, and of the child indicated that if the child were born of the wife, as is admitted, then it was not merely improbable but impossible that the appellant was the father."

He concluded at p. 475:

> "I wish to make it plain that what I regard as being decisive is the fact that the evidence was to the effect that the appellant could not be the father of the child."

This case is indicative of the weight and conclusiveness of such evidence.

Now as to the admissibility of a blood test: As might be expected, particularly in criminal trials, there has been a conflict of judicial opinion. Some were of opinion that the rules governing the admissibility of a blood test were analogous to those relating to a confession, so well known to all of you, namely, that before such evidence could be given the jury must be satisfied that the blood test was carried out with the consent of the accused and there was an absence of threats, fear or compulsion. This was the view adopted by the Alberta Court in *Rex v. Ford* [2] by the Quebec Court of Appeal in *Rex v. Frechette*[3] and in the unreported decision of *Rex v. Gagnon* in 1951.

However, courts in other jurisdictions differed from this approach. The Ontario Court of Appeal in *Rex v. McNamara*[4] refused to follow *Rex v. Ford* and held that the evidence of a blood test taken when the accused was in no condition to give consent was admissible: the analogy to a confession was denied. The Ontario Supreme Court in 1950 in the unreported decision of *Rex v. Linquard* was to the same effect.

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1. [1952] 1 D.L.R. 465.
2. [1948] 1 D.L.R. 787.
3. (1948) 93 C.C.C. 111, aff'd., (1949) 94 C.C.C. 392.
4. [1951] O.R. 6.

There are provisions in the Criminal Code respecting chemical analysis: these are contained in s. 224 (3) and (4); s. 224 pertaining to chemical analysis refers only to the previous two sections. S. 222 deals with the offence of driving while intoxicated, while s. 223 pertains to driving while the ability to drive is impaired. The effect of s. 224 is that the analysis of blood may be admitted in evidence, notwithstanding that an accused person was not, before he gave the sample, warned that he need not give a sample; and it further provides, in subsection (4), that there is no obligation upon an accused person to give such a sample and that a refusal should not be commented upon at the trial.

This rather unsatisfactory state of affairs pertaining to the admissibility of blood tests was, I think, settled in a very recent decision of the Supreme Court of Canada, *The Attorney General for Quebec v. Begin.*[5] In that case the accused was convicted of what is known as motor-manslaughter. At the trial the Crown proved intoxication by means of evidence of a blood test. The accused had consented to give a sample but he had not been warned that the analysis of the sample might be tendered in evidence against him. The question of the admissibility of such evidence was fully considered by the members of the Court and the conclusion and rule to be followed appears to be well set out in a part of the headnote of this case which reads as follows:

> "Under the general law, as it was before the addition of s-s 4 (d) of s. 285 of the Code," [this refers to the section of the 1927 Code] "evidence of a blood test taken without a warning is admissible. The contrary view is based on a misapprehension of the reason and object of the confession-rule and of the privilege-rule both of which are related to the very substance of the declarations made respectively by an accused or a witness. The taking of a blood test does not give rise to the application of these rules nor does the fact that while the method used to obtain a blood test might be illegal and give rise to civil or criminal recourses, renders, per se, inadmissible the evidence resulting therefrom."

The Chief Justice's views were clearly stated at pp. 595 and 596 as follows:

> **"In the present case the accused consented, but I agree with the judgment in the McNamara case that even if he had not asked and therefore had not consented the evidence would be admissible . . . . .**
>
> **"In my view a confusion has arisen between the rules as to the admissibility of statements, or admissions, and those relating to self-incrimination. In taking a blood test the accused does not say anything because he is not asked any question. Nothing in this judgment is to be taken as weakening the effect of the rules as to the admissibility of statements, or admissions, because the two matters are entirely distinct."**

Let me now turn to changes in the statutory law of evidence. As you know, the new Canada Evidence Act is contained in Chapter 307

5. [1955] S.C.R. 593.

of the Revised Statutes of Canada, 1952. There were no changes made in this Act in the Revised Statutes. In the same year we had a revision of New Brunswick statutes and the New Brunswick Evidence Act is now contained in Chapter 74 of the Revised Statutes of New Brunswick, 1952. Three new sections were added to this Act. S. 14 deals with the effect of disbelief in an oath; it provides:

> "Where an oath has been administered and taken, the fact the person to whom it was administered and by whom it was taken did not at the time of taking the oath believe in the binding effect of the oath shall not, for any purpose affect the validity of the oath."

There was also included a provision as to the number of expert witnesses allowable. S. 22 provides that unless leave of the Court is obtained not more than three expert witnesses may be called by either side. Finally there is a provision which will permit evidence to be given of a child who is too young to understand the nature of the oath. I wonder how many of you were aware that until 1952 in a civil action the evidence of a child who was not old enough to take an oath would not be admitted. S. 23 now permits such evidence. Subsection (2) of s. 23 is also important: it provides that no action can be decided upon the evidence of a child of tender years unless such evidence is corroborated.

I want to say a word about the admissibility of photographs as evidence at a trial. There are, even today, some Courts which hold that before a photograph can be admitted, the person who took the photograph as well as the person who developed it must be called as witnesses. I myself have had this experience within the past few months. I suggest to you that this is unrealistic and actually not necessary. After all, when a witness goes in a witness box and gives oral testimony, he, in effect, says — "the following words represent the facts as I saw them." I suggest, therefore, that if this witness can say—"these photographs show the facts as I saw them," this would be sufficient. Indeed, in New Brunswick, we have a strong authority concerning the admissibility of photographs and I believe it is frequently overlooked. I refer to the decision of the New Brunswick Court of Appeal in *Rex v. Arthur Bannister.*[6] Photographs of the victim's body were admitted into evidence. The late Chief Justice Baxter said at p. 398:

> "When these gentlemen recognize the photographs as being accurate portrayals of the condition of the charred remains, it seems immaterial to inquire as to the person who had taken them or when they were taken or as to those engaged in their development."

There are also cases on the admissibility of motion pictures. An example of this type of evidence is contained in the decision of The *Army & Navy Department Store v. Retail Wholesale & Department Store Union.*[7] In that case motion pictures of strikers who were

6. (1936) 10 M. P.R. 391.
7. [1950] 2 D.L.R. 850.

picketing the premises were admitted by Chief Justice Farris of the British Columbia Supreme Court. His Lordship stated that the object or purpose of the admission of these photographs, however, was merely for the clarification of the verbal testimony given and not as proof of the facts. He further suggested that with modern innovations old rules of evidence would not necessarily remain static. As a matter of interest I know of two cases within the past year before our own Supreme Court, both of which are unreported, in which motion pictures were admitted into evidence. In all probability the use of motion pictures as evidence will become a common occurrence rather than a novel one.

Let me conclude my remarks with what I consider to be a somewhat prevalent practice in some of our courts. I refer to the tendency in some courts to permit evidence to be given subject to objection. Perhaps I am out of order in referring to this but to me this is a practice which is to be regretted. The admissibility of evidence in a criminal action is ruled upon immediately. However, the rules of evidence in a civil trial are not enforced with such strictness. It would seem that the rules of evidence are comparatively simple, and if evidence is tendered which is objectionable it should be ruled inadmissible forthwith, and if such evidence is admissible it should be admitted as such and not subject to objection. We frequently find that evidence which is admitted subject to objection gets into the record, the case is argued on appeal and nothing further is done about it. We do not know in many cases whether the court bases its decision on such evidence or not. In fact we do not know whether or not such evidence has been rejected or actually admitted, the result being, frequently, that there is no ruling on the matter whatsoever. It is likely that in some cases this is the proper course to follow, that is to admit such evidence subject to objection, but I suggest this is too frequently done. In this regard I would like to refer to a portion of a recent article which appeared in Chitty's Law Journal wherein the author refers to an old decision of *Walker v. Frobisher*,[8] which was decided 150 years ago. In referring to this the author said:

> "A judge must not take it upon himself to say whether evidence improperly admitted had or had not any effect upon his mind. In many cases it would appear very difficult for a judge to disabuse his mind of the effect that inadmissible evidence has had upon him. It may well be that he can disabuse his mind of the facts stated in that evidence but even a person of the greatest mental discipline would sometimes, if not often, find it extremely difficult to disabuse his mind of the atmosphere created by the hearing of that inadmissible evidence. If evidence is admissible, even if there be no jury, a judge ought to rule that it is inadmissible and refuse to hear it, because of the danger, not of his acting upon the facts known by that evidence, but of the danger that the atmosphere that the hearing of the evidence may create upon his mind."

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8. (1801) 6 Ves. Jun. 70; 31 E.R. 943.

IV

INCOMPLETE "CONTRACTS" IN RECENT CASES

The Problem

The maxims "there cannot be a contract to make a contract" and "the courts will not make a contract for parties who have themselves failed to do so" reflect a philosophy of contract rooted in the idea of subjective coalescence of freely consenting wills. They reveal a reluctance to impose contractual obligation without a promisor's deliberate consent to all its terms. If uncritically applied, however, these maxims can cause injustice. Business men often wish to stabilize future outlets and sources of supply by contracting for the sale or purchase of goods for delivery at distant dates, but if markets are volatile they may hesitate to tie themselves to inflexible prices; not all long term contracts are designed to throw the risk of rising prices on the seller or of falling prices on the buyer: the parties may prefer to leave prices to be set before deliveries by agreement or by some other standard.[1] It is also not unusual for business men to agree on subject matter, prices and quantities, but to reserve precise arrangements for transportation for later settlement. Then, too, commercial people often use terms that are meaningful to themselves, but which are well nigh unintelligible to those who are unfamiliar with the ways of the trade. Agreements such as these, though vague and imprecise, are no doubt concluded in the belief that binding commitments have been made. They create reasonable expectations of legal recognition and enforcement. The maxims quoted do, however, threaten disappointment of the hopes so aroused.

My theme is the judicial resolution of the tension between the desire to support reasonable expectations created by business and private agreements however ineligantly phrased and reluctance to impose contractual duties not completely and voluntarily defined and accepted. The interests in conflict in such cases often are not susceptible of easy adjustment by application of broad maxims. More specifically, the problems to be considered arise out of these types of agreement:

1. The parties may in so many words agree to agree on a term whose content is for the time being left indeterminate.
2. The agreement may contain no specific undertaking to negotiate further, but one so phrased as to suggest that such negotiation was intended.
3. Though a term may be so worded as in its context to indicate finality of bargain, its meaning may be very obscure.

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1. Fuller: **Basic Contract Law**, pp. 87-89.

Obviously these problems are but species of a general category which includes the whole variety of problems centering around determination of the precise moment at which negotiation ends and legal right and duty begin.

Specific Agreement to Agree

Discussion of the specific agreement to agree on a term in an otherwise settled document may conveniently begin with a well known case, *May and Butcher, Limited v. The King*[2] A very detailed agreement had been made for the purchase by the plaintiff from a government commission of all tentage becoming surplus during a defined period. Price was to be as agreed from time to time. All disputes arising out of the agreement were to be submitted to arbitration. After several shipments of tentage had been taken at agreed prices, the commission refused to proceed, and the plaintiff sued. The defence was that there was no contract because of the agreement to agree on price. This contention was sought to be answered by submitting that, absent agreement, the price by implication would be a reasonable one, and its reasonableness arbitrable. Reliance was placed on the section of the English Sale of Goods Act corresponding to our s. 9:

> "9. (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.
>
> (2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price . . ."[3]

On the basis of this section it was argued that the price was a reasonable one, but the argument was rejected. Lord Warrington of Clyffe's answer was that to imply a reasonable price would not be "to imply something about which the parties have been silent; it would be to insert in the contract a stipulation contrary to that for which they have bargained . . . not the result of their own agreement, but possibly the verdict of a jury, or some other means of ascertaining the stipulated price. To do that would be to contradict the express terms of the document which they have signed."[4] And the arbitration clause was inoperative simply because there was no contract. Lord Buckmaster said that the "clause refers 'disputes with reference to or arising out of this agreement' to arbitration, but until the price has been fixed, the agreement is not there."[5]

Thus the plaintiff failed; in the often quoted words of Viscount Dunedin: "To be a good contract there must be a concluded bargain,

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2. [1934] 2 K.B. 17 (H.L. 1929).
3. Sale of Goods Act, R.S.N.B. 1952, c. 199.
4. [1934] 2 K.B. 17, at p. 22.
5. Ibid., at p. 20.

and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties."[6]

An express term to agree on price may not be fatal, however, otherwise *Foley v. Classique Coaches, Limited*[7] would not have been decided as it was. The owner of adjoining lots, on one of which was a filling station, sold the other to the defendant for a bus depot. Part of the consideration was a promise to buy all gasoline required by buses operating out of the depot from the vendor and not elsewhere at prices to be agreed from time to time; differences under the agreement were referable to arbitration. The defendant took his gasoline from the plaintiff for three years at agreed prices, but then refused to buy any more, and relied on *May & Butcher v. The King*. An important difference, however, was that immediately the agreement was made in the *Foley* case title to the lot vested so that there was at once substantial performance. To give business efficacy to the contract it was necessary to imply a promise that, failing agreement, the price would be a reasonable one.

Similarly in *British Bank Ltd. v. Novinex Ltd.*[8] the Court of Appeal imposed contractual liability despite the inclusion in a letter from the defendant of a proposal to pay "an agreed commission" for a stipulated service. The defendant, wishing to buy oilskins, wrote to the plaintiff offering to pay a commission in respect to a consignment of such skins if the plaintiff would put the defendant in contact with a supplier. The letter stated: "We also undertake to cover you with an agreed commission on any other business transacted with your friends. In return for this you are to put us in direct contact with your friends." This the plaintiff did. The defendant entered into further transactions with the supplier so introduced, but refused to pay the plaintiff commissions because none had been agreed. The Court of Appeal, finding for the plaintiff, applied the legal principle Denning, J. at first instance had extracted from the earlier cases on agreements to agree, though on its application to the facts the Court differed from his Lordship. Denning, J. had said that if an essential term is to be agreed and there is no express or implied provision for its solution there is no contract. He proceeded:

> "In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides, and one which has been executed on one side or the other. In the ordinary way, if there is an arrangement to supply goods at a price 'to be agreed,' or to perform services on terms 'to be agreed,' then although, while the matter is still executory, there may be no binding contract, nevertheless, if it is executed on one side, that is, if the one does his part without having come to an

6. Ibid., at p. 21.
7. [1934] 2 K.B.1 (C.A.).
8. [1949] 1 K.B. 623 (C.A. 1948); [1949] 1 All E.R. 155.

> agreement as to the price or the terms, then the law will say that there is necessarily implied, from the conduct of the parties, a contract that, in default of agreement, a reasonable sum is to be paid."[9]

This rule, with respect, poses a difficulty. It appears to mean that a bilateral executory agreement containing as an essential term an unqualified promise to pay a price to be agreed in return for the promise of an act is not a contract, but is transformed into one by performance of the act, the promise becoming not simply one to pay a sum to be agreed but also to pay a reasonable sum failing agreement. It would follow that before performance of the act either party could resile. There is no contract until the act is done (or possibly begun);[10] but, the act done, a promise is at once implied different in a material respect from the original non-contractual promise which was simply to pay a price to be agreed. Actually, on the facts of the *Novinex* case, the defendant's letter might have been interpreted as the offer of a unilateral contract—an express offer of a promise to pay a commission to be agreed, coupled with an implied offer to pay a reasonable commission if agreement were not reached, in return for an introduction. Alternatively, if the agreement were bilateral but failed as a contract, recovery for an act done under it might have been permitted in quasi-contract by way of restitution of a benefit conferred under a "contract" that failed. Professor Williston, writing of the effect of part performance upon an indefinite promise given in exchange for a definite one said this: "Let it be supposed first that the promise which originally was definite is performed; this cannot make the indefinite promise enforceable but may give rise to a quasi contractual obligation to pay the fair value of what has been received."[11] *Craven-Ellis v. Canons, Ltd.*[12] and the *Degelman* case[13] might afford precedents.

Another example of a contract containing an express term to agree is the Ontario case, *DeLaval Co. Ltd. v. Bloomfield.*[14] Here the price of the article sold was definite, but the manner of payment was not: the price was $400, of which $200 were payable on a named date, "balance to be arranged". The vendor succeeded in an action for the first instalment, despite the plea that the agreement was too indefinite. Several possible explanations of the result are suggested by the judgment. One seemed to be that there was a contract for a definite price, but with payment subject to a condition precedent — agreement on

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9. [1949] 1 K.B. 623, at pp. 629 and 630.

10. See **Errington v. Errington and Woods**, [1952] 1 K.B. 290 (C.A. 1951), per Denning, L.J. at p. 295; [1952] 1 All E.R. 149; but see **Dawson v. Helicopter Exploration Co. Ltd.**, [1955] 5 D.L.R. 404, per Rand, J. at p. 410.

11. Williston on Contracts (Revised ed. 1936) s. 49, at p. 139.

12. [1936] 2 K.B. 403 (C.A.); [1936] 2 All E.R. 1066.

13. **Degeman v. Guaranty Trust Co. of Canada and Constantineau**, [1954] S.C.R. 725; [1954] 3 D.L.R. 785.

14. [1938] O.R. 294 (C.A.); [1938] 3 D.L.R. 405.

the mode of payment. By refusing to agree the buyer discharged the seller from the need to show performance of the condition: the price thus became payable at once. Another explanation might be that refusal to agree was a breach which vested in the vendor an immediate right to damages, the measure being the contract price.[15]

The *DeLaval* case has been condemned and defended by learned commentators.[16] The British Columbia courts have refused to follow it. In the recent case, *Cherewick v. Moore and Dean*,[17] for example, the trial judge expressly stated that it was not an authority in British Columbia. In the Cherewick case, though the amount of royalties to be paid by the defendant to an inventor for a license under his patent were fixed, and a cash price of $10,000 agreed, it was held that the agreement was not a contract because the $10,000 was to be financed by a promissory note on terms to be settled by the solicitors of the parties. ". . . where the parties have not settled a method of payment but have left it to be agreed upon later . . . a British Columbia Court cannot treat the refusal of the buyer to enter into an agreement as to the method of payment as an act entitling the vendor to immediate payment."[18]

In theory there is of course no reason why a promise to negotiate for price or any other term should not be enforceable if supported by consideration. Such a right may be valuable and bargained for. Lord Wright said as much in *Hillas v. Arcos*.[19] However, an agreement that price or some other term is to be as agreed is not a promise to negotiate. In *Colwell & Jennings Ltd. v. J. W. Creaghan Co. Ltd.*[20] it was argued that a lessor's refusal to negotiate where the lessee purported to exercise an option to take a new lease on terms to be agreed before a named date, the lessor undertaking not to lease to another during that period, was an anticipatory breach of an implied promise to negotiate and that the lessee was entitled to at least nominal damages. But Harrison, J. described the lessor's promise as illusory. "Contract" is mirage where unfettered power not to perform is reserved by the promisor. Of course, if a promise to negotiate had been implied, power would have been fettered, and in principle nominal damages recoverable.

If *Foley v. Classique Coaches* and the *Novinex* case are right, an agreement to agree on price may in a fit context be construed as implying a reasonable price failing agreement. The maxim "there cannot be a contract to make a contract", though not inconsistent with these holdings, would mislead if the possibility of such implication were overlooked. But there is a better reason for handling the maxim with care: it is really quite inaccurate. As Sargent, L.J. said in *Chillingworth*

15. See also **Hall v. Conder**, 2 C. & B. (N.S.) 22, per Williams, J. at p. 40; 140 E.R. 318, at p. 326.
16. Gordon, (1939) 17 Can. B. Rev. 205; C.A.W., (1939) 17 Can. B. Rev. 208.
17. [1955] 2 D.L.R. 492.
18. Ibid., at p. 501.
19. (1932) 147 L.T. 503.
20. (1951) 28 M.P.R. 40 (N.B. Ch. 1950); [1951] 4 D.L.R. 840.

v. Esche: "It should be 'contract to enter into an indeterminate contract.' The court will enforce a contract to enter into a determinate contract as for example to renew a lease."[21] Or it might be added to give a lease or a conveyance. The terms of the lease or conveyance would, however, have to be certain. The New Brunswick case, *Post v. Bean,* [22] is illustrative. The plaintiff alleged that the defendant company had agreed to give a lease of fishing rights fronting on the defendant's land adjoining the Tobique River until such time as the company should build piers and booms at the location. These works were not constructed and the defendant granted the exclusive fishing rights to another. The plaintiff sought a declaration that he was entitled to these rights. Though the allegation was traversed, the trial judge held that the alleged agreement had been made and that it could be performed by the grant of a lease for the life of the plaintiff or for ninety-nine years, subject to termination on the happening of the event stipulated. The Court of Appeal reversed (Harrison, J. dissenting) holding that the duration of the lease was too uncertain for specific performance. Michaud, C.J.Q.B., said:

> "The Court will decree specific performance of an agreement for lease, . . . only where such agreement has the essential elements required for a valid lease, and the same are admitted or distinctly proved. The essential terms of an agreement for a lease are:
>
> (1) The identification of the lessor and the lessee.
> (2) The premises to be leased.
> (3) The commencement and duration of the term.
> (4) The rent or other consideration to be paid."[23]

Vague Terms

No express agreement to agree may be present, yet a term may be so vague as to suggest that the parties must have intended further agreement or, if there is no such suggestion, it may be difficult or impossible to give the term a reasonable meaning. Lord Wright, in a familiar passage, said of the very sketchy agreement in *Hillas v. Arcos* that "business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; . . ."[24] Courts can and should where possible save such agreements by "the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail."[25] The implied term is the judicial tool used to save business agreements vague and sketchy in their expression.

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21. [1924] 1 Ch. 97, at p. 100.
22. (1947) 20 M.P.R. 168 (N.B.C.A. 1946), aff'd [1947] 3 D.L.R. 513 (Can. S. Ct.).
23. (1947) 20 M.P.R. 168, at pp. 192 and 193.
24. (1932) 147 L.T. 503, at p. 514.
25. Ibid.

But it is a tool that requires malleable material. The facts in the much discussed case, *G. Scammell and Nephew, Limited v. H. C. and J. G. Ouston*,[26] must at first sight have seemed workable. The plaintiff agreed to buy a lorry from the defendants for £268; he was to be allowed £100 on the turn-in of a second-hand truck, balance payable on hire-purchase terms over two years. Later the defendants refused to deliver and the plaintiff sued for damage for breach of contract. The defence was that the agreement was not a contract because of the indefiniteness of the hire-purchase terms. All the judges in the lower courts agreed there was a contract: the hire-purchase contract would be such as would be reasonable in the trade though the judges differed widely in their views on what form it should take. The House of Lords, reversing, were of opinion that there are no usual or ordinary hire-purchase terms in the automobile trade; sometimes only two parties are involved, the seller and buyer; often a finance company is a party; and the actual terms relating to repair, repossession on default and interest vary. Again, in this case, there was no past course of dealing between the parties as there had been in *Hillas v. Arcos*. Lord Wright found two fatal defects in the agreement: either the parties never got beyond negotiation (they must have intended to agree later on the hire-purchase terms)or, even if, in intention, they had concluded their bargain it was too indefinite to ground legal obligation.

The *Scammell* case leads naturally to a series of Canadian cases dealing with agreements to convey land, part of the price to be financed by a purchaser's mortgage. A agrees in writing to sell Blackacre to B for $20,000 payable $10,000 in cash, balance on mortgage at six percent. Is this a contract or is the agreement for the mortgage too vague?

Only two of the series of cases will be considered. In *Jackson v. Macaulay, Nicholls, Maitland & Company Limited and Willett*,[27] there was an agreement for the purchase of realty; the price was $7,500, payable $4,000 in cash, balance by assuming a first mortgage of $3,500 at six percent. No mortgage existed at the time of the agreement but there was a contract of sale under which payments were still owing. The purchaser repudiated and successfully sued to recover a deposit, the court holding that the agreement was too indefinite because of uncertainty over the identity of the mortgagee and the length of the mortgage term. In*Thomson Groceries Ltd. v. Scott*[28] on the other hand an agreement "to purchase these premises for the sum of seven thousand three hundred and seventy-five dollars . . . Terms $4,000.00 cash, balance 1st mortgage. Interest at 5% per annum" was held to be a contract. The mortgagee would be the seller; the mortgage deed would take the form provided in *The Short Forms of Mortgages Act*,[29] and, accord-

26. [1941] A.C. 251; [1941] 1 All E.R. 14.
27. [1942] 2. W.W.R. 33 (B.C.C.A.); [1942] 2 D.L.R. 609.
28. [1943] O.R. 290 (C.A.); [1943] 3 D.L.R. 25.
29. R.S.O. 1950, c. 362.

ing to Kellock, J. the principal would be payable on demand. It was, of course, urged that neither party would have contemplated demand liability, but his Lordship held that such liability was the consequence either of the covenant read into the mortgage by the Ontario Act or of the obligation to repay raised by the mortgage loan itself.[30]

One might speculate on the enforceability in New Brunswick of an agreement like the one in the *Scott* case. Against enforceability could be urged the lack of a specified mortgage period and of agreement on taxes, insurance and power of sale. In this Province there is no statutory form of mortgage nor is there in practice a standard mortgage deed.[31] On the other hand the rule that the mortgage principal would, in the absence of a contrary stipulation, be payable on demand, if such is the law, would seem applicable, and our statutory powers of sale and insurance could be invoked. Interest might be at the legal rate.[32] The lesson seems to be, however, that in drafting an agreement of sale, the solicitor ought to specify at least the amount of the purchase money mortgage, the parties, the term, rate and times of payment of interest and any special convenants desired.

An agreement, though obviously complete in intention contemplating no further negotiation, may yet contain a meaningless clause. Is such a defect fatal? *Nicolene Ltd. v. Simmonds*[33] is a recent authority

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30. The authorities cited by Kellock, J. for the proposition that the mortgage loan itself creates a demand obligation seem indecisive. In **Farquhar v. Morris**, (1797) 7 T.R. 124; 101 E.R. 889, it was held that a bond with no date of payment stipulated created a present obligation. **King v. King and Ennis**, (1735) 3 P. Wms. 358; 24 E.R. 1100, held that every mortgage implies a debt though there is no bond or covenant. Neither case specifically indicates that the obligation would be conditional on a demand. In **Sutton v. Sutton**, (1883) 22 Ch. D. 511 (C.A. 1882), Jessel, M.R., said in a dictum at p. 516: " . . . every mortgage contains within itself, so to speak, a personal liability to repay the amount advanced." The actual holding of the case was that the limitation period on the express covenant to pay on demand involved in the case ran from the date of the last payment made before the action. **Kellock, J.'s** citation from Corpus Juris, 41 C.J. 396, on the other hand, reads: ". . . if no time is fixed in the mortgage the law will supply the omitted element and prescribe that performance take place within a reasonable time after demand." **Higgins v. McLaughlan**, reported in Russell's Nova Scotia Equity Cases 441, is an authority for saying that if no time is mentioned an obligation arises, but it is not helpful on whether it is performable on demand. Nor is the law altogether clear on the legal effect of a promise to pay on demand. In **Canada Permanent Mortgage Corporation v. Saynor**, [1946] O.W.N. 406, decided since the Thomson Groceries case, the Assistant Master said at pp. 411 and 412: "The law appears to be that where a mortgage is payable on demand the right of action accrues immediately it is executed, and unless there is a stipulation to the contrary a demand is not considered to be a condition precedent to the bringing of the action." **Wakefield and Barnsley Union Bank, Limited v. Yates**, [1916] 1 Ch. 452 (C.A.) and **In re J. Brown's Estate. Brown v. Brown**, [1893] 2 Ch. 300 were cited. In the Brown case a distinction was taken between, on the one hand, "a present debt and a promise to pay on demand", where demand was said not to be a condition precedent to action, and, on the other, "a promise to pay a collateral sum on request, for then the request ought to be made before action brought." In the **Wakefield** case an action to foreclose a mortgage given to secure a demand loan was held barred because the limitation period had run out since the last acknowledgement. Both the **Brown** and **Wakefield** cases must now be read in the light of **Lloyds Bank Ltd. v. Margolis**, [1954] 1 W.L.R. 644 (Ch.). In that case a demand mortgage collateral to a running account between bank and customer was held to be actionable where the demand was made within, but the loan before, the limitation period. The case could have been decided on the basis of the distinction taken in the **Brown** case, but Upjohn, J. said that he preferred to base his judgment on the broad ground that purely as a matter of construction the covenant to pay on demand meant just that.

31. See **Buyers v. Begg**, (1951) 3 W.W.R. (N.S.) 673 (B.C.C.A.); [1952] 1 D.L.R. 313.

32. See **Buyers v. Begg**, [1952] 1 D.L.R. 313, per Robertson, J.A. at p. 316. **Interest Act**, R.S.C. 1952, c. 156, s. 3.

33. [1953] 1 Q.B. 543 (C.A.); [1953] 1 All E.R. 822.

for saying it is not. In an exchange of letters containing detailed terms the plaintiff offered to buy specified goods; the defendant wrote purporting to accept the offer but saying "I assume that we are in agreement that the usual conditions of acceptance apply." There were no "usual conditions of acceptance" between the parties, so the clause lacked meaning. In holding that nonetheless there was a contract, in effect that a blue pencil could be drawn through the offending words, Denning, L.J. said:

> "In the present case there was nothing yet to be agreed. There was nothing left to further negotiation. All that happened was that the parties agreed that 'the usual conditions of acceptance apply.' That clause was so vague and uncertain as to be incapable of any precise meaning. *It is clearly severable from the rest of the contract. It can be rejected without impairing the sense or reasonableness of the contract as a whole*, and it should be so rejected. The contract should be held good and the clause ignored. The parties themselves treated the contract as subsisting. They regarded it as creating binding obligations between them; and it would be most fortunate if the law should say otherwise."[34] (Italics added).

The test of validity is this: Is the meaningless clause collateral to the main purpose and can it be severed without impairing the sense of what remains? On this ground his Lordship distinguished **Scammell** v. Ouston insofar as that decision rested on the vagueness of the hire-purchase clause: "It [the term in this case] was clearly severable from the rest of the contract, whereas the term in *G. Scammell & Nephew Ltd. v. Ouston* was not."[35]

Conclusion

These cases may be considered from the viewpoint of either advocate or solicitor. From both aspects one might almost be forced to the traditional counsel of despair: "Whether an agreement is so vague as to be devoid of legal efficacy depends on the wording of the particular clause read in the context of the document as a whole and against the relevant factual background." In this type of case such a formula is not without utility: it permits a relatively free weighing of the conflicting interests involved and leaves room for protection of reasonable expectations. But more precise formulations seem possible.

For counsel deciding whether to litigate an agreement containing a clause that the parties agree to agree on price or some other term, the presumption is that the agreement is not a contract for negotiation is not ended. It may, however, be possible to imply a promise to pay a

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34. [1953] 1 Q.B. 543, at p. 552.

35. Ibid. See also **Parento and Parento v. Jacobsen**, [1955] 2 D.L.R. 510 (B.C.) and compare **Bishop & Baxter, Ltd. v. Anglo-Eastern Trading & Industrial Co., Ltd.**, [1944] K.B. 12 (C.A. 1943); [1943] 2 All E.R. 598 and **British Electric and Associated Industries (Cardiff) Ltd. v. Patley Pressings Ltd.**, [1953] 1 W.L.R. 280 (Q.B.); [1953] 1 All E.R. 94.

reasonable price or some other reasonable term failing agreement in order to give efficacy to the agreement. Such implication is more likely when either party has wholly or substantially executed his promise, though the precise legal basis of this distinction is debatable. Again, an agreement to agree on a relatively insignificant item may be ignored as **de minimis.**[36] Recent important advances in the law of restitution to prevent unjust enrichment might also be explored.

A solicitor drafting a contract should of course avoid the agreement to agree. If the client insists that firm agreement on price is not presently feasible, it may be possible to insert an agreement to agree on price with a provision that failing agreement the price should be reasonable and arbitrable or fixed in accordance with some clear formula: for example, in a long term lease of commercial premises, it might be possible to set a fixed minimum with an added variable rental tied to sales.

If the challenged clause is vague, the courts will tend to uphold it by implying what is reasonable if it clearly appears that the parties intended to strike a final bargain. Much will depend in such cases on the skill of counsel in developing by evidence the details of business background which give meaning to the apparently obscure. The solicitor will of course avoid obscurity in his drafting.

And to conclude — if a clause is meaningless the contract may be saved by its severance if a clear excision is possible and the clause is relatively unimportant.

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36. Williston on Contracts (Revised ed. 1936) s. 48.

Case and Comment

SERVICE OUT OF THE JURISDICTION IN TORT ACTIONS— LOCUS OF TORT — SPECIAL RULE IN NEW BRUNSWICK— EXERCISE OF DISCRETION

Applications for an order for service out of the jurisdiction in a tort case can present vexing problems. This is especially true in federal countries such as Canada and the United States where there are many "law districts". The decision of McRuer C.J.H.C. in *Jenner v. Sun Oil Co. Ltd.*[1] may serve as a focal point for a discussion of some of these problems. In that case allegedly defamatory radio broadcasts emanating from New York were heard in Ontario.[2] The plaintiff, an Ontario resident, brought an action in defamation in Ontario against a number of defendants. These defendants, individuals and limited companies, were resident in Ontario, New York, Pennsylvania, Maryland and the District of Columbia. An order for service out of the jurisdiction was sought on the grounds that the action was a tort committed within Ontario and that a person out of Ontario was a necessary or proper party to the action properly brought against another person duly served within Ontario. The above are grounds *inter alia* under which the Ontario Rules of Court permit service out of the jurisdiction. There are identical provisions in the Rules of the Supreme Court of New Brunswick.[3]

The granting of the order on the ground that a party defendant properly served within the jurisdiction was a necessary or proper party was not considered, as the matter was disposed of on the ground that this was a tort committed within Ontario.[4]

An obstacle in the way of finding that there was a tort committed within the jurisdiction was *George Monro Ltd. v. American Cyanamid and Chemical Corp.*,[5] a decision of the English Court of Appeal. There a negligent act was committed in the State of New York in the manufacturing process with the resulting damage occurring in England. It was held that the tort was not committed in England when damage and nothing more occurs there. The judgment did not go so far as to say that the tort must be **wholly** committed within the jurisdiction and in fact Scott L. J., expressly left that question open:

> I express no opinion whether, if an act were committed out of the jurisdiction which did not give rise to a cause of action in tort until something further had happened within the jurisdiction, the resultant damage could properly be regarded

1. [1952] 2 D.L.R. 526 (Ont.).
2. An interesting discussion of this type of tort based on U. S. authorities appears in Harper, "Tort Cases in the Conflict of Laws," (1955) 33 Can. B. Rev. 1155, at p 1169 et seq.
3. O. 11, r. 1 (1) (e) and (g) of the Rules of the Supreme Court of New Brunswick.
4. On this ground of service out of the jurisdiction see **The Brabo**, [1949] A. C. 326 and **Paul v. Chandler & Fisher Ltd.**, [1924] 2 D.L.R. 479 (Ont.).
5. [1944] K. B. 432 (C. A.).

> as flowing from a tort taking place within the jurisdiction. It is not necessary to decide that question in the present case.[6]

Thus the first obstacle to finding that there was a tort committed in Ontario is disposed of quite easily. A number of other cases[7] go as far as the *Mo.* case in holding that damage alone within the jurisdiction is not enough.

In *Johnson v. Taylor Brothers*[8] where the House of Lords had to decide, on an application for external service, whether a breach of contract occurred within England they said the test is whether it was "substantially" committed within the judisdiction rather than "wholly" or "solely". While their Lordships were not directing their minds to torts it is submitted that the rules relating to breach of contract are identical in principle.

A leading authority for holding that the tort in the *Jenner* case was a tort committed within Ontario is *Bata v. Bata*[9], a decision of the English Court of Appeal; Lord Justice Scott answered the question which he did not decide in the *Monro* case. A letter mailed from Switzerland to England containing defamatory statements was held to be a tort committed within England on the ground that the material part of the cause of action in libel is not the writing but the publication. Unfortunately this case is not fully reported, appearing only as a headnote in the *Weekly Notes*. The facts in *Bata v. Bata* would appear to be on all fours with those in the *Jenner* case. The only discernible difference, which seems immaterial in deciding where a tort is committed, being between the written and the spoken word.

Publication in defamation appears to be analogous to the negligent act or omission in negligence and publication occurs not on the speaking of the defamatory words but on the hearing of them. This is not to say that speaking is not a part of publication; it may be that publication consists of both the speaking and hearing. However it would not follow that the facts in the *Jenner* case did not amount to a tort committed within Ontario for the following reasons: (1) the hearing of the defamatory statements occurred there; (2) the hearing would appear to be a "substantial" commission of the tort; (3) there is no requirement that the tort be "wholly" or "solely" committed within Ontario; and (4) *Bata v. Bata* being in point there appears to be no reason for departing from that authority. The learned Chief Justice's finding that the tort was committed in Ontario therefore seems amply warranted.

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6. **Ibid.**, at p. 437.
7. **Paul v. Chandler & Fisher Ltd.**, [1924] 2 D.L.R. 479 (Ont.); **Beck v. Willard Chocolate Co.**, [1924] 2 D.L.R. 1140 (N. S. Sup. Ct.); **Anderson v. Nobels Explosive Co.**, (1906) 12 O.L.R. 644 (Ont. Div. Ct.).
8. [1920] A. C. 144.
9. [1948] W. N. 366 (C. A.).

In New Brunswick, in addition to the enumerated grounds which include the two referred to above, it is provided:

> Service may also be allowed where the action is for any other matter and it appears to the satisfaction of the Court or a Judge that the plaintiff has any good cause of action against the defendant and that it is in the interest of justice that the same should be tried in this jurisdiction; . . . [10]

This provision was interpreted by the Court of Appeal in *Roy v. Saint John Lumber Company*.[11] White J., speaking for the majority (Grimmer J., concurring without reasons; Crockett J., dissenting), said "any other matter" included those matters over which the Court had jurisdiction to order service *ex juris* before the coming into force of the Judicature Act and which were not specifically included in the enumeration of matters in the new Order 11. Since contracts made in the Province the breach of which occurred outside had formerly been a ground for service abroad,[12] service out of the jurisdiction was granted. However before the coming into force of the Judicature Act service out of the jurisdiction was not permitted in the case of torts committed without the Province. There is however a very recent New Brunswick case,[13] decided this year by Michaud C.J.Q.B.D., in which he found that an automobile accident in Quebec is a proper subject to be brought within 0. 11, r. 1 (2). It is understood that this case is on appeal; for that reason no comment will be made here.

Service out of the jurisdiction was unknown at common law; it is statutory in origin. It is *prima facie* an interference with the jurisdiction of a foreign power; the rules which provide for such service use the permissive "may" rather than the mandatory "shall". A discretion is given which must be exercised judicially. This is the spirit of the law referred to in the *Monro* case where it was said that the facts must come within the "spirit" as well as the "letter" of the rule. In the *Jenner* case the learned Chief Justice having found that the facts came within the "letter" of the rule was required to examine its "spirit" to determine whether the discretion had been exercised accordingly.

It is said that if there is any doubt whether the discretion should be exercised it should be resolved in favour of the foreigner.[14] The circumstances surrounding the action must be viewed to determine whether any doubt exists.

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10. 0. 11, r. 1 (2) of the Rules of the Supreme Court of New Brunswick. Formerly 0. 11, r. 1 (h).
11. (1916) 44 N.B.R. 88 (C. A.).
12. S. 52 of the Supreme Court Act, Chapter 110, Consolidated Statutes of New Brunswick 1903. The grounds under which service out of the jurisdiction might be granted were where "a cause of action which arose within the jurisdiction, or in respect of a breach of a contract made wholly or in part within the jurisdiction, or in respect of any contract executed, or to be executed, in whole or in part within the jurisdiction."
13. King v. Paradis [1956] N. B., Q.B.D. (Unreported).
14. The "Hagen", [1908] P. 189 (C. A.).

Examination of the cases discloses no analysis of the basis for exercising the discretion. The learned Chief Justice speaks only of the *forum conveniens* as an important element. Slesser L. J., said in *Kroch v. Rossell et cie* [15]:

> But the fact that the case might be tried in this country, and might be within the jurisdiction, is not necessarily a sufficient reason for allowing leave to be given to serve out of the jurisdiction. The various matters which have to be considered have been constantly before the courts, the question of the convenenience of the forum, the question of under which laws, such questions as the place where the evidence may more regularly be obtained, where the case may more conveniently be heard, and a number of other considerations, which it is perhaps unwise to attempt to define in any particular manner.[16]

The above quotation hardly indicates a real attempt to analyze the constituent elements of the discretion. Indeed all the various matters referred to would seem to be contained in the term *forum conveniens* .

As regards the *forum conveniens* it is of importance that the plaintiff in the *Jenner* case sought vindication of his reputation and the trying of the cause in Ontario would give him the widest publicity in the area where his reputation may be said to be located. In the *Kroch* case a French resident sought to sue in England because of certain defamatory statements contained in a Belgian and a French newspaper which had been circulated in a small number in England. Slesser L. J. said:

> I quite agree with Mr. Slade that, if there were evidence in a particular case that a person had a reputation in this country to be defamed, or was known here, or traded here, or had professional or social connections, it might be that the circulation of a very few copies might do him very serious or irreparable harm. It is certainly an element to be taken into consideration.[17]

The material for the broadcasts was apparently gathered in Ontario. The hearing of the case in Ontario would facilitate the presenting of evidence should the defendants seek to justify. Also the witnesses who heard the publications complained of would be best able to testify in Ontario.

Lord Justice Slesser alluded to the choice of law as a matter to be considered in the exercise of the discretion. Since the finding is that the facts constituted a tort committed within the jurisdiction, the *lex loci delicti commissi* and the *lex fori* coincide if the case is tried in Ontario.

15. [1937] 1 All E.R. 725 (C. A.).
16. Ibid., at p. 727.
17. Ibid., at p. 729.

The possibility of realizing on a judgment obtained might be a factor in the exercise of the discretion since a judgment would be an empty one could no assets be reached either directly or indirectly. Certain English legislation provides for the setting aside of a service out of the jurisdiction under such circumstances.[18] However this was not material in the *Jenner* case because one of the defendants was resident in Ontario.

Another factor which seems worthy of consideration is the lack of an alternative *forum conveniens*. Of the parties only one resided in New York from whence the defamatory broadcasts originated and the matter might be said to be not one of "substance" in New York. The tort seemed most intimately connected with Ontario: the statements were heard there, the material for the broadcasts was gathered there, the reputation sought to be vindicated was located there and two of the parties resided there. It is difficult to conclude other than that the discretion was properly exercised.

The applicability of the above principles to the law of New Brunswick should be examined. In the *Roy* case Barry J., from whose decision an appeal was taken, expressed some doubt whether he should exercise his discretion. In the light of *The "Hagen"* case one would have thought doubt should be resolved in favour of the foreigner. The headnote to the *Roy* case reads in part:

> *Per curiam*, where under clause (h) a judge in the exercise of his discretion on the facts decides that it is in the interest of justice that jurisdiction should be exercised and service abroad authorized, the Court on appeal will not interfere with the exercise of such discretion.[19]

The reporter must have based this comment on the argument of counsel for the plaintiff as it nowhere appears in the judgments in the Court of Appeal. In fact White J., speaking for the majority, said:

> The decision of the question we are called upon to determine in this matter depends upon the extent of the power conferred upon the Court or a judge by clause (h) of O. 11, r. 1, and not upon any consideration as to whether, assuming the learned judge had a discretionary power to make the order appealed from, he exercised that discretion just as we would have done upon the same facts.[20]

In the *Roy* appeal there was no consideration in the judgments of the circumstances under which the discretion ought to be exercised except that Mr. Justice White expressed the opinion that stricter limits should be observed under clause (h) than under the specific clauses (a) to (g). The proper manner of dealing with an exercised discretion on an appeal would seem to be as stated by Fullerton J. A. in *Nemerovsky v. McBride*.

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18. See **Goff v. Goff**, [1934] P. 107.
19. (1916) 44 N.B.R. 88.
20. **Ibid.**, at p. 116.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONTRACT — OFFER AND ACCEPTANCE — PLACE OF CONTRACTING — COMMUNICATION BY "TELEX"

Both plaintiffs in London and defendant's agents in Amsterdam had in their offices equipment known as Telex service by which messages could be dispatched by a teleprinter operated like a typewriter in one country and almost instantaneously received and typed in another. The plaintiffs desired to make a contract with the defendant's agents in Amsterdam for the purchase of copper cathodes from the defendant corporation. A series of communications by Telex passed between the plaintiffs and the defendant's agents, the material ones for the present purposes being a counter-offer made by the plaintiffs on September 8, 1954 and an acceptance of that offer by the Dutch agents on behalf of the defendant received by the plaintiffs in London by Telex on September 10, 1954. The plaintiffs alleged there had been a breach of the contract by the defendant. They applied under Order 11, rule 1 of the English Rules of Court for leave to serve notice of a writ on the defendant in New York on the ground that the contract was made in England. It was contended for the defendant that the contract was made in Holland. The application was granted by a master whose decision was affirmed by Donovan, J. The Court of Appeal affirmed Donovan, J.'s decision unanimously. *Entores v. Miles Far East Corporation,* [1955] 3 W. L. R. 48.

Order 11, rule 1 of the English Rules of Court provides in part that service out of the jurisdiction of a notice of a writ of summons may be allowed by the Court or Judge in an action to recover damages for the breach of a contract made within the jurisdiction.[1] Thus in this case the order could be granted if it were held that the contract was made when the message appeared on the Telex receiver in London, but not if the acceptance was effective on its transmission in Holland.

The general rule is that acceptance of an offer of a bilateral contract must be communicated to the offeror unless he has waived such communication by indicating some other mode. It would follow that the place of making is the place of receipt. Where, however, an offer is made by post, the rule is that the contract is concluded when and presumably where the letter of acceptance is posted. The Court of Appeal had to decide whether communication by Telex fell within the general rule or was so closely analogous to postal communication as to fall within that special category. Guidance could be sought in cases dealing with telephonic and telegraphic communication.

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1. R. S. C., Ord. 11, s. 1. (e) (i).

The law concerning telephonic and telegraphic communications is, however, not clear. The case law seemed to show a tendency to treat these cases as being similar in effect to the letter cases. In *Cowan v. O'Connor,* [2] for example, it was held that acceptance of an offer by telegram is made when and where the acceptance is handed to the telegraph company for transmission. Hawkins, J. said:

> "I think that where, as here, a person opens a correspondence and initiates a transaction by telegram he must be treated as though he were, through it, speaking to the person to whom such telegram is directed, at the place to which he directs it to be sent, and where he intends it to be delivered; and if he desires a reply by telegram, such a reply must be considered as given to him at the telegraph office from whence such reply is despatched."[3]

The same principle was applied in *Carow Towing Co. v. The "Ed McWilliams,"* [4] a telephone case. It was held that a contract proposed and accepted over the telephone is made where the words of acceptance are spoken. In the Exchequer Court, Hodgins, J. said: "His reply at the telephone is of the same effect as if he had posted a letter or sent off a telegram from an office in Ontario."[5] Professors Williston and Winfield have, however, taken a different view on the time and place of making a contract by telephone. Professor Winfield has written:

> "It is submitted that there is no communication until the reply actually comes to the knowledge of the offeror. In the first place, the telephone is much more like conversation face to face than an exchange of letters. It is a mere technicality to say that just because the Post Office has control of the telephone, it ought to be subject to exactly the same rules as govern letters . . . . the rule about acceptance by post was laid down before the telephone was generally known or used."[6]

Professor Williston expressed the hope that ". . . . the principles applicable to contracts between parties in the presence of each other will be applied to negotiations by telephone."[7]

The telephone and telegraph cases could give the court no sure guidance in the present case. Denning, L. J., said, ". . . There is no clear rule about contracts made by telephone or by Telex."[8] But contracts by Telex, being instaneous, fell more naturally, he thought, within the general rule governing acceptance. The conclusion he reached was:

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2. (1888) 20 Q. B. D. 640.
3. **Ibid.**, at p. 642.
4. (1919) 46 D. L. R. 506.
5. **Ibid.**, at p. 508.
6. Winfield, Some Aspects of Offer and Acceptance, (1939) 55 Law Q. Rev. 499, at p. 514.
7. Williston on Contracts (Revised ed. 1936), s. 82, p. 239.
8. [1955] 3 W. L. R. 48, at p. 50.

> ". . . . that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received."[9]

Birkett, L. J. agreed:

> "The ordinary rule of law, to which the special considerations governing contracts by post are exceptions, is that the acceptance of an offer must be communicated to the offeror, and the place where the contract is made is the place where the offeror receives the notification of the acceptance by the offeree."[10]

Parker, L. J. referred to the judgment of Thesiger, L. J. in *Household Fire and Carriage Accident Insurance Co. v. Grant,* [11] ". . . in which he points out that where the parties are at a distance the balance of convenience dictates that the contract shall be deemed complete when the acceptance is handed to the Post Office."[12] But in contracts made by instantaneous communication there is no need for any such rule of convenience; the normal rule governing the formation of contracts should apply.

This case is important because of the international scope of modern business and its use of methods of instantaneous communication. The case has laid down a workable principle logically arrived at.

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9. **Ibid.**, at p. 51.
10. **Ibid.**, at p. 53.
11. (1879) 4 Ex. D. 216.
12. [1955] 3 W. L. R. 48, at p. 54.

Practice Notes

1. Extending time for Notice of Appeal under 0.58, r. 3.

Plaintiff obtained an ex parte order extending time for the service of a notice of appeal from a judgment in the Queen's Bench Division. Defendant applied on summons for the plaintiff to show cause why the order so granted should not be set aside for irregularity in that no notice of the application had been given. It was held that the order was irregular for want of notice and must be set aside.

Selby v. Selby, per Richards, C. J. (January 1955).

Teed & Teed for defendant.

Limerick & Limerick for plaintiff.

2. Extending time for perfecting security in appeal to Supreme Court of Canada.

Defendant applied ex parte to extend the time for perfecting security on an appeal to the Supreme Court of Canada. The order was granted. Plaintiff moved to set aside the order for irregularity in that notice of motion had not been given nor had a summons been obtained to secure the order. Defendant argued that the Judge had no jurisdiction to reconsider the order once given: the jurisdiction to make the order is found in s. 65 of the Supreme Court Act and when exercised could not be revoked or changed.

Plaintiff argued that until such time as the Supreme Court of Canada made rules under s. 103 of the Act the rules of practice of the court in which the application was made were applicable.

Reference was made to **Jackson v. McLellan,** 19 N.B.R. 494. It was held that the ex parte order was irregular and must be set aside with costs to the plaintiff.

Debly v. M. Gordon & Son Ltd., per Richards C.J. (Sept. 1955).

Teed & Teed for plaintiff.

Ian P. Mackin for defendant.

3. Application in Chambers in New Brunswick Supreme Court in Supreme Court of Canada Appeals.

Defendant served notice of motion for a hearing in chambers on an application to extend time for perfecting security in an appeal to the Supreme Court of Canada. Before the day set in the notice of

motion, he secured a summons returnable the same day, calling upon plaintiff to show cause why the application by notice of motion should not be granted.

Plaintiff objected that under the Rules of Court six days notice had not been given; that all applications in chambers must be by summons; and that all notices of motion must be heard in Court. Reference was made to **Romaine Saulnier v. McCormick,** 1 M.P.R. 495 (N.B.C.A.).

Defendant argued that no practice had been established to cover applications under s. 65 of the Supreme Court of Canada Act and the Judge was free to deal with the matter as he saw fit.

McNair J. said:

"It would seem to me that in such applications where a procedure has not been set under s. 103 of the Supreme Court Act, a Judge should follow the practice and procedure in his own Court."

The applications were dismissed with costs to the plaintiff.

Debly v. M. Gordon & Son Ltd. (Sept. 1955).

Teed & Teed for plaintiff.

Ian P. Mackin for defendant.

4. Leave to issue execution under 0. 42, r. 23.

Plaintiff obtained judgment in the Supreme Court. The judgment was assigned in writing and notice of the assignment given to defendant. The assignee applied for examination of the judgment debtor under the provisions of section 33 of the Arrest and Examinations Act. Defendant objected on the ground that the examination was in effect a type of execution and leave had not been obtained to issue execution under Order 42, rule 23 of the Supreme Court. It was held:

"I am of the opinion that proceedings under section 33 of the Arrest and Examinations Act are in the nature of an execution. The purposes of an application for examination under section 33 are twofold.

"Firstly, as discovery in aid of execution, i.e., to find out what assets the debtor may have or have had that may be eligible to satisfy the judgment; secondly, where other forms of execution have failed or proved inadequate, to provide for instalment payments. Both purposes are directed to enforcement of the judgment. No one would make an application under this section but one who sought to enforce his judgment. If the creditor makes use of the application for the second purpose above (as he may rely upon this entirely and never issue execution at all) he is enforcing his judgment just as surely as if he levied by fieri facias.

"I conclude that the applicant must obtain leave under Order 42, Rule 23 before he is entitled to an order for examination under section 33 of the Arrest and Examinations Act."

Travis v. Maxwell, per Keirstead, Co. Ct. J., Saint John County (Jan. 1956).

Gilbert, McGloan & Gillis for judgment creditor.

Gibbon & Harrigan for defendant.

5. Cases entered but not tried

If a case has been entered on the docket of a Circuit Court and is not tried it automatically is placed on the docket of the next circuit as a remanet. If it is not then tried before the following circuit, it automatically is removed and must be re-entered. A case remains on the docket for two circuits.

Per Michaud, C.J.Q.B. at Saint John Circuit Jan. 1956.

6. Trial out of term: County Court Act, R.S.N.B. 1952, c. 45, s. 55

In an action for contribution for the support of a child and an order for weekly payments for maintenance, plaintiff applied for a trial out of term. Pleadings were closed, and two months would transpire before the regular sitting of the Court. Plaintiff alleged the matter was ready for trial and delay would mean the possible loss of weekly payments for the maintenance of a child. It was ordered that the trial be held out of term and a date was fixed before the regular sitting of the Court.

Lord v. Fudge, Kierstead Co. Ct. J. Saint John County (Dec. 1955).

Teed & Teed for plaintiff.

Henry E. Ryan for defendant.

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