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The Association of Canadian Law Teachers *

In 1950, with a thinly-spread population of over fifteen million Canada had eleven law schools, but only forty-four full-time law teachers. This small band of professional teachers, divided between the civil law of Quebec and the common law of the rest of Canada have had to perform the thousand and one tasks associated with teaching, administration and research. Too often the work of the Canadian law teacher has been made more difficult by an unsympathetic attitude on the part of those who ultimately control legal training in Canada. (1) Also, legal education in Canada has been marked for some time by what has been called "a limited allocation of resources". (2)

It has been a combination of environment, both legal and geographical, with prevailing attitudes which has delayed the formation of the Association of Canadian Law Teachers. The American law schools formed an association in 1900 to improve legal education. (3) It was not until 1951 that a distinct Canadian counterpart was formally organized. Unlike the Association of American Law Schools, however, the Canadian organization does not have an institutional basis; the Association of Canadian Law Teachers is not a central organization of law schools or of representatives of law schools: it is an individualistic continuous association of law teachers. (4)

The first meeting of the law teachers, who later were to take the leadership in forming the Canadian Association of Law Teachers, was held in Ottawa in the autumn of 1947. The opportunity was provided by the Canadian Bar Association which was then meeting in the nation's capital. The teachers who were chiefly responsible for initiat-

*This article was written for the AMERICAN JOURNAL OF LEGAL EDUCATION: The editor of that review and the author have granted us their kind permission to reproduce it in these pages.

(1) See Cecil A. Wright, *Should the Profession Control Legal Education*, in (1950), 3 JOURNAL LEGAL EDUC. 1.

(2) Maxwell Cohen, *The Condition of Legal Education in Canada*, in (1951), 28 CAN. BAR REV. 267, at p. 272.

(3) W. A. Seavey, *The Association of American Law Schools in Retrospect*, in (1950), 3 JOURNAL LEGAL EDUC. 153.

(4) "Constitution and Purposes of the Association: (1) Membership is open to all persons engaged in the teaching of law in Canada (whether full or part time) and to the editor of the Canadian Bar Review. (2) The Association is representative of law teachers and is primarily concerned with their problems and interests. It is not representative of law schools or their administration as such." From the minutes of the meeting held at McGill University, Montreal, June 4th and 5th, 1951.

ing this gathering, the genesis of the Association, were Dean George F. Curtis of the University of British Columbia Law School and Professor F. R. Scott of the McGill Law Faculty. Considerable enthusiasm for a future meeting was evinced in Ottawa and it was determined to meet again in 1948. The annual meeting of the Canadian Bar Association again afforded the occasion and the law teachers assembled at McGill University in Montreal. The report of that meeting indicates that the teachers in attendance concluded that "a useful purpose would be served" by forming an association of Canadian law teachers "on a more or less permanent" basis. (5) It was agreed that the law teachers should meet annually, if possible, and the most convenient time would be during the next annual meeting of the Canadian Bar Association at Banff, Alberta. Poor attendance of law teachers at the 1949 meeting indicated the difficulties of attempting to fit these meetings into the proceedings of the Bar Association. It was decided that the 1950 meeting should be held in Kingston, Ontario, where the so-called "learned societies" (6) were meeting. The 1951 meeting was held at McGill University in Montreal where the learned societies were also meeting. This convention gave a formal status and permanent basis to the association by adopting a simple constitution and by electing an executive. (7)

After a casual beginning, and tentative existence, the very logic of the annual meetings crystallized the Association into a formal organization. However, this passage from one form to another did not change the purpose or the aim of the Association which is no more grandiose than to meet annually "to discuss common problems". (8) It was felt that annual discussions of common problems by unofficial delegates from the law schools would eventually benefit those law schools. There has never been any desire to impose decisions upon participating law schools. The objective of the Association has been solely to develop closer co-operation on common problems and to exchange information and ideas.

(5) From the Report of Canadian Law Teachers Meeting, held at Montreal, P.Q., August 30th, 1948.

(6) For example, the Canadian Historical Association, the Canadian Association of Political Science and the Royal Society of Canada. These societies meet annually in early June before or after the National Conference of Canadian Universities. The invaluable contact made by law teachers with university colleagues in other fields seemed to be an additional reason for meeting with the learned societies. However, convenience has always been the deciding factor in fixing the place and time of meeting. See the minutes of the meeting held at Montreal, on June 4th and 5th, 1951.

(7) During the informal phase of the association, between 1947 and 1951, Professor F .R. Scott of McGill University had acted as convenor of the gatherings.

(8) From the Report of the Canadian Law Teachers Meeting, held August 30th, 1948, at McGill University, Montreal.

In 1952, the Association met under the distinguished chairmanship of its first president, Dean George F. Curtis of the Law Faculty of the University of British Columbia. The meetings were convened in early June in the gracious old-world setting of Laval University in Quebec, where the learned societies were also gathering. Ten law schools were represented as against only five at the 1950 conference at Kingston, Ontario. The Association of American Law Schools was ably represented by its president, Professor Robert E. Mathews. Topics discussed embraced the full range of the common problems which common law teachers in nine provinces share with civil law teachers in the Province of Quebec.

This is not the place for a discussion in detail of the matters raised at the 1952 conference. Only brief mention of each topic will be made. Naturally, panel discussions, attended by those who were interested, were held on various subjects of legal education — torts, taxation, contracts, constitutional law, evidence and labour law. The plenary sessions devoted themselves to a discussion of problems involved in the publication of teaching materials and aids, the co-ordination of law library facilities, the teaching of public international law, teaching techniques and the study of comparative law. While there were areas of disagreement in the discussion of these matters, one striking conclusion stands out — there exist important fields common to all provinces in which there is scope and need for co-operation between civil and common law schools. This is especially true in the field of comparative law for it is obvious that Canada has a unique and favorable environment to stimulate the study of comparative law, in that she has two, mutually-enriching legal systems within the bosom of a single federal state, namely, the civil law of Quebec and the common law of the other nine provinces. (9)

After a short existence of only a few years the Association can now claim to be more than a clearing house of information. As its concern is with the advancement of legal education, the Association has provided, and should provide, leadership in this field to the legal profession in Canada. It may or may not attempt to exercise this leadership through the formulation of standards it considers desirable for the Canadian law schools. But it has and it should continue to emphasize the scholarly purposes and traditions of the law profession in Canada.

J. Carlisle Hanson*

(9) So obvious, indeed, that it was announced to the Association that the Carnegie Institute has placed $50,000. at the disposal of the University of Toronto Law School for the study of comparative law in Canada.

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THE ENFORCEABILITY OF WAGERS IN NEW BRUNSWICK

Gaming and wagering have been enjoyed (on the part of the successful participants in any event) by people the world over for many ages. The elements of risk and uncertainty in such transactions have appealed to the side of human nature that enjoys the possibility of realizing something for little or no effort on their part. Wagering has not only been entered into for trifling amounts and for pleasure, but also for large sums and as a matter of business.

"Wager" was defined by Hawkins J. in **Carlill v Carbolic Smoke Ball Co.** (1) in the following words: "(a transaction) . . . by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that dependent on the determination of that event one shall win from the other, and that the other shall pay or hand over to him a sum of money or other stake, neither of the contracting parties having any other interest in that contract than the sum or stake he will win or lose, there being no other real consideration for the making of such contract by either of the parties." Strictly speaking, such a wager as just defined was probably at first an honourable transaction between parties and nothing more – one that if not honoured by one party would bring little more than moral condemnation from the other. Support for this view is found in the past and present attitudes of the law as treating a wager as something rather personal between the parties to it – an agreement not to be enforced by a court but merely to be honourably upheld by the parties.

However, changes have taken place. The honour side of the wager was not altogether extinguished as being outdated phase of the transaction, but was in many cases relegated to the background when purely mercenary considerations began to occupy the minds of wagerers. The commercial and contractual aspects of gaming began to rear hitherto unthought of heads, the successful party beginning to question whether he could not enforce his "debt of honour" by some means other than by a simple appeal to the character of the losing party. Those arbiters of social custom, the Courts, were eventually resorted to, and it is their pronouncements on the enforceability of wagers, as well as legislative pronouncements on the question, that must be examined to ascertain the present state of the law in New Brunswick. It is proposed to deal principally with wagers between individuals rather than gambling covered by the Criminal Code, lotteries, etc.

To appreciate New Brunswick's position one must first have regard to the English decisions and statutes which have had an effect on the development of our wagering law. The pronouncements of

1. (1892) 2 Q. B. 484

the English courts on wagering stemmed largely from their doctrine of public policy. Gaming in many instances was looked upon as contrary to public policy. When English courts first adjudicated on the matter, however, wagers were assumed to be valid, with scarcely a dissenting murmur. Lord Campbell in the **Ramloll** case (2) of 1848 stated the common law position to be that " . . . an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy." In **Sherbon v Colebach** (3), a case tried in the reign of William and Mary, an action in indebitatus assumpsit for £20 won by the plaintiff in a game of chance was upheld. It is amusing to note that the Court, apparently in all seriousness, stated that the declaration "might be as well as an indebitatus pro opere et labore."

The time came, however, when the English bench repented of its lenient stand towards wagers, and in seeking to suppress what they had once upheld sometimes went to ridiculous lengths. A prime example of their abstruse reasoning is found in the 1818 case of **Eltham v Kingsman** (4), in which one carriage proprietor made a wager with another that a certain person would choose to go to the assembly rooms in his carriage rather than the other's. In suing to enforce his winning (the honour system having somehow gone astray) the successful carriage proprietor was told that the wager was void because it tended to abridge the freedom of one of the public to choose his own conveyance and to be exposed to " . . . the inconvenience of being importuned by rival coachmen." Similarly a wager on the (length of) life of the Emperor Napoleon was void because it gave the plaintiff an interest in keeping the king's enemy alive, and the defendant an interest in bringing about his death by other than lawful warfare (5). This stiffening attitude of the court was not free from criticism however, for Lord Campbell in the **Ramloll** (2) case stated that he looked with "concern and almost with shame" on such subterfuges and contrivances with which judges in England sought to evade what the learned judge thought a clear rule of common law.

But further changes in the original tolerant attitude were forthcoming, this time in the form of legislative enactments. As pointed out by Cockburn C. J. in **Hampden v Walsh** (6) (a case by the way in which an English gentleman refused to accept the findings of explorers that the world was really round and not flat), the broad common law rule that a wagering contract was a legal and therefore enforceable contract was altered by various statutes so that many forms of betting and wagering became stamped with illegality, with

2. Ramloll Thackoorseydass v Soojumnull Dhondmull (1849) 6 Moo. P. C. 300; 13 E. R. 699, 18 E. R. 729
3. 86 E.R. 377
4. (1818) 1 B & Ald. 683; 106 E.R. 251
5. Gilbert v Sykes (1812) 16 East 150; 104 E.R. 1045
6. (1876) 1 Q.B.D. 189

the result that a winner could no longer maintain an action for non-payment. Even the few types of wagers that were beyond the scope of these earlier statutes were often unenforceable due to the continuance of the bench's crusade to suppress gambling, and ample grounds under the head of "matters of a frivolous nature" were found to bar a winner from succeeding in realizing on his winnings.

An early English statute on gaming was passed in the reign of Henry VIII, in the year 1541 (7), entitled "The Bill for the Maintaining Artillery and the Debarring of Unlawful Games". By this enactment the law's stiffening attitude towards gaming in general is shown, for by section eleven several named classes of people such as apprentices, labourers, and fishermen were forbidden from a set time to play at tables, tennis, dice, cards, bowls, etc. under pain of a twenty shilling forfeit for each time apprehended doing so. Public gaming was restricted by the further provision forbidding under pain of fine any playing at bowls outside their own gardens or orchards.

By the later and for our purposes much more important statute of 9 Anne, C. 14, passed in the year 1710, all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn or entered into or executed by any persons where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing, whatsoever won by gaming or playing at cards, dicetables, etc. etc., or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person(s) so gaming, "shall be utterly void, frustrate, and of none effect to all intents and purposes whatsoever . . . " This statute of Anne drastically changed the common law, for broadly speaking, securities given for gaming debts could not now be legally enforced. Such securities were rendered worthless by this enactment which declared them utterly void. The statute was well intituled "An Act for the Better Preventing of Excessive and Deceitful Gaming."

In order to better carry out the purpose of this 1710 Act, several further enactments were made, such as 12 Geo. 2, 28 1738, until in 1835 it was amended by 5 & 6 Wm. 4, 41. A significant change took place, for now the securities given in respect of wagering transactions are not deemed to be ". . . void, frustrate, and of none effect" but are deemed to have been given for illegal consideration. This amendment would appear to brand a wagering transaction with actual illegality, whereas formerly it had been more or less neutral in character.

Then in 1845 came 8 & 9 Victoria, C. 109, "The Gaming Act", which is still the governing law in England. The relevant section is as follows:

7. 33 Hen. 8, C. 9 (Imp.)

> S. 18. All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made . . .

Contained in the section also is a saving clause concerning subscriptions, etc., in respect of lawful games. By this Act the common law position was relegated to oblivion, for not only are the securities of the Statute of Anne unenforceable, but also any contract or agreement, parole or otherwise, arising by way of gaming or wagering.

A further act introduced by Lord Herschell in 1892 (8) had the effect of amending the powerful 1845 statute with this result: that where A had paid money at B's request to persons to whom B was indebted because of lost wagers, A had no recourse against B for the monies so paid on his behalf.

Though subsequent enactments on the subject of gambling and wagering have been passed by the English legislature, the general effect of the 1845 Statute remains unimpaired; accordingly a brief summation by Halsbury (9), founded largely on that Act, states the English position on the subject of wagers: "All contracts by way of gaming or wagering are void, and no action can be brought by the winner of a wager either against the loser or the stakeholder to recover what is alleged to be won. This applies both to wagers upon games and to those upon other events. All alike are void, and, though not illegal, are of a neutral character, giving rise neither to rights or liabilities."

The English courts and Parliament have thus attempted with their respective machineries to discourage gambling, by driving a winner of a bet back to reliance on the loser's honour for realization of the sum won (a procedure somewhat tainted with risk). What is the position in New Brunswick with respect to wagers? There appears to be a dearth of case law on the question, but such authorities as exist suggest that New Brunswick's common law position accords with that of England, for in **Bailey v McDuffee** (10) the Court remarked that gaming, which included wagering, had by common law been legal, unless contrary to the principles of morality and sound policy – a statement similar to the English view as expressed in the **Ramloll** case (2). The Court went on to say that statutory enactments had subsequently changed the common law position.

One of the earliest of these was passed in 1786 (11) and set the style for subsequent New Brunswick gaming statutes. By this Act, "for the more effectually preventing and suppressing Gaming of every kind," all notes, bills, bonds, mortgages or other securities or

8. 55 & 56 Vict., C. 9 (Imp.)
9. Vol. 15, p. 475, s. 872
10. (1878) 18 N.B.R. 26
11. 26 Geo. 3, C. 26 (N.B.)

conveyances whatsoever entered into, where the whole or any part of the consideration be for any money or any valuable thing, won by gaming or playing at cards, dice, etc., "shall be utterly void, frustrate and of none effect, to all intents and purposes whatsoever." This provision re-echoes the Statute of Anne both in spirit and language. By section two of the Act, a plaintiff was to suffer non-suit if he brought action in any Court of Judicature in the Province for any sum of money, when it should appear that the cause of action "accrued by or in consequence of a wager or gaming bet", and the defendant in such an action should have full costs. Section three was important from the loser's standpoint, for it provided that where any person within twenty-four hours or at any one meeting or sitting lost more than twenty shillings to one or more persons, or goods valued at more than twenty shillings, and paid the sum lost or any part thereof to the winner, he could within one month sue for and recover such payment from the winner or winners. This section has been substantially re-enacted down to the present gaming statute, with appropriate currency changes.

In 1854 the 1786 Act was repealed (12) and a modified statute (13) substituted, which with slight variation has become the statutory law of New Brunswick today. Section one reads as follows:

> All instruments for the payment or securing the payment of money, performance of engagements, or conveyance of any estate, real or personal, founded upon, arising out of, or connected with any gambling transaction, shall be void; but the wife and heirs of any person making any such instrument affecting such estate, shall be entitled to the same, whether mortgaged or otherwise, as if such person were naturally dead.

The Act goes on to treat in almost identical language with that of the repealed statute, with the right of the loser to recover what he had lost within twenty-four hours or at any one sitting provided suit was brought within a month, and the final provision deals, as did the 1786 Act, with parents, masters, and guardians recovering monies won from their infant charges. However, the Act contains no section similar to section two of the 1786 Statute which automatically non-suited a plaintiff suing on a wager. The question of whether a purely verbal wager can be enforced by the winner seems therefore to be open. It scarcely seems likely that the legislature intended to revert to the common law position in regard to oral wagers, particularly when one considers that a loser may under the conditions outlined recover money lost; but because of the withdrawal of the 1786 "non-suit" provision there is reason for doubting whether all wagers are unenforceable in New Brunswick. Some oral wagers may be unaffected by the Gaming Act; if so, they would be governed by the common law, and as late as 1904 in the New Brunswick case of **Seeley v Dalton** (14), there was dictum to the effect that a wager is not an illegal transaction.

12. Repealed by C. 162 of the 1854 Acts.
13. Revised Statutes of New Brunswick (1854) C. 103 (N.B.)
14. (1904) 36 N.B.R. 442

C. 103 of 1854 was enacted again as C. 87 of the Consolidated Statutes of New Brunswick, 1877, then as C. 145 of 1903's Consolidated Statutes, and with minor changes as C. 156 of the Revised Statutes of 1927. No further amendments have been made to date.

This province's legislation on the enforceability of wagers does not go to the same extent as that of England. All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void, with no suit to be brought to enforce them – this is the English position under the 1845 Act. With the exception of the repealed 1786 Statute, New Brunswick has confined its enactments to instruments only, except for the loser's limited right to recover losses. The result is that our legislation accords more with the English Statute of Anne before its amendment by 5 & 6 Wm. 4, C. 41. Indeed, one New Brunswick judge stated as late as the year 1932 that 9 Anne C. 14 as amended is in force in the province (15). With respect, this statement may be open to question in view of the fact that our Gaming Act seems to cover the same ground.

The position of a stakeholder in New Brunswick appears to be substantially the same as in England. In the English case of **Hastelow v Jackson** (16) it was stated that where parties pay money to a stakeholder to abide the event wagered on, they may recover their respective deposits from the stakeholder if it has been paid over by him to one of the parties against the other depositor's wishes as expressed before the payment, or if the event for which the deposit was made has not occurred. In **Kinney v Stubbs** (17), a New Brunswick case, the plaintiff was permitted to recover the deposit from a stakeholder when the horse race for which the money had been deposited was not run. But there is no reported case in this province in which the winner of a wager has recovered from the stakeholder the loser's deposit as well as his own.

On reviewing New Brunswick's position regarding wagers, it seems that there are some types of wagers not provided for by our statute. It will be necessary to have a strong court decision or legislative pronouncement before this uncertainty be resolved.

Beverley Smith, Law III

15. McLatchy Co. Ct. Judge in Leblanc v Thomas (1932) 5 M.P.R. 401
16. (1828) 108 E.R. 1026
17. (1858) 9 N.B.R. 126

The Conflict of Laws Sections in the New N. B. Wills Act

1. LORD KINGSDOWN'S ACT.

In 1857, the Judicial Committee of the Privy Council, in the leading case of Bremer v. Freeman (1), affirmed the exclusive authority of the law of a testator's domicile at death to prescribe the forms in accordance with which a will of movables should be made. The following is Lord Wensleydale's proposition:

> That the law of the Testator's domicile at the time of making the Will and of the death of the Testator, when there is no intermediate change of domicile, must govern the form and solemnities of the instrument, can no longer be questioned.

In that case the testatrix, an Englishwoman, was living in France. But she had not obtained the authorization of the French government to establish a domicile in France and, while there, she made a will in English form. It was held that, under English conflict rules, whatever may have been her status under French domestic law, she was domiciled in France when she made her will and that, since she had not satisfied the formalities of the French law in making it, it was invalid.

Cheshire (2) says that "this (decision) caused so much alarm among British subjects resident in Paris that they pressed the Legislature to provide a remedy for the future", and that "stimulated by this agitation, Lord Kingsdown introduced his bill to alter the law . . . " The Parliament of the United Kingdom approved the bill and, in 1861, enacted "An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects" (3). This act is usually referred to as Lord Kingsdown's Act. It is reproduced, mutatis mutandis, in the New Brunswick Wills Act contained in the Revised Statutes of 1927 (4).

The dominant sections of Lord Kingsdown's Act are sections 1 and 2:

> 1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's Dominions where he had his domicile of origin.

(1) 14 E. R. 508.
(2) Private International Law, 3rd. Ed. p. 691.
(3) Cited as the Wills Act, 1861, 24 & 25 Vic. c. 114.
(4) R.S.N.B. 1927, c. 173, ss. 29 to 33.

2 Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Certain differences in language may be observed in these two sections. To indicate only one, section 1 refers to "a British subject" while section 2 speaks of "any British subject".. In the case of In re Grassi (5), Buckley J. reviews these verbal differences and says that "they must have arisen from a want of scanning the language, and not from the existence of any purpose of producing different results". He later adds that the variance between the two sections is "one of words only, and not of meaning". The actual difference between them is that section 1 applies to wills made "out of the United Kingdom" while section 2 refers to wills made "within the United Kingdom". And, whereas section 1 provides three alternatives to the form prescribed by the law of the domicile of the testator at the time of death, section 2 only permits one such alternative, namely, the lex loci actus. Both sections are restricted to wills of "British subjects" and, most important of all, both are limited to wills of "personal estate".

Varied theories have been advanced to explain why this Act adopted the classification of "personal estate" rather than that of "movables". What appears to be the most plausible explanation is that, in using the expression "personal estate", the British Parliament was using the inaccurate language of older judgments and older text writers and that it used the term "personal estate" to signify the concept "movables". But the Act has nevertheless been construed literally by the courts wherever it has been adopted and, as a result, an illogical situation has arisen in English Conflict of Laws.

Before Lord Kingsdown's Act, in order to arrive at a common basis with other systems for determining questions involving foreign elements, English conflict rules had classified the subject matter of ownership into "movables" and "immovables". It is not necessary here to review the reasons underlying the maxim "mobilia sequuntur personam". But, in view of the exceptions brought into English conflict law by Lord Kingsdown's Act in regard to chattel interests in land, a class of immovables which English law classifies as personal property, it might be well to touch on some of the reasons for recognizing that all immovables should be governed by the lex rei sitae.

This rule is supported by Cook (6) on principles of social convenience:

(5) (1905) 1 Ch. 584 at 591.
(6) 'Immovables' and the 'Law' of the 'Situs' (1939) 52 Harvard Law Review, 1246 at 1247.

> Clearly the physical object in question can not as 'land' be removed outside the borders of the state or country in which it is physically situated. One can, of course, 'sever' a portion of the 'land' and thereby convert it into a 'chattel' or 'movable', and then transport it elsewhere. So long, however, as it remains 'land' it must remain within the borders of a given state; consequently under the territorial organization of modern society, only the appropriate officers of the government of the state in question may lawfully deal physically with it. This being so, if the question as to who owns or is entitled to the possession of a piece of 'land' in one state is raised in the courts of another state, it seems obvious that it is desirable or convenient for the court in this other state to inquire what the courts of the state where the 'land' is would say about the matter, and thereby bring about uniformity of decision.

In Freke v. Lord Carbery (7), Lord Selborne supports the same rule by reference to the law of nature and of nations and he speaks along similar lines, not only of land but also of chattel interests in land:

> "The territory and soil of England, by the law of nature and of nations, which is recognized also as part of the law of England, is governed by all statutes which are in force in England. This leasehold property in Belgrave Square is part of the territory and soil of England, and the fact that the testator had a chattel interest in it, and not a freehold interest, makes it in no way whatever less so."

The illogical exception to which Lord Kingsdown's Act has subjected this rule springs from the fact that, under English domestic law, a number of interests in land are classified as personal property, for example, leasehold interests, a mortgagee's interest, or the interest of a beneficiary in real property held upon trust for conversion into money. In their character as interests in land, these interests are immovables and, as such, succession to them should be governed by the lex rei sitae. But, by reason of Lord Kingsdown's Act, in their character as personal estate, these interests may, as regards formal validity, be disposed of by will in any of the alternative forms which that act permits. In other words, whereas previously English Conflict of Laws was only concerned with the distinction between movables and immovables in selecting the proper law for purposes of probate and succession, it had now to consider the common law distinction between realty and personalty as well.

In Canada, the situation has been made even more complicated by the fact that the various provinces have not uniformly adopted Lord Kingsdown's Act. New Brunswick has incorporated the whole act into its 1927 Wills Act; Ontario and Alberta adopted sections 1, 2 and 3; British Columbia only adopted section 1; Nova Scotia adopted section 1 with two modifications; Prince Edward Island, on the other hand, does not appear to have adopted any of the sections.

2. PART II OF THE N.B. WILLS ACT (1950) AS AMENDED

It was with a view to eliminating the complications discussed above that, in 1929, the Conference of Commissioners on Uniformity of Legislation in Canada adopted a revised version of Lord Kingsdown's

(7) 1873 L. R. Eq. 461.

Act as Part II of the draft Uniform Wills Act. Part II of that draft act is reproduced in sections 33 to 35 inclusive of the 1950 New Brunswick Wills Act (9). The benefits of this Act are extended to all persons and are not limited to British subjects; the Act rectifies the error of the British Parliament in using the term "personal estate", substituting the concept "movables"; it extends the scope of the original Act; and it includes a statement of the general conflict rules relating to the formal and intrinsic validity of wills.

(a) Change in Terminology

After the Uniform Wills Act was adopted by the Conference in 1929, Dr. Falconbridge, who had contributed to that revision, submitted a further redraft. This appeared first in a note published in the Law Quarterly Review (10) and is reproduced in Dr. Falconbridge's Essays on the Conflict of Laws (11). In 1951, Dr. Falconbridge brought the subject matter of this note to the attention of the Ontario Commissioners who embodied the note verbatim in their report which was submitted to the 1951 Conference.

The Conference referred the report and the Uniform Wills Act to the Nova Scotia Commissioners to act in consultation with Dr. Falconbridge for the purpose of incorporating into the Act a new Part II, giving effect to Dr. Falconbridge's recommendations. The Nova Scotia Commissioners were to report at the next meeting of the Conference.

In the meantime, the New Brunswick Legislature, by section 25 of the Statute Law Amendment Act, 1952 (12), repealed Part II of the 1950 New Brunswick Wills Act substituted a new Part II which enacts Dr. Falconbridge's latest redraft.

The only explanation of the reasons for the redraft which appears in Dr. Falconbridge's note is contained in the following paragraph:

> **The terms "movable property" and "immovable property" which** occur in the Conference version are inconsistent with the distinction between things on the one hand and the property or an interest in things on the other hand . . . Things may be movable or immovable, but the property or an interest in a thing is an intangible concept that cannot itself be described as movable or immovable. If the thing itself in which a person has the property or an interest is intangible, neither thing nor property or interest can be accurately described as movable or immovable, but conventionally an intangible thing is classified as movable in the conflict of laws and therefore in the new version the definition of "interest in movables" includes an interest in an intangible thing.

On reading the various chapters of his Essays on the Conflict of Laws, however, particularly chapters 20, 21 and 32, one gets a clearer understanding of the defects in the 1929 draft which he is seeking to remedy.

(9) 14 Geo. VI, c. 172.
(10) (1946) 62 Law Quarterly Review, p. 323
(11) Pages 474 to 476.
(12) 1 Eliz. II, c. 22.

First it should be kept in mind that this redraft is not meant to alter the substantive law of the 1929 draft in any way. It is merely designed to restate the contents of the original draft in more accurate terms. An examination of the previous artificial use of the terms "movables" and "immovables" shows that there was need for a revision of these terms along the lines adopted in the new Part II.

It is often said that "immovables are governed by the lex situs". But a court never has to decide on an immovable. The word "immovable" is a term which refers to the physical nature of a thing; it distinguishes land, and things physically attached to it, from other things. What courts decide in actual cases are questions involving legal rights. They may be proprietary rights, possessory rights or any other rights relating to particular pieces of land. These rights are themselves intangible legal concepts and to refer to them, or to any particular one of them, as, for example, to a leasehold, as an "immovable" is an artificial use of that term. So, in the new Part II, the word "immovable" has been discarded and all the rights and interests previously known as "immovables" are now grouped together under the more accurate classification of "interests in land."

This term is defined in section 33 (a) as follows:

> (a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;

But there is a class of things, usually classed as immovables, which it is even less reasonable to bring within the scope of that term. That class is referred to by Lord Selborne in Freke v. Lord Carbery (supra):

> So strong is the force of the immovable character where it is found, that it will attract to itself prima facie things which are ambiguous, at least to the extent of obliging other nations to recognize the law of the place where the immovable property is situate, as entitled to lay down the rule with regard to these ambiguous things connected with it.

These ambiguous things include ordinary chattels like keys to a house, title deeds of land and stones of a dry wall. It is usually said of them that they "partake" or "savour" of the nature of immovables and as such, Lord Selborne says that "it belongs to the law of the country in which that property is situate to determine whether they shall be deemed movable or immovable." And so, a thing may be deemed an "immovable", which is neither an immovable in fact, nor an interest in an immovable, but which is an interest in a physically movable object. Such a use of the term "immovable" is unreal; the new Part II therefore provides expressly for this class of interests:

> 40. Nothing herein contained shall be construed so as to preclude the application of the law of the place where land is situated, instead of the law of the domicile of the deceased owner, as regards succession or intestacy or under a will to a thing which in itself is movable because it is not physically attached to or incorporated in the land, but which is so closely connected with the use of the land that succession to it should be governed by the same law as governs succession to the land.

The term "movables" also refers to the physical nature of movable things and, like the term "immovables", is inaccurate when used to designate rights or interests in things. It has therefore been replaced by "interests in movables". But, before the 1952 amendments, "movables" was also used to designate interests in things which are themselves intangible legal concepts, as, for example, interests in shares. This artificial classification of intangibles as movables has been avoided in the 1952 Part II by expressly including this class of interests in the definition of "interests in movables" set out in section 33 (b) as follows:

> (b) an interest in movables includes an interest in any tangible or intangible thing other than land, and includes personal property other than an estate or interest in land.

Thus, Dr. Falconbridge has abandoned the classical distinction between movables and immovables and substituted two distinctions: first, the distinction between things and interests in things, and, second, the distinction between tangible things, which may be either movable or immovable, and intangible things. In the words of Dr. Falconbridge, (13), this latter classification "is unreal in the sense that the description of an intangible legal concept (such as a chose in action or the goodwill of a business) as a "thing" involves the reification or "thingifying" of what does not exist in the same way as a tangible thing exists, but merely exists in the eye of the law". But the necessity for this usage arises from the common practice of speaking of the situs of an intangible thing and also of expressing conflict rules, with regard to intangibles, in terms of situs.

The merit of Dr. Falconbridge's classifications lies in the fact that they are universal and natural. In his own words (14):

> If regard is had to the purpose to be served by conflict rules, it is obvious that those rules should be based on distinctions and classifications which are, so far as practicable, universal and natural, and therefore susceptible of application to the different systems of law between which a choice must be made, (as, for example, the distinction between immovable things (land) and movable things), and not upon distinctions and classifications which are technical and complex in that they involve legal concepts which may be peculiar to a particular system of law, and are therefore unsuitable as a basis of selection between different systems of law, (as, for example, the distinction between different kinds of interests in land and other things). It is important therefore that things and interests in things be not confused.

(b) Extension of Scope of Lord Kingsdown's Act

The new New Brunswick Act extends the scope of the conflict sections of the old Wills Act in two ways: the new conflicts part applies to all persons, not merely to British subjects; its available alternatives for valid formal execution of a will are extended. On the other hand it restricts the scope of the sections by excluding chattels real. The relevant sections are 36 and 37 which read as follows:

(13) Essays on the Conflict of Laws, p. 417.
(14) Essays on the Conflict of Laws, pages 435 and 436.

36. As regards the manner and formalities of making of a will, so far as it relates to an interest in movables, a will made within the province shall be valid and admissible to probate if it is made in accordance with the law in force at the time of the making thereof.

(a) of the province under Part I;
(b) of the place where the testator was domiciled when the will was made; or
(c) of the place where the testator had his domicile of origin.

37. As regards the manner and formalities of making of a will, so far as it relates to an interest in movables, a will made outside the province shall be valid and admissible to probate if it is made in accordance with the law in force at the time of the making thereof,

(a) of the place where the will was made;
(b) of the place where the testator was domiciled when the will was made; or
(c) of the place where the testator had his domicile of origin.

It will be noted that these two sections reproduce sections 1 and 2 of Lord Kingsdown's Act with four important changes: (1) They are not confined to wills of British subjects. (2) They do not apply to chattel interests in land which had been illogically included in Lord Kingsdown's Act by the use of the words "personal estate", here replaced by "interest in movables". (3) The same alternatives are permitted for a will made within the province as for a will made outside the province; it is thus not clear why two sections are necessary. (4) The clause "(whatever may be the domicile of such person at the time of making the same, or at the time of his or her death)" has been omitted.

(C) The Effect of Section 38

Section 38 of the new Act corresponds to section 3 of Lord Kingsdown's Act with one important difference. The word "only" has been added in "by reason ONLY of any change of domicile". The section now reads as follows:

38. A will shall not be revoked or become invalid and its construction shall not be altered by reason only of any change of domicile of the testator after the making of the will.

In Lord Kingsdown's Act itself this section had, unfortunately been drafted in very wide terms as compared to the other sections of that Act. As a result difficult questions were raised and opinions differed as to its scope and meaning. The most useful classification of the points of disagreement may be found in Dicey on Conflict of Laws (15). They are: (1) whether the section was limited by implication to wills of British subjects; (2) whether it applied to cases where the domicil is changed, but no further act is done, or also to cases where a further act or acts are done; and (3) whether it was limited in its effect to formal validity or extended also to material validity. In view of the changes effected by the 1952 amendments, it would seem to be the best course to examine the section in its context in the amended Act in regard to these three issues.

(15) 6th Ed. 1949, pages 839 to 842.

(1) Is the section limited to the wills of British subjects? Obviously, since none of the sections of the 1952 Act is limited to wills of British subjects, this issue is now disposed of. However, there may still be a question whether section 38 is of universal application or whether its effect is limited to wills made in one of the alternative forms permitted by sections 36 and 37. If the view is correct that section 3 of Lord Kingsdown's Act was limited to British subjects, it could well be held, after a review of the history of the statute, that the legislature did not intend to extend the application of section 38 beyond the scope necessary to give effect to the broader sweep of the new section.

The issue under Lord Kingsdown's Act was never finally decided and no doubt convincing arguments could be made for either view.

In the Estate of Groos (16) is the only case which seems to have decided that the section was of universal application. But that case is not conclusive on the point, as the same result could have been reached without any reference to section 3 of Lord Kingsdown's Act. Sir Gorell Barnes himself pointed this out (17).

There are no doubt good reasons why the section should be made generally applicable, just as there are reasons for limiting its application to wills made under sections 36 and 37. It is not the intention to debate the issue here; it is submitted, however, that the question is still open and that doubts should be resolved by a clarifying amendment.

(2) Before the 1952 amendments, it was not clear whether the section only operated to save a will where there had been a change of domicil and nothing more, or whether it also extended to cases where some other act had been performed as, for example, where a revocation of the will had been executed in a form recognized by the law of the new domicil but not by the law of the domocil where the will was made. The 1952 amendments have determined this issue by the insertion of the word "only".

(3) Is the section limited to formal validity and construction or does it extend to material validity? On the question of construction, even under ordinary conflict principles, unless a testator expresses a contrary intention, construction depends prima facie on the law of his domicil at the date of the will, both as regards wills of interests in land and wills of interests in movables. So this reference to construction in the section is unnecessary, unless it is looked upon as a statement of the common law rule. But even on this view, such reference is hardly necessary because section 39 permits the application of the general conflict rule in this respect.

(16) (1904) P. 269.
(17) (1904) P. 269 at 272.

> 39. Nothing herein contained shall be construed so as to preclude resort to the law of the place where the testator was domiciled at the time of the making of a will in aid of the construction of a will relating to either an interest in land or an interest in movables.

On the question of formal validity, however, the usefulness of section 38 cannot be doubted since sections 36 and 37 no longer provide that a will made in accordance with their permissive provisions will be formally valid whatever may have been the domicil of the testator at the time of making the will or at the time of his death.

But it is also necessary to consider whether the section extends to material validity. The dominant sections of Lord Kingsdown's Act referred to matters of form. It would have been natural, therefore, under that Act, to restrict section 3 to formal validity also. Material validity of a will of movables at common law was governed by the law of a testator's domicil at the time of his death and it did not seem likely that the legislature intended to alter that rule in a statute dealing mainly with matters of form. When applied with reference to the 1952 amendments, that argument has an even greater force as the legislature has expressed its intention not to alter the general rule by stating the rule in section 35. But, on the other hand, a scrupulous application of the literal rule of interpretation might lead to an opposite conclusion and, therefore, it might be advisable to amend this section so as to limit it to formal validity.

(d) Sections Restating General Conflict Rules

In conclusion it may just be noted that the new Act restates the the general conflict rules governing the formalities of making, the intrinsic validity and effect of wills. Subject to the other provisions of Part II of the Act, these rules will continue to operate, but now as statutory mandates. For sake of completeness these rules are reproduced here:

> 34. Subject to the other provisions of this Part, the manner and formalities of making a will, and the intrinsic validity and effect of a will, so far as it relates to an interest in land, shall be governed by the law of the place where the land is situated.
>
> 35. Subject to the other provisions of this Part, the manner and formalities of making a will, and the intrinsic validity and effect of a will, so far as it relates to an interest in movables shall be governed by the law of the place where the testator was domiciled at the time of his death.

Yves Dube, III Law U.N.B.

Case and Comment

STANLEY v. DOUGLAS (1951) 4 D. L. R. 689

Counsel – Witness – Competency – Ground for New Trial – Judicial Control –

The Supreme Court of Canada, in this case was confronted with the unsavory situation created by a lawyer acting as both counsel and witness during a trial. Three rules relating to counsel-witnesses may be found in the observations and comments of four of the five judges who heard the appeal. (1) These three rules are as follows: (1) A party's counsel is a competent witness; (2) when counsel gives evidence as a witness the court has the power to control his conduct by refusing to allow him to continue as counsel; and (3) when a counsel has given evidence as a witness the court may order a new trial. The appeal is of interest because it is the first reported case in which these three rules have been considered to be co-existent and of equal importance. In previous cases where two or more of these rules were considered, it appears that the courts always held one of them as paramount to the others.

The appeal involved the admission to probate of a will in Prince Edward Island. The decision of the Probate Judge to allow probate of the will was appealed to the Supreme Court **en banc** of that Province and a new trial ordered. (2) Campbell C. J., who delivered the judgment of that court based his decision on the ground that the cumulative effect of three considerations led him to the conclusion that the evidence was not in a satisfactory form to assess the factual elements at their real value. The third consideration which he dealt with was that the case for the executor of the will was conducted mainly by his senior counsel, who was also the principal witness examined (to support the validity of the will).

The decision of the Supreme Court of Canada turned substantially on the question whether the Supreme Court of Prince Edward Island had the jurisdiction to order a new trial. However the matter of the senior counsel acting as a witness at the trial received sufficient consideration to warrant comment on that question.

It is clear that the courts disapprove of counsel acting as a witness. The procedure has been variously described as irregular and contrary to practice, an indecent proceeding, contrary to ethics, an objectionable practice, a disgrace, and an outrage to decency. The reasoning behind this judicial condemnation is indicated by the following extracts from cases:

(1) Kerwin, Taschereau, Kellock and Cartwright JJ., Rand J., making no observations on the matter of counsel-witness.
(2) (1950), 25 M. P. R. Campbell, C. J., MacGuigan and Tweedy JJ.

> It is very unfit that he (counsel) should be permitted to state, not upon oath, facts to the jury which he afterwards stated to them on his oath. (3)
>
> Counsel cannot be unbiased witnesses, and if permitted without check to be witnesses there would be not only the revolting indecency of the proceedings, but the possible difficulty of the jury being unable to distinguish between what the counsel said as an advocate and what he said as a witness. (4)
>
> It is most humiliating for counsel to be allowed to give evidence, and then address the jury, trying to make them believe his evidence to be true. (5)
>
> The Bench should not be called upon to discuss with counsel the weight to be attached to evidence offered by counsel himself. The giving of such evidence must have the effect of preventing a full and free discussion on the part of both counsel and Bench and to that extent, at least, serves to hamper the proper administration of justice. (6)

Substantially these quotations resolve themselves into the proposition that it is improper for counsel to address the court or a jury on his own evidence. It is submitted that the Supreme Court in recognising the three rules under consideration has ensured that in future the courts need not be embarassed by the counsel-witness. There can no longer be any question about the rule that counsel is a competent witness. Cartwright J. (7) carefully reviewed the authorities and properly came to the conclusion that evidence of counsel is legally admissible. (8)

There also appears to be no question about the rule that the court may order a new trial on the ground that counsel was a witness. Kerwin J. who delivered the judgment of Taschereau J. and himself indicated approval of this rule by his statement:

> I am content to agree with the Chief Justice of the Island that for the reasons given by him a new trial should be had. (9)

As the reader will recall, the fact that senior counsel acted as the main witness for plaintiff, was one of the reasons for ordering a new trial. Kellock J. indicated his approval of the rule as follows:

> I think, however that the trial was so unsatisfactory as to render the direction with respect to a new trial the proper direction. (10)

(3) **Rex V. Brive** (1819), 2 B. & Ald. 605; 106 E. R. 487.
(4) **Davis v. Canada Farmers Mutual Insurance Co.** (1876), 39 U.C.Q.B. 452, at p. 482.
(5) **Bank of British North America v. McElroy** (1875), 2 Pugs. 462; 15 N.B.R. 462.
(6) **Robert Bell Engine & Thresher Co. Ltd. v. Gagne** (1914), 29 W.L.R. 322.
(7) [1951] 4 D.L.R. at p. 694. Cartwright J. dissenting in part, but that part of his judgment relating to counsel-witness is not in conflict with the majority of the Court.
(8) It is of interest to note that in the **Parish Courts Act. Ch. 122**, R.S.N.B. 1927 Sec. 12 contains a provision that a plaintiff or defendant in a suit in a parish court may appear by an attorney of the Supreme Court but on the trial of a contested cause such attorney shall not be a competent witness for the party for whom he appears.
This statutory abrogation of the right of an attorney to be his client's witness is the only instance of such which the writer has been able to find. No doubt it stems from the lack of control which a parish court commissioner can exercise over an attorney who is an officer of the Supreme Court, a problem which of course is not faced by the Supreme Court itself.
(9) **Supra.**, at p. 692.
(10) **Ibid.**, at p. 693.

Cartwright J., in his review of the cases relating to the matter of counsel-witnesses, proved that the rule has been long established.

The rule that the court may control the conduct of the counsel-witness, however has been the subject of considerable controversy in some jurisdictions. In New Brunswick the rule was recognized as early as 1828. In the case of **Hamilton v. McLean** (11) the attorney and counsel for the plaintiff gave evidence at the trial to prove a document. On appeal the court held this was an irregular practice and in future it would require some other counsel to examine such a witness and comment on his testimony. The same principle is still in effect in New Brunswick and the court will require counsel who wishes to give evidence to be examined by another counsel and will not allow him to address the court upon his own testimony. (12) It is the writer's understanding that the same practice prevails in the Supreme Court of Canada. Kerwin J. said:

> I would add only that, without deciding whether such evidence would be admissible or not, on such new trial no one appearing as counsel for any party should give evidence. (13)

Mr. Justice Taschereau adopted this statement and it would seem to indicate that the court has the power to control the actions of the counsel-witness.

The controversy over the power of the court to control the conduct of the counsel-witness was brought about by the judicial misapplication of the decision of the English case of **Cobbett v. Hudson.** (14) The **Cobbett** case was decided in 1852 and resulted from an improvement in the law which allowed a party to an action to be his own witness. Prior to this, a party was allowed to conduct his own case but was prohibited from giving evidence. The removal of this prohibition allowed the first adventurous party-counsel-witness to commence an action. In the **Cobbett** case the plaintiff sued in **forma pauperis** and conducted his own case. Lord Campbell C. J. at the trial told the plaintiff he must elect to be either counsel or witness. The plaintiff elected to be his own counsel and subsequently after losing the trial, appealed on the ground that he should also have been allowed to give his own evidence. The full court of Queen's Bench (15) held that the Court could not derogate from

(11) (1828), Chipman M.S. 47; 1 N.B.R. 192 (Saunders C.J., Botsford, Bliss and Chipman JJ.).

(12) (1951) **Broderick v. Beyea.** unreported K.B.D. Circuit sitting per Bridges, J. The same principle has been recognized by the Court of Appeal although Ritchie C. J. held that the opposing counsel should object when he deems the course being pursued is objectionable, otherwise the Court need not interfere. **Gilbert v. Campbell,** (1870) 13 N.B.R. 55.

(13) **supra.,** at p. 692.

(14) (1852), 1 El & Bl. 11; 118 E.R. 341; 22 L.J.Q.B. 11.

(15) Lord Campbell C.J., Coleridge, Wightman and Erle JJ..
Lord Campbell in his **lives of the Chancellors** referred to the first instance of the counsel-witness which happened in the case of Sir Thomas More, 1 Howe St. Tr. 386. There the then Solicitor-General who was conducting the prosecution in the language of the author, "to his eternal disgrace and to the eternal disgrace of the Court who permitted such an outrage on decency left the bar and presented himself as a witness for the Crown". Apparently he was still of this sentiment at the trial of the **Cobbett** case.

(16) it does not behoove the writer at this time to consider the effect of this case upon the principle that a party who conducts his own case cannot have counsel to assist him. **Robinson v. Palmer,** 2 Allen 223 and **Gilbert v. Raymond,** 3 P & B. 315.

the party's legal right to conduct his own case and to be his own witness, which rights had been expressly given by statute. Accordingly, it allowed the appeal. From this decision, one may derive the rule that a party to an action may be his own counsel and witness. (16)

The misapplication of the decision in the **Cobbett** case commenced with **Davis v. Canada Farmers Mutual Insurance Co.** (17) Harrison C. J. made a thorough study of the precedents and reported cases, omitting only the New Brunswick case of **Hamilton v. McLean.** (18) The following part of his judgment expressly and clearly recognizes the rule that the court may control counsel:

> The presiding judge may control the conduct of counsel but has no right to reject his testimony when tendered as a witness if a competent witness. (19)

It is submitted that the learned Judge was in error in holding that the **Cobbett** case overruled the previous decision on the matter. This error is manifested in his statement referring to the **Cobbett** case.

> The fact that the case was one of plaintiff in person acting as his own advocate, and seeking to act as a witness, makes no difference in the application of the rule. The rule applied to him is one which must be applied to any advocate whether acting for himself or any other person. (20)

Apparently there is the greatest difference between a person acting as his own advocate and counsel and a counsel acting for another party. In the one case the person is acting under statutory rights, does not represent a client and is not acting as an officer of the court. In the other case he is acting on behalf of a client and as an officer of the court subject to its discipline and control. Accordingly, the rule of the **Cobbett** case would seem to have no application beyond a party acting for himself.

The error of Chief Justice Harrison in attempting to extend the application of the **Cobbett** case was recognized by Cartwright J., who said:

> With great respect for the contrary view expressed by Harrison C. J. in *Davis v. Canadian Farmers Mutual Insurance Co.*, it appears to me that *Cobbett v. Hudson* . . . may not be of general application, as in that case the plaintiff who, it was held, should have been allowed to testify was acting as his own advocate. (21)

With this recognition, there should be no longer any question about the power of the court to control the conduct of the counsel-witness in all cases except where the party himself is the counsel-witness. Also, there should be no further question about the rights of the court, the counsel, the witness and the party to the action with respect to competency, control and conduct of the trial when the party or counsel wishes to give evidence.

(17) (1876), 39 U.C.Q.B. 452, at p. 482.
(18) (1828) Chipman M.S. 47.
(19) **Supra.**, at p. 477.
(20) **Supra.**, at p. 481.
(21) **Supra.**, at p. 695.

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IN THE ESTATE OF NEWLAND (1952) 1.A.E.R. 841.

Will – Seaman at sea – Document made in Contemplation of voyage

Under English testamentary legislation (1) a soldier being in actual military service, and a mariner or seaman being at sea, may make a testamentary disposition of his real and personal estate, either orally or by a writing, although not complying with the Wills Act. These persons may also make a testamentary disposition of real and personal estate at the age of fourteen.

In **In The Estate of Newland,** Ian Frederick Charles Newland, a seaman, though under twenty-one, had made a will, otherwise validly executed. In view of Newland's age, the will could be admitted to probate only if it was the will of "a seaman being at sea". That he was a "mariner or seaman" was not in dispute. These words in an earlier Irish case(2) were held to mean "any person employed in any branch of the Royal Navy or the Merchant Navy from the highest to the lowest". The problem here was whether Newland was a seaman "being at sea" when he made the disputed instrument.

Newland joined the S.S. Strathmore as an apprentice in April 1944 and continued to serve in that vessel until October 1944. During the war the Strathmore was engaged as a troopship between England and India. On July 4, 1944 she was in dock at Liverpool. On July 25, 1944 the deceased while on leave in England with the approval of his employers, the owners of the ship, executed a will in compliance with the formalities required by the Wills Act, 1837. At the time the will was made no sailing date had been set for the ship. Newland rejoined his ship on or before August 4, 1944 on which date the ship sailed on a new voyage. He died on August 8, 1951 at Madras, India.

Mr. Justice Havers was unable to find a principle of universal application by which to interpret the term "seaman being at sea". In fact the courts have interpreted the words liberally. The privilege extends to a person in maritime service serving on board a vessel permanently stationed in a harbour (3), or on service in a river (4); and a will made in the course of a voyage may in fact be made on shore (5). Mr. Justice Havers applied In **The Goods of Hale** in deciding that the deceased Newland was a "seaman being at sea" when he made his will between voyages in England. Newland was declared to be a "seaman being at sea" because he was in the employment of the steamship company when he made the will and was then in contemplation of sailing on a fresh voyage.

(1) The Wills Act, 1837, 1 Vict. c. 26, s. 11 (Imp.;) Wills (Soldiers and Sailors) Act, 1918, 7 and 8 Geo. 5, c. 58, ss. 1 and 3 (Imp;) the N.B. Wills Act, 14 Geo. 6, c. 172, s. 4 subs. (1) provides that "the will of any mariner or seaman when at sea or in the course of a voyage, may be made by writing signed by him or by some other person in his presence and by his direction without any further formality or any requirement as to the presence of or attestation or signature by any witness"
(2) In The Goods of Hale (1915) 2 I. R. 362.
(3) In The Goods of McMurdo (1868), 17 L. T. 393.
(4) In The Goods of Austen (1853), 163 E. R. 1431.
(5) In The Goods of Lay (1840), 163 E. R. 444.

Mr. Justice Havers seemed to base his decision on the fact that, though the will was made on shore and not during a leave in the course of a voyage, the testator had in contemplation a future voyage to take place within a reasonable time. This was the decisive factor in **In The Goods of Hale.** There the deceased lady was engaged by the Cunard Steamship Company as permanent typist of the Lusitania, and when she was not actually sailing on board the Lusitania she worked in the office at Liverpool. She had been notified that she would have to sail in the vessel. The ship was to sail on January 16th, and on January 14th and 15th she made the three documents which were set up as a seaman's will. The Irish Courts held that she was a "seaman" and that she was at sea, because she was definitely engaged to commence her voyage, although she had not actually commenced it. It was evident from the documents of January 14th and 15th that she intended to sail on January 16th. The reasoning of the judgment was based on analogy to the cases involving soldiers wills; in those cases if a man has definitely taken the first step to go on a military expedition he is said to be in actual military service; by parity of reasoning, the lady having taken the first step to go on board the Lusitania was said to be at sea.

The facts in the Hale case appear to be distinguishable from those in **In the Estate of Newland;** the will in the latter was made between voyages with the date of the oncoming voyage indefinite; in the former the will was made on the eve of a definite sailing.

The decision of Mr. Justice Horridge in **In the Estate of Bowly** (6) was not referred to in the Newland case but the facts are similar. The facts in **In the Estate of Bowly** are sketchy; there, a gentleman who was employed as a lieutenant on the Mediterranean Squadron came up to London for five days to be married. Then he went back and joined his ship. In those circumstances, was he a seaman being at sea when he made a will during his leave? In deciding that this man was not a seaman being at sea when he made the will while in London Mr. Justice Horridge said: "It was no portion of his duty as a seaman, and it was not in the course of a voyage. It was a distinct and separate occasion, on which he left his ship and went to London and got married and went back".

Both Newland and the gentleman from the Mediterranean were on leave with the consent of their employers. Neither was on shore in the course of a voyage. Newland was waiting on a voyage to start; his ship had been in dock in Liverpool from July 4th till around August 1st when it sailed, five or six days after Newland had made the will on July 25th. The gentleman from the Mediterranean was on leave for five days at the most, the time granted by his employers, and then he went back to his ship, and in that five day period he made his

(6) In the Estate of Bowly, 1918, 34 T. L. R., 626.

will; he was declared not to be a seaman being at sea. The decisions do not seem reconcilable.

The Court however applied **In The Goods of Hale**; the result of the application it seems, widens the scope of the already liberal interpretation given by the Courts to the term "mariner or seaman being at sea".

Terence V. Kelly, Law III U.N.B.

Re ELLIOTT (deceased). LLOYDS BANK, LTD. v. BURTON – ON–TRENT HOSPITAL MANAGEMENT COMMITTEE AND OTHERS

Will – Condition Precedent – Illegal Condition – Gift of Personality Subject Thereto – Malum Prohibitum and not Malum In Se – Validity of Gift

The recent case of **Re Elliott (deceased) Lloyd's Bank Ltd. v. Burton-On-Trent Hospital Management Committee et Al** (1952) 1 A.E.R. 145, is of interest. It provides an example of the adoption by courts of equity of a civil law doctrine involving the distinction of **malum in se** and **malum prohibitum** in reference to conditions precedent and personal property.

The facts of the case are that the testator, Arthur Elliott, by his will appointed the plaintiff bank to be executor and trustee and directed the bank to convert the whole of his estate, both real and personal, into money. After payment of his debts and funeral and testamentary expenses, he gave the sum of £100 to the Burton-On-Trent Infirmary to be invested as the trustee should direct "for the purpose of maintaining and renovating my grave and headstone, subject to the Burton-On-Trent Infirmary accepting the above £100 and the terms as above attaching thereto then I give to the said Burton-On-Trent Infirmary the rest, residue and remainder of my estate to be applied to the general purposes of the said infirmary."

From the facts it will be apparent that this was not an absolute gift but rather a gift subject to a condition precedent under which the infirmary was to take the residue only if it accepted the legacy of £100 and also the terms, which were to maintain and renovate the testator's grave and headstone.

The Court held that on construction of the will, the legacy of £100 was intended to be set apart in perpetuity for maintaining the testator's grave, and, therefore, it was void as transgressing the rule against perpetuities and thus the condition precedent attached to the gift of residue was an illegal one which the residuary legatee could not lawfully carry into effect.

The question arose whether the illegality of the condition avoided the gift of residue or whether the illegal condition could be avoided. It was in this connection that the civil law distinction between **malum in se** and **malum prohibitum** was introduced.

Bouvier's Law Dictionary (Century Edition) states that "an offence **malum in se** is one which is naturally evil, as murder, theft, and the like. An offence **malum prohibitum**, on the contrary, is not naturally an evil, but became so in consequence of its being forbidden, as playing at games which being innocent before, have become unlawful in consequence of being forbidden."

The distinction has arisen in cases concerning illegality of contract, but Pollock on Contracts (13th Ed.) in discussing the effect of prohibitory statutes on agreements says at page 274 "When a transaction is forbidden, the grounds of the prohibition are immaterial. Courts of Justice cannot take note of any difference between **mala prohibita** (i.e. things which if not forbidden by positive law would not be immoral) and **mala in se** (i.e. things which are so forbidden as being immoral)."

In the field of personal property, however, it would seem from the cases cited by Harman, J. in the judgment of the case under discussion, that the distinction has not been altogether abandoned.

Mr. Justice Harman first emphasizes the fact that if this had been a gift of **real** property, failure to perform the condition must have avoided the gift, and he cites the case of **Egerton v. Earl Brownlow** (1).

The judge goes on to point out that when gifts of personalty are in question, different rules apply and he relies to a great extent on dicta in **Re Moore** (2). He cites Cotton, L. J., who cites from Jarman on Wills, (3): "The rule is thus stated by Mr. Jarman: 'But with respect to legacies out of personal estate, the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving **malum prohibitum**, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving **malum in se**, in these cases the civil agrees with the common law in holding both gift and condition void.' According to English law if a condition subsequent which is to defeat an estate, is against the policy of the law, the gift is absolute, but if the illegal condition is precedent there is no gift. In the civil law a distinction is taken between what is **malum in se** and what is only **malum prohibitum** . . ."

(1) (1853) 10 E.R. 359.
(2) (1888) 39 Ch. D. 116.
(3) 4th Ed., Vol. II, p. 12.

Later in the judgment Mr. Justice Harman cites a passage from Roper on Legacies, (4) to the effect that if the illegality of the condition precedent involves **malum in se** the disposition is void, but if it be merely **malum prohibitum,** then the condition is void and the bequest good.

The learned judge continues "The present illegality is of the second kind, and therefore, if this doctrine of the civil law has been imported into the English law, the condition can be disregarded. Mr. Roper is of the opinion that this rule was imported into equity, and for this there appears to be the authority of Lord Hardwicke, L. C. (3 Atk. 332) in **Reynish v. Martin,** quoted and accepted by Bowen, L. J. (39 Ch. D. 131) in **Re Moore,**" (supra).

Mr. Justice Harman concluded that the condition is avoided; the gift is unfettered and the first defendant can take the residue and disregard the condition.

Just how far this distinction is applicable in Canada would seem to be doubtful in the light of the decision of the Ontario Court of Appeal in **Re Going.** (5) In this case a testatrix attached to a gift of personalty to two nephews a condition precedent to the effect that they were to be "members and adherents in good faith and standing of a Protestant church . . ."

Although the validity of this condition was attacked on the ground of public policy the Court did not attempt to consider the question of illegality.

D. G. Farquharson, Q.C., in an illuminating note (6) says: "The court found that the condition was clearly a condition precedent and did not consider it necessary to decide whether the condition was or was not illegal since the court held:

> It is plain from the language of the Will that it was the intention of the testatrix that if the gift to her nephews failed the whole of the fund to be set aside by her executors under paragraph 5 of her will should go to the Pension Fund of The United Church of Canada. Thus, if the gift to the nephews fails because the condition annexed to it is void, as contended by their counsel the Pension Fund of the United Church is entitled to it. If the condition is a valid one, the fund likewise goes to that beneficiary because neither of the nephews of the testatrix had complied with the condition and the time permitted for doing so had passed."

Mr. Farquharson goes on to comment, "It is clear from this passage that the court was of the opinion that, if the condition was illegal, the gift to which it was attached failed with it."

In **Re Going,** the court had also referred to a statement of Middleton, J. A. in **Re Gross** (7). There, Middleton J. A., had cited a statement by Lord Sterndale in **In Re Wallace** (8). Then Lord

(4) 4th Ed., Vol. I, p. 757.
(5) (1951) O.R. 147.
(6). 29 C.B.R. 434.
(7) (1937) O.W.N. 88.
(8) (1920) 2 Ch. 274.

Sterndale had said: "This condition is clearly a condition precedent and in that case if a condition be void as against public policy, the gift fails."

Mr. Farquharson has this to say concerning the above citation: "With deference to the definite views expressed by Middleton, J. A., it is suggested that the English courts differentiate between such conditions attached to devises of real property and to bequests of personalty, and between failure of the condition as **malum prohibitum** and as **malum in se.** The statement quoted by Middleton, J. A. from the Wallace case was at most a dictum, because the court there held the condition to be valid."

Mr. Farquharson goes on to discuss the English approach to the problem in much the same fashion as did Jarman, J. in the case which forms the subject of this present note, and he concludes, "Since the Ontario Court of Appeal in **Re Going** did not find it necessary to consider the validity of the condition, much less to consider whether it was illegal as involving **malum prohibitum** or **malum in se,** it must be assumed that in Ontario any gift of personalty fails, if it is attached to a condition precedent which is illegal as contrary to public policy."

While the decision in **Re Elliott** could hardly be said to be one of outstanding importance, it does throw some interesting light on the importation into the law of England of a civil law doctrine involving the distinction between **malum in se** and **malum prohibitum.** As for its application in Canada, and particularly in Ontario, it is still doubtful, since the decision in **Re Going,** whether such an importation has taken place.

Dennis Townsend, Law II

BEST v SAMUEL FOX & CO., LTD. 1952 2 A. E. R. 394.

Negligence – Consortium – Injury to husband resulting in sexual impotency – Loss of consortium by wife – Liability of tortfeasor to wife

In this recent case the House of Lords was called upon to determine the state of the law on a rather unique point. Since the case was one of first impression it had to be discovered whether it was new in principle or simply new in instance. The question, as stated in the judgment of Lord Goddard, was whether a married woman, whose husband has been injured by a negligent act or omission, has a right of action against the person causing that injury for the loss or impairment of consortium consequential on the injury.

The pertinent facts may be set forth briefly. The appellant's husband was injured during the course of his employment with the respondents, and as a result of the accident he sustained serious personal injuries which deprived him of his ability to have sexual intercourse. The husband was successful in recovering damages from the respondents in an action for damages for breach of statutory duty and negligence. In the present action the appellant rested her claim for damages on the contention that because of the negligence of the respondents her consortium with her husband had been unjustifiably interfered with in that she had been deprived of the opportunity of having further children and of ordinary marital relations, "as a result whereof she suffers from nervousness, instability, . . . insomnia, . . . and is restless . . . "

Croom-Johnson, J., by whom the action was heard, dismissed the plaintiff's claim, drawing an analogy to the group of cases known as the enticement cases, viz., **Gray v Gee** (1923) 39 T. L. R. 429, **Place v Searle** (1932) 2 K. B. 497, and **Newton v Hardy** (1933) 149 L. T. 165. An essential ingredient of an action of this description was that the infringement of the rights of the consort had to be intentional, and in the case at bar Mr. Justice Croom-Johnson found that the defendant had not committed any intentional or deliberate act which was intended to break up the consortium.

The plaintiff's appeal to the Court of Appeal was heard by Lord Asquith of Bishopstone (appointed Lord of Appeal in Ordinary April 23, 1951), Cohen and Birkett, L. JJ. They decided that the rendering of the husband incapable of sexual intercourse was but an impairment of consortium, and in order for the wife to succeed against the respondents she must prove total loss of consortium as contrasted with impairment of, or interference with consortium. Lord Justice Birkett and Lord Justice Cohen, with Lord Justice Asquith agreeing, based their decision on the belief that consortium is one and indivisible, and the wife had not lost it as a whole. Lord Justice Birkett said:

> Companionship, love, affection, comfort, mutual services, sexual intercourse — all belong to the married state. Taken together they make up the consortium, but I cannot think that the loss of one element, however grievous it may be, as it undoubtedly is in the present case, can be regarded as the loss of the consortium within the meaning of the decided cases. Still less could any impairment of one of the elements be so regarded. Consortium, I think, is one and indivisible. The law gives a remedy for its loss, but for nothing short of that.

Lord Justice Cohen entertained some doubt whether even total loss of consortium would enable a wife to succeed where the loss was occasioned by a negligent, not a malicious, act of the defendant. Lord Justice Asquith felt that the wife had no cause of action as was claimed, but that if he were wrong, it would require total loss of consortium to constitute it.

An appeal from this judgment to the House of Lords was dismissed by their Lordships, but on different grounds.

Appellant's consel contended before their Lordships that since the law gives an action to a husband for a negligent injury to his wife by a third party, therefore it ought to give the same right to the wife. For many decades a husband was entitled, and still is, to recover damages for loss of consortium against a person who negligently injures his wife. This right is grounded on the decisions in numerous old cases. Their Lordships, however, were of the opinion that this was an anomaly at the present day and saw no reason for extending it to the wife. For this reason the appeal was dismissed. As Lord Morton of Henryton expresses it:

> There is thus no general principle of English law which would entitle the appellant to succeed in the present case. Nor is her claim justified by authority . . . It (i. e., the principle that a husband can maintain an action for loss of consortium) is founded on old authorities decided at a time when the husband was regarded as having a quasi-proprietary right in his wife, and is now so firmly established that it could only be abolished by statute.

The effect of the House of Lords decision is that the wife can have no cause of action for either loss or impairment of consortium. In a dictum Lord Goddard agreed with the Court of Appeal in so far as the question of impairment affected the claim of a husband. Lord Porter felt there was much to be said for the view taken by the Court of Appeal, but found difficulty in determining what would be loss of consortium and what would not.

The judgment of the House of Lords thus serves to focus more clearly two divergent viewpoints on a particular phase of case law which, it was agreed, had an illogical historical development. There was the possibility of expressing disapproval with the theory that a husband can recover damages for the loss of consortium suffered as a result of injury caused to his wife by a negligent third party, and so refuse to extend it so as to give the wife a like cause of action. On the other hand, each

Court might have placed the emphasis on equal rights for men and women proclaimed so vigorously in our modern age, and, despite their belief that the husband's cause of action for loss of consortium was anomalous in character, extend the cause of action to the wife. The Court of Appeal appeared to accept the latter view, with the proviso that there must be total loss of consortium. The House of Lords, however, exercising a higher degree of judicial restraint, felt that there was no general principle of English law upon which the appellant could succeed, and moreover, saw no reason for extending the husband's exceptional cause of action to the wife.

The position of the law in the United States on this point is discussed by Lord Justice Birkett in his judgment in the Court of Appeal. (1) The claim of a wife for loss of consortium has, with the exception of one case, been denied in that country by decided cases and this view was adopted by the American Restatement of the Law. (2) The one exception (3) is noteworthy because of its recentness and its possible influence on the conclusion arrived at by the Court of Appeal. There, in circumstances similar to those in the instant case, a United States Court of Appeals was able to hold that the wife has a cause of action for her loss of consortium brought about by injuries to her husband through the negligence of another person. One notable difference, however, is that the wife's statement of claim in the American case alleged deprivation of consortium, while in the present case the wife's claim was for interference with her consortium.

The situation in Canada also deserves short comment. In some Canadian cases (4) the husband was allowed to recover damages for the loss of his wife's services and society, although in one case (5) the husband was refused recovery for the loss of his wife's companionship. Earlier this year in a Nova Scotia case (6) the Court of Appeal decision in the present case was considered. While the action was by a husband seeking damages for deprivation of the services and companionship of his wife by reason of injury to his wife through a defendant's negligence, the case presents an interpretation by a Canadian Court of the distinction made in the present English case between loss and impairment of consortium. Assuming it to be the law that a husband must suffer loss of consortium, the Nova Scotia Supreme Court felt that each case must be decided on its facts, and it would be a loss of consortium despite the fact that the wife should retain some particular capacity where others are gone. This Canadian case was decided before the House of Lords decision in the case under review. With regard to a wife's claim there is more difficulty, occasioned by a dearth of case law in respect to it. Before the present case reached the Court of

1 (1951) 2 K. B. at 654.
2 Vol. 3, the Law of Torts, para. 695.
3 **Hitaffer v Argonne Co.** (1950) 183 Fed. R. 811.
4 **Corkill v Vancouver Recreation Parks Ltd.** (1933) 1 W. W. R. 413; **Dallas v Hinton and Home Oil Distributors** (1937) 4 D. L. R. 260.
5 **Lawrence v Edmonton** (1917) 2 W. W. R. 940.
6 **Robar v MacKenzie** (1952) 2 D. L. R. 678.

Appeal the judgment of Mr. Justice Croom-Johnson was applied in an Ontario case (7) by the Court of Appeal of that province. The decision, however, was considered from the point of view of an action brought by a wife for alienation of affections to which Mr. Justice Croom-Johnson had drawn a parallel, and to which the attention of the Ontario Court was directed. In a recent Manitoba case (8) it was held that a widow whose husband has been killed by negligence could not recover damages for loss of consortium, because such loss is not a cause of action surviving the deceased. The Court, however, made no remarks as to whether the wife would have had a valid claim had the husband not been fatally injured, but had survived the accident.

Franklin O. Leger, II Law U.N.B.

7 **Brydon v Abernethy** (1951) O. W. N. 428.
8 **Drewry v Towns** (1951) 2 W. W. R. (N.S.) 217.

NATIONAL COAL BOARD vs. J. E. EVANS et al 1951 2KB 861

Trespass – Negligence – No Liability without Fault

In the instant case the Court of Appeal was called upon for the first time to determine whether liability can be imposed for trespass in the absence of negligence or intent.

The predecessor of the plaintiffs in title had laid an electric cable through and under the lands of the Glamorganshire County Council, without the knowledge of the Council. The cable was damaged by contractors employed by the Council to excavate a trench across the property; the damage was not reported to the plaintiffs who suffered a loss. The trial judge, Donovan J., found that there was no negligence but imposed liability for trespass; the Court of Appeal accepted the finding of no negligence, but reversed the trial judge on the trespass issue.

The negligence issue was resolved in accordance with the well-established principles: the defendants had acted as reasonable men in assuming that the ground plans, which did not show the position of the cable, were correct; there was no duty of care requiring them to ascertain the presence of the cable, and, in the absence of any such duty, there could be no liability.

It was sought to escape liability based on trespass by invoking the doctrine of inevitable accident. Rejecting this plea, Donovan J. stated: "This absence of information (regarding the presence of the cable) affords (the defendants), in my opinion, no defence against the allegation of trespass" (1). It is clear that the trial court felt itself precluded by the authorities from drawing any other conclusion. Perhaps it is of some significance that it was the view taken of the authorities by the Court of Appeal, rather than any divergence on principle, that distinguishes the result reached by that Court and in the court of first instance.

The Court of Appeal reviewed four principal authorities:

Weaver vs. Ward (2) where it was stated: "Therefore no man shall be excused of a trespass, except it may be judged utterly without his fault." In the instant case, in the principal judgment, Cohen L. J. took this to mean: "where the defendant was entirely without fault, he would have a good defence to an action of trespass" (3).

Leame vs. Bray (4) where Grose J. intimated that neither accident nor misfortune afford an excuse for trespass; this was regarded in the instant case as dicta, neither cited nor approved in any later case.

(1) page 873
(2) 1616 Hob. 134
(3) page . . . 874
(4) 1803 3 East 593

In Holmes vs. Mather (5) the third case to be considered, Bramwell B. asserted the result of the authorities led to the conclusion: "if the act that causes the injury is an act of direct force, vi et armis, trespass is the proper remedy, where the act is wrongful either as being wilful or as being the result of negligence. Where the act is wrongful for either of these reasons no action is maintainable, though trespass would be the proper form of action if it were wrongful". (6) Though these remarks were made in relation to a highway accident, the Court of Appeal took the view that a more general application must be given to them.

Finally, the Court of Appeal considered the much disputed judgment (7) of Denman J. in Stanley vs. Powell (8) in which his lordship, after a review of earlier cases, concluded that where neither intent nor negligence is proven, no action would lie for injury to the person resulting by accident from the lawful act of another.

The defendants in the instant case were on the property in the exercise of their lawful employment; they were, on the facts, utterly without fault with respect to damage to the cable. On the view taken of the authorities – a view which it has been suggested elsewhere should have been predicated on "more adequate investigation of the relevant case law" (9) – the Court of Appeal concluded that, since there was an absence of fault on the part of the defendants, liability could not be imposed for trespass.

The decision marks a departure in the fundamental common law rule regarding proprietary trespass. The rule has been that the absence of negligence or intent affords no defence to an action of trespass. Thus, in the famous case of Entick vs. Carrington (10), it was stated: "Every invasion of property, be it ever so minute, is a trespass". By an application of the doctrine evolved in Stanley vs. Powell (8), which was a case of trespass to the person, the Court of Appeal mitigated the effect of the Entick vs. Carrington rule. It has been said that Stanley vs. Powell is "the sole decision supporting a departure from the fundamental common law doctrine" (11). Stanley vs. Powell is, however, not only approved in the instant case, but is applied to an invasion of proprietary interests.

It is submitted that it is open to Canadian Courts to follow or to reject this decision. By following the decision the Courts can bring the two categories of proprietary trespass (land and chattels) into a consistent position with trespass to the person. Both from a legal and a social point of view this would be a desirable advance in the law; it would also be in accord with the position already reached in the common law courts in the United States (12).

(5) 1875 LR 10 Exch. 261
(6) page . . . 875
(7) Pollock on Torts 14th. Edition page 114
(8) 1891 1QB 86
(9) 1952 15MLR No. 1 page 81
(10) 1765 19St. Tr. 1030
(11) 1952 15MLR No. 1 page 83
(12) American Restatement (Intentional Harms) Chapter 2. Topics 1 and 2. Section 153 and 218.

Though there is much to commend the decision, a word of comment is in order. The judicial process has resolved the problem of whether there should be liability for trespass in the absence of intent or negligence by leaving the innocent party, who has suffered a loss due to a lawful act on the part of another innocent party, entirely without redress. Is there a more acceptable solution?

It is not within the scope of this note to discuss the incidence and apportionment of losses. There is, however, a trend towards compensation for all losses suffered in the course of peaceful pursuits. The common law rule regarding contributory negligence left the plaintiff with no right of recovery; this problem was solved by legislation which enabled the Courts to apportion the loss and award damages accordingly. The positions of negligent and innocent parties are not alike, but perhaps it would not be unprofitable to consider the possibility of some legislative approach to the problem of losses suffered by innocent parties and occasioned by innocent parties.

William A. Davidson, U.N.B. II Law

REX v WINDLE 1952 2 A.E.R.

Criminal Law – Insanity – Lack of knowledge that act causing death was "wrong" – Belief that act, while legally wrong, was morally right.

The defense of insanity in a murder trial, for about the last one hundred years, has been guided by the rule laid down in **McNaughten's case.** (1) The rule is, "Every man is presumed to be sane, and to possess a sufficient degree of reason, to be responsible for his crimes, until the contrary be proved to the satisfaction of the jury; to establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

In the present case, the accused relied solely upon the defense of insanity. He was convicted before Devlin J. of murdering his wife by administering to her one hundred aspirin tablets. Devlin J. held that there was no case of insanity to be put to the jury, and the accused was found guilty. The case was appealed. The accused was a man of weak character who was involved in an unhappy marriage with a woman eighteen years his senior. She always talked of suicide as an escape from her sickness. The accused became obsessed with this idea and discussed it with his fellow workers. Just before the crime was committed, one of the workmen, in a jocular vein, suggested that the accused "give her a dozen aspirin". He then gave her the fatal dose. Subsequently he told the police that he supposed that he would be hanged for it.

1 1843, (10 Cl. and Fin. 200).

Goddard C. J. delivered the House of Lords judgment. The appeal was based solely on the meaning of the word "wrong" as set out in the McNaughten rule (supra). Doctors produced both by the Crown and the accused agreed that the accused knew that he was doing an illegal act. At this point, Devlin J. had refused to allow the jury to decide upon the accused's insanity, since knowledge of his act, as being an illegal act. was sufficient to overthrow the defense of insanity. The accused probably believed that he was doing an act morally right in relieving his wife from her earthly suffering. The evidence of communicated insanity, known as **"folie a deux"** which arises from constant attendance on a person of unsound mind was vague. The defense stated that the McNaughten rule included "morally wrong" to be sufficient to exonerate the accused.

A court of law can only distinguish between that which is in accordance with law and that which is contrary to law. Many acts are contrary to both God and man; e.g. "Thou shalt not kill", and "Thou shalt not steal". But, "Thou shalt not commit adultery," so far as criminal law is concerned, is not contrary to law of man, though contrary to the law of God. (Perhaps Lord Justice Goddard's example is not too appropriate here in New Brunswick.)

Rex v Rivett (2) supports the finding in this case by saying the test of insanity included, " . . . trial of such person for that offence that he was insane, so as not to be responsible according to law for his actions at the time when the act or ommission was done . . . " The meaning implies that the wrong must be a legal wrong.

Rex v Kierstead (3) is one of the few appeal cases in the province of New Brunswick dealing with the defense of insanity. Barry J. found the accused guilty of murdering his wife. White J. affirmed this judgment holding that the accused merely suffered from insane delusions, and that the heavy duty of establishing the defense of insanity beyond a reasonable doubt was not discharged. The accused obviously knew that what he did was wrong. "Wrong" is not employed in the strict sense of the present case. Although arriving at the same conclusion, this case would have been simplified, if it had the present case as a precedent. McNaughten's rule has been universally applied to insanity cases, whether it be concerned with delusions, disease of the mind, or insanity itself.

The accused realized that his act was illegal, and the rule was therefore satisfied. Devlin J. was correct in withdrawing the question of insanity from the jury. From the evidence, it could not be left to the jury to give a verdict of insanity instead of guilty.

Devlin J. in the first instance and Goddard C. J. in the House of Lords, by their respective judgments in this case, have reduced the generality of the McNaughten case to a more specific rule.

D. J. O'Brien, U.N.B. Law III

2 1950 34 Cr. App. Rep. 87
3 1918. 45 N. B. R. 553.

Practice Notes

1. MODE OF ENTERING CASES ON THE DOCKET

Michaud C.J.Q.B. at the June sitting of the Saint John Circuit Court drew the attention of the solicitors then present to a long established rule of practice as to the mode of entering cases on the Docket, which rule has been lost sight of in the last few years. His Lordship stated that the correct practice was for the senior solicitor to enter one case of his own choosing for which notice of trial had been given. He would be followed by the next senior solicitor who would enter one case followed by the remaining solicitors in the order of seniority, until all present had entered a case. Then the senior solicitor entered his second case if he had one, followed again by the remaining solicitors in order of seniority entering their second case. This procedure is to be repeated until all cases have been entered.

The junior solicitors will doubtless be pleased to hear this rule re-iterated again for it has sometimes happened of late that senior solicitors by entering all their cases at the one time, have taken all available trial days, leaving the junior solicitor with the consolation of having a remanet for the next sitting of the Court.

It is also of interest to know that the case is entered by the solicitor, not by the counsel or barrister. This being the case, it follows that it is not necessary to move the case be entered as has been attempted in some circuits.

2. PERSONAL SERVICE

The requisites for service under the provisions of the Arrest and Examinations Act were dealt with by Harrison J., in an application for Habeas Corpus arising out of an action in the Magistrate's Court at Hampton, entitled **Pierce v Hopkins.**

Pierce recovered judgment by default against Hopkins and applied under the Arrest and Examinations Act for examination of the judgment debtor. A summons was issued. This was served on the defendant by leaving a copy with his landlady, she being an adult at his usual place of abode.

Subsequently on the return of the summons, when the defendant failed to appear, an execution was issued against him and he was lodged in jail. He applied for a habeas corpus on the ground that the execution and hearing on which it was based were nullities, as there had been no service of the summons. The statute provides that the summons be served as follows: if the defendant can be found, by delivering to him a copy thereof, or if he cannot be found by leaving the same at his place of abode, with some adult member of his household.

Harrison J. held that service upon an adult member of the household could only be effected if the defendant could not be found. As the affidavit showed no grounds for not serving the defendant personally, there was no service. Further, service upon a landlady was not service upon an adult member of the defendant's household and the service was bad on this account also. Accordingly the defendant was discharged from jail.

J. D. Harper for discharge of the defendant.

Henry E. Ryan, contra.

3. ORDER 56 RULE 10–ACCESS TO CHILD BY FATHER

A father and a mother were living separate and apart. The mother had taken custody of the children. The father wished to have access to the children but did not desire to have custody. The proper procedure was for the father to apply as a next friend under the provision of Order 56 Rule 10 of the Judicature Act for access.

BONNY v BONNY Harrison J.

W. A. Gibbon for the applicant.

4. CONTEMPT OF COURT

Where there has been a contempt of court but the parties did not do so deliberately they will be sufficiently punished by paying the costs of the application for attachment, where such is made.

MALONEY et al v GALBRAITH Hughes J.

W. G. Power for attachment.

J. F. H. Teed, contra.

5. COSTS OF ORIGINATING SUMMONS

Where there are proper grounds for an originating summons to determine the construction or meaning of a will, the costs of all parties properly represented will be paid out of the estate on a solicitor and client basis but the Court may order that such costs do not exceed 5% of the Probate value of the estate.

Re IDA A. NORTHRUP Harrison J.

D. G. Willett for executrix

6. COUNTERCLAIM IN EXCESS OF COUNTY COURT JURISDICTION

Where the defendant conterclaimed for damages in excess of the jurisdiction of the County Court in an action commenced in the County Court the action will be transferred to the Supreme Court with costs of the application in the cause, unless the parties consent to the Jurisdiction of the County Court.

ROURKE v TEED-McCARTHY CONSTRUCTION LTD
Kierstead Co. Ct. J.

Teed & Teed for application.

Whelly & Whelly contra.

7. WITHDRAWL OF COUNTERCLAIM AND DISMISSAL OF ACTION

Where an action in which there is a counterclaim is called for trial and the plaintiff does not appear, the defendant is entitled to withdraw its counterclaim without prejudice to again raising the issues and to have the action dismissed under Order 36 Rule 32. Where the original action was commenced in the County Court the action will be dismissed with costs on the County Court scale.

ROURKE v TEED – McCARTHY CONSTRUCTION LTD.
Anglin J.

Eric L. Teed, Saint John, N.B.

Book Reviews

UNDERMINING THE CONSTITUTION A HISTORY OF LAWLESS GOVERNMENT

(By Thomas James Norton. New York: The Devin-Adair Company. 1950 Pp XIV, 351. ($3.00))

The most surprising thing about this book is that it was ever published at all. It is nothing more than an irrational and hysterical attack on the legislation of the late President Roosevelt. In one chapter, Roosevelt is called a communist, in another he is a fascist, and in yet another he is accused of "alienism" (whatever that is). The Tennessee Valley Authority is described as a "fascist corporation". One would hope that no self-respecting Canadian undergraduate would use either the author's arguments or the grammatical construction that contains those arguments. The book has a huge content of propaganda and inaccuracy.

It is so filled with hatred that one would suppose that the dagger or stiletto would be more appropriate to the author's purposes than the pen.

J. Carlisle Hanson, B.A., (U.N.B.), M.A., (McGill), B.C.L. (U.N.B.) of the New Brunswick Bar

WITNESS, Whittaker Chambers (Toronto: Random House of Canada, Limited, 1952) 808pp. $6.00

Published earlier this year was a book, outwardly impressive in size and design, of immediate interest to the reading public generally and of particular note to students at law because of the legal "backdrop" to the unfolding drama of nearly one-third of the book. The subject matter of **Witness** can be considered on three planes: (1) as an autobiography in itself; (2) as pointing up acutely the signal conflict of our time, communism versus the free world, with special consideration deserved by a memorable foreword which takes the form of a letter by the author to his children; (3) for its treatment of the hearings before the House Committee on Un-American Activities and the Alger Hiss trials.

As the autobiography of Whittaker Chambers **Witness** relates the activities of a man who navigated the seas of communism on the surface as a member of the open Communist Party and below as an agent of a section of the Soviet Military Intelligence, operating in Washington and New York. During his career in the Communist

Party Chambers was a member of the staff of the **Daily Worker** and for a short period editor of the **New Masses.** It was not until 1934, after he had moved underground, that he met Alger Hiss, a man who in later years was active at Dumbarton Oaks, Yalta, the setting-up of the United Nations at San Francisco, and who became the president of the Carnegie Endowment for World Peace. The two, according to Chambers, became close friends as members of the communist conspiracy and remained such until Chambers broke with communism in the spring of 1938. In 1939 Chambers was offered a position with **Time** and when he voluntarily left that magazine some nine years later he had risen to the post of a senior editor.

Through the testimony in the hearing and trials reproduced in the book the reader is able to attempt a delineation of the character of each man. Throughout the committee hearing and Hiss' two trials on charges of perjury one is ever conscious of the striking dissimilarity between the mode of offering testimony by Chambers and that by Hiss: that of the former is straightforward and unambiguous, that by the latter monotonously qualified. Another arresting fact is that Hiss was represented by prominent counsel, while Chambers, after his resignation from **Time,** was never accompanied by a lawyer when he appeared before the Grand Juries.

Since publication, **Witness** and what it purports to expound has been a controversial topic. It has been condemned and acclaimed for its approach to the present-day ideological crisis; the trials themselves are yet stirring arguments: the validity of important evidence impugned and even the trial procedure criticized. Some reviews term it the best book on communism to appear on this continent to date. In contrast is the view of an American professor of law who had occasion to refer in print to **Witness** as "one of the longest works of fiction of the year". Words descriptive from "fascinating" to "boring" have been applied to this book. One statement at least seems capable of assertion — **Witness** should be read by all, for, rightly or otherwise, it takes its place as a monumental book of the present.

F. Leger

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The Evolution of Civil Liberty and Equality?

Trial by jury of a civil action is a rarity in our Province since the Rules of Court were changed in 1938, and it does not appear to me that this latest chapter concerning the jury system and this latest development in the evolution of civil liberty and equality should be without comment.

As an expression of the democratic ideals of liberty and equality, trial by jury, rather than by arbitrarily appointed officials, became the accepted mode of trying both criminal and civil actions at a very early period in English legal history. At the time of the Judicature Acts, all common law actions were tried with a jury, and suits in Equity were tried by a Judge alone. After the Acts, the English Court of Appeal ruled, that, "wherever there was, before . . . , a right to trial by a jury, such right still exists." (1) ——This right to the trial of an action at law by a jury became part of the law of this Province upon the inception of the laws of England, and it was preserved by the Rules of Court under our Judicature Act 1909. (2)

In England this right to a jury trial was, generally speaking, unrepealed until 1933; in that year the Administration of Justice Act provided that in a civil action the order upon the summons for directions must indicate whether the action is to be tried with a jury or without a jury. This enactment has been held to have placed the question regarding the mode of trial within the absolute discretion of the Judges. (3)—— The New Brunswick rules regarding the mode of trial for civil actions were repealed in 1938, and new and different provisions were substituted. (4) After providing for a right to a jury trial in actions for libel, slander, breach of promise of marriage, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment, the new rules direct that all other actions be tried by a Judge alone, unless the Court or a Judge directs a jury trial, because, "the questions in issue are more fit for trial by a jury than by a Judge." These new provisions have never been interpreted by the Court of Appeal; however members of the profession embrace the view that the amended rules repeal any common law right to a jury trial.

The lawyers of New Brunswick cheerfully accept the inferiority of juries for the trial of all issues, since, presumably as a result of their advice to their clients, there are no applications for civil jury trials. We

(1) **Jenkins v. Bushby** (1891) 60 L.J. Ch. 254, per Lindley, L.J.
(2) **Fairweather v. Foster** (1918) 46 N.B.R. 40, per White, J., at 60.
(3) **Hope v. G.W.R.** (1937) L.J. 563.
(4) Order 36, Rules 1-6.

have far outdone the rest of the common law world in the matter of the abolition of civil juries. The right to a jury trial is only slightly abridged in any other common law jurisdiction in Canada; on an appeal after a jury trial in another Province, the Supreme Court of Canada may still make this observation: "A jury is an eminently proper body for the trial of a negligence action arising out of an automobile collision." (5) In England it is certainly still common practice to obtain a direction that a jury find the facts in issue between litigants in a civil action. The dockets of Circuits Courts in New Brunswick are alone unencumbered by jury trials. It may be said that in our Province we set an example for the rest of the common law world in the matter of the simplification of the administration of justice. (Simplicity is a mark of perfection! Of course it can not be said that the process of simplification has really culminated yet. While we are still burdened by the now outmoded laws of evidence (6) and not fully adjusted in every way, the abolition works a severe hardship on our very capable, but very overworked Judges, for their task of adjudicating legal disputes approaches the impossible since they have been deprived of the assistance of juries.)

The reasons advanced by the majority of the members of our Bar as demonstrating the superiority of non-jury trials are said to become apparent even when one considers the points concerning this superiority about which there might be debate, and certainly the superior fitness of a Judge alone to try actions which involve issues of law only or issues of fact involving the integration of complicated data is not debatable.

It has been said that seven heads are better than one for weighing issues of simple fact, so that a jury would be the proper body for the trial of such issues. Even if it is admitted that individual jurors, as opposed to an entire jury, are equally as reasonable as a Judge and equally as fit to try issues of simple fact, especially since their unfamiliarity with the intricacies of law insures that their deliberations on a question of fact are not distracted by considerations of points of law, it is said that one should realize that each additional member of a body of triers increases the chance that the body will err; seven persons have seven times the capacity for error of one person. It is submitted that this fact rebuts the clever sophism, that seven heads are better than one.

The additional expense of jury trials is the factor which must outweigh any advantage which society might have derived from more general participation in the administration of justice by its citizens, so as to nullify what might otherwise be a sufficient reason for preferring trial by jury of cases which might properly be delegated to juries. Of course the weight of any advantages to be realized from more general participation in the administration of justice is only slight, otherwise it would not be less than the factor of the small additional expense. The same thing, that it is outweighed by the additional expense, must be true of the possible advantage, that the formality of jury trials engenders an awe which acts as a deterrant to perjured testimony by witnesses.

(5) **Telford v. Secord; Telford v. Nasmith** (1947) 2 D.L.R. 474.
(6) See the final paragraph.

One must regard the abolition of civil juries as an important development in the evolution of civil liberty and equality. Ever since individuals first banded together, there have been disputes concerning the conflicting interests of different persons; the resolution of these disputes was always a major concern of society. The abolition of civil juries can only be interpreted as evidence of the fact that individuals have learned to co-operate to such an extent that our society is enabled to concern itself less with these conflicts between the interests of its citizens. There was a time when laymen were sufficiently uninformed, that, except for the fact that they were an integral part of the Courts and familiar with their necessary role and the noble way in which they discharged their duty by reason of sitting on juries, they might not have appreciated this role and might even have suspected the arbitrarily appointed Judges and court officials of favoritism and the denial of the equality of all men before the Courts. However today, since the advantages of more general participation in the administration of justice are outweighed by the factor of the additional expense involved, the knowledge of the average layman has apparently increased to such an extent that, even though he takes no part in the administration of justice, he is aware of the role of the Courts and is confident of their integrity. Consider what a fine compliment this is to litigants, who are now willing to entrust the determination of their disputes to apparently casual treatment in a practically deserted courtroom or a Judge's chambers!

It is to be hoped that our lawyers, who must be credited with unselfishly abolishing civil juries even though it results in the relegation of their art to a lower place in the management of our society, will now apply themselves to the simplification of our procedural rules and especially to the modernization of the rules of the Law of Evidence applicable to civil trials, for inasmuch as the rules of evidence are largely a product of the jury system they are superfluous to non-jury actions.

JOHN T. CARVELL,
Moncton, N.B.

Allurement

An occupier of land or premises who has upon those premises something which can be regarded as an "allurement" may thereby be imposing upon himself an additional duty of care. That additional duty of care arises because of the temptation which is offered to children by that allurement. Although an adult is presumed to be able to appreciate those things which might injure him, a child may be so attracted as to be completely oblivious to the danger to which he is exposed.

The duty of care owed to a child, like that owed to an adult, depends upon whether the person on another's premises is a trespasser, a licensee, or an invitee. To the child trespasser an occupier owes no greater duty than he does to an adult in the same category. It is thus stated by Viscount Dunedin in **Addie v. Dumbreck: (1)**

> "The truth is that in cases of trespass there can be no difference in the case of children and adults, because there is no duty to take care that can vary according to who is the trespasser."

The Supreme Court of Canada following **Addie v. Dumbreck** (infra) has similarly held in **East Crest Oil Co. v. R.** (2). It was there stated by Estey J., Kerwin J. concurring:

> "It is sometimes suggested that a landowner is under an obligation to take special precautions with respect to children, but so long as the children remain trespassers the law seems to be settled that in principle there is no diffrence between a child and an adult."

The doctrine of allurement, therefore, has no place where the injured child is a trespasser on the property. Where the child is a licensee or invitee, however, allurement may have a very important place. The general philosophy behind the increased liability to children is thus stated by Lord Macnaughton in **Cooke v. Midland G. W. Rly. of Ireland (3):**

> "Persons may not think it worth their while to take ordinary care of their own property, and may not be compellable to do so; but... if they allow their property to be open to all comers, infants as well as children of maturer age, and place upon it a machine attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it with their tacit permission, and who are unable, in consequence of their tender age, to take care of themselves."

In this case, which is generally regarded as the introduction of the doctrine of allurement, the attractive and dangerous object was a railway turntable on the defendant's land. It was proved that to the knowledge of the defendant's servants both children and adults frequented the land and that children were in the habit of playing on the turntables. The held accordingly.

(1) (1929) A.C. 358 at 376
(2) (1945) S.C.R. 191 at 200
(3) (1909) A.C. 229 at 236

jury held that the railway company was negligent in not taking steps to put a stop to the practice of children playing with the turntable altogether or in not taking steps to prevent such an accident as that which occurred. The House of Lords supported the decision of the jury and held accordingly.

The Cooke case established the place of "allurement" in our scheme of law. Later cases leave no doubt but that one who brings an allurement onto his property thereby brings upon himself an additional duty of care towards children who might be injured by it. The difficult question to be answered, however, is just what constitutes an allurement:

> "It does not cover all objects with which children may hurt themselves, and it is a question of fact whether the fascinating and fatal object is to be regarded as an allurement."

Per Middleton, J. in **Pedlar v. Toronto Power Co.** (4).

The famous case of **Cooke v. Midland G. W. Rly.** (5) was followed by **Glasgow Corporation v. Taylor** (6) where the allurement was poisonous berries in a public park, where the injured child was regarded as a licensee on the property – perhaps even an invitee.

Several Canadian cases also provide examples of these fascinating and fatal objects. A wheel with an unguarded shaft driven at the rate of 200 revolutions a minute and a stream of water flowing through the premises were held by the N.S. Court of Appeal to be allurements to children (7); so also an empty gasoline drum left on the highway was held to be an allurement (8) and a crate left leaning in a dangerous position was held to be a lure to the boy who was injured when he caused it to fall upon him (9). A pile of timber left on a public street was held to be an allurement to children, even in 1900 (10) and the municipality was held liable for injuries suffered by the child.

We have observed earlier in this paper the general statement that in the case of a child trespasser, no greater duty is owed to that child than would be owed to an adult trespasser. That is so once the child has been found a trespasser but in deciding the question of whether he is a trespasser or not, the allurement or dangerous and fascinating thing is taken into consideration. And since an adult is presumed to know whether the fascination is dangerous or not, we face the situation that in exactly similar circumstances an adult might be a trespasser while a child would not.

"Allurement" says Lord Goddard "only means a form of invitation." (11) Riddell, J., in the Ontario Court of Appeal put it this way:

> " 'Allurements', 'attentions', 'implied invitations', 'implied licenses', etc., have been relied upon in some cases to fasten liability upon a landowner in respect of an infant coming upon the land; and the cases shew that, if the landowner place or leave upon his land anything that

(4) (1913) 15 D.L.R. 634 at 688
(5) (1909) A.C. 229
(6) (1922) 1 A.C. 144
(7) Burbridge v. Starr Mfg. Co. (1921) 56 D.L.R. 658
(8) Fergus v. Toronto (1932) 2 D.L.R. 807
(9) Clement v. Nor. Navigation Co. (1918) 43 O.L.R. 127
(10) Ricketts v. Markdale (1900) 31 O.R. 610.
(11) Edward v. Railway Executive, (1952) 2 A.E.R. at 437

would naturally attract children to come upon his land without taking efficient means to keep them off, he may therefore be held to have invited or licensed them to come upon his property—and consequently they cease to be trespassers and become invitees or licensees with all the rights of express invitees or licensees . . ." (12)

A recent English case, **Edwards v. The Railway Executive** (13) gave rise to some discussion on this allurement problem by the House of Lords. In that case, a child went through an opening in a fence onto an electric railway track in search of a ball which had been thrown there. The child slipped on the rails and was run over by a train. There was an embankment within the fence on which children had been accustomed to sliding, and to gain access to that embarkment the children had habitually broken the fence. Each time it was repaired as soon as discovered. In these circumstances, it was alleged that the toboggan slide constituted an allurement and that therefore the defendant was liable. It was held, however, that the children must be regarded as trespassers and the action failed. The company was not bound to take every possible step to keep out intruders, but only enough to show that it resented and would try to prevent the intrusion.

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(12) Wallace v. Pettit (1923) O.L.R. 82 (C.A.)
(13) (1952) 2 A.E.R. 430

Case and Comment

SHEASGREEN v. MORGAN, (1952) 1 D.L.R. 48

Contributory Negligence of a Child – Negligence of Parent.

This case, recently decided by Mason J. in the Supreme Court of British Columbia, is of interest for two reasons. The first is because it deals exhaustively with the question of contributory negligence of a child. The second is because it does not deal with the question of the contributory negligence of a parent.

In this case a father conveniently provided his son, who was only five years and three months old, with a bicycle, and the child to ride the bicycle upon the main highway. The child, oblivious to possible danger, peddled through a stop street intersection onto the main highway. The defendant driving through the intersection was operating his car in a somewhat negligent manner and as a result the child was seriously injured and hospitalized for a considerable time. Action was brought by the child for personal damages which were allowed at $10,000.00 and by the father for expenses incurred by and during the hospitalization of his son. These were allowed at $7,853.71. The jury found the child 70% negligent and the defendant 30% negligent. Mason J., after an exhaustive review of the cases relating to the question, found that contributory negligence could not be imputed to the child. Judgment was granted to both plaintiffs.

There have been attempts to set an arbitrary age limit under which no child could be held guilty of contributory negligence. (2) However Mason J. concluded that the question of contributory negligence in children is governed not by their age, but by the "capacity, intelligence and understanding." It is submitted that such is the proper principle to apply and the conclusion of the learned judge is amply supported by the authorities.

With respect to the question of negligence of the parent in cases where a child has been injured, both bench and bar have made sporadic attempts to fix some responsibility upon the person having the child in his charge. The writer submits that this matter could be more fully developed and appreciated by future litigants. For instance in the

(1) [1952] 1 D.L.R. 48

(2) See Anglin C.J.C., **Bouvier v. Fee** [1932] 2 D.L.R. 424 at p. 428: "As to contributory negligence or common fault, it is, in our opinion, almost out of the question to raise such an issue as a ground of appeal in the case of a child under 8 years of age, i.e., barely above the age under which all responsibility must be denied." To the contrary is Idington J. in **Winnipeg Electric v. Wald**, 41 S.C.R. 431, at p. 437. Though the law fixes an age limit for responsibility in some cases, none for the application of the doctrine of contributory negligence has yet been so definitely fixed as to furnish a uniform rule of law to guide us in all possible emergencies that may arise in the conduct of children.

Sheasgreen case, if the question of the father's negligence in allowing his son to travel upon the main highway, while the child was not of sufficient age or understanding to appreciate the dangers involved upon such a course, had been properly raised, and if the father was found guilty of negligence, the defendant would doubtless have been relieved of payment of a considerable portion of the damages assessed against him.

The first judicial comment upon the matter of parents' liability was made by Alderson B. in the case of **Lygo v. Newbold.** (3) There the plaintiff child stole a ride upon a cart and was subsequently injured. His claim failed and in the course of judgment Alderson B. stated:

> "The negligence in truth is attributable to the parent who permits the child to be at large."

This idea received support years later in the Canadian case of **Hargrave v. Hart.** (4) Mathers CJKB (Manitoba) stated that parents should take more care of their children and not allow them to run and play on the streets in the indiscriminate manner in which some parents allow their children to do.

Sangster v. T. Eaton & Co. (5) was one of the first Canadian cases where the question of parents' negligence was indirectly raised. The court held that regardless of any negligence of a mother who was taking care of a child, the child could still recover full damages. With this principle we are in entire agreement. It should not be necessary to emphasize that the question of identification of the child with the parent does not arise and is not considered in this comment. (6)

In **Hudson Bay Co. v. Wyrzkowski** (7) the court was faced with a similar problem and the case was decided upon the same principle as was the **Sangster** case. It is perhaps unfortunate that the question of parents' negligence was not directly raised in these two actions.

The only case the writer has discovered in which the question of parents' liability for negligence was directly raised, is that of **Gargotch v. Cohen.** (8) This was an action by a six year old child and his father for damages sustained by the child while returning from school. It was contended that the father was negligent in not taking reasonable and proper care of the child at the time of the accident. However, on the facts the court held that there was no negligence on the part of the father.

The case of **Mercer v. Gray** (9) shows, however that a parent can be found guilty of negligence. There a jury found the child 15%

(3) 9 Ex. 302; 156 E.R. 129
(4) 9 D.L.R. 521
(5) 25 O.R. 78; on appeal 21 O.A.R. 624; on appeal 24 S.C.R. 708
(6) See **Oliver v. Birmingham & Midland Omnibus** [1933] 1 K. B. 35 which held that the doctrine of identification does not apply to an infant as opposed to **Waite v. North Eastern Railway Co.,** El. Bl. El. 719, where it was held the negligence of the person in actual custody of the child at the time of its injury which contributed to the injury may be imputable to the child.
(7) [1938] 3 D.L.R. 1
(8) [1940] 4 D.L.R. 810
(9) [1941] 3 D.L.R. 564

negligent, the defendant 80% negligent and the parent 5% negligent. Unfortunately for the defendant, the matter of the parent's negligence was not properly pleaded and the court had to deliver judgment for full damage against the defendant.

Similarly in **Oliver v. Birmingham Omnibus** (10) the defendant was found guilty of negligence and the plaintiff's grandfather found guilty of contributory negligence. Again the matter of the contributory negligence was not properly pleaded and the plaintiff was awarded full damages against the defendant.

It is submitted that these cases indicate that the question of the contributory negligence of a parent can be properly brought before the court and that such claims will in all probability be favourably received. In this modern age of haste and hurry, John Public should not have to be confronted with swarms of negligent and unattended infants darting hither and yon over highways and byways to the utter disregard of the rights of others. Especially is this so where the very media which carries them to their destination is conveniently provided by the infants' parents. Bearing in mind the comments of Alderson B. and Mathers CJKB it would be well for parents to make stricter supervision over the actions of their children or stand the possibility of being held liable for injuries sustained by them.

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(10) Supra (6).
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BADDELEY v. INLAND REVENUE COMMISSIONERS (1953) 1 A.E.R. 63.

Trust – Charity – Moral, Social and Physical Training and Recreation – Whether For Relief of Poverty or Beneficial to the Community – Whether Religious Nexus Between Individuals Constitutes Them a Section of the Public.

This case raises several problems in the well-ploughed field of charitable trusts, including the question of trusts for the relief of poverty, for recreational facilities and a consideration of whether a class of people, determined by their affiliation with a particular religious group, is a part of the community for the purpose of a trust beneficial to the community.

Two conveyances, both dated the same day, transferred several pieces of land to trustees who were directed to allow the property in each case "to be appropriated and used by the leaders for the time being of the Stratford Newton Methodist Mission under the name of the 'Newton Trust' " for certain purposes, inter alia, for the moral, social and physical training and recreation of persons resident in the county boroughs of West Ham and Leyton in the county of Essex who were members of the Methodist Church or were likely to become members of that church and lacked the means otherwise to enjoy the

advantages provided by the trusts, and for the promotion and encouragement of all forms of such activities as were calculated to contribute to the health and well-being of such persons. It was contended by the trustees (taxpayers) that the conveyances were exempt from the doubled stamp duty imposed by s. 52(1) of the Finance Act, 1947, since the trust was established for charitable purposes only and accordingly came under s. 54(1) of that Act.

In support of their claim the trustees invoked two of the four classifications of charitable trusts delineated by Lord Macnaghten in **Income Tax Commissioners v. Pemsel,** (1) namely, trusts for the relief of poverty and trusts for other purposes beneficial to the community. Mr. Justice Harman, who heard the case, disposed shortly of the ground of relief of poverty:

> " 'Relief' seems to connote need of some sort, either need of a home or of the means to provide for some necessity or quasi-necessity and not merely for an amusement, however healthy it is."

Among the conceivable objects of the trusts in the present case were activities which well could be termed amusements. In passing, the learned judge points out that to have a trust for the relief of poverty which is also a charitable trust, the poverty does not have to be a state of "absolute want or grinding need."

The trustees' view that the trusts were for the benefit of the community also failed. On this ground, the learned judge followed the decision in **Londonderry Presbyterian Church House Trustees v. Inland Revenue Commissioners** (2), a judgment of the Court of Appeal of Northern Ireland, and held that the recreative provisions in the instant case did not constitute a charitable trust.

Mr. Justice Harman's judgment contains an interesting dictum; it concerns the point whether a class of persons ascertained by reference to their connection with a particular religious denomination can be regarded as a section of the community within the fourth category of **Pemsel's** case (supra). The learned judge states that had he held recreation to be appropriate subject-matter for a charitable trust, the question would still remain for determination whether the object was a public one; that is, one that would benefit the community or a class of the community. The individuals which the trust in this case had in view had to be inhabitants of two boroughs in the country of Essex, persons of insufficient means, and either Methodists or likely to become Methodists. In the learned judge's opinion, these individuals would form a section of the community, so that had he held recreation to be a charitable object, he would have held the purpose here to be a public recreation. This was the view expressed by two of the three members of the Court of Appeal in the **Londonderry** case (supra).

(1) 1891) A.C. 531 at 583.
(2) (1946) N.I. 178.

The conclusions on this matter, however, are not all one way. In **Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund** (3), the Court of Appeal held that although the fund in that particular case was for the relief of air-raid distress, its purposes were of a personal, and not of a public character, because it was merely for the benefit of the employees of a particular company who were themselves, for the main part, the subscribers to the fund, and, moreover, the benefits were confined to such of the employees as had subscribed to the fund. In **Opponheim v. Tobacco Securities Trust Co., Ltd.** (4), by a settlement trustees were directed to apply certain income "in providing for ... the education of children of employees or former employees" of a British limited company or any of its subsidiary or allied companies. The employees so indicated numbered over 110,000. The House of Lords held, Lord MacDermott dissenting, that the common employment of the beneficiaries would not be a quality which constituted them a section of the community so as to afford to the trust the necessary public character to render it charitable, so the gift was void for perpetuity. The Ontario Court of Appeal in **Re Cox** (5), considered the following gifts: "To pay the income thereof in perpetuity for charitable purposes only; the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependents of such employees ..." It was held that the gift was not a valid charitable gift for it was not for the benefit of the public or an appreciably important section of the public.

Although the designated groups in these last three cases were not religious denominations, the decisions illustrate that the problem whether certain individuals form a class of the community is one shared by all the types of purportedly charitable trusts(with the possible exception of the anomalous "poor relations" cases). To determine the public character of the gift, the test is not the nature of the gift; that is, whether it be for the relief of poverty, or for the advancement of education, or for the advancement of religion; it is, rather, the description of the beneficiaries. The words of Lord Greene, M.R. in **Re Compton** (6) appear in point:

> "No definition of what is meant by a section of the public has, so far as I am aware, been laid down, and I certainly do not propose to be the first to make the attempt to define it."

Franklin O. Leger, II Law U.N.B.

(3) (1940) 1 A.E.R. 501.
(4) (1951) A.C. 297.
(5) (1951) 2 D.L.R. 326.
(6) (1947) 1 Ch. 123 at 129.

Practice Notes

1: AMENDING WRIT

Order 20 Rule 4 provides as follows:

"Whenever a statement of claim is delivered the plaintiff may therein alter, modify or extend his claim without any amendment of the indorsement of the writ."

This rule is subject to some exceptions, inter alia, the one that the plaintiff cannot by enlarging the claim in his statement of claim, introduce a new and wholly different cause of action not referred to in the writ.

Under Order 28 Rule 1, where a plaintiff wishes to claim on any cause of action not mentioned in his writ, he can do so only by leave of the Court. However, amendments which would prejudice the rights of opposite parties existing at the date of the proposed amendment, are not as a rule allowed. A plaintiff will not be allowed to amend by setting up fresh claims which, since the issue of the writ, have become barred by the Statute of Limitations or any other statute.

MOCKLER v TOWN OF GRAND FALLS et al per Michaud C.J.K.B.

2: COUNTERCLAIM

Where the original action is dismissed for want of prosecution, the counterclaim may still be proceeded with.

BEYEA et al v. WALSH et al per Michaud C.J.K.B.

3: CRIMINAL CODE 285 (2)

An information which alleges any one or more of the three matters contained in section 285 (2) namely; failure to stop, failure to tender assistance and failure to give name and address is sufficient in law upon which to found a conviction.

GRASS v. REGINA per Keirstead Co. Ct. J.

4: DECEASED PARTY

The defendant in the original action died before a judgment was delivered. The plaintiff subsequently made an application to the Court. Held, the Executor of the deceased defendant should be made a party to the action and served with notice before any further applications could be considered.

SEARS v. COLE per Dysart Co. Ct. J.
Solicitor for Plaintiff: W. G. Stewart
Solicitor for Defendants: C. V. Cole

5: DISCOVERY

The defendants applied for examination for discovery of an officer of the plaintiff corporation. The officer selected was unable to furnish certain information. Application was made to have a former manager of the plaintiff corporation examined as an officer under Order 31 (a) Rule 19 (2). It was held that the question whether the former manager was an officer or merely an employee of the plaintiff would be left up to the trial judge and an order in the alternative was granted for the examination of the manager as an officer or employee of the corporation.

ELLIS MOTORS LTD. v. BALOISE INSURANCE CO. et al
per Anglin J.

Solicitor for Plaintiff: Ritchie, McKelvey & McKay
Solicitor for Defendant: Gilbert McGloan & Gillis

6: EVIDENCE

Before petition for divorce had been served an application was made to take evidence of a witness **de bene esse.** An order was made allowing the evidence to be taken and the petitioner was granted leave to apply after the petition had been served for an order that the evidence so taken be used upon the trial.

G. v. G. per Anglin J.

Solicitor for Petitioner: Ritchie, McKelvey and McKay.

7: INJUNCTION

Upon an ex parte application for an injunction to restrain members of a labour Union on strike from molesting the premises of the plaintiff the injunction was limited in so far as parading and congregating was concerned to parading and congregating in excess of lawful picketing.

LAWSON MOTORS LIMITED v. LODGE 1700 I. A. M.
per Anglin J.

Solicitor for Plaintiff: Ritchie, McKelvey & McKay

8: LUNACY COMMITTEE'S COMPENSATION

Where the committee of the estate and persons of a lunatic passed his accounts, the court allowed the committee compensation based on income and receipts. The committee of the person was also allowed compensation for services rendered in taking care of the person.

Re: ADA J. TEED Per Harrison J.

9: STATEMENT OF CLAIM

A plaintiff claimed damages for assault, illegal arrest and false imprisonment which were endorsed on the writ of summons. Allegations referring to malicious prosecution will not be allowed in the statement of claim until the writ is amended. Where the writ cannot be amended because such would institute a new action, then barred by statute, all such allegations will be struck out of the statement of claim.

MOCKLER v. TOWN OF GRAND FALLS et al
per Michaud C.J.K.B.

10: THIRD PARTY PROCEEDINGS

Third party proceedings are not available in the County Court.

HOGAN v. HARVEY & CITY TRANSIT LIMITED
per Keirstead Co. Ct. J.

Solicitor for Plaintiff: J. B. M. Baxter
Solicitor for Defendant: J. Paul Barry
Solicitor for 3rd Party: Gilbert, McGloan & Gillis

11: TORT

(Difference between False Imprisonment and Malicious Prosecution)

There is no doubt that a cause of action for assault, false arrest and false imprisonment is altogether different from a cause of action for malicious prosecution. Assault, illegal arrest and false imprisonment are trespass to the person, while malicious prosecution of a person is an injury to his character rather than his person, and gives rise to a right of action different in its character, in the manner in which it should be conducted and in the nature of the damages to be proven and awarded from the right to an action for direct trespass to his person.

MOCKLER v. TOWN OF GRAND FALLS et al
per Michaud C.J.K.B.

12: WANT OF PROSECUTION

Where the original action has been dismissed, time for further proceedings in the counterclaim is calculated as from the date the original action was terminated. A motion made to dismiss the counterclaim for want of notice of trial will be refused where the time allowed by the rules, when calculated from the date when the original action was disposed of, had not expired.

BEYEA et al v. WALSH et al per Michaud C.J.K.B.

13: WITNESS

The name of a police informant is privileged from disclosure on cross examination on the grounds of public policy.

REGINA v. ROY per Keirstead Co. Ct. J.

ERIC L. TEED

"Legal Aid"

(A Brief History)

When Good King Alfred singed the cake,
That was a picayune mistake,
To fright the Danes? For Heaven's sake!
Threaten 'em with a lawyer!

Old King Canute made Royal Sport,
Commanding waves, at Plymouth Port,
Then fined them; for Contempt of Court,
Without advice of lawyer.

When Thomas Becket sought retreat,
Beneath a fat churchwarden's seat,
Came knights (with swords) and made cat's meat
Of Tom. He had no lawyer.

The Duke of Clarence came to dine;
They drowned the bloke in Malmsey wine,
Then proved it "wasn't by design",
Through some ingenious lawyer.

And Mary, Queen of Scots, they say,
Might be alive unto this day,
But (being Scottish) wouldna pay
A bawbee tae her lawyer.

And but for George the Third, gor' blimey!
Whose tea-tax caused a legal stymie,
All Yanks might yet be talking "Limey"
But George rebuffed his lawyer.

Ye Monks! Ye Merchants! Dukes and Queens!
When full of Malmsey, guile, (or beans)
Dig deeply in thy nether jeans,
And fee a brilliant lawyer.

Herman Lordly, Librarian.

Written expressly for the U.N.B. "Law Journal"