CASE AND COMMENT

FIRE INSURANCE — ASSIGNMENT OR NEW CONTRACT — ALBERTA. — *Springfield Fire and Marine Insurance Company* v. *Maxim* and *The Eagle Fire Company* v. *Maxim*[1] was an action in the Province of Alberta dealing with the legal results of the transfer of a policy of fire insurance, which policy had been issued as a result of misrepresentation. The original applicant, Efrim Maxim, was a foreigner and in answer to a question on the written application he declared that he had had no previous fires. This answer was untrue. Subsequently the property insured was transferred by Maxim to his wife. At the request of his wife, Maxim informed the companies' agent of the transfer and requested that insurance should be placed in her name. The usual forms for transfer were not used.

The agent thereupon wrote to both companies as follows:

> I am informed by the assured that he has transferred the property in the name of his wife, Mrs. Millie Maxim. Please issue the endorsements and send same to me for attachment to the above policy.

The endorsement sent by the Springfield Company was in the following terms:

> Notice received and accepted that the title to the within described property now stands in the name of Mrs. Millie Maxim and this policy is held to cover in her name only. All other terms and conditions remaining unchanged.

The Eagle endorsement, while slightly different in terms, was in substance the same.

A fire loss having occurred, the plaintiff, Millie Maxim, the assignee, brought an action on the policies. The trial judge, Ewing J., held that the husband, having knowingly represented that he had never had previous fires, the policies were void. He also held that this defence was valid as against the plaintiff as assignee and dismissed the action. The Court of Appeal of Alberta reversed Ewing J. and held that the later transactions constituted new contracts of insurance between the insurance companies and the wife, that no misrepresentations by the husband could have any application to the wife's contract and therefore that the wife could recover. The insurance companies appealed to the Supreme Court of Canada. Their appeal was dismissed, the Chief Justice and Hudson J. dissenting.

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[1] [1945] 3 W.W.R. 209 (trial court); [1945] 3 W.W.R. 705 (Court of Appeal); [1946] S.C.R. 604, 13 I.L.R. 108 (Supreme Court of Canada).

Obviously if this was an ordinary assignment of a policy the assignee took subject to the inherent defect resulting from the misrepresentation. But both appellate courts avoided this result by holding that the wife held, not under an assignment of the old contract, but under a new and independent contract of her own. Why?

Harvey C. J., of the Alberta Court of Appeal says that it was a new contract because:

(a) Efrim Maxim as agent of his wife applied to the companies' agent; and

(b) "she acquires her rights not by assignment but by the terms of a new contract as disclosed in the words of the endorsement".

The Chief Justice does not elaborate this statement and, to the writer, it appears to be entirely inconsistent with the endorsement, which says ". . . *this* policy is held to cover in her name only". Surely, the words "this policy" mean the existing policy and not a new policy.

Ford J. A. concurs with the Chief Justice and says:

> I agree with the learned Trial Judge that when the assents or consents endorsed on the policies were given, new contracts between the Companies and the appellant resulted; and I agree with him that the new contract is based upon the terms of the existing policy, with this limitation that only those terms thereon are continued as are applicable to the new contract . . . I think it entirely repugnant to the concept of the new contract which arises to say that it is to be avoided by reason of a misrepresentation, the materiality of which can have relation only to the moral risk relative to someone other than the person who has been accepted by the insurer as the person assured. The question of whether an applicant for fire insurance has had other fires is so personal to the individual applicant that its materiality is relevant only to him.

Ford J. A. says also that there was no formal assignment, that is, no written assignment. There is no legal requirement of writing by the assignor and the insurer may well act on the assignor's verbal application. Ford J. A. likewise fails to give due appreciation to the insurer's acquiescence in the application, which is expressed in the words, "this policy shall read and cover in the name of the assignee". Beyond question, it would appear that whatever rights the assignee acquired were under "this policy", that is, the original policy and not under a new policy.

In the Supreme Court of Canada Kerwin J., Rand J. and Estey J. agreed with the view of the Alberta Court of Appeal.

In the opinion of Kerwin J., Mrs. Maxim was a purchaser for value and "the results in the commercial world would be

serious indeed if in the ordinary course of business it were not possible for a purchaser of insured property to enter into a new contract without being bound by all representations that had been made to the insurer by his predecessor in title". No person denies the right of a purchaser to enter into a new contract. But the question here was: Did the purchaser and the insurers in fact enter into a new contract?

Kerwin J. continues ". . . bearing in mind the manner in which the Companies' local agent was apprised of the respondent's wish, and that the evidence of representatives of the Companies makes it abundantly clear that they had no objection to the respondent as an insured, I agree with the view of the members of the Appellate Division that new contracts were entered into between the Companies and the respondent". It is respectfully suggested that the manner of the apprisal and the absence of objection on the part of the insurer to the assignee are quite as consistent with the assignment of the old contract as they are with the making of a new one. Neither of these reasons nor both of them support the conclusion of fact, and both of them ignore the fact that any rights acquired by the assignee were by the express consent of the insurers limited to rights under the existing policy.

Rand J. refers in his judgment to the contract of fire insurance as a personal contract of indemnity against loss or damage to the interest of the insured in specified property. It is insurance, he says, against certain risks, among which is the moral risk of the insured. To say of such a reciprocal relationship that the insured could by his own act substitute a new party to the old contract and thereby change the moral risk is, he contends, to misconceive the nature of the contract. This begs the real question of fact in issue because the Alberta Court of Appeal says that the insured, Maxim, made the application as the agent of his wife. This is supported by the evidence and ought to be accepted as a fact, and the suggestion of Rand J. that some principle of law was violated by the substitution of a new party to the old contract has no foundation in fact.

Rand J. appears to treat the transaction in question as an ordinary assignment of an insurance policy, but concludes that under any assignment of an insurance policy the entire group of relations undergoes a readjustment and what emerges is an entirely new contract. If this conclusion is a sound one then the whole practice as to assignment of fire insurance policies must undergo a change. If the conclusion is sound, every assignee is a new in-

sured under a new contract and all the disabilities of the original insured under the policy are wiped out. But even if this conclusion were correct, it ought not to have been applied to the circumstances in this case. It is submitted that the proper conclusion should have been that as between the assignee and the insurers there was no *consensus ad idem*. The assignee presumably sought new insurance. The insurers specifically granted the assignee only such rights as existed under the original policies.

Hudson J., who wrote the dissenting judgment which was concurred in by the Chief Justice, does not discuss whether new contracts were entered into between the wife and the companies at the time of the assignment. He takes the view that since the husband represented the wife in getting the approval of the companies for the transfer, he was her agent and she was responsible for his acts as her agent. His concealment or misrepresentation is to be imputed to her and any policies effected through him are void. Further the assignee merely takes the place of the original assured and necessarily succeeds to the consequences of any act or omission by which the validity of the policies may have been effected before the assignment. Finally there was no change in the moral risk. The husband was at the time of the assignment and subsequently in control of the insured property. Therefore the wife acquired no rights under the policies.

The result of this case may be put on one of two grounds:

(a) the ground put by Rand J., that an assignment of an insurance policy invariably and inevitably creates a new contract — which may be a good or a bad conclusion in law; or

(b) on the ground upon which it was put by the other appellate judges who held that the wife could recover, that in the circumstances of this case the transaction was in effect new insurance and not an assignment — which does not appear to be supported by the facts and is one more illustration of hard cases making bad law.

How can the rights of the insurer be protected? If the first ground is correct, then only by legislation. If the second is the true ground of the decision, then the insurer must protect itself by the use of proper words to exclude the contention of new insurance.

R. G. PHELAN

Toronto

AVIATION INSURANCE — PASSENGERS ON PRIVATELY OPERATED AIRCRAFT — INSURABLE INTEREST — WAIVER THEREOF — ONTARIO. — The recent decision of the Court of Appeal of Ontario in the case of *Attorney-General of Ontario et al.* v. *R. C. Stevenson for Union Marine Underwriters at Lloyd's, London*,[1] is of interest to insurers and to owners of aircraft operated for private purposes; particularly, perhaps, to governments that operate such aircraft for governmental purposes. It is suggested that the chief interest aroused by the case lies as much in what is not decided as in the point actually decided.

A minor point, not raised in the action, concerns the propriety of a contract being made in the name of a "department" which has no corporate entity, instead of in the name of a Minister of the Crown or in the name of His Majesty as represented by a Minister. A decision of the Appellate Division of the Alberta Supreme Court, *Attorney-General of Canada* v. *Petterson et al.*,[2] although not entirely conclusive on the point, at least throws grave doubt on the desirability of the practice of naming a "department" as a party to an action.

In the case at bar the policy purported to cover not only employees of the insured (the Department of Lands and Forests) but "others whom it may be deemed necessary or expedient by the assured to cover". The policy also contained a provision reading as follows:

> It is understood that the insurable interest of the assured is admitted by the underwriters.

It appeared that under the rules of the department pilots of the departmental aircraft could not carry passengers who were not employees of the government except by special permission from the Minister, the Deputy Minister or the Chief of the Division of Air Service. The department agreed to keep records of all flights and to forward to the insurer monthly declarations respecting the passengers carried, the basic premium to be increased in respect of such additional coverages.

In the particular case, the pilot carried three persons without permission and, as subsequently appeared, with no intention of reporting the fact. After the accident a report was however made. Unfortunately a serious accident occurred in which the three passengers were killed. The Attorney-General for Ontario and representatives of the three deceased sued on the contract.

[1] (1947), 14 I.L.R. 143.
[2] [1946], 3 W.W.R. 279.

The action by the representatives, as might have been expected, was dismissed both in the court below and on appeal on the simple ground that "neither they nor the persons they represent were parties to the contract of insurance". The trial judge, however, gave judgment for the Attorney-General. On appeal the judgment was reversed on the grounds that, no permission to carry the passengers having been given, none of them was an "insured person" within the meaning of the policy.

The appellant did raise, as one ground of appeal, the point that "the Department of Lands and Forests, Province of Ontario, had no insurable interest in the deceased, and the contract of insurance was therefore void in respect of those persons". It was argued that the department was, by reason of the admission of insurable interest, estopped from raising this claim. In respect of this Laidlaw J. A. says:

> Finally, I cannot give effect to the argument that the insurer should be estopped from setting up lack of insurable interest. If the deceased were insured persons within the meaning and intention of the policy, that argument would be available and effective, but the provision in the memorandum that 'the insurable interest of the assured is admitted by the underwriters' cannot reasonably be construed to prevent the insurer from setting up that a person, in respect of whom claim was made, was not 'an insured person' covered by the policy. It rests with the assured to establish affirmatively that the person or persons who suffered death were covered by the policy. This burden has not been discharged by the claimants in this case. Consequently, the action wholly fails.

This is not, it is respectfully submitted, wholly satisfactory as a ground upon which to rest the judgment. Moreover the statement that if the deceased had been insured persons within the meaning and intention of the policy (that is to say, if the proper permission had been obtained and reports made) "the argument would be available and effective" is unfortunate. These words are doubtless *obiter dicta* and hardly agree with the remarks of Robertson C. J. O.:

> It is difficult to conceive that such an admission would be contemplated to extend to such persons, and if it were so intended, then the validity of the contract itself comes in question, for the existence of an insurable interest seems to be out of the question in such case.

Subsection (5) of section 209 of The Insurance Act of Ontario (Accident and Sickness Part) states that, among others, sections 146 and 147 (Life Part) of that act apply to contracts to which the Accident and Sickness Part applies. Section 146 describes certain "insurable interests"; and section 147 provides that the contract shall be void if, at the time at which it would otherwise take

effect and be binding, the insured has no insurable interest. These provisions are common to the common-law provinces.

One need do no more here than mention the fact that an insurable interest is required by the law to prevent the making of gaming and wagering contracts. This is not a provision for the private benefit of the parties that can be waived. It is a matter of the policy of the law, and I suggest that it cannot be waived.

McGillivray on Insurance Law (2nd edition) at page 185 says:

> Contracts which promise payment without proof of the necessary interest are illegal and void, or null and void, and the parties to the contract cannot waive the illegality or the nullity. If the illegality is not pleaded in defence it is the duty of the court to take cognizance of it and refuse to enforce the contract.

In *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega*,[3] the contract sued upon was expressed to cover for a period longer than a year, whereas the statute required such contracts to be limited to a period not exceeding a year. Mathew L. J. said:

> It is said that we ought to make every effort to uphold the contract, and that under the circumstances an agreement by the parties may be inferred that the objection to the validity of the document should not be raised. It is enough to say that, if there were such an agreement, it would not help the plaintiffs. The parties cannot agree between themselves that the judge shall not perform his duty.

In *Gedge et al.* v. *Royal Exchange Assurance Corporation*[4] the policy sued on contained this clause:

> It is hereby agreed that this policy shall be deemed a full and sufficient proof of interest.

The headnote to that case reads, in part, as follows:

> Where, on the trial of an action, the plaintiff's case discloses that the transaction which is the basis of his claim is illegal, the court cannot properly ignore the illegality or give effect to the claim, even if the illegality be not pleaded or relied on by the defendants. The court will, therefore, not enforce a policy of marine insurance which is illegal under 19 Geo. II, c. 37, s. 1, by reason of its containing a clause that the policy itself is to be deemed a full and sufficient proof of interest, although that defence is not set up by the underwriters.

The purpose of this note is to suggest that in the *Stevenson* case, even if permission had been duly obtained and reports duly

[3] [1902] 2 K.B. 384.
[4] [1900] 2 Q.B. 214.

made, still such a contract of insurance was contrary to public policy, there being no insurable interest in the non-employee passengers. Having made in the policy the admission of insurable interest, it is possible that Lloyd's Underwriters did not feel it desirable to press the issue of lack of an insurable interest baldly, and not merely in relation to the fact that the deceased were not persons intended to be insured by the policy. Having no information as to the argument one cannot know whether this was done. However, it is, with great respect, difficult to understand why the court itself did not raise the issue and decide it, quite apart from any question as to whether the deceased were or were not persons intended to be covered by the policy. It is also suggested that the above-mentioned *dicta* of Laidlaw J. A. do serve to obscure a point that is of fundamental importance.

G. S. RUTHERFORD

Winnipeg

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CRIMINAL LAW — USE OF TESTIMONY GIVEN IN FORMER PROCEEDINGS — SECTION 999 OF CRIMINAL CODE — SUGGESTED AMENDMENT.

Section 999 of the Criminal Code of Canada provides:

> If upon the trial of an accused person such facts are proved upon oath or affirmation that it can be reasonably inferred therefrom that any person, whose evidence was given at any former trial upon the same charge, or whose deposition has been theretofore taken in the investigation of the charge against such accused person, has since become and is insane, or is dead, or so ill as not to be able to travel, or is absent from Canada, or if such person refuses to be sworn or to give evidence, and if it is proved that such evidence was given or such deposition was taken in the presence of the person accused, and that he or his counsel or solicitor if present had a full opportunity of cross-examining the witness, then if the evidence or deposition purports to be signed by the judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution, without further proof thereof, unless it is proved that such evidence or deposition was not in fact signed by the judge or justice purporting to have signed the same.[1]

In a recent unreported case,[2] this section came before a County Court judge in Ontario for interpretation. Two accused were charged jointly with assault and robbery. At the preliminary inquiry, the Crown called the complainant as a witness and, on the basis of his evidence, the Magistrate held that there

[1] Criminal Code, R.S.C., 1927, c. 36, s. 999; amended 3 Geo. VI, 1939, c. 30, s. 25.

[2] *Rex* v. *Potter and Stevens.*

was sufficient evidence on which to base a committal for trial. Counsel for the accused, however, decided to call as a defence witness one of the other witnesses for the Crown, for the purpose of obtaining further information about the Crown's case.

The accused were then committed for trial. When the case came up for trial, the Crown witness who had been called as a witness for the defence at the preliminary inquiry was absent from Canada and, consequently, was unavailable. The question then arose as to whether the Crown was entitled, under section 999, to read as evidence in the prosecution the deposition of the witness taken at the preliminary inquiry.

It was held, it is submitted quite properly, that the Crown was not entitled to do this. A strict reading of section 999 indicates that the accused or his counsel or solicitor must have had a full opportunity of cross-examining the witness at the time his deposition was taken. In this case the witness had been called as a defence witness and therefore counsel for the accused had an opportunity only to examine directly, not to cross-examine.

But section 999 gives rise to a more serious problem. The section evidently contemplates the use only by the Crown of testimony given in former proceedings. The section states that if the evidence was given or the deposition taken in the presence of the accused and he or his counsel if present had a full opportunity of *cross-examining* the witness, it shall be read as evidence *in the prosecution*. Section 999 does not, therefore, extend to situations where a defence witness has given evidence at any former trial upon the same charge or at the preliminary hearing and subsequently is unavailable because of (a) insanity, (b) death, (c) illness so serious as to prohibit travel, (d) absence from Canada, or (e) refusal to be sworn or to give evidence.

So far as serious illness is concerned, it may be that counsel for accused could make use of section 995, which provides for the taking of statements on oath from persons dangerously ill by a commissioner appointed by a judge. Section 998 provides for the reading of such statements at the trial if certain conditions are satisfied. Similarly, in cases where the witness has departed from Canada, counsel for the accused might make use of section 997, which provides for the appointment of commissioners to take the evidence of witnesses who are outside Canada and for the use of such depositions as evidence at the trial. Sections 995 and 997 are worded in such a way that they may be invoked by either the Crown or the accused.

Apart from these sections, however, the writer has been unable to find any provisions in the Code that would provide an accused person with the same opportunity to use prior testimony that section 999 gives to the Crown. Apparently, if an important defence witness has given evidence at a former trial upon the same charge or at the preliminary hearing, and then dies or becomes insane, there is no way by which the accused can introduce this previous evidence in his defence. As an illustration, let us assume a hypothetical case where an important alibi witness is called by an accused at his trial. The accused is then convicted, but on appeal the conviction is set aside and a new trial ordered. Before the new trial can be heard, this important defence witness dies. It is submitted that under the present provisions of the Code the accused has no means of introducing his prior testimony.

It might be argued that, in the absence of specific enabling provisions in the Code, counsel for an accused person could rely on the case law relating to civil actions for authority to introduce prior testimony of a defence witness. The case of *Erdman* v. *Town of Walkerton*, decided by the Supreme Court of Canada, is authority for the proposition that where a witness has given his testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself cannot be called, be admitted in any subsequent suit between the same parties, or those claiming under them, provided it relate to the same subject or substantially involve the same material questions.[3]

It is doubtful, however, whether a civil case such as *Erdman* v. *Walkerton* would be accepted as a binding authority in a criminal trial. In any event, it is submitted that this is a matter that should be dealt with in the Code itself and that an appropriate amendment should be made in order to give to an accused person the same rights to use prior testimony of witnesses as section 999 gives to the Crown.

EDWARD RICHMOND

London, Ont.

* * *

CONFLICT OF LAWS — NULLITY OF MARRIAGE — JURISDICTION AND CHOICE OF LAW. — The English courts have just produced one of those rare instances in annulment of marriage where the two problems of jurisdiction and choice of law have been recognized as entirely separate and necessary items in any deci-

[3] (1894), 23 S.C.R. 352.

sion upon such an issue. In *Robert* v. *Robert*,[1] Barnard J. looked not merely to the question whether his court had jurisdiction, but also to the question as to what law he should apply, assuming that his court did have jurisdiction. The facts briefly were that the wife (petitioner) and husband, while both were domiciled in Guernsey, went through a ceremony of marriage in that island, which ceremony was formally valid by the law of Guernsey. Subsequently the wife established residence in England where she presented a petition for annulment of the marriage on the ground of the husband's wilful refusal to consummate the marriage. At the time of the petition the respondent husband was resident and domiciled in Guernsey, where the wife also continued to be domiciled. The husband was personally served with the petition in Guernsey. Barnard J. held: (a) that he had jurisdiction to hear the case in view of the petitioner's residence in England, and (b) that the law applicable to the case was the law of Guernsey, by which law marriages may be annulled for wilful refusal to consummate. The decree asked for was granted.

On the first point — jurisdiction — his Lordship relied upon the much disputed case of *White* v. *White*,[2] even though in that case, as his Lordship notes, the petitioner, in addition to being resident in England, was domiciled there. But this made no difference:

> She was subject to English law . . . . It seems to me that she was, therefore, entitled to know whether, by English law, she was married or not . . . . I think it is clear from the authorities that either domicil or residence would found jurisdiction.[3]

There is a hint here of the view put forward by Cheshire[4] that it is not as important to limit the number of courts having jurisdiction to decree an annulment as it is to have a uniform law in all those courts as to what law shall be applied to the case, wherever heard. A person may very well not want to go to the expense and difficulty of proceedings in a foreign state where he may never have been but where he happens to be domiciled. He should be able to proceed where he is resident. But the law applied in either case should be the same. To date, as Cheshire declares — "The tendencies are clear enough. They are to widen the jurisdiction and apply the *lex fori*".[5]

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[1] [1947] 2 A.E.R. 22.
[2] [1937] 1 A.E.R. 708; [1937] P. 111 (Bucknill J.).
[3] [1947] 2 A.E.R. 22, at p. 23.
[4] Private International Law (3rd ed., 1947), at pp. 446-7, 458.
[5] *Ibid.*, at p. 446.

Assuming that jurisdiction in nullity as opposed to divorce is widened beyond domicile, as it must be admitted it has been both in England and Canada, how far do we go? Cheshire[6] submits that either the place of celebration or the place of the residence of the parties (*i.e.* at least of the *respondent*) is sufficient to found jurisdiction in the absence of domicile, though there is no definite authority for the former in the case of "voidable" marriages as opposed to "void" marriages, even assuming that that distinction makes any difference. It is to be noted that in the instant case none of the three bases above-mentioned existed — the petitioner only was resident in the jurisdiction. Two previous English cases might be said to have gone this far, *Roberts* v. *Brennan*[7] and *White* v. *White*,[8] but the latter may be explainable on the ground of domicile, as well as residence, in England. On the other hand a subsequent case has expressly decided the point in the opposite way. In *De Reneville* v. *De Reneville*[9] Jones J. discusses all the cases fully, including the decision of his brother judge two weeks before, and, in particular, points out (a) that the various reports of *Roberts* v. *Brennan* were confusing as to whether the court actually held that the court had jurisdiction based solely on the residence of the petitioner as distinct from the residence of both parties, (b) that *White* v. *White* was distinguishable on many grounds, one of the most important being the absence of any appearance by the respondent White [a distinction surely to be deplored], and (c) that *Robert* v. *Robert* was distinguishable on the ground that in that case jurisdiction was not questioned. This case (*De Reneville*) was the first in which jurisdiction was questioned where jurisdiction was alleged to be founded solely on the petitioner's residence. His Lordship held that the court had no jurisdiction to entertain the suit. In Canada, both the Manitoba[10] and British Columbia[11] Courts of Appeal have approved of residence of both parties as a basis for annulment, yet have refused a decree where only the petitioner was resident within the jurisdiction.

However, for Canadians the second point in the decision of Barnard J. in *Robert* v. *Robert* raises a question of substantial interest, *i.e.*, assuming jurisdiction has been found, the proper law to be applied is not the *lex fori* but some other law depending

[6] *Ibid.*, at pp. 448, 458.
[7] [1902] P. 143.
[8] [1937] 1 A.E.R. 708.
[9] [1947] 2 A.E.R. 112.
[10] *Hutchings* v. *Hutchings*, [1930] 4 D.L.R. 673 (Man. C. A.) ("void").
[11] *Shaw* v. *Shaw*, [1946] 1 D.L.R. 168 (B.C. C.A.) ("voidable").

upon the nature of the alleged defect in the marriage. As Barnard J. put it:

> Non-consummation of a marriage owing to the wilful refusal of the husband to consummate the marriage was introduced as a new impediment to marriage by the Matrimonial Causes Act, 1937. A peculiar feature of this impediment consists in the voidability of the marriage based on a post-nuptial fact. Ought I, in these circumstances, to apply the *lex fori*, which is the English law, or the *lex loci celebrationis*, or the *lex domicilii*, both of which are, in the case before me, the law of Guernsey?[12]

His Lordship noted that there was evidence before him as to the law of Guernsey and that by such law wilful refusal to consummate was a ground for a decree of nullity. Thus by all three laws — forum, domicile, or place of celebration — the petitioner's ground for suit existed and anything that his Lordship said might be treated as obiter. However, he does express his views and makes it clear that it is not the law of the forum which applies, but some other law chosen according to the nature of the impediment to marriage. His Lordship chooses the *lex loci celebrationis:*

> Wilful refusal to consummate a marriage in order to be justified on principle as a ground for annulment and not dissolution, must be considered as a defect in marriage, an error in the quality of the respondent.[13]

Then, very shortly, his Lordship applies to such type of defect the rule in *Berthiaume* v. *Dastous*[14] and holds that the marriage should be annulled on the ground alleged, which is available as a ground by the law of the *lex loci celebrationis* — Guernsey. His Lordship notes that, "if I were wrong" and the ground alleged — wilful refusal to consummate — was to be considered as something affecting capacity of one of the parties to contract marriage, he would be bound to apply the *lex domicilii* — Guernsey. On either basis the law of Guernsey applied.

The implications from this second point in the decision are important. It is true that the choice of a law other than that of the *lex fori* was in a sense unnecessary to the decision, as the law of the places chosen and of the forum happened to be same in so far as wilful refusal to consummate was a basis for a nullity decree. But the fact that the judge deliberately chose the law of a place other than the forum is a major step in bringing the matrimonial conflicts law into better shape. What law, then, is to be chosen — the *lex loci celebrationis* or the *lex domicilii?* His Lordship chooses the former, but leaves the way open for the choice of the latter.

[12] [1947] 2 A.E.R. 22, at pp. 23-4.
[13] *Ibid.*, at p. 24.
[14] [1900] A.C. 79 (J.C.P.C.).

It is submitted that as this is a type of marriage which is perfectly valid until annulled, according to our domestic laws, we should proceed to annul it only on the basis of a defect operating by reason of some reasonably well-defined law or laws. But whether we choose one or the other of the two suggested by Barnard J. should be left open for a time to allow the full implications of each to be felt and to allow us to view developments elsewhere, in order that a certain uniformity may be gained. Of the first it may be said that it is unreal in that the parties may have married, out of design or while visiting, etc., in a state in which neither has any connection. Of the latter, it is admittedly said that unjust hardships may operate, particularly in a newer continent such as North America which draws people with distant domiciles of origin and permits those domiciles to continue or revive every time a domicile of choice is never acquired or lost. In any case, no rule should be developed artificially out of a desire to apply or extend, without thought of application, the already developing rules of private international law.

By way of authority, we might look at two earlier cases. In *Easterbrook* v. *Easterbrook*[15] and *Hutter* v. *Hutter*[16] a court in England awarded a nullity decree on the same ground as used in the present case, wilful refusal to consummate, but in neither case inquired as to any other law. The law of the forum was applied automatically. It is true that in both cases the marriage took place in England, but the court did not look to this. Its sole problem was the initial one — jurisdiction to hear the case at all, which in each case the court found without difficulty: residence of both parties in England. But in neither case was the husband-petitioner's domicile in England. In the former it was in "Canada", in the latter, "America". Thus a man, domiciled in a country in no part of which would he be able to get a decree on the ground used successfully in the *Easterbrook* case, was able to get a decree on that ground in England. While we cannot speak for all jurisdictions in the United States, the same is probably true of the plaintiff in the *Hutter* case. If we carry the problem in these cases further and assume that Barnard J. is correct in holding that, while the courts of the residence have jurisdiction in nullity matters, the law applied by those courts must be the law either of the *lex loci celebrationis* or of the *lex domicilii,* then the plaintiff would have succeeded if the former law had been chosen, would have failed if the latter had been chosen. Neither case was mentioned by Barnard J. but they certainly may be

[15] [1944] 1 A.E.R. 90; [1944] P. 10 (Hodson J.).
[16] [1944] 2 A.E.R. 368; [1944] P. 95 (Pilcher J.).

used in the future to swing the balance, in keeping with Barnard J.'s preference in favour of the *lex loci celebrationis*.[17]

Some of these implications for Canadians are important. In a country such as Canada where the grounds for annulling a marriage are few, it will open new fields to our courts to permit annulment on grounds available in England and Europe, where many Canadian soldiers married. Assuming, as we submit they should, that our courts follow *Robert* v. *Robert*[18] on its second point, will they apply the law of the place of celebration of the marriage in every case? Or will much depend upon the ground alleged as a basis for the decree? And even if we have chosen a foreign law on this basis, will we apply it in every case or will there be cases where, on grounds of public policy, our courts will decline to accept such law? What if British Columbia passed a law (though of doubtful constitutional validity) providing that those marriages shall be void wherein one of the parties is of the Japanese race and the other not? Would Ontario in an action for nullity apply the law of British Columbia to such a B.C. marriage, or would Ontario on grounds of public policy exclude such a law? Much remains to be explored.

GILBERT D. KENNEDY

Faculty of Law,
University of British Columbia

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LABOUR RELATIONS — ARBITRATION — FUNCTIONS OF MANAGEMENT — CONDITIONS FOR SUCCESSFUL ARBITRATION. — A recent labour arbitration award in the Province of Quebec may serve as a grim reminder to employers that the arbitration process can, in the absence of protective provisions, place their traditional prerogatives in serious jeopardy and, in fact, drastically diminish even ordinary management functions.[1]

[17] In the United States, Beale puts this view more categorically: "It seems, therefore, that it will everywhere be admitted that the law governing nullity is the law of the place of marriage unless there is an attempt to nullify the marriage for one of the special causes [*e.g.* miscegenation as applied to persons domiciled in certain southern states] which make a marriage null notwithstanding a valid contract of marriage, in which case the law applicable will be the law of the domicil forbidding the marriage", Conflict of Laws (1935), vol. 2, s. 136. 1.

[18] [1947] 2 A.E.R. 22 (Barnard J.).

[1] Unfortunately, the case cannot be identified. The proceedings were taken under the Quebec Trade Disputes Act and awards under this act are not published except upon application of either party and approval of the arbitrators. While there presumably would be no legal bar to independent publication the matter has certain delicate aspects and therefore the parties must remain anonymous.

The case involved the promotion of a plant employee to a supervisory position. The employee in question had nine years service with the firm but the union intervened and lodged grievances on behalf of several other employees who admittedly had longer service, citing clauses in the agreement which provided that, in cases of promotion, seniority should be the deciding factor when ability to do the work was equal.[2]

The Union, of course, alleged that the abilities of these other employees (subsequently narrowed down to one) were equal to those of the employee who had been promoted, while the Company contended that not only was the latter's ability superior as a plant employee but he also, in its opinion, possessed much higher supervisory qualifications. Since no agreement could be reached the Union took the matter to arbitration under a clause in the agreement.[3]

The Council of Arbitration, consisting of a nominee of each party and a chairman, who was a judge appointed by the Minister of Labour, ordered the Company, by a majority decision, to grant the promotion to the senior employee on the grounds that

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[2] The clauses are as follows:

"(14) — *Promotion* — When there will be one or more promotions the Management will consider:

(1) Ability to do the required work.
(2) Length of service in the department.
(3) Seniority in the Syndicate.

"The employees who have a better general education or have taken special educational courses may receive a certain preference.

"(15) — *Seniority* — In the cases of promotion, re-hiring or transfer, all things being equal the seniority will be deciding factor. If, without fault on the part of the employees concerned, it becomes necessary to dismiss or lay off temporarily certain employees, seniority will be considered.

"Three (3) months of continuous service with the Company are required before the rights of seniority are recognized. Once this period is passed the seniority will be retroactive to the first day of employment, except it is interrupted by suspension, discharge or leaving voluntarily."

[3] "Any grievance or complaint not settled in this manner will be submitted to a council of arbitration or conciliation according to the clauses of the Quebec Trade Disputes Act., R.S.Q. 1941, Chapter 167. The decision of the majority of this arbitration or conciliation council will be final and binding to both parties and must be put in effect in the following 14 days after the decision has been taken."

It should be noted that the arbitration contemplated under the Quebec Trade Disputes Act is not in fact arbitration at all, as the awards are not binding. There is a provision whereby the parties may agree in writing to be bound, before the award is made, and a number of companies and unions have agreed to employ the machinery of the act and to put their agreement to be bound by the award in their collective agreement, as in this case. The difficulty is that the whole procedure of the act is designed to get disputes compromised rather than adjudicated. The act is normally used more for conciliatory than for arbitral purposes. It is suggested that while such procedures are undoubtedly of great importance in collective bargaining, the field should not be confused with arbitration, which should be more concerned with legal interpretation than with "settlement" of disputes in "equity and good conscience".

his ability was equal to that of the employee whom the Company had originally chosen.

The Company thus found itself in the unenviable position of having an appointment to its supervisory staff made by a third party. While such a result is an ever present danger when management functions are made subject to arbitration, even with "good" decisions, the risk is considerably enhanced by decisions such as this. For it is submitted, with great respect, that the award in question is wrong in law and probably could be successfully attacked in the courts if enforcement were attempted.

In the first place, the agreement covered only non-supervisory employees and therefore the union had no jurisdiction over positions outside the bargaining unit. Would the arbitrators have attempted to interfere with an appointment to manager of the plant or president of the company? That the agreement did not purport to cover promotions except within the bargaining unit would seem to be completely obvious — even in the absence of express wording to this effect. It is to be doubted whether an experienced industrial arbitrator would have made such a decision.

Secondly, in dealing with the evidence of the abilities of the men, the Council fell into the error of judging them on an objective basis, as though it were a jury weighing all the evidence and then arriving at a decision on the preponderance of the evidence, as in a civil jury trial. The palpable fallacy here is that no outside party, whether arbitrator, judge or fellow employee, can possibly assume to judge so subjective a question as what constitutes ability, particularly in a supervisory position. Surely the employer or manager is the only one capable of making such a decision. This doctrine of sole capability is not only elementary commonsense but would seem to stem clearly from the subjective nature of the employee-employer relationship — a conclusion that would require very clear words in the agreement to modify. Employers generally have not deemed it necessary to state specifically in seniority clauses that "the employer shall be the sole judge of ability or qualifications". They have assumed (and a good many unions have agreed) that this was too obvious to require expression. It does not follow that such an essential and basic discretionary power can be exercised without being subject to any review. If the evidence should show that there was no basis whatsoever for the employer's judgment, or if there had been a demonstrable error as to fact or even a hint of bad faith or proven discrimination, or if there had in fact been no reasonable exercise of a discretion, then an arbitrator would probably be justified in

investigating and reversing the employer's decision.[4] A contrary opinion would, with deference, display rather a blithe disregard for the realities of industrial management, not to mention legal rights. In such matters arbitrators should treat the judgment of an employer with at least as much respect as appeal courts treat a verdict by a jury — they may decide that there was no evidence on which the employer could have so decided, but they may not substitute their own opinion as to the weight of evidence.

Finally, it is curious to note that the arbitrators in the case in question were much concerned with the relative merits of the two men in their plant jobs. In the case of a promotion, the abilities of an employee for the job to which he is promoted would seem to be most relevant. One seeks in vain, in the reasons for decision, for any recognition of the fact that the ability to supervise, those unmeasurable and indefinable qualities of leadership, are much more important in a supervisory job than technical or manual proficiency.

But the chief significance of this, as well as other recent labour arbitration awards, lies not so much in any error on the part of arbitrators. Even if all arbitration decisions arising from union agreements were eminently fair and legally sound, the fact still remains that industry in Canada is ill-prepared to face all the implications of arbitration with anything resembling equanimity. In reading the typical union agreement it is quite apparent that an arbitration procedure is normally considered just one of the "window dressing" clauses. On the whole there has been a surprising failure to give more than perfunctory attention to limiting or even defining the exact scope of the arbitration procedure or to incorporating other protective clauses. Even unions have not yet realized the tremendous power that has been given them in most agreements.

This rather casual attitude is understandable because compulsory arbitration of disputes by agreement is relatively new in Canada — having received its main impetus as a result of section 18 of the Wartime Labour Relations Regulations, Order in Council P.C. 1003 of 1944. But the effect of arbitration on the rights and functions of both labour and management is fraught with so many important consequences that a more mature consideration

[4] Updegraff and McCoy in their volume, Arbitration of Labour Disputes (Commerce Clearing House Inc., Chicago), have this to say (page 131): "Arbitrators quite generally adopt a middle ground, and hold that the decision of such a matter is one primarily for management, subject to being set aside only upon satisfactory proof that the decision was not a bona fide exercise of judgment and discretion but was the result of bias, favoritism, anti-union prejudice, or such like cause, or was the result of a clear mistake."

and technical study of all its aspects should be the number one job of employers and their advisors.

The following matters, in the writer's opinion, should receive prompt and serious attention:

1. Union agreements must be more carefully drafted. This does not mean that they must be couched in complicated legalese. It does mean that more effort must be exerted to "say what you mean" and that loose, vague and contradictory provisions must be avoided. Not only should the arbitration procedure itself precisely define jurisdiction and scope, but other substantive clauses should contain similar qualifying or protective provisions.

   Often the parties find that an arbitrator takes jurisdiction over a subject that neither of them intended. An arbitrator is perhaps not to be blamed too much for stretching his jurisdiction when no attempt has been made in the agreement to limit it. By the same token he perhaps should not be expected to take "judicial notice" of too many things nor to accept uncritically the inarticulate major premises of the parties unless he receives reasonably clear guidance in the express words of the agreement. It is only natural, particularly for an inexperienced arbitrator, to deal "with the merits" rather than to interpret the agreement. Arbitration is in essence a judicial process but in existing circumstances it may well degenerate into a loose, haphazard and ineffectual mediation procedure. While mediation and conciliation have their place in the negotiation of agreements, the administration of agreements must rest on a more objective basis. Union agreements have traditionally been mere statements of intentions. Now that they are increasingly becoming subject to enforcement by means of quasi-judicial procedures and sanctions, commensurate care in their contents is a "must".

2. If the parties agree on arbitration as a method of settling their disputes then it is most necessary that the procedure to be followed should be defined clearly in advance. The method of choosing the arbitrators, allocation of costs and other such matters are relatively simple and are covered usually in present agreements. There are very few agreements, however, that provide any procedure for settling the precise terms of the reference or for the filing of the claim and the reply. There should be a clear under-

standing as to the procedure at the hearing, as to what, if any, rules of evidence are to be applicable, the burden of proof and the scope of the arbitrator's authority in ordering redress — the type of penalty and method of enforcement.

3. Much more consideration must be given to the personnel who are selected as arbitrators. In the United States, arbitration of labour disputes is becoming a profession. In Canada there is a tendency to rely largely on judges and, apart altogether from the undeniable fact that judges are much too busy with their judicial duties to meet the demands that will be made on them as arbitrators, it is questionable whether mere legal or judicial training is adequate in labour arbitration cases. A judicial mind and judicial training is of course essential, but the complexity and specialized nature of modern industrial problems make a rather profound experience in such problems even more essential. Lawyers who have such experience and who apply themselves to a study of management and union problems of administration will be able to perform a real public service as labour arbitrators.

   We shall have to follow the example of the garment trades and some others in the United States, and agree on the appointment of permanent impartial umpires for a whole industry. Panels of competent, trained and impartial arbitrators should be agreed upon between the major employers and the major unions.

4. Finally, unless arbitrators can receive some guidance from previous decisions in similar cases by other arbitrators, the prospects of achieving some measure of certainty and uniformity are very poor. Without the prestige that stems from reasonable consistency in awards, arbitration can never fulfil the helpful role that union and management relationships require.

   Such guidance is only possible if arbitration awards are reported and published. This is admittedly a difficult matter and requires the cooperation of employers, unions and governments. Possibly employer organizations, alone or in co-operation with labour bodies, could publish awards. Possibly the universities could do so. (Queen's has begun to collect some arbitration decisions.) In any event this is perhaps one of the most important

items to consider when planning a less chaotic future for the arbitration process in labour disputes.

HAROLD J. CLAWSON

Montreal

IN CHANCERY: JARNDYCE v. JARNDYCE

On such an afternoon, if ever, the Lord High Chancellor ought to be sitting here — and here he is — with a foggy glory round his head, softly fenced in with crimson cloth and curtains, addressed by a large advocate with great whiskers, a little voice, and an interminable brief, and outwardly directing his contemplation to the lantern in the roof, where he can see nothing but fog. On such an afternoon, some score of members of the High Court of Chancery bar ought to be — as here they are — mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horse-hair warded heads against walls of words, and making a pretence of equity with serious faces, as players might. On such an afternoon, the various solicitors in the cause, some two or three of whom have inherited it from their fathers, who made a fortune by it, ought to be — as are they not? — ranged in a line, in a long matted well (but you might look in vain for Truth at the bottom of it), between the registrar's red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense piled before them. Well may the court be dim, with wasting candles here and there: well may the fog hang heavy in it, as if it would never get out; well may the stained glass windows lose their colour, and admit no light of day into the place; well may the uninitiated from the streets, who peep in through the glass panes in the door, be deterred from entrance by its owlish aspect, and by the drawl languidly echoing to the roof from the padded dais where the Lord High Chancellor looks into the lantern that has no light in it, and where the attendant wigs are all stuck in a fog bank! This is the Court of Chancery; which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every madhouse, and its dead in every churchyard; which has its ruined suitor with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to monied might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overflows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give — who does not often give — the warning, "Suffer any wrong that can be done you rather than come here!" (Charles Dickens: Bleak House)