Case and Comment

EVIDENCE — COMPETENCY OF WITNESS — BELIEF IN GOD AND A STATE OF REWARDS AND PUNISHMENTS AFTER DEATH — ARTICLES 321 AND 324, QUEBEC CODE OF CIVIL PROCEDURE.—The Montreal Herald in its issue of January 19th, 1949, breezily reported a trial in the Superior Court as follows:

> 'UNBELIEVER' CAN'T TESTIFY
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> A Montreal taxi driver said yesterday he didn't believe in the biblical prophesies of a life after death; in fact he went so far as to say he thought that when 'you died here on earth, that's that. . .'
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> Somewhere in the dusty tomes of Canadian law there is a section which prohibits such 'unbelievers' from testifying in a court action.
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> So . . . Mr. Justice Joseph Archambault had to refuse Abi Greener as a witness in a Superior Court damage suit.
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> The outcome was that Greener his employer, Sam Green, and another taxi driver, Leo Laferte, were ordered to jointly pay a claim for $4,517 to a nurse, Miss Claire Lavallee, injured when Greener's cab ran into one owned by Laferte.

The newspaper report is a substantially accurate summary of the judgment,[1] the Code of Civil Procedure is the "dusty tome" and article 324 the "section" the reporter had in mind.[2] It says:

> 324. Before the witness is admitted to be sworn, he may be examined by either of the parties as to his religious belief, and he cannot take the oath or the affirmation, or give evidence, if he does not believe in God, and in a state of rewards and punishments after death.

This article would be no loss if omitted from the new Code of Procedure we have been promised.[3] It first appeared in the Code of 1866 as article 259, which the codifiers took almost verbatim

[1] No. 248229 records of Superior Court, District of Montreal, now in appeal. See also *Corbeil* v. *Maigret* (1917), 18 Q.P.R. 430, where a similar decision was rendered.

[2] The Code *is* getting dusty. If was first enacted in 1867 and then revised in 1897. Last year the legislature authorized the preparation of an entirely new code of procedure but the commissioners who are to prepare the draft have not yet been appointed by the Lieutenant-Governor in Council.

[3] At the same time article 321 should be replaced by section 14 of the Canada Evidence Act; see *infra* p. 1237.

from Starkie upon whom they drew heavily.[4] Our law in this respect, therefore, is the law of England as it stood in 1833.

Of course age alone is no reason to condemn a law and one must admit that article 324 is the corollary of article 321 which requires all witnesses except Quakers (who may affirm) to take an oath invoking the Deity. Obviously, such an oath by a witness who did not believe in God would be no oath at all.

The assumption underlying the requirement of an oath and the corresponding belief in God on the part of the witness is that an unbeliever is so unlikely to tell the truth that he cannot be allowed to testify. Conversely, it is assumed that the person who takes the oath is likely to tell the truth and that the fear of God operates to prevent perjury. As a deterrent it cannot be very effective judging by the complaints so frequently voiced by judges that perjury is prevalent in their courts. Thus Marin J. the other day "took time out to speak of the total disregard shown by some persons taking an oath. He said that false oaths and perjury had become a social plague which had to be remedied at all costs".[5] On November 30th, 1949, Mr. Justice Bertrand of the Superior Court, when addressing the St. Lawrence Kiwanis Club, "viewed with alarm the facility with which perjury was committed in the city's courts".[6] In 813 A.D. the Council of Tours was saying the same thing[7] and practitioners know that the oath does not deter the wilful perjurer. What deters him is cross-examination and the fear of prosecution.[8]

If a belief in God and a state of rewards and punishment after death is a prerequisite to taking an oath, article 324 should not be merely permissible. Every prospective witness should first be required to qualify himself by stating his belief in God, etc., before taking the oath, as a matter of routine procedure by the court officials. As it is, the "unbeliever" is only incompetent if he is found out and has the honesty to admit his disbelief under questioning by the opposing attorney who wishes to exclude his testimony. The article therefore is never applied except in the execution of a surprise tactic which does not sit well with the court and is repugnant to our sense of fair

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[4] Starkie, Law of Evidence (2nd ed., London, 1833), Vol. 1, p. 93.

[5] Reported in the Montreal Gazette, November 26th, 1949. He gave the accused three years for perjury.

[6] Reported in the Montreal Herald for December 1st, 1949.

[7] Coulton, The Medieval Village (Cambridge, 1925) p. 187.

[8] One would think judges in the civil courts would make freer use of the power of committal for perjury conferred upon them by section 870 of the Criminal Code. There is only one reported instance of the exercise of this jurisdiction cited in Tremeear's Annotated Code, p. 1002.

play. For we may be sure that the advocate who seeks to disqualify a witness on this ground is not a high-minded crusader against perjury, and be forgiven the suspicion that this tactic is resorted to because the witness is going to tell the truth and the truth is going to hurt. The article in this way defeats the purpose for which it was enacted.

This use of the article obliges the court to exclude what may be the crucial evidence in a case and no doubt Archambault J., in the case cited, was led to wonder what Mr. Greener's views on immortality had to do with the facts of an automobile accident. It may be he reflected that a taxi driver who had the independence of mind to be unorthodox and the moral courage to admit his disbelief before the courts was just as likely to tell the truth as the other interested driver, Mr. Laferte, who apparently was not questioned on his religious beliefs.

There is another and even less desirable use to which this article may yet be put. It would seem that a witness may avoid testifying against his will by refusing to take the oath on the ground that he does not believe in God. Or he need not go that far. All he has to say, and no one could possibly contradict him, is that he does not believe in a state of rewards and punishment after death. Indeed, since the requirements of the article are cumulative he may content himself with affirming without fear of contradiction that he does not believe in punishment after death or in being rewarded after death. Once that is discovered or revealed his testimony cannot be received and he has avoided testifying without the risk of being cited for contempt.

It was perhaps with some such abuse in mind, or because the law of England had changed since 1833, that the codifiers in 1897 wanted to drop this article from the revised version of the Code. In England the Oaths Act (51 & 52 Vict., c. 46) had, in 1888, permitted an affirmation to be made instead of an oath in these terms:

> Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury.

In 1893 the Canada Evidence Act was passed by the Dominion Parliament and reproduced in substance the provisions of the Imperial Oaths Act as follows:

> 14. If a person called or desiring to give evidence, objects, on grounds of conscientious scruples, to take an oath, or is objected to as incompetent to take an oath, such person may make the following affirmation:—
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> 'I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.'
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> 2. Upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath.

In view of this legislation the Commissioners were lead to say:

> Articles 310 and 393 [now 321 and 324] are retained; but an opinion exists among us that they should be amended in accordance with section 23 of the 'Canada Evidence Act' 56 V (c) c. 31, so as to allow persons having conscientious scruples against taking an oath to take an affirmation instead.[9]

The draft code prepared by the Commissioners was submitted to a joint committee of the two houses of the provincial legislature and this committee, while retaining article 324, thought that it should end at the word "God" and deleted all the remaining words. The Legislative Council put them back in again.[10]

The result is anomalous. Suppose, to take the case of Mr. Greener, Miss Lavallee had been killed in the accident. Greener could have testified on his own behalf before the Coroner's Court and before the Court of King's Bench had he been charged with manslaughter, but when he crosses the street to the civil courts he can be prevented from testifying in a civil suit for damages!

The insistence on a witness taking an oath was more understandable in the old law of procedure than it is now. Then the parties to litigation, because of their interest, were incompetent witnesses. However, if the plaintiff failed to make his case by other witnesses and by the examination of the defendant on articulated facts he could oblige the latter to take a descisory oath on the whole issue. The defendant in turn could refer the oath back to the plaintiff and in this way a doubtful case was decided on the simple oath of whichever party was willing to swear. Now of course all that has been changed. The descisory oath has been abolished, the parties are competent witnesses who testify to facts and not to the general issue. They are all subject to cross-examination and there seems no longer to be

[9] 2nd Report of the Codifiers, 1894, c. XVIII.
[10] *Ibid.*

any good reason for retaining article 324 when, as we have seen, it is open to abuse.

In the *Greener* case no injustice was done by the application of article 324 because the trial judge heard his testimony under reserve of the objection and, while excluding it in his judgment, says it would not have changed his decision because it was contradicted by an impartial eye-witness to the accident.[11] But the day will come when not an ordinary taxi driver who is interested in a case but some eminent though unbelieving scientist who happens to be the sole eye-witness of some serious accident will be refused as a witness on the ground that he does not believe in God and in a state of rewards and punishments after death. That case will make headlines in the Herald.

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CONFLICT OF LAWS — NULLITY ACTIONS — JURISDICTION — VOID AND VOIDABLE MARRIAGES — DOMICILE.— The problem of jurisdiction in actions or proceedings for annulment of marriage is complicated by two factors. Those two factors are, first, the fact that the ecclesiastical courts had no jurisdiction to grant a divorce *a vinculo*, and, secondly, that the term annulment or nullity applies indiscriminately to void and voidable marriages. Because the ecclesiastical courts had jurisdiction to annul a marriage void ab initio but lacked power to dissolve a marriage, they assumed jurisdiction under the canon law also to annul marriages that were only voidable, and exercised that jurisdiction as a matter of expediency in order to arrogate to themselves a partial jurisdiction to dissolve marriages. There have been recent instances where even courts of law have resorted to this same subterfuge. As we shall see, the only real difficulty as to jurisdiction arises in the case of voidable marriages.

That the problem has come under intense scrutiny of late is evident from the fact that the 4th edition of Dicey's Conflict of Laws enunciates a comparatively short rule showing three heads of jurisdiction drawing no distinction between void and voidable marriages. In the 5th edition a further head of jurisdiction was added in order to draw this distinction and in the 6th edition

[11] We think the judge erred in permitting the witness to testify under reserve of the objection. The article is clear: "he cannot take the oath or the affirmation, *or give evidence*. . .".

the rule is completely rewritten in the light of *De Reneville* v. *De Reneville*.[1]

The new rule in Dicey[2] set up six grounds of jurisdiction, of which only the first five seem of importance in Canada. They are (1) domicile of both parties within the jurisdiction, or (2) domicile of the petitioner or plaintiff within the jurisdiction in the case of a void marriage, or (3) celebration of the marriage within the jurisdiction, or (4) residence of both parties within the jurisdiction, or (5) where the marriage has been declared void or invalid by a foreign court of competent jurisdiction.

It must be apparent that the first ground is sound in any circumstances, whether the marriage is void or voidable. Since *Inverclyde* v. *Inverclyde*,[3] which was the first case to draw a clear distinction between void or voidable marriages and decided that at least in case of a voidable marriage only the court of the domicile of the parties[4] had jurisdiction, the jurisdiction of the court of the domicile of the parties has never been questioned. The process of enlightenment was carried at least one step further in *White* v. *White*[5] where it was held that the *Inverclyde* rule was confined to voidable marriages and that in the case of a void marriage there might be other grounds of jurisdiction, founded in that particular case upon domicile of the petitioner, the supposed wife, within the jurisdiction. *White* v. *White*[5] was approved in *De Reneville* v. *De Reneville*. The second ground in Dicey, therefore, seems sound.

Stopping there for the moment and leaving the other grounds for later discussion, let us examine the latest case because that is the primary object of this comment. In *Casey* v. *Casey*[6] an attempt was made to come within the second ground in Dicey on the argument that in Canada, the domicile of the husband, a marriage, which it was sought to have declared invalid on the ground of wilful refusal to consummate, would be held to be void and not voidable. The importance of that point arose owing to the decision in *De Reneville* that the essential validity of the marriage ought to be decided according to the law of the supposed husband's domicile at the time of marriage. Although the question as to Canadian law is stated not to have been argued before the Court of Appeal in *Casey* v. *Casey*, Bucknill L.J.

[1] [1948] P. 100.
[2] 6th ed., p. 244.
[3] [1931] P. 29.
[4] This is, of course, the domicile of the husband since the marriage is valid until declared void.
[5] [1937] P. 111.
[6] [1949] 2 All E.R. 110.

draws an inference from the citation of two Canadian cases in Cheshire on Private International Law[7] that in 1928-9, when those Canadian cases were decided in Saskatchewan, a marriage which might be annulled for impotence was regarded as void and not voidable only.

Both those cases, *G.* v. *G.*[8] before a single judge and *Reid* v. *Francis*[9] in the Saskatchewan Court of Appeal, were clearly and solely based on the unqualified statement in Dicey's 4th edition that the court *loci celebrationis* has jurisdiction, and which has been carried into the 6th edition as ground (3) previously mentioned.

Before discussing this ground of jurisdiction it might be as well to point out, in case it might be suggested in another English court in the light of *Casey* v. *Casey* that a marriage might be declared in Canada void ab initio for wilful refusal to consummate, that there is no such ground of nullity in Canada. If this ground could be advanced in Canada it could only be on the inference that non-consummation was the result of impotence. As far as the reported cases show it has never been seriously argued in Canada that impotence was in any circumstances a ground for declaring a marriage void ab initio.

But attention having been drawn to these Saskatchewan cases — though why Cheshire singles out these Canadian cases in particular seems somewhat inexplicable — it is our intention here to submit that jurisdiction to annul cannot ever be founded on the fact of the celebration of the marriage within the jurisdiction as stated in ground (3) in Dicey. The only authority given in Dicey for it is *Linke* v. *Van Aerde*,[10] a case decided long before the distinction between void and voidable marriages was drawn. It was a case of a marriage void ab initio for bigamy, and the decision, therefore, might be supportable on other grounds. But clearly, since the distinction between void and voidable marriages has been drawn, the simple ground of jurisdiction that the marriage was celebrated within the jurisdiction could not, it will be submitted, be the real ground for assumption of jurisdiction. *Sottomayer* v. *De Barros*[11] has been cited as authority for this proposition. But as Bucknill L. J. points out in *Casey* v. *Casey*[12] that was not the ratio decidendi. Indeed the real ratio

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[7] 3rd ed., p. 449.
[8] (1928), 22 Sask. L.R. 376.
[9] [1929] 4 D. L.R. 311.
[10] (1894), 10 T.L.R. 426.
[11] (1877), 3 P.D. 1.
[12] [1949] 2 All E.R. at pp. 113-4.

decidendi appears to have been the first groping towards the distinction between void and voidable marriages, for *Simonin* v. *Mallac*[13] is distinguished in *Sottomayer* v. *De Barros* on essentially this ground. The defect in the marriage in *Simonin* v. *Mallac* went only to part of the ceremony of the marriage — consent of a parent required by the law of the husband's domicile. The marriage was thus at most only voidable. In *Sottomayer* v. *De Barros* the defect was fundamental, a marriage within the prohibited degree of consanguinity and thus incestuous and void by the law of the Portugese domicile of both parties, and had been so declared in Portugal at the suit of the supposed husband.

In *Ogden* v. *Ogden*[14] Gorell Barnes P. followed his previous judgment in *Linke* v. *Van Aerde*[10] somewhat naturally. But in *Inverclyde* Bateson J. refused to follow *Ogden* v. *Ogden*, and *Inverclyde* has not been questioned, at least on this point.

No doubt the *lex loci celebrationis* is the proper law by which to test the validity of the marriage so far as the ceremony of the marriage is concerned. But it is a far cry from that to conclude there that the fact of marriage within the jurisdiction can ever be a ground upon which jurisdiction is conferred upon the court to annul the marriage.

Jurisdiction founded upon residence of both parties within the jurisdiction is another ground stated in Dicey, as ground (4), that cannot be accepted as it is there stated. True in the text following the rule Dicey does qualify it by saying that its application in the case of voidable marriages is doubtful. Some years ago a writer in the Fortnightly Law Journal[15] criticized some obiter in *Manella* v. *Manella*[16] on the ground that the marriage there being alleged to be void, the court ought not to have expressed itself as of the opinion that it lacked jurisdiction, because although the plaintiff husband was resident and domiciled in Ontario the wife was neither resident nor domiciled there. Professor Hancock in the Canadian Bar Review[17] criticized the Fortnightly writer and supported *Manella* v. *Manella*, on the ground that the wife was not resident in Ontario and so could not be hailed before the Ontario courts. He supported his argument on a New Zealand case, which refused leave to serve a writ for nullity out of the jurisdiction in similar circumstances, over-

[13] (1860), 2 Sw. & Tr. 67.
[14] [1908] P. 46.
[15] 12 F.L.J. 167.
[16] [1942] O.R. 630. The actual decision was that all proceedings in the action after service of the writ were a nullity, since, the defendant being a lunatic, the proper practice in such case had not been followed.
[17] (1943), 21 Can. Bar Rev. 149.

looking the fact that the Ontario rules then expressly provided for service out of the jurisdiction in such a case. He also supported his argument on a Manitoba case where the Court of Appeal declined jurisdiction because the respondent — the marriage being void as the court held in order to decide the point — was not domiciled within the jurisdiction. This decision, as the Fortnightly writer pointed out in reply,[18] cannot be taken too seriously, first, because the court had first to decide the question of the validity of the marriage in order to determine the question of jurisdiction, and, further, because if the domicile of both parties within the jurisdiction is necessary to found jurisdiction in the case of a void marriage, no action for nullity could be entertained where the domicile of the parties was different at the date of the alleged marriage.

In the light of these latest cases it seems that the rule for determining jurisdiction ought to be very simply stated. Clearly, since *Inverclyde*, which was the first step towards enlightenment, and *White* v. *White*, *De Reneville* v. *De Reneville*, and *Casey* v. *Casey*, which have completely lifted the curtain, the question of domicile is only critical in the case of a voidable marriage. Where the marriage is void, or perhaps we should say where it is sought to annul the marriage on the ground that it is void ab initio, the domicile of neither party determines the question of jurisdiction, but the rules applicable to ordinary actions prevail. The rule should, therefore, state that the courts of the domicile of the husband have exclusive jurisdiction in the case of a voidable marriage — the only ground for which in Canada, it should be made clear, is impotence.[19] The second branch of the rule should then state that in the case of a marriage whose validity is questioned on the ground that no marriage in fact took place, *i.e.*, that the marriage is void ab initio, the ordinary rules as to jurisdiction in ordinary actions prevail. The text-writers, as is their wont, bedevil the problem by harking back to the older cases and refusing to see that since *Inverclyde* the courts have taken an enlightened view of the problem. It is time that it was recognized that the assumption of jurisdiction by the ecclesiastical courts to annul a marriage which was only voidable was

[18] 12 F.L.J. 279.

[19] This first part of the suggested new rule is essentially the same as the addition made in Dicey's 5th edition to the rule as stated in the 4th edition. But the editor of the 5th edition backed the wrong horse when, in citing *Inverclyde* as authority for the change, he criticized that decision. The courts have accepted it without hesitation in so far as it dealt with the case of a voidable marriage, and only rejected the obiter suggestion that the rule should be the same in case of a void marriage.

really the assumption of a jurisdiction to dissolve marriage which they did not possess and consequently the value of the earlier cases as precedents is more than doubtful.

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DISCOVERY IN COUNTY COURTS — JURISDICTION OF COUNTY COURTS — NEW BRUNSWICK. — Recent unreported decisions of county courts in the province of New Brunswick support the opinions (a) that discovery from an adverse party before trial is a procedure not available in county-court actions, because it is not within the limited jurisdiction of the county courts, and (b) that, at any rate, it is precluded by section 40 of the County Courts Act.[1] These opinions have not yet been challenged in a court of appeal, and they have gained wide acceptance. However there are adequate grounds upon which to base doubts of their validity, and, with a view to determining whether either truly states the law of the province, it is proposed to examine the applicable legislation.

The Rules of Court, which are made a part of the Judicature Act[2] by section 75 of that Act, authorize discovery. Of course, the Judicature Act and Rules are primarily applicable in the Supreme Court; however the Judicature Act further provides that, "The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts in New Brunswick, so far as the matters to which such rules relate shall be respectively cognizable by such Courts".[3] The county courts are undoubtedly a class of such provincial courts; they are constituted "courts of law and record" by a statute of the province.[4] Accordingly, discovery as authorized by the Rules is a procedure that is available in county-court actions, so far as the procedure is cognizable by county courts.

In 1927 when the Judicature Act, incorporating the Rules of Court, was passed, four methods of obtaining discovery were authorized by the Rules:

(1) by requiring answers to written interrogatories delivered with leave (Order 31, Rule 1);

[1] R.S.N.B., 1927, c. 116.
[2] R.S.N.B., 1927, c. 113.
[3] S. 38.
[4] County Courts Act, s. 3(1).

(2) by oral examination of an adverse party pursuant to an order therefor (Order 31A, Rule 1);

(3) by requiring an affidavit discovering documents pursuant to an order (Order 31, Rule 12);

(4) by examination of documents produced pursuant to notice (Order 31, Rule 15).

The four methods of obtaining discovery authorized by the Rules of Court (1927) are still in existence, although two of the procedures are substantially changed: oral examination is now provided for by a new Order 31A, which was substituted in 1932; and under a new Rule 12 of Order 31, which was also substituted in 1932, an affidavit discovering documents can be required by notice to that effect, and it is no longer necessary to obtain an order.

Meanwhile, section 38 of the Judicature Act, relied on as the principal provision that incorporates the provisions of the Rules into the practice of county courts, has remained unchanged, and consequently the incorporation of the rules of law enacted and declared by the Judicature Act affects only the rules of law as they existed at the time of the passage of section 38. Thus, if section 38 stood alone in providing for the incorporation of the Rules, it should be concluded that only the Rules of Court (1927) have been incorporated; however the section does not stand alone. The Judicature Act reveals an intention to incorporate amendments when it provides that amendments to the Rules shall form part of the original Judicature Act.[5] As a result of the latter provision, the amendments are made applicable in all courts in the province, for, as part of the original Act, they are included in the reference, by section 38, to, "the several rules of law enacted and declared by this Act". Accordingly, it becomes clear that it is discovery as authorized by the present rules that is available in county-court actions, so far as it is cognizable by county courts.

The following section of the County Courts Act, in which the relevant provisions have been italicized, may be relied on as emphasizing the proposition that the Rules are applicable in county courts if they are cognizable therein:

> 71. *All laws of this Province relating to* the examination or dispositions of witnesses before trial, to proceedings in replevin, to actions by or against executors or administrators, to evidence, to the service of process, to service out of the jurisdiction, to set off and counter claim, and for *the amendment of the law in any way as to practice,* proceedings, or evidence, *or any other matter or thing whatever connected with the admin-*

[5] S. 73.

istration of justice in the Supreme Court, when applicable and not inconsistent with the provisions of this Chapter, shall apply to each County Court and the mode of proceeding in all cases not herein provided for shall be according to the practice of the Supreme Court.

The problem whether discovery is cognizable by the county courts depends upon whether it is within the limits of their jurisdiction and whether it is expressly precluded by competent legislation; if it is within their jurisdiction and not expressly precluded, then it is applicable in county courts.

The original county courts of the Norman era in England were among the first royal courts with unlimited jurisdiction, but they fell into disuse early in the fourteenth century; modern county courts are totally distinct creatures of statute, which date from the nineteenth century, and whose jurisdiction is limited to that conferred by the legislation creating them. The statutory jurisdiction of the county courts in New Brunswick extends to "all personal actions" in which the damages claimed do not exceed a specified amount.[6] In consequence of this jurisdiction, two sets of rules should be cognizable in county courts: (i) substantive rules founding personal actions; (ii) rules of practice, which are capable of furthering the fulfilment of the rôle of these courts, entertaining personal actions and disposing of disputes in them according to law.

It is well established that discovery under the Rules is a matter of practice.[7] Therefore it is cognizable in county courts, provided it is not expressly precluded.

The decision of the New Brunswick Court of Appeal in the case of *Robinson & McBride* v. *Johnson*[8] is cited as authority for the opinion that discovery is not within the limited jurisdiction of county courts. In that case a sheriff had seized goods, which were claimed by two different persons, and he interpleaded in the Supreme Court; it was objected that he was not entitled to costs on the supreme-court scale, for the matter was within the jurisdiction of a county court. However the Court of Appeal held that the sheriff was entitled to interplead in the Supreme Court. The ratio decidendi appears to be that interpleader is a special statutory proceeding under the Rules, which is not within the jurisdiction of the county courts.

At page 558 of the report of the *Robinson & McBride* case Grimmer J. says: "I may remark the County Court is created

[6] County Courts Act, s. 11.
[7] Lord Watson in *Ind. Coope & Co.* v. *Emmerson* (1887), 12 A.C. 300; Middleton J. in *Graydon* v. *Graydon* (1922), 67 D.L.R. 116.
[8] (1931), 3 M.P.R. 548.

by statute and its jurisdiction and powers are clearly defined therein, and it has no authority other than is found in the Act creating it". If the learned justice meant that, although interpleader is authorized by the Rules and is merely a proceeding in continuance of an existing action, it is not within the cognizance of a county court, since it is not expressly authorized by the County Courts Act, then, in light of the foregoing, it must be concluded that he erred. However, interpleader may be a special action, since "the applicant [for relief by way of interpleader] may take out a summons".[9] If, for this reason, the learned justice meant that interpleader is a special statutory action and is not within the jurisdiction of a county court, because it is not a personal action as contemplated by section 11 of the County Courts Act, then the decision has no bearing when the question is whether a rule of practice is cognizable by county courts. It appears that this theory, that interpleader is a special statutory action and not a personal action, was accepted by the court.[10]

The only remaining ground upon which discovery might be found to be outside the jurisdiction of county courts is that it is expressly precluded. As to the possible exclusion of discovery, the relevant provision of section 40 of the County Courts Act reads as follows:

> The rules of pleading of the Supreme Court shall apply to County Courts, but there shall be no summons or order for directions in any action or any order for discovery.

Section 40 only precludes "any order for discovery", and this should not be construed as entirely precluding discovery itself. In 1927, when section 40 was enacted, an order was a condition precedent to obtaining discovery by oral examination and to demanding an affidavit discovering documents; however an order was not necessary before demanding the production of certain documents, and it need not be obtained before delivering interrogatories. Production of documents referred to in pleadings could be demanded by notice, and an adverse party was required to answer written interrogatories delivered with leave. The fact that leave must be obtained should not be confused with the necessity of obtaining an order. Therefore the prohibition of an order for discovery does not preclude notice or even leave for discovery; it operated only to preclude discovery by oral examination and by requiring an affidavit discovering documents and it did not affect discovery by demanding

[9] Order 57, Rule 5.

[10] Attention is especially directed to the report of the argument!

the production of certain documents or by requiring answers to written interrogatories.[11]

Indeed, it would be an absurdity for discovery under the Rules to be entirely precluded from county-court practice. Discovery, similar to that obtained in answer to interrogatories, has been the subject of an equitable action; this proceeding is distinct from discovery under the Rules, and it still exists.[12] Therefore, if a litigant in a county-court action were to be denied discovery by requiring answers to interrogatories, he would be entitled to bring a separate equitable action claiming such discovery.

Under the present Rules, only one method of obtaining discovery has been amended in such a way that, although an order was formerly a prerequisite, the method now involves a mere notice. The methods of obtaining discovery by delivering interrogatories and by demanding the production of certain documents remain the same and involve no order, so that these two methods should still be available in county courts. An order is still a prerequisite to oral examination, so that this method should be precluded, as it was in 1927. However, an affidavit discovering documents used to be demanded by an order, and it can now be demanded by notice to that effect under the new Order 31, Rule 12. Inasmuch as an order is no longer required, it is doubtful whether this method is any longer precluded from county-court practice. It may be argued that section 40 was formerly intended to preclude discovery by demanding an affidavit discovering documents, and, since this intention has never been changed, discovery by this method is still precluded, even though an order is no longer required. As against this, it may be argued that the legislature may be taken to have intended the removal of this method from the prohibition of section 40, when it adopted a procedure under which no order is necessary. The latter argument should prevail if the inference, that section 40 was only intended to preclude the more formal and expensive methods of obtaining discovery, is made.

At any rate, it is submitted that the foregoing considerations have demonstrated that discovery under the Rules is a matter of practice, which is cognizable in county courts and is incorporated into the practice of county courts, although one and possibly two of the methods of obtaining discovery are precluded, so

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[11] See, *Derby* v. *Derbyshire County Council*, [1897] A.C. 550, a case in which interrogatories were allowed in a county court.

[12] *Hawthorne* v. *Sterling* (1903), 2 N.B. Eq. 503.

that discovery from an adverse party before trial is a right of parties to a county-court action in New Brunswick, although the right is narrower than the comparable right in the Supreme Court.

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CIVIL LIBERTIES — DISTRIBUTION OF HANDBILLS AND PAMPHLETS — WITNESSES OF JEHOVAH — CONSTITUTIONAL POWER TO REGULATE.—A recent judgment of His Honour Judge Harrison of the County Court of Nanaimo, British Columbia, raises some interesting points on the subject of civil rights and the exercise of freedom of the press. The case, *Rex* v. *Kite*,[1] involved a by-law forbidding the distribution of handbills and pamphlets, a subject that has been fruitful of litigation in the Province of Quebec of recent years. After a conviction by a magistrate, the county-court judge held on appeal that a by-law forbidding the distribution of such material on the street was an invalid exercise of the municipality's powers of regulation.

His Honour said *inter alia:*

> Clause 57 of the by-law upon which the information and conviction herein are based, reads as follows:
>
> 'Restricts distribution of handbills:
>
> 57: No person shall give or cause to be given to any other person in or upon any street any handbill, dodger, circular, card or other advertising matter, nor shall he place such advertising matter upon or in any vehicle upon any street without the consent of the owner or person in charge of such vehicle.'
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> The appeal was heard before me on the 20th of May, 1949, and the evidence adduced, amongst other things, indicates that at the time and place alleged in the information and conviction, Eustace W. Kite, a member of a religious sect known as 'Jehovah's Witnesses' gave a handbill or pamphlet, purporting to be put out by or on behalf of the Watchtower Bible and Tract Society, dealing with religious matters, to the informant Constable McMillan.

The municipality, City of Nanaimo, attempted to argue that the ordinance could be supported on the ground that it regulated street traffic or, alternatively, under the municipality's general power to enact by-laws for the welfare of the community. In reply to these contentions the court said:

> In my opinion clause 57 of the by-law is invalid for the following reasons:

[1] [1949] 2 W.W.R. 195.

The clause in question does not concern the regulation of street traffic within the meaning or intent of either of the Acts referred to by counsel for the informant, but it does concern, and its real intent and purpose is to prohibit, the giving of a handbill or other advertising matter by one person to another in or upon any street. The very language of this clause indicates this to be the case.

I cannot agree that the statutory enactments referred to empower the council to enact by-laws for the purpose of regulating or prohibiting the distribution of handbills or other advertising matter or for the regulating or prohibiting the giving of any handbill or other advertising matter by one person to another upon any street, nor can I agree with any contention that clause 57 of the by-law can be supported under a general power on the part of the council to enact by-laws for the welfare, good rule and government of the municipality, for the reason that the *Municipal Act* conferring such general power (clause [301] of sec. 58 thereof) is restricted by its language to the various subject-matters mentioned therein and I am unable to find anything therein which can rightfully be said to relate to the same subject-matter as that dealt with by clause 57 of the by-law.

The municipality sought to support its by-law under the following provisions of section 58 of the Municipal Act:[2]

58. In every municipality the council may from time to time make, alter, and repeal by-laws not inconsistent with any law in force in the province for any of the following purposes, that is to say:—

(256) For regulating or preventing the encumbering, injuring, or fouling by animals, vehicles, vessels, or other means of any road, street, square, alley, lane, bridge or other thoroughfare.

(261) For the regulation of traffic within the municipality and the prevention of immoderate riding or driving.

(301) Generally, for the good rule and government of the municipality in relation to the various subject-matters mentioned in the several clauses of this section.

In addition to the provisions of the Municipal Act the city sought to base itself on section 66 of the Motor Vehicles Act:[3]

In addition to the provisions for motor traffic regulation contained in this Act, the Municipal Council of any municipality in the Province, or the Park Commissioners authorized by Statute to make by-laws, may by by-laws, and concurrently with and in addition to the exercise of any powers conferred upon the Municipal Council or Park Commissioners by the *Municipal Act* or by any other Act of the Legislature, provide and enforce by-laws regulating traffic and motor vehicles and trailers on highways in every respect, save as to the rules of the road and rate of speed or any matter within the scope of section 57 or 65 and, in the case of motor vehicles and trailers not used or plying for hire, save as to licence fees, as the Municipal Council or Park Commissioners may

[2] R.S.B.C., 1948, c. 232.
[3] R.S.B.C., 1948, c. 227.

think fit; and no such by-law shall be quashed or set aside or declared ineffectual or void by reason of any informality or by reason of any want of declaration of the power under and by virtue of which the by-law was passed, or on or for or by reason of any ground or matter whatsoever; but every such by-law shall be valid and effectual and shall be enforced so as to carry out the intention of the Municipal Council or Park Commissioners passing the by-law as expressed therein.

Judge Harrison based his conclusion on the principle that before legislation can be construed as authorizing an infringement upon the rights and liberties of the subject, it must do so in clear and unequivocal language. In this case the by-law was held to be infringing a right of long standing: that individuals and organizations have a right to distribute literature on the streets as one of the means of exercising the right of freedom of expression. For these reasons, only unequivocal legislative support could validate it:

It seems to me that the prohibitions and restrictions provided by said clause 57 constitute an unwarranted interference with a right exercised for a great many years by members of the public and by religious, political, social, and labour organizations, to freely employ that method of announcing or advertising their views, opinions, and criticisms to the general public or of inviting them to attend at some particular place to hear or discuss the same. The 'right' referred to seems to have been very much exercised as long ago as the time of King Charles and the Commonwealth, for *Chambers* in his *The Book of Days*, year 1864, refers to that period of history as 'the pamphleteering age'.

In my judgment, power on the part of the council to enact prohibitions and restrictions of the kind contained in clause 57 of the by-law requires the delegation to them of such power by a competent Legislature in clear and unequivocal language.

I think that the following quotations from the judgments of eminent members of the judiciary are applicable to the matter now under discussion:

Lord Summer said in *Rex* v. *Broad*, [1915] A.C. 1110, 84 L.J.P.C. 247:

'The rule is well established that if by-laws "involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say 'Parliament never intended to give authority to make such rules'" — Lord Chief Justice Russell of Killowen in *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, at 99, 67 L.J.Q.B. 782, at 785.'

Lord Davey said in *Toronto* v. *Virgo*, [1896] A.C. 88, 65 L.J.P.C. 4, affirming 22 S.C.R. 447:

'. . . a municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner.'

The late Mr. Justice Irving said in *Rex* v. *Sung Chong* (1909), 14 B.C.R. 275, at 277, 11 W.L.R. 231:

'. . . Where a restraint is sought to be put upon any person in respect of the exercise of any of these natural rights, I think it is the duty

of the Court to assume that the Legislature did not intend to interfere with them unless clear and unequivocal words have been used.'

In the foregoing opinion the court has treated the right of dissemination of opinion by public distribution of literature as a right that can only be prohibited under the authority of express words of a competent legislature. Members of the Supreme Court of Canada, however, have expressed the view that the sole right to curtail freedom of the press falls within the Dominion's legislative field: *Alberta Accurate News Reference.*[4] In a case involving the same issue of the right to distribute pamphlets on the streets, Mr. Justice Galipeault of the Quebec Court of King's Bench expressed the view that this means of exercising freedom of the press could not be abolished even by the province, adopting the reasoning in the *Alberta* case. In his decision, *Saumur* v. *Recorder's Court of Quebec* (unreported), Mr. Justice Galipeault was dissenting, the majority of the court having dismissed the appeal on procedural grounds without seriously considering the implications of the question for freedom of the press.

Mr. Justice Galipeault said:

> . . . it is well recognized that freedom of speech, of criticism or counter-criticism, etc., is not only the privilege of the newspapers or of the great press, but of all citizens.
>
> The by-law of the City of Quebec, if *intra vires*, could just as well hit the daily newspapers or others; and, if it does not apply to-day to the great press, it is evident from the interpretation and the reasoning of the City, that nothing prevents it being included in the enumeration of the writings that cannot be distributed without a written permit from the Chief of Police. And still by virtue of the same powers, the Municipal Council of Quebec could prescribe in its by-laws that it would be necessary to obtain from the Chief of Police an authorization before delivering any address, lecture, sermon, etc.
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> In the United States, whose constitution on the disputed question does not differ materially from ours, there are a number of decisions from the highest Courts, and particularly from the American Supreme Court, which have been cited to us and which corroborate the judgment of the Supreme Court of Canada I have just described. For reference purposes, and to adopt as mine the reasoning of the learned American judges, I take the liberty to quote.
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> In the case of *Lovell* v. *Griffin*, 303 U.S. 444, Chief Justice Hughes of the Supreme Court of the United States expresses himself as follows:
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> 'The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner, without a permit from the City Manager. We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is

[4] [1938] S.C.R. 100.

> such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. . . . Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form. The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defence of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'
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> . . . . .
>
> The legislature from which the City holds its powers of regulation, not having in my opinion the authority to permit the said City to regulate as it has done, it is evident that the City Council could not delegate the powers which it believed necessary to transmit to its chief of police, ... This power, if it were within the attributes of a municipal body, would be a constant danger, a permanent menace to minorities, and this, in all spheres of activity, religious, political or others.[5]

The view taken by Mr. Justice Galipeault and His Honour Judge Harrison, that there is a right to disseminate printed information in public places, is in harmony with the law as laid down in the Supreme Court of the United States in *Lovell* v. *Griffin, supra.* Their views, however, are by no means universally accepted by the Canadian bench, since some Quebec judges have expressed the view that censorship of the press is a proper and harmless power for the police to exercise.[6] It is submitted that allowing police censorship of the press comes all too close to the pattern set by a number of European states, where police control has been able largely to destroy the critical and educational contribution the press can make to the operation of the state.

It is of interest to note that, following the decision in *Rex* v. *Kite,* the City of Nanaimo sought the support of the Union of British Columbia Municipalities in a request that the province enact legislation authorizing the municipalities to prohibit distribution of literature. The convention of British Columbia municipalities held at Victoria refused to support the resolution proposed by Nanaimo. Quebec is the only province that has legislation allowing municipalities to probibit this exercise of freedom of the press.[7]

The opinion has been expressed in both the Supreme Court of Canada and in the Supreme Court of the United States that

[5] Translation.
[6] See (1948), 26 Can. Bar Rev. 759, at pp. 778 ff., for a more detailed discussion of the subject.
[7] Statutes of Quebec, 11 Geo. VI, c. 59 and 77.

dissemination of opinion without prior censorship is a citizen's right. Chief Justice Duff and Mr. Justice Cannon express the view in the *Alberta* case that the means of controlling undesirable expression is through the prohibitory provisions of the Criminal Code. Despite this, one provincial legislature has passed a statute designed to prohibit or censor dissemination of printed matter on the streets, while in another province a judge expressed the view that such a prohibition is "unwarranted". Amidst this array of conflicting views it is placing considerable strain on judicial discretion to leave so much of the problem of civil rights to the courts. Without free interchange of ideas a democratic constitution simply cannot function. Yet, despite its importance, this branch of the law is left so indefinite that it can swing like a pendulum according to the complexion of the individual who is called upon to interpret it.

In the writer's opinion the result reached by His Honour Judge Harrison in *Rex* v. *Kite* and the protection it gives to individual liberty are highly desirable. Freedom of the press, however, would be much more secure if it were guaranteed by statute as has been done in some provinces of Canada as well as by the constitutions of other countries. Now that the problem of constitutional amendment is to the forefront in Canada it is to be hoped that a Bill of Rights will be adopted protecting the rights of all Canadians.

W. GLEN HOW

Toronto

Recent Judicial Appointments

The Honourable Lauchlin D. Currie, K.C., to be a judge of the Supreme Court of Nova Scotia, and a judge of the Court for Divorce and Matrimonial Causes of the Province of Nova Scotia.

His Honour Cecil Bray Philp, a judge of the County Courts of the Eastern Judicial District in the Province of Manitoba, to be the Senior Judge of the County Courts of the district.

James I. Morkin, Esquire, K.C., of the City of Winnipeg, in the Province of Manitoba, to be a judge of the County Courts of the Eastern Judicial District in the province.

Clarence G. Keith, Esquire, K.C., of the City of Winnipeg, in the Province of Manitoba, to be a judge of the County Courts of the Eastern Judicial District in the province.