To sum up: It is respectfully suggested that however correct *Re Haig* may be as an interpretation of the particular will before the Court, it cannot be regarded as authority for the proposition that a devise for life with remainder to the devisee's "children" or his "sons or daughters" vests an estate tail in the first taker under Wild's case whether or not the latter has children living at the testator's death. In reality it is authority for the contrary proposition.

It is, of course, not contended that the word "children" or equivalent words can never depart from their primary meaning of descendants in the first degree. The context or extrinsic evidence may turn them into words of limitation after a gift for life to the parent, but that is not by virtue of Wild's case, but because the available extrinsic or intrinsic evidence requires the adoption of some secondary meaning in order to carry out the manifest intention of the testator. *Bowen* v. *Lewis*,[9] cited in *Re Haig*, if of any general authority in the case of devises taking effect since our present Wills Act (which is doubtful), is at most an instance of the context forcing a secondary meaning upon the word "children."

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PROOF OF FOREIGN AND EXTRA-PROVINCIAL LAWS.

Certain anomalies exist in our legal system in the application by our Courts of the laws of other provinces of Canada and of foreign countries.

In actions instituted in any of our provincial Courts wherein one of the parties claims that the law of another province of Canada or of another British dominion applies, the party relying thereon must specifically allege what are the provisions of such law and prove them as facts in the case.

It is curious to note that this rule prevails in the Province of Quebec, although it is based on no text of the law of that province nor on any principle of the old or modern French law, but is an adoption by the Quebec Courts of the English rule.[1]

[9] 9 App. Cas. 890.

[1] Laurent, Droit Civil National, Vol. 2, p. 279; Odgers' Law of Evidence (Can. Ed.), p. 50; Phipson's Law of Evidence, 6th ed., p. 20.

In the absence of such proof, the Quebec Courts have held that such law must be presumed to be the same as the law of the province.[2]

The proof has to be made by experts, *i.e.*, judges, advocates, barristers or solicitors of the province or dominion the law of which is to be proved.

The question of foreign law at issue may be a controverted one in the other province or British dominion and the experts called to prove the same may express only their view thereof to the Court and such experts may err, as even experts sometimes do, but the provincial judge before whom the case is tried must accept the evidence adduced before him and base his decision on such foreign law as so proved in the case.

If the law at issue is one of another province and the case is appealed to the Supreme Court of Canada, the Supreme Court being a Federal Court, will, however, be entitled to judge the case according to its own knowledge and interpretation of the law of such province. It may, therefore, disregard the proof made before the trial judge as to the law of the other province and render a judgment on its own interpretation of the law of such province, although the Court of First Instance was bound to render judgment in accordance with the proof made at the trial.[3]

This is curiously anomalous, but the anomaly is still more striking in the following instance.

Were the law at issue, let us say, the law of Australia or some British Indian law, and the case were appealed to the Supreme Court of Canada, the Supreme Court would find itself bound in the interpretation of such foreign law by the evidence of record in the same manner as the Court of First Instance. If the case, however, were appealed to the Judicial Committee of the Privy Council, it could decide and would be bound, *proprio motu,* to decide the case according to its own knowledge of the law at issue.[4]

If I am not mistaken in my view on the subject, the position of a judge of the Supreme Court of Canada who is at the same time a Privy Councillor is somewhat extraordinary in certain cases. When hearing in the Supreme Court of Canada a case based, say, on the law of Australia he would be bound to base his finding on the proof made

[2] *Canadian Pacific Railway Company* v. *Parent.* Q.R., 24 C.K.B. 193; *Babineau* v. *Railway Centre Park Company.* Q.R., 47 S.C., 161; *True* v. *Kirkup,* M.L.R., 7 S.C., 308; *Primeau* v. *Gill.* M.L.R., 7 Q.B. 467.

[3] *Logan* v. *Lee,* 39 S.C.R., p. 311.

[4] *Cooper* v. *Cooper,* 13 L.R. (Appeal Cases), 88; *Lyell* v. *Kennedy,* 14 Appeal Cases, 437; Phipson's Law of Evidence (6th Ed.), p. 20; Odgers' Law of Evidence (Can. Ed.), p. 50.

of that law in the trial court, whilst if the same case, instead of being appealed to the Supreme Court of Canada, were appealed to the Privy Council, and he happened to be sitting when the case was there heard, he would be free to, and in fact should, take judicial notice of the Australian law and as a result might, quite conceivably, arrive at a conclusion entirely different from that which he would have reached had he been hearing the case in the Supreme Court of Canada.

It seems strange that the Imperial Act (22 and 23 Vict. ch. 63), known as the British Law Ascertainment Act of 1859, is not more often made use of by our Courts when the law to be ascertained is that of another British dominion.

Mr. Eugene Lafleur, K.C., in his work "Conflict of Laws,"[5] long since pointed this out and drew attention to the fact that although our Courts could make use of this Imperial Act of their own accord, whenever it was deemed necessary or expedient, they seldom seemed to avail themselves thereof.

The scope and application of the Act is well summarized by Mr. Lafleur as follows:

"Whenever the law to be ascertained is the law administered by any part of the British Dominions, another method of establishing such law is furnished by the Imperial Act of 1859 (22 and 23 Vict. cap. 63). This Act provides that if in any action pending in any Court within Her Majesty's Dominions, it shall be the opinion of such Court, that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's Dominions on any point on which the law of such other part of Her Majesty's Dominions is different from that in which the Court is situate, it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing. The Court or judge, after settling such case, settles the questions of law arising therefrom upon which the opinion of another Court is desired, and pronounces an order remitting the case and questions to a Superior Court in such other part of Her Majesty's Dominions. The parties or their counsel may be heard before the Court whose opinion is sought, and before pronouncing an opinion such Court may take any further procedure it deems proper. The opinion may be lodged in the Court which

[5] Page 33.

sought it by any of the parties to the action, and upon a motion to that effect the Court applies the opinion to the facts, or submits it to the jury as evidence, if the case is tried by jury. In the event of an appeal to Her Majesty in Council or to the House of Lords, the opinion pronounced by any Court whose judgments are reviewable by Her Majesty in Council or by the House of Lords, may be adopted or rejected as it may appear well founded or not in law."

Mr. Lafleur refers to a case of *Noad* v. *Noad*,[6] in which the Court of Chancery in Ontario referred for direction to our Quebec Superior Court under this Act.

Although it is quite possible that this Act has been made use of in other provinces, I am unaware of its ever having been taken advantage of by the Quebec Courts, or of our Quebec Courts (except in the case just cited) ever having been called upon by the Courts of other provinces to state what the Quebec law was when such law was pleaded in a case heard in another province.

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COVENANTS AS JOINT OR SEVERAL.

SECTION 1—JOINT CONTRACTORS.

(1) The legal principles applied in the construction of covenants as joint or several, or as joint and several, are the same as those applied in construction for other purposes, but, due to the necessary collateral application of the law as to joint contractors, these principles may appear at times to be different, and highly technical. But the intent of the parties—their real intent—is as carefully sought and applied in the construction of covenants as joint or several as it is in the construction of other aspects of covenant. Where that intent is obscure, or where the language of the covenant, construed with relation to the law as to joint contractors, produces results seemingly unintended, the court will imply the intent that the parties seem to have sought (but failed) to express. This, frequently in the case of covenantors, and usually in the case of covenantees, is an intent that the nature of the covenant (joint or several) shall conform to the interest (joint or several) of the parties in its subject-matter. For

[6] 21 L.C.J., 312.