Correspondence

Capacité légale de la femme mariée

MONSIEUR LE DIRECTEUR:

Peut-être y a-t-il lieu d'ajouter quelques observations au commentaire de mademoiselle Gertrude Wasserman sur l'arrêt de la Cour d'Appel de la province de Québec dans l'affaire *Duchesneau-Lasnier* v. *Cook et Leclerc*, [1954] B.R. 333? Le texte très intéressant de mademoiselle Wasserman a paru au volume 32 de la *Canadian Bar Review*, numéro de juin et juillet 1954, à la page 666.

La cause dont il s'agit posait principalement trois problèmes:

(a) Le femme mariée sous le régime de la séparation de biens peut-elle, sans autorisation, acquérir un immeuble par voie d'achat?

(b) Si elle jouit de ce pouvoir, a-t-elle en plus le droit de se porter ainsi acquéreur sous réserve d'un droit de réméré en faveur du vendeur, et à la charge d'acquitter éventuellement une hypothèque dont l'immeuble est grevé?

(c) En faisant emploi de ses biens réservés, quel que soit son régime matrimonial, la femme peut-elle se prévaloir des articles 1425*a* à 1425*i* du Code civil si elle acquiert un immeuble et le paie en majeure partie avec des biens réservés, et pour le reste à même le montant d'un emprunt contracté à cette fin?

La Cour d'Appel a répondu négativement aux trois questions par un arrêt majoritaire de trois contra deux. Chacun des cinq juges a écrit des notes. Tous ont entendu interpréter les dispositions de notre droit telles qu'elles existaient au moment de la décision, et les opinions exprimées de part et d'autre sont dignes de la plus grande considération.

Tout en respectant le point de vue exposé par mademoiselle Wasserman, il me paraît difficile de l'agréer entièrement.

C'est sans doute un truisme de dire que nous vivons dans la province de Québec sous le régime du droit civil écrit. Seul le législateur a la faculté et l'autorité de modifier les lois existantes, de les abroger ou d'en établir de nouvelles. Le rôle, certainement non moins important et peut-être plus difficile, des tribunaux, c'est d'appliquer les lois et de les interpréter telles que le pouvoir législatif les a voulues.

Si l'intention du législateur n'apparaît pas clairement, il appartient aux juristes de recourir aux principles généraux et à l'équité naturelle. "Le juge", dit l'article 11 du Code Civil, "ne peut refuser de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi". Mais la conception que chacun se fait de l'équité demeurant presque nécessairement subjective dans une certaine mesure, le droit positif est encore la meilleure garantie de justice.

Le commentaire de mademoiselle Wasserman comporte un excellent résumé des faits de la cause. Il n'y a donc pas lieu de le reprendre ici.

Mais un développement extrêmement important vient de se produire. La législature se trouve en ce moment saisie d'un projet de loi qui abrogerait la disposition de l'article 986 C. c. d'après laquelle les femmes mariées sont incapables de contracter, "excepté dans les cas spécifiés par la loi". Néanmoins, je crois que l'étude de mademoiselle Wasserman garde toute son actualité car l'affaire *Duchesneau-Lasnier* présente des aspects juridiques que n'affecte pas l'amendement projeté à l'article 986.

Il convient de nous référer d'abord aux textes des articles 177 et 1422 du Code civil, tels qu'ils existaient avant les amendements de 1931:

> 177. La femme, même non commune, ne peut donner ou accepter, aliéner ou disposer entre vifs, ni autrement contracter, ni s'obliger, sans le concours du mari dans l'acte, ou son consentement par écrit, sauf les dispositions contenues dans l'acte de la 25 Vic., chap. 66.
>
> Si cependant elle est séparée de biens, elle peut faire seule tous les actes et contrats qui concernent l'administration de ses biens.
>
> 1422. Lorsque les époux ont stipulé, par leur contrat de mariage, qu'ils seront séparés de biens, la femme conserve l'entière administration de ses biens meubles et immeubles et la libre jouissance de ses revenus.

En conséquence de l'entrée en vigueur du chapitre 101 des Statuts de Québec, 1930-31, le texte du second alinéa de l'article 177 est devenu ce qui suit:

> Si cependant elle est séparée de biens, sa capacité d'agir civilement est déterminée par les articles 210 et 1422, suivant le cas.

Et l'article 1422 est maintenant en ces termes:

> 1422. Lorsque les époux ont stipulé, par leur contrat de mariage qu'ils seront séparés de biens, la femme conserve l'entière administration de ses biens meubles et immeubles, la libre jouissance de ses revenus et le droit d'aliéner, sans autorisation, ses biens meubles.
>
> Elle ne peut, sans autorisation, aliéner ses immeubles ni accepter une donation immobilière

L'article 986 est demeuré inchangé en 1931, mais ce sont bien les articles 177 et 1422 qui précisent les incapacités de la femme et

les cas où elle peut, ou ne peut pas, contracter. Les exceptions dont parle l'article 986 se trouvent toutes en substance dans l'article 177 d'abord, et ensuite dans l'article 1422. Le premier nous indique que dorénavant, si la femme est séparée de biens, sa capacité d'agir civilement sera déterminée par les articles 210 et 1422 suivant le cas.

Il n'y a pas lieu de s'arrêter à l'article 210, qui régit uniquement la capacité de la femme séparée de corps. Par contre, l'article 1422 définit nettement le sens et la portée de l'exception créée par l'article 177 en faveur de la femme séparée de biens: il paraît bien lui conférer une capacité de caractère général, ne lui interdisant que l'aliénation de ses immeubles et l'acceptation d'une donation immobilière, sans autorisation.

La loi de 1931 a donc modifié profondément l'ancien régime sous l'autorité duquel la femme séparée de biens ne pouvait faire seule que les actes d'administration. Aujourd'hui, elle peut aliéner son actif mobilier sans aucune restriction.

Au tome 1er du *Droit civil canadien* de Mignault, à propos de l'article 177, à la page 511, nous lisons:

> Si la femme ne s'est point réservé le droit d'administrer ses biens en tout ou en partie, elle ne peut rien, son incapacité est absolue; elle s'applique aussi bien aux actes de simple administration qu'aux actes de disposition.
>
> Que si au contraire, elle a conservé, d'après ses conventions matrimoniales, l'administration de ses biens, en tout ou en partie, ce qui a lieu notamment sous le régime de la séparation de biens (art. 1422), son incapacité n'est plus que relative à certains actes: incapable de tout acte de disposition, elle peut faire tout acte d'administration.

La femme, qui ne jouissait autrefois d'aucun droit de "disposition", a donc acquis se droit en 1931 à l'égard de tout bien mobilier. Si l'on considère l'importance prise par les fortunes purement mobilières avec le développement de la grande industrie, caractéristique de notre siècle, la législation remédiatrice de 1931 ne saurait être surestimée. Ainsi, celle qui détient des actions ou des obligations de très grande valeur peut maintenant les aliéner, à sa guise, c'est-à-dire en disposer de la facon la plus absolue.

La femme séparée de biens peut acheter et payer de ses deniers une voiture de grand luxe. En pareil cas, elle contracte et s'oblige valablement. Pourquoi alors, en l'absence d'un texte le lui interdisant formellement, ne pourrait-elle employer ses valeurs mobilières à l'achat d'un immeuble?

Il est bien vrai que les articles 1425*a* et suivants, consacrés aux "biens réservés de la femme mariée", confèrent expressément à cette dernière, dans les conditions prévues, le droit d'acquérir un immeuble et celui de l'aliéner à titre onéreux. Faut-il déduire de cette législation remédiatrice, promulguée en même temps que les

nouveaux articles 177 et 1422, que le droit d'acheter un immeuble se limite nécessairement à l'emploi des biens réservés? La négative me paraît s'imposer.

Tout d'abord, les droits découlant des articles 1425*a* et suivants s'appliquent à tous les régimes matrimoniaux sans distinction, c'est-à-dire aussi bien aux femmes mariées sous le régime de la communauté ou de l'exclusion de communauté qu'aux autres. Or, pour les femmes communes en biens ou mariées sous le régime de l'exclusion de la communauté, l'incapacité absolue de contracter et d'aliéner sans autorisation est demeurée absolue, selon l'article 177.

En second lieu, il faut bien tenir compte que la loi sur les biens réservés donne aux femmes séparées de biens comme aux autres des pouvoirs beaucoup plus étendus que n'en prévoit l'article 1422. Cette dernière disposition, devenue la charte des droits de la femme séparée de biens, lui interdit toutefois d'aliéner ses immeubles, même à titre onéreux. Cette interdiction n'existe pas à l'égard des biens réservés, et toutes les femmes mariées ont le droit, sans autorisation aucune, d'aliéner à titre onéreux les immeubles qu'elles ont pu acquérir en faisant emploi de leurs économies. Enfin, l'hypothèque conventionnelle ne pouvant être consentie que par ceux qui ont la capacité d'aliéner leurs immeubles (art. 2037 du Code civil), la femme séparée de biens ne pourra hypothéquer son immeuble tandis que cette faculté existe dans le domaine des biens réservés.

Si l'on doit reconnaître que l'article 1422 permet à la femme séparée de biens d'employer son argent à l'acquisition d'un immeuble, nous demeurons en présence de deux objections formulées par la majorité de la cour. La première, c'est que la vente de l'intimé Cook à l'appelante Dame Duchesneau-Lasnier comporte un droit de réméré, donc une clause résolutoire en faveur du vendeur. La seconde, c'est que les immeubles vendus se trouvaient grevés d'une hypothèque de $1100, don l'appelante prenait charge et qu'elle s'obligeait d'acquitter, à défaut par l'intimé de racheter l'immeuble dans le délai stipulé.

Le droit de réméré représente-t-il un engagement d'aliéner prohibé par la second alinéa de l'article 1422? Personne ne peut aliéner ce qu'il n'a pas. Or l'appelante n'a jamais eu sur les immeubles qu'un droit de propriété résoluble. Ayant acquis sous la condition résolutoire d'un droit de rachat, elle n'est devenue propriétaire que sous réserve de cette faculté du vendeur; partant elle ne consent vraiment à aucune aliénation en cas d'exercice de ce droit.

Si le vendeur exerce la faculté de réméré, il doit d'abord rembourser en entier le prix de vente, capital et intérêt. Et si l'acquéreur pouvait légalement employer ses fonds à l'achat d'un immeuble, il paraît difficile de soutenir qu'elle se trouvait empêchée de consentir simultanément à une clause résolutoire dont la seule conséquence

ne saurait être que la rétrocession de l'immeuble sur remboursement du prix.

Quant à l'obligation hypothécaire dont l'appelante a pris charge conditionnellement, elle ne lui était interdite que si elle constituait une aliénation immobilière. Or le contraire semble bien vrai.

Sans doute l'article 2037 C. c. prévoit que "les hypothèques conventionnelles ne peuvent être consenties que par ceux qui ont la capacité d'aliéner les immeubles qu'ils y soumettent". Mais la constitution d'hypothèque est un contrat entre le débiteur qui s'oblige et le créancier au profit de qui l'immeuble est grevé et dont l'acceptation est requise. Rien de tel ne s'est produit en l'occurrence.

Il reste que madame Duchesneau-Lasnier a fait un placement de ses derniers en achetant un immeuble dont elle a acquitté le prix pour une partie en versant $3000, et pour l'autre en s'engageant à payer un solde de $1100 au créancier hypothécaire du vendeur. L'opération, n'étant pas contraire à l'article 2037, demeure valide sous l'autorité de l'article 1422, qui la justifie dans son entier.

Supposant maintenant que l'appelante n'avait pas le droit d'acheter un immeuble si ce n'est en faisant emploi de ses "biens réservés", conformément aux articles 1425*a* et suivants, la question se pose de savoir si tout la prix d'acquisition devait nécessairement se composer de "biens réservés".

Dans l'espèce, le prix payé de $3000 comprenait $2500 de biens réservés et $500 provenant d'un emprunt contracté par l'appelante. Est-ce que l'opération se trouve validée par le fait qu'une somme de $2500 représentant les cinq sixièmes du prix, répond à la définition que donne l'article 1425*a* de ce qu'il faut entendre par "biens réservés"?

Les articles suivants du même chapitre du Code civil, particulièrement l'article 1425*d*, font bien voir que les droits spéciaux conférés par cette législation à toutes les femmes mariées, sans aucune exception, ne sauraient être étendus à des biens non réservés. Ainsi l'article 1425*d* prévoit: "En toutes circonstances et à l'égard de tous la preuve est soumise aux règles ordinaires pour établir la consistance et la provenance des biens réservés".

Si l'on admet la proposition qu'une femme mariée peut ajouter à un montant de biens réservés un montant moindre qu'elle emprunte afin de compléter le prix d'acquisition d'un immeuble, par le motif que le produit de l'emprunt constitue un simple accessoire de la somme tirée des biens réservés, que faudra-t-il décider dans une cause analogue où l'emprunt représentera les deux cinquièmes ou le tiers du prix d'achat? En d'autres termes, les articles 1425*a* et suivants n'en disant pas mot, jusqu'où pourra-t-on aller dans l'application de la même théorie à d'autres cas?

En s'éloignant du texte de la loi pour s'en rapporter à l'équité naturelle ou aux principes généraux, ne risque-t-on pas de tomber

éventuellement dans l'arbitraire? Dans une affaire récente de *Gagnon* v. *Le Barreau de Montréal*, [1954] B.R. 621, monsieur le juge Bissonnette dit à la page 626:

> Puis-je rappeler que, dans les pays où on a une législation codifiée, le juge a l'impérieux devoir de la suivre et que les principes généraux dont elle s'inspire doivent céder le pas à la législation formelle dont il doit être le vigilant gardien.

Le législateur s'étant exprimé clairement au chapitre des "biens réservés", il semble que le contrat discuté devait être déclaré nul sous l'autorité des dispositions de ce chapitre, si toutefois l'appelante n'avait pas le pouvoir de s'obliger ainsi à son seul titre de femme séparée de biens et par application de l'article 1422.

ROGER BISSON*

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Conflict of Laws and Conditional Sales: Hannah v. Pearlman

TO THE EDITOR:

In his comment at page 900 of the October issue on the *Hannah* case, [1954] 1 D.L.R. 282, Mr. Ziegel suggests that Wilson J. erred both in his reasoning and in the result. The facts, shortly, were that *G* sold to *J* an automobile under a contract by which the title remained in *G* until payment was complete. The whole transaction was within Manitoba, where by statute a provision that the title shall not pass with the possession is valid only in the case of manufactured goods if at the time of the contract they have the manufacturer's name or other distinguishing name plainly marked on them. Apparently this car was not so marked. *G* assigned his rights to the defendant. *J* brought the car to British Columbia when it was sold to *K*, who sold it on June 13th, 1952, to the plaintiff, neither transaction in British Columbia apparently being a conditional sale or chattel mortgage transaction. On January 10th, 1953, the defendant, five days after discovery of the removal of the car to British Columbia, filed a copy of the Manitoba agreement with British Columbia's Superintendent of Motor Vehicles, purporting to act under section 3(5, 8) of that province's Conditional Sales Act. On January 31st, 1953, the defendant seized the car because of default in payment and pursuant to power reserved in the original agreement between *G* and *J*. The plaintiff then sued, in the action here discussed, for recovery of the car. Wilson J. found for the plaintiff.

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It should be noted here that his lordship did not decide the very nice question whether section 3 (5) of the British Columbia Conditional Sales Act (incorrectly appearing at page 906 of Mr. Ziegel's comment as 3 (8)) was applicable to this transaction. That section provides for registration in British Columbia "if the goods, having been *delivered* at a place outside the Province, are subsequently *removed* into the Province by the buyer". There is much to be said for the argument that the section applies only to sales governed by British Columbia law and in which the goods are at the time of the sale outside the province—a purchase by a Vancouver resident from a Vancouver car dealer of a new Chevrolet presently at Oshawa, Ontario. The question was left open. His lordship did hold that the original transaction in Winnipeg was governed by Manitoba law and, because that law provided that the clause of the contract reserving title to the seller should be invalid in certain situations of which this was one (manufacturer's name not on goods), that the claim of the seller and of his assignee, the defendant, failed.

Mr. Ziegel, in his comment, suggests that this decision is wrong because of a failure, he says, of the court to differentiate between the *personal* right arising out of the contract in Manitoba (governed by the proper law, Manitoba) and the *property* right in the car itself (governed, he suggests, by the law of the situs—British Columbia—at the time of the sale to the plaintiff in British Columbia). I suggest, respectfully, that his lordship's language, quoted by Mr. Ziegel, is quite open to the proper distinction and that, although property and not personal rights were in issue in this action, his lordship's reference to the law of Manitoba as the law governing the original contract was quite proper. The law of the situs, British Columbia, must refer to the law under which the seller at a subsequent sale acquired his rights in order to determine what rights he can pass on. Mr. Ziegel quotes a passage from Dr. Falconbridge to support this distinction. That passage makes it quite clear that property rights acquired under a contract abroad will not be ignored locally, provided that they are not inconsistent with the type of property interests recognized in the situs. Thus, I suggest, a contract abroad under which *A* grants to *B* a fee tail interest in land in British Columbia *may* not give within British Columbia such an interest because the *lex situs* does not recognize a fee tail in land. But a contract abroad which granted a limited interest or right similar to one recognized within British Columbia would be treated as giving rise to the limited interest or right in British Columbia. The *lex situs* may well govern property rights. But to determine what rights any particular person may have, we may be required to go to some other law under which the rights were acquired.

At the end of his seventh paragraph, in dealing with the hypothetical situation arising out of the *Nichols* case in Saskatchewan, Mr. Ziegel eventually admits that the *lex situs* would look to the law where the rights were acquired, because, he says, the common law prevails. The rule *nemo dat quod non habet* is the basic rule of property, subject to, *inter alia*, statutory modification. But British Columbia's Conditional Sales Act, section 3 (5), does not, as your correspondent notes in passing, predicate the *lex situs* rule. It may do so, if applicable. Some doubt has been expressed already about its applicability to sales governed by any law other than that of British Columbia, and, therefore, to this original sale which was governed by Manitoba law. Likewise, it is doubtful whether any part of the act applies to sales governed by outside laws, despite Mr. Ziegel's further statement that section 3 (1) is not concerned with local sales only, but also cases where possession has been delivered to a buyer whatever law may govern the sale. But these are minor matters.

It is at this point that Mr. Ziegel gets to the meat of his attack upon the case: the purpose of the Manitoba statute was solely to protect the interests of buyers in Manitoba; a well-established line of Canadian cases makes it clear "that the conditional sale statutes are not to be given extraterritorial effect. In all these cases goods subject to a lien had been removed from one province into another, and the invariable decision was that the conditional sales legislation *of the province into which they had been removed* did not apply to them, so as to make registration of the lien agreements mandatory"; hence, he says, the necessity for legislative intervention in the form of section 3 (5), and further apart from such legislation that the law of the province *into which* the goods have been removed disclaims any pretensions to govern the extra-provincial transaction, "then, mutatis mutandis, a wider intention ought not to be imputed to the law of the province *from which* the goods have been removed" (my italics). I suggest that the very opposite to the last conclusion is true. The law of the province "into which" disclaims because it says such matters should be governed by the law of the place "from which" the chattel is removed—the law under which the property rights were created.

The learned author then cites an Alberta trial decision, *Cline* v. *Russell*, in which Harvey J. interpreted a provision of the state of Washington, which, it may be noted, his lordship seemed to admit governed the property rights of the purchaser of a car in that state, as cutting down the seller's reservation of title in a conditional sale only in the case of a subsequent sale to a "purchaser" within Washington state. This case really supports the opposite of Mr. Ziegel's contention as to what law governs the property rights of the parties. On the question of applicability of the law of the

place of acquisition of rights to the chattel when removed into another place, the case is really no authority—it simply interprets one word in a statute in a restrictive manner and leaves the whole of the rest of that law available for application in the second jurisdiction, and presumably Harvey J. applied it. The New Jersey case of *Marvin Safe* v. *Norton* in 1886 is then fully discussed, and also put forward as setting up the true view. That case dealt with a chattel sold in Pennsylvania subject to the usual conditional sales agreement. The Pennsylvania law declared that, if the agreement was not registered, it was ineffective to protect the seller's title against a subsequent innocent purchaser or creditor. But the New Jersey court held that the seller could assert his right in New Jersey, into which state the chattel had been removed, even against such an innocent purchaser. Under New Jersey law the seller's reservation of title was not lost by non-registration. "The New Jersey court held that its own law must prevail." The New Jersey court said that the transmission of title to chattels situated in New Jersey must be governed by New Jersey law, and not by foreign laws. Even if for the moment we accept this case of 1886 as good today, it does not really go as far as suggested. It in fact recognizes the title retained by the seller under the Pennsylvania law, but suggests that occasions where that right may be impaired are local to Pennsylvania. The title obtained by the seller is not invalidated for all purposes, but only *qua* innocent purchasers and creditors from the buyer in Pennsylvania. The court makes it clear that the title remains unimpaired as between the parties themselves and as to all persons other than the two preferred groups. The impairment of the seller's title occurred in New Jersey and should be governed by New Jersey's law.

Without discussing for the moment whether the *Marvin* case fits the facts of *Hannah* v. *Pearlman* or not, is it law today? If it is correct to say that a transmission of title to chattels within state *A* must be governed by the law of state *A* and not by the law of state *B* where the title now being transmitted was created, and this is what the *Marvin* case is cited as saying, then it does not say that the law of state *A* will not look to the law of state *B* to determine what rights the present seller in state *A* acquired in state *B*. Even the *Marvin* case impliedly admitted this. But the *Marvin* case went further and said that while state *A* will recognize the title acquired in state *B*, it will not recognize the impairment rules of state *B* with respect to that title. State *B* said that the original seller retained title subject to its being impaired if sold by the original buyer to an innocent purchaser. Or, looking at the original buyer's "title", state *B* said he obtained no title, but he did get a power to pass title to an innocent purchaser. State *A* refused to recognize that possibility of impairment or that power. Mr. Ziegel suggests that

the *Marvin* case is sound, and that the subsequent New Jersey case of *Dougherty* v. *Krimke*, 1929, which appears to decide the opposite, was decided upon an inaccurate construction of the facts of the *Marvin* case and of an interpretation of that case in 1905. Mr. Ziegel also notes, in his last footnote, that the apparent irreconcilability of the *Marvin* and *Dougherty* cases is noted in a case book by Cheatham et al. The learned editors of that book do not there suggest, however, that the *Marvin* case represents either the true or accepted view. Indeed, it may not today.

It may be suggested, in the first place, that the forum today more readily looks to the law governing the acquisition of the rights than it did in 1886. Further, by way of illustration, may I direct attention to *International Harvester* v. *Holley* (1939), 18 N.E. 2d 484 (Ind. C.A.); *North American Acceptance* v. *Meeks* (1945), 20 N.W. 2d 504 (Neb.); *Associates Discount* v. *McKinney* (1949), 55 S.E. 2d (N.C.); *Southwest Cattle* v. *Nevada Packing* (1930), 292 P. 587 (Nev.). In the *Holley* case, the conditional sale occurred in Illinois where the law required the name of the seller to be marked on both sides of the vehicle. It was not so marked. The vehicle was later seized in Indiana by a judgment creditor of the buyer who was doing business in both Illinois and Indiana. The Indiana court held, upon this point, that because the reservation of title by the seller was invalid as against innocent purchasers or judgment creditors of the buyer by the law of the state where the initial transaction took place, the seller could not assert that title in Indiana. "The conditional sales contract entered into between the [seller] and the [buyer] being invalid under the law of the State of Illinois as to subsequent judgment creditors is invalid everywhere, in the absence of an intention clearly shown that the parties intended that the contract should be governed by the laws of another state" (at pp. 486-7). It is true that we are not told what the local law of Indiana is upon the subject, but it would appear that there was no local policy in Indiana against recognition of "foreign" laws invalidating titles, as would appear to be the explanation of the New Jersey decision in the *Marvin* case, followed more recently in *Commercial Credit* v. *Colando* (1940), 15 A. 2d 762 (N.J.). It is equally open to any Canadian province to legislate to the same effect if it chooses. Until it does so, however, it would seem that the title as acquired abroad, with its potential defects, will be recognized locally.

All these remarks are not to suggest, categorically, that the *Marvin* case is wrong and the others correct, but merely to point to the different approach, whether correct or not, in a number of other jurisdictions. In fact, Beale treats the *Marvin* case as an illustration of a special local rule in a few states under which no one is allowed to pass a greater title than he has and is not therefore enabled to pass someone else's title even though he has "power"

to do so under the conditional sales legislation of the jurisdiction where he obtained title (2 Beale, p. 1006). Goodrich makes clear the point as to power to confer title, even though the transferor has none himself. He suggests, however, that it is not a property interest conferred by the law governing the original transaction, and therefore not a property interest required to be recognized by the present situs (3rd ed., 1949, pp. 477-8). This is a fair but fine distinction. It is Mr. Ziegel's point, too, I believe. To this extent Goodrich supports Mr. Ziegel.

But let us assume that Mr. Ziegel and Goodrich and the *Marvin* case correctly represent the law as to the limited effect of the "power" idea. Even then, I suggest, it makes no difference to *Hannah* v. *Pearlman*. Mr. Ziegel suggests that where a seller retains title but gives possession, and by statute that reservation of title is void *as against* certain persons (creditors of and innocent purchasers from the buyer) in the absence of registration or marking, then the provision as to invalidation and the consequent "power" of the buyer to give title to specific people is not a property interest recognizable elsewhere than in the original jurisdiction. And that when the buyer in *Hannah* v. *Pearlman* left Manitoba and came to British Columbia with the car, he had no property interest in the car because by Manitoba law the title was in the original seller. That title, unfettered by the buyer's power to pass it, is brought to and recognized in British Columbia. Unfortunately for Mr. Ziegel, the Manitoba legislation is not of this type. As examination of it will show, it is not of the usual conditional sale type invalidating the reservation of title as against some specific people only. It reads:

> Receipt notes, hire receipts and orders for chattels given by bailees of chattels, where the condition of the bailment is such that the possession of the chattels should pass without any ownership therein being acquired by the bailee, shall be only valid in the case of manufactured goods or chattels which, at the time the bailment is entered into, have the manufacturer's name or some other distinguishing name painted, printed or stamped thereon. . . .

It will thus be seen that the section invalidates the reservation of title ("ownership") as against all persons *including the original seller* if the appropriate marking is not on the car. The document in which the title is reserved to the seller is valid only if the manufacturer's name appears on the car. The court, in a separate analysis of the point, ruled that the proper name did not appear on the car and that the act was not complied with in this respect.

The court had earlier ruled, it might be said parenthetically, that this legislation applied to the document in question without discussing whether it was a "receipt note", "hire receipt" or an "order for chattels given by a bailee of chattels", all of which are within the section of the legislation. The court calls the document

a "lien note or conditional sales agreement". A "lien note" or "conditional sale agreement" is not within this section expressly. They are not listed with the documents covered by the section, but are listed in other sections of the same act, not relevant to this litigation, along with the documents already mentioned. Presumably on ordinary rules of interpretation a "lien note" expressly included in one section, and omitted in a second, is not intended to be included in the second, especially where specific documents are listed in each case, and the list is largely but not entirely identical. What a "lien note" is remains a mystery. None of the terms is defined for purposes of the legislation. The addition of section 2A to the Manitoba statute in 1946 might, by implication, be held to bring lien notes and conditional sale agreements within section 2, especially if any meaning is to be given to section 2A(2). And the document held to be within section 2 in the *Western Milling* case in 1893, referred to by Wilson J. at p. 287, is very similar to the one in our case.

Finally, even assuming both the acceptance of Mr. Ziegel's argument and the presence of the type of legislation which he supposes exists in Manitoba, are we not met by section 32(2) of the British Columbia Sale of Goods Act? Mr. Ziegel suggests that the subsequent sales in British Columbia are governed by that province's law as the law of the situs of the chattel at the time of the subsequent sales. He is prepared to admit that the Manitoba buyer got only such title as Manitoba law gave him (none, in this case, he says). This buyer now comes to British Columbia and sells to an innocent purchaser. Section 32(2) of the local Sale of Goods Act (in force in most provinces, and similar to section 25(2) of the English act) reads:

> Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for the sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Even on the assumption, then, that Mr. Ziegel is correct in his law throughout, is not Wilson J. correct in holding that the buyer in the British Columbia sale obtained good title by reason of the provision of British Columbia law? Or is this section totally inapplicable to conditional sales? If it is, to what type of sales is it applicable? It may be true that this provision should be amended

to exclude sales under a conditional sale type agreement as is done in Manitoba (Sale of Goods Act, s. 27(3)) or in Alberta (Sale of Goods Act, s. 27(2)). In the case of Alberta, however, the exclusion in the case of conditional sale agreements only applies where the Conditional Sales Act has been complied with and thus, had we Alberta's provision in British Columbia, no difference in result might arise in *Hannah* v. *Pearlman*.

It is suggested, in conclusion, that there are very strong reasons for thinking that Wilson J. was correct, both in result and in his reasoning, on this aspect of the case.

On another aspect of the case, whether the Manitoba requirement as to the placing of the manufacturer's name on the car, and his lordship's holding that the presence of the word "Chevrolet" was not a compliance, it is interesting to note that the statute requires the "*manufacturer's* name or some other distinguishing name" (s. 2), while in subsequent sections dealing with the seller's duty in relation to a retaking of possession or in furnishing information (ss. 2A, 3), the words "bailor" or "bailor of chattels" has been substituted by amendment in 1946 (c. 31) for "manufacturer". It is presumably not the *seller's* name which is required to be on the chattel, as is the case in other jurisdictions where the name provision applies (for example, the Conditional Sales Act of Ontario, s. 2(5)). Some revision of the Manitoba legislation is clearly indicated. This in no way disagrees with the decision of Wilson J. that the word "Chevrolet" is not a compliance with the statute, except in so far as that term is a sufficient "distinguishing name" to indicate the one and only manufacturer of this brand of car, it being remembered that by "manufacturer" the statute clearly does not intend "seller".

It is hoped that these remarks, rather long though they be, will help to clarify some of the doubtful areas in this unnecessarily complicated area of every-day commercial transactions.

GILBERT D. KENNEDY*

TO THE EDITOR:

I have the misfortune to differ from Professor Kennedy in practically every one of his points, but to deal with them all in detail would require another comment. Your learned correspondent also raises a number of new points which are not strictly germane to my own comment, but since they involve questions of general interest in the law of conditional sales I shall endeavour to deal with them also as briefly as I can.

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1. Professor Kennedy raises, incidentally, the question of the proper construction of section 3(5) of the British Columbia Conditional Sales Act, and he suggests that it applies only where the original sale is governed by British Columbia law. I suggest, with respect, that the subsection is perfectly clear and that there is no warrant for reading into it something that is not there. Section 3(5), and its counterpart in the other provincial statutes, as I pointed out in my comment, was introduced to fill the lacuna in the law left by the decisions which held that the then existing registration requirements did not apply where the original delivery of the goods to the conditional buyer took place outside the particular province. The construction contended for by Professor Kennedy would nullify the plain intent of the subsection and emasculate almost to a vanishing point the protection which it was obviously designed to give a subsequent purchaser in British Columbia. No reason has been advanced by him why it should make any difference where the original contract was concluded, and I suggest there is none. It is significant that the point has never been raised before: it was not taken, for example, in *Colonial Finance Corporation* v. *Ellis & Walker*, [1949] 2 W.W.R. 799 (Alta.).

I differ, for the same reasons, with your correspondent's interpretation of section 3(1) of the British Columbia act. The subsection does not say that the conditional sale must have been made within the province because, I suggest again, it is immaterial where it was made. What is important is the fact that "possession of the goods has been delivered" to the buyer in British Columbia, who will thus give the appearance of being the ostensible owner of them unless the requirements of the act are complied with. In *Green* v. *Van Buskirk* (1866), 5 Wall. 307, *B*, who lived in New York, executed and delivered to *V*, who lived in the same state, a chattel mortgage on certain iron safes which were then in the city of Chicago. The registration requirements of the law of Illinois had not been complied with. The United States Supreme Court held that, although the agreement had been concluded in New York, the validity of the chattel mortgage was governed by the law of Illinois because the goods were situated in that state when the mortgage was created. I suggest that that decision would also be followed by the Canadian courts, and that it provides an important indication how section 3(1) of the British Columbia act should be interpreted.

2. I think Professor Kennedy misapprehends what Wilson J. appears to have decided in *Hannah* v. *Pearlman*, [1954] 1 D.L.R. 282. The question at issue was not what the parties to the original contract in Manitoba had agreed as to the passing of the property in the car—there was no dispute about that—but whether effect should be given to their intention. Now I say that it is the *lex situs* of the chattel at the time of the agreement which determines what

effect, if any, and, if so, under what conditions, will be given to the parties' intention, whereas the learned judge (as I read him) would appear to have held that the proper law of the contract determines that question. In the instant case one of the issues before the court was whether the seller had complied with the marking requirements of the Manitoba Lien Notes Act. Was that act applicable because Manitoba was the proper law of the contract, or because it was the *lex situs* of the automobile at the time of the original transaction? I say, with all deference, that it was because Manitoba was the *lex situs;* and *Green* v. *Van Buskirk* (*supra*) proves my point. Incidentally, Professor Kennedy overlooks the fact that there were not one but two *leges sitae* in *Pearlman*'s case, namely, first, Manitoba law, and, secondly, the law of British Columbia, so that even if British Columbia would have been prepared to implement the parties' intention, if no other *lex situs* had intervened, it would still have to reckon with the law of Manitoba, the original *lex situs.*

3. I suspect that my learned friend has not read the cases, *McGregor* v. *Kerr* (1896), 29 N.S.R. 45 (C.A.) et al., which I cited in my comment (I hope I am not doing him an injustice), because if he had he would have seen that the true effect of those decisions was not, as he suggests, to leave it to the law of the place from which the chattel had been removed to regulate its removal into another province—how could it?—but to expose a gap in the law which had to be filled in by the legislature. Those cases lay it down that conditional sales statutes are not to be interpreted extraterritorially. I would not wish to suggest that that is always a sound canon of construction with every act—it obviously depends on the end the legislature had in mind in passing it—but I do say that these decisions establish an authoritative body of case-law, at any rate so far as the law of conditional sales is concerned, which no trial judge can safely disregard.

4. I confess I am puzzled by Professor Kennedy's treatment of *Cline* v. *Russell.* Does it not cover the exact situation in our case, on the assumption I made regarding the consequences of not complying with section 2 of the Manitoba act? Your correspondent says that all that *Cline*'s case decided was that when the Washington code speaks of "purchasers" it means purchasers within the state of Washington and not without it. It was the only point for which I cited the decision (although, as I pointed out, it is also susceptible of a wider interpretation), but, if accepted as correct, and its correctness is not impugned, is it not sufficient to dispose of *Pearlman*'s case? Even Dr. Falconbridge and Dr. Morris concede that the registration requirements of one state need not be given effect to in another state unless those requirements are expressly declared by the first state to be for the benefit of purchasers *everywhere.*

I should like in this connection to draw attention also to the

decision of Beck J. in *Jones* v. *Twohey* (1908), 1 Alta L.R. 267, which actually anticipates the conclusion in *Cline* v. *Russell*. In that case a chattel mortgage had been created in goods which were originally in Saskatchewan, but which were subsequently removed into Alberta and fraudulently sold to an innocent purchaser. It was argued that the mortgage was void because the mortgagee had not complied with the Saskatchewan ordinance which required the mortgage to be re-registered in the "district" to which the goods had been removed. In rejecting this argument the learned judge said (at p. 270):

> The statutes were effective only within the territory over which the legislature which enacted them had jurisdiction, and it seems to me were obviously and necessarily intended to protect creditors and subsequent purchasers seeking to enforce their claim within the *same* judicial territory; and hence that such registration is not necessary to preserve the validity of the mortgage as against creditors and subsequent purchasers seeking to enforce their claim in *other* jurisdictions. [Italics added.]

He also referred with approval to *Marvin*'s case and to *Weinstein* v. *Freyer* (1891), 9 So. 285 (Alabama), which followed *Marvin*'s case.

5. Professor Kennedy questions whether *Marvin*'s case is still good law in the United States today. I should think that it is, in so far as it has been followed in such decisions as *Weinstein* v. *Freyer* (*supra*); *P. A. A. C.* v. *Embree-McLean Carriage Co.* (1897), 40 S. W. 582 (Ark.); *U.S. Fidelity & Guaranty Co.* v. *N. W. Engineering Co.* (1937), 112 So. 580 (Miss.); and *Commercial Credit* v. *Colando* (1940), 15 A. 2d 762 (N.J.), already referred to by Professor Kennedy. This last decision is a particularly strong one because it is the unanimous opinion of fourteen judges with not a single dissent. *Marvin*'s case is referred to with approval in Judge Goodrich's work on the Conflict of Laws (3rd ed., 1949, p. 484, footnote 113), and has been judicially approved in at least two Canadian cases (*Jones* v. *Twohey* (*supra*); and *National Cash Register Co.* v. *Lovett* (1906), 39 N.S.R. 540, *per* Longley J. at p. 554.

If my learned friend is not impressed with this array of authority, then I would refer him also to the English Court of Appeal decision in *Ex parte Melbourn* (1870), 40 L.J. Ban. 25. In that case a contract had been made between husband and wife in Batavia. The Dutch law which prevailed in the colony provided that unless the contract was registered it was void vis-à-vis the husband's creditors. The husband afterwards became bankrupt in England, and the wife claimed to prove against his estate for the moneys owing to her under the contract. It was held that the non-registration in Batavia did not affect the validity of the contract there, but only postponed any claim the wife might have against her husband's

estate to the claims of all other creditors; that the question of priority of creditors *inter se* was governed by the law of the country where the bankruptcy took place; and, therefore, that the wife was entitled to prove *pari passu* with the other creditors. Mellish L.J. said at page 27: "No doubt a bankruptcy taking place there, and an act of law not having been completed with respect to the registration, any claim the wife might have against her husband would, in Batavia, be postponed to the claims of all third parties, but there is no such law here".

The only reasons that Professor Kennedy advances for denying that *Marvin Safe Co.* v. *Norton* is still good law is, first, that it is an old decision. My answer is that it has been followed repeatedly since, the last occasion being as recent as 1940; that the phenomenon of conditional sales has only changed in the interval since 1886 in a quantitative sense but not qualitatively; and that the importance of the *lex situs* as governing property rights in movables was as well understood then as it is, or should be, today. *Cammell* v. *Sewell* (1860), 5 H. & N. 728, and *Green* v. *Van Buskirk* (*supra*), two leading decisions on both sides of the Atlantic, were respectively decided in 1860 and 1866. Secondly, Professor Kennedy argues that the forum today more readily looks to the law governing the acquisition of rights than it did in 1886. No one denies that property rights acquired under the *lex situs* should be recognized everywhere, but the whole gravamen of my argument was that the conditional buyer in *Pearlman*'s case had acquired no property rights under Manitoba law. Your correspondent admits this, but says he had a "power" to pass on a good title—granted, but it was a power strictly limited in its effect to Manitoba, which created it for the benefit of its own community. Actually the use of the word "power" in this context is misleading because it presupposes something that a person may validly do, whereas what is really meant is that a purchaser from the conditional buyer has *a right to assume* that the latter has the power to pass on a good title.

Finally, Professor Kennedy refers to a number of cases which, he says, decide the contrary of *Marvin*'s case. I have examined them all (with the exception of *Associates Discount* v. *McKinney* (1949), 55 S.E. 2d (N.C.), a series of reports that is not available at the Vancouver library), and they seem to me all distinguishable on one or other ground. First, as to *International Harvester* v. *Holley* (1939), 18 N.E. 2d 484: (1) the ultimate decision in that case rested on a point not arising out of the non-registration of the agreement in Illinois; (2) the Indiana court cites no authority in support of its proposition, not even *Krimke*'s case; (3) the court confused contractual and property rights, which may help to explain why it thought that the conditional seller's rights were governed by Illinois law as the law of the contract. Thus the court said at pages

486-487 that Illinois law governed "in the absence of an intention clearly shown that the parties intended that the contract should be governed by the laws of another state". Next, *North Acceptance Corp.* v. *Meeks* (1945), 20 N.W. 2d 504, may be distinguished on the ground that by the law of Illinois no recording of the original conditional sale was necessary, so that the Nebraska court's observations are at best only obiter. Lastly, *Southwest Cattle* v. *Nevada Packing* (1930), 292 P. 587, is equally unhelpful because we are not told where the livestock was at the time of the re-sale, whether in California or in Nevada. The difference is obviously one of crucial importance.

6. Professor Kennedy next suggests that non-compliance with the requirements of section 2 of the Manitoba Lien Notes Act makes the retention of title by the original seller not merely voidable at the instance of innocent purchasers but altogether void, even as between the original parties to the contract. I pointed out in my comment that my views were predicated on the assumption that non-compliance with the Manitoba act made the retention of title not void but only voidable, and I find on looking further into the matter that my assumption was justified. If section 2 be read literally, then non-compliance with its provisions would avoid the *entire* contract and not merely that part which deals with the retention of title. This result follows because the section says "Receipt notes, etc. . . . shall only be valid"; it does not say "shall only be valid *in so far as the seller purports to retain title in the goods*". This is the view which Killam J. took of the section in *Sutherland* v. *Mannix* (1892), 8 Man. R. 541, where he says at page 549: "Now, suppose the statute applies; the sole effect is to invalidate the whole agreement or the bailment, or both. But if this be done, this does not carry over property not already parted with by the original vendor." The other two judges in that case, however (Taylor C.J. and Dubuc J.), would appear impliedly to have favoured the alternative view that failure to comply with the section made the retention of title voidable vis-à-vis an innocent purchaser. In *Cox* v. *Schack* (1902), 14 Man. R. 174, Richards J. said (at p. 183): "In the absence of decisions as a guide, it seems to me that it [section 2] must be restricted to cases where the claim under the lien note would be a fraud upon some purchaser who has bona fide, and without notice of the claim of the lien-holder, given valuable consideration for the goods". He accordingly held that as between the original seller and buyer the title remained in the seller. Neither of these views, therefore, supports Professor Kennedy's interpretation of the section.

My learned friend also questions the meaning of "receipt notes, hire receipts and order for chattels" in section 2 of the Manitoba act, and wonders whether these words are wide enough to include a lien-note or conditional sale agreement. Prima facie, I should

think they are not. In *Sutherland* v. *Mannix* (*ante*) a majority of the court apparently was of the opinion that a promissory note did not come within one of the three categories. Nor do I think that the 1946 amendment to the act (section 2A) helps very much in the interpretation of these terms. First, "lien note and conditional sale agreement" is obviously a borrowing from the Farm Implement Act (R.S.M., 1940, c. 72, ss. 19, 20). Secondly, "order" and "agreement" are mutually exclusive terms. On the other hand, it may be argued that it would be anomalous to hold that an "order" but not an "agreement" is covered by the section, since the need for protecting innocent purchasers is exactly the same in either case. It may also be pointed out that every agreement surely presupposes an "order", which term I take to mean the same thing as an "offer". I entirely agree with Professor Kennedy, however, that the Manitoba act is very poorly drafted and is badly in need of revision.

7. The last point I should like to deal with is the applicability of section 32 of the British Columbia Sale of Goods Act to conditional sales agreements. In my view it has no application at all. It is possible to argue that when section 32 speaks of a "buyer" or "seller" it refers to a sale taking place within the province. But I prefer to rest my opinion on the broader ground that the Conditional Sales Act impliedly excludes section 32. Section 3(1) of the act provides that after possession of the goods has been delivered to the conditional buyer every provision whereby the property in the goods remains in the seller shall be void as against certain persons "unless the requirements of this Act are complied with". It follows logically, I think, that if the requirements of the act are complied with the conditional seller is protected and section 32 of the Sale of Goods Act is excluded. If it were otherwise, much of the Conditional Sales Act would hardly be worth the paper it is written upon. *Mutatis mutandis*, the same reasoning applies to section 3(5) of the act. In *Hannah* v. *Pearlman* the original seller did comply with the statute, in so far as he registered the agreement within twenty days of learning that the car had been removed into British Columbia; hence he was entitled to its protection. If I read him correctly, then this is also the view of the present Chief Justice of the British Columbia Court of Appeal. In *Vowles* v. *Island Finance, Ltd.* (1940), 55 B.C.R. 362, Sloan J.A. (as he then was) said at page 367: "Filing of a conditional sale agreement may be (by reason of section 2 of the Conditional Sales Act) constructive notice to subsequent purchasers or mortgagees claiming from the buyer. . .". If the last mentioned act has not been complied with, then it is not necessary to rely on section 32 of the Sale of Goods Act, because the conditional sales statute affords protection to a wider class of persons than does section 32.

JACOB S. ZIEGEL*

*Of Vancouver, B.C.

TO THE EDITOR:

Your contributor and I do not appear to be far apart on the substance of *Hannah* v. *Pearlman*. He suggests that the situs of the chattel at the time of the transaction is controlling. I agree, but suggest that the *lex situs* looks, subject to overriding questions of public policy, to the proper law of the contract of sale or other disposition to determine what rights are acquired at the time of the transaction in question. Thus, in the *Hannah* case, the situs of the chattel at the time of the last sale was British Columbia. Mr. Ziegel says we should look to Manitoba as the situs of the chattel at the time of the earlier transaction to determine what rights, if any, were acquired by the conditional buyer in Manitoba, rights which he could bring to British Columbia. I should prefer to look to the same Manitoba law, not as the *lex situs* only, but as the proper law of the first sale, to which law we are directed by the law of the situs. Both of us apply Manitoba law and both of us admit that by that law the conditional buyer obtained a "power" to pass a good title to an innocent purchaser. But Mr. Ziegel's interpretation of the Manitoba legislation is that this power limits its protection of subsequent innocent buyers to those who are such within Manitoba, whereas in my own view I find it difficult to imply such a restriction. I am ready to admit that it is more difficult for the conditional buyer to take this mere "power" from Manitoba than it would be for him to take the more formal property rights which Mr. Ziegel admits may be taken with him to British Columbia. I do suggest, however, that the "power" here involved can be looked at as a property right—as one of the aspects of property which the buyer acquired on purchase.

In other incidental respects it will be seen that we differ in the effect to be given to certain legislation and to certain cases. I do see that common ground is not far away. Perhaps after further discussions together we shall find a larger measure of agreement.

GILBERT D. KENNEDY

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The "Dominion" of "Canada"

TO THE EDITOR:

If Professor Scott is right and the full name of this country is simply "Canada", we appear to be in a minority of one among the nations of the world. I think it will be found that the official name of every other country includes some word describing, more or less accurately, its constitutional organization. Repetition would be tedious

and a few examples must suffice: The United Kingdom of Great Britain and Northern Ireland; The United States of America; The Republic of France; The Commonwealth of Australia; The Union of South Africa; The Kingdom of the Jordan; The Principality of Monaco. Of course there is a certain satisfaction in being able to say "wha's like us?", but there must surely be some good reason for such an unusual display of international unanimity.

Professor Scott's comparison with the name of the U.S.A. is misleading. To call this country simply "Canada" is equivalent to calling the U.S.A. "America". That does seem a more logical abbreviation than "the United States" (we don't call France "the Republic", and I sometimes wonder what the United States of Brazil and of Mexico feel about this appropriation of part of their names), and I am not suggesting that we should ordinarily refer to our country otherwise than as "Canada". But if Professor Scott is going to carry his comparison to its logical conclusion he should call this country "the Dominion", or whatever other similar word he may prefer.

R. B. CANTLIE*

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Salvage Award to Wrongdoing Vessel

TO THE EDITOR:

In your June-July issue the following passage from my tenth edition of *Marsden on Collisions at Sea* (p. 275) was adversely commented upon by Mr. Léon Lalande as not reflecting English law correctly:

> One of the consequences of negligence causing collision is that, as the law now stands, neither the owner nor any of the crew of the wrongdoing vessel can recover salvage remuneration for service rendered to the ship with which the collision occurred, although the latter is also in fault for the collision. . . . In *The Beaverford* v. *The Kafiristan*, however, doubts were expressed in the House of Lords as to the soundness of this principle. . . .

The concluding paragraph of Mr. Lalande's comment (p. 678, at pp. 684-685), enlarging upon a similar criticism by him in his review of the tenth edition of *Marsden* in the same issue (p. 686), reads in part as follows:

> The fact is that of the nine judges who sat in the various stages of the *Kafiristan* case, eight, Slesser L.J. in the Court of Appeal being the

*R. B. Cantlie, M. A. (Oxon), of the Inner Temple and Lincoln's Inn, Barrister-at-Law; and of the Bar of Manitoba). Mr. Cantlie is referring to remarks made by Professor F. R. Scott in a book review in the August-September issue, upon which there was an exchange of correspondence between Dr. Eugene Forsey and Professor Scott at pages 1061-1062 of the November issue.

> only exception, expressed some dissatisfaction with the law as thus stated. Doubts were not only expressed *in* but *by* the House of Lords as to the soundness of the principle. A careful reading of these judgments and of those in *The Susan V. Luckenback* makes it quite clear to me that a wrongdoing vessel in a collision is not barred in law from claiming salvage remuneration from the other vessel. The House of Lords seems to have gone to pains to demonstrate that the moral principle invoked by Dr. Lushington [in the *Cargo ex Capella*] was inapplicable, both in equity and as a matter of good admiralty practice, to ordinary collision cases. The opinion of this commentator is that the rule still reproduced in *Marsden* was bereft of principle by the House of Lords and, consequently, that it should not have been applied in the *Robertson* case.

I am unrepentant. The passage quoted from *Marsden* is, I still contend, an accurate statement of English law.

The Beaverford v. *The Kafiristan*, [1938] A.C. 136, is authority for the proposition summarized in the headnote:

> There is no principle of law which prevents a ship which has rendered salvage services from obtaining a salvage award merely because she belongs to the person who also owns the vessel which caused or was partly responsible for the damage giving rise to the necessity for the salvage services.

The question whether a vessel itself to blame is precluded from claiming salvage was deliberately left undecided. This appears clearly from passages in the opinions of Lord Atkin and Lord Wright. Lord Atkin, at page 140 of the report, said:

> I will only add my personal opinion that the reasoning adopted in this case *will* require that careful consideration be given to the question of claims for salvage for services rendered by a vessel which is itself to blame. [Italics added]

Lord Wright said at page 146:

> The case, it was contended, is indistinguishable so far as the claim of the shipowners is concerned from that of a case where a ship, in whole or in part responsible for a collision, performs salvage services but is held to be not entitled to any award for salvage remuneration. The principle in this latter case was said to have been established by authorities such as *The Minnehaha* and *Cargo ex Capella* and other authorities ever since acted upon.

Lord Wright said further at page 149:

> It is, however, said that if the principle that no man can profit by his own wrong excludes a claim for salvage where the salving vessel is the colliding vessel, as was held in the *Cargo ex Capella*, and other cases, the same principle should apply where the salving and the negligently colliding vessel belong to the same owner, because the wrong is committed by the person who salves, acting in either case by his servants. *I shall assume the principle there is established.* I am doubtful of the logic or equity of it, *but do not consider it necessary to express any*

> *final opinion about it here. . . . If the rule laid down in* Cargo ex Capella *is at all sound, it is at any rate excluded where the ship which is the instrument of the salvage is a different ship from that which is the instrument of the negligent collision.* [Italics added]

In the case of *The Susan V. Luckenback*, [1950] P. 197, *The Kafiristan* was applied by Pilcher J. and the Court of Appeal. The question of a wrongdoing vessel herself rendering assistance after a collision was not in issue in this or any other case decided since *The Kafiristan*.

After careful consideration when editing the last edition of *Marsden*, I came to the conclusion that the only possible interpretation of the opinions of Lord Atkin and Lord Wright in *The Kafiristan* was that the decisions in *The Minnehaha* (1861), 15 Moo. P.C. 133, *Cargo ex Capella* (1866), 1 Adm. & Eccl. 356, and subsequent authorities on the point were not overruled. In a passage on page 275 of *Marsden* I commented: ". . . the hostility of the House [of Lords] to the principle of any such disability is clear". This comment is, I think, justified by the language used by Lord Wright in the second of the two passages quoted from his judgment in *The Kafiristan*. If my comment is so justified, it may be that if and when the point is adjudicated upon by the House of Lords the principle established by *The Kafiristan* will be applied to the case of the wrongdoing vessel herself. But however well founded my comment may be it could not, in my view, now be successfully contended that the law on the point has been altered by *The Kafiristan* or any other case.

KENNETH C. MCGUFFIE*

TO THE EDITOR:

Mr. McGuffie is right, on a strict application of stare decisis, that *The Kafiristan* is decided authority only that an award of salvage may be made to a sister-ship of the wrongdoer in the collision; I conceded in my original comment (p. 683) that, strictly viewed, the decision of the House of Lords does not cover the *Robertson* case. But, on that narrow basis, there is no reported authority binding in English law for the proposition that salvage remuneration cannot be recovered by a vessel responsible only in part for the collision when the salved vessel is also at fault for the collision. The English cases are: *Cargo ex Capella* (salvage claimed by master and crew of a vessel partly to blame for the collision against innocent cargo on board the other colliding vessel), *The Glengaber* (claimant wholly to blame for the collision), *The Minnehaha* (no finding of blame against the salvor in the Privy Council). It would seem there-

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fore that *Marsden* never did reflect English law correctly on this point.

In Canada, we have had Sullivan C.J., in the Prince Edward Island case of *The Diana*, [1907] Ex. C.R. 40, following *Marsden* without scrutiny or question, but Sir Matthew Begbie in the British Columbia case, *The Zambesi* (1893), 3 Ex. C.R. 67, formulated what to me is a conclusive argument: the moral principle invoked in Dr. Lushington's *Capella* judgment (no man may profit from his own wrong), even if it had logic or equity here, must be applicable to both parties when the colliding vessels are each at fault for the collision.

LÉON LALANDE*

Books Received

The mention of a book in the following list does not preclude a detailed review in a later issue.

American Bar Research Center Publication No. 1, May, 1954. Part I: List of Unpublished Legal Theses in American Law Schools. Part II: List of Current Legal Research Projects in American Law Schools. Chicago: American Bar Research Center. 1954 Pp. viii, 142, and Supplement A, pp. vi, 21. (No price given)

Canadian Government Publications. Consolidated Annual Catalogue 1953. Ottawa: The Queen's Printer, Office of the Supervisor of Government Publications. 1954. Pp. xvi, 578 ($1.00)

Canadian Government Publications. Monthly Catalogue. Ottawa: The Queen's Printer, Office of the Supervisor of Government Publications. (Yearly subscription: ($3.00)

At the End of the Day. By THE RT. HON. VISCOUNT MAUGHAM. Melbourne, London, Toronto: William Heinemann Ltd. Toronto: British Book Service (Canada) Ltd. 1954. Pp. xiii, 613. ($6.00)

The English Legal System. By A. K R. KIRALFY, Ph.D., LL.M. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1954. Pp. xxiv, 408. ($5 25)

"Full Aid" Insurance for the Traffic Victim: A Voluntary Compensation Plan. By ALBERT A. EHRENZWEIG. Berkeley: University of California Press. 1954. Pp. xii, 72. ($2.00 U.S.)

Learning the Law. By GLANVILLE WILLIAMS, LL.D. (Cantab.). Fifth edition. London, Stevens & Sons Limited. Toronto: The Carswell Company, Limited 1954. Pp ix, 216. ($2 75)

Limitation of Liabilities in International Air Law. By H. DRION. The Hague: Martinus Nijhoff. 1954. P p. xxvii, 389. (24.50 guilders)

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