Case and Comment

TRADE UNIONS—ACTION FOR WRONGFUL SUSPENSION—APPLICABILITY OF KUZYCH V. WHITE—REPRESENTATIVE DEFENDANTS.—*Tunney* v. *Orchard et al.*,[1] a trial judgment from which an appeal has already been launched, does not establish any new principles, but it does serve as a reminder of the obstacles that a member of an unincorporated association must overcome if he is to succeed in an action for wrongful expulsion or suspension. Two of the obstacles will be considered in this comment. In the opinion of the trial judge neither of them prevented the plaintiff from succeeding.

For a number of years before July 1947 the plaintiff had been a member in good standing of Local No. 119 of the International Brotherhood of Teamsters, etc., of America. He was employed as a milk-wagon driver-salesman by Crescent Creamery Company, Ltd. An agreement between the local and the company stipulated that the company would hire only members of the local who were carrying working cards of the local. In July 1947 the plaintiff was charged with an alleged contravention of the local's constitution. The charge against the plaintiff was tried by the local's executive board on August 4th, 1947. The trial culminated in a resolution purporting to suspend the plaintiff from all his rights, benefits and privileges as a member of the local. The suspension resulted in the company terminating his employment.

These events led to an action commenced by the plaintiff on October 6th, 1947, against the seven individual members of the local's executive board, the president, vice-president, secretary-treasurer and business agent, recording secretary and three trustees. The plaintiff claimed a declaration, an injunction and damages. After an eight-day trial Williams C.J.Q.B. decided in favour of the plaintiff, holding that he was entitled to the declaration and injunction as claimed and to damages in the sum of $5,000.

The first obstacle surmounted by the plaintiff was the decision of the Privy Council in *Kuzych* v. *White et al.*[2] The defendants con-

[1] (1953) 9 W.W.R. (N.S.) 625. [2] (1951) 2 W W.R (N S) 679.

tended that the plaintiff was not entitled to resort to the courts unless and until he had exhausted the remedies available to him under the constitution of the local.[3] This contention was rejected by the learned Chief Justice, who found at least three reasons for holding that *Kuzych* v. *White* had no application.

To rely successfully on the principles of the *Kuzych* case the defendants must establish two propositions. The first is that the union's constitution furnishes the aggrieved member with a right of appeal to other bodies within the general structure of the union. The existence of the right of appeal depends on the terms of the constitution and by-laws, which constitute the membership contract between the plaintiff and the union or between the plaintiff and the other members. After considering a mass of evidence so extensive and conflicting that it cannot be summarized here, the Chief Justice decided this issue in favour of the defendants by holding that the constitution of the local contained the following section:

> 45 All decisions of the Executive Board shall be concurred in at a regular meeting of the union before becoming effective. The accused shall have the right to appeal to the General Executive Board.

The second proposition is that, before resorting to the courts, the plaintiff is obliged to exhaust the remedies which, as established by the first proposition, are available to him under the constitution. In *Kuzych* v. *White* that obligation was imposed on the member as a contractual duty by the provisions of the constitution. In the instant case the only provision requiring the plaintiff to exhaust his internal remedies is the following section, contained, not in the constitution of the local, but in the constitution of the international union:

> Every member or officer of a Local Union against whom charges have been preferred and disciplinary action taken as a result thereof, shall be obliged to exhaust all remedies provided for in this Constitution and by the International before resorting to any other Court or tribunal.

An examination of more conflicting evidence led to the finding that the constitution of the international was not part of the contract between the members of Local No. 119. The right to appeal to the General Executive Board, given by section 45 of the local's constitution, is optional. Section 45 does not purport to compel the exercise of the appeal before the member can resort to the

[3] The plaintiff had appealed to the General Executive Board of the international, but the board had informed him that his appeal would not be considered while the present action was pending.

courts. There is therefore no contractual provision requiring the plaintiff to appeal to the General Executive Board and the decision of the Privy Council can consequently be distinguished.

The question that appears to have been overlooked is: Assuming that the union's constitution provides the member with a right of appeal, is the duty to exhaust that appeal a duty which does not exist unless it is imposed as a contractual obligation by one of the terms of the membership contract or is it a duty imposed by law as a consequence of the existence of the right of appeal? What makes the exhaustion of internal remedies a condition precedent to the commencement of an action? Is it a further provision in the contract or is it a rule of law? *Tunney* v. *Orchard* seems to proceed on the theory that the duty to pursue the appeal does not exist unless it is imposed as a contractual obligation by the union's constitution and by-laws. When *Kuzych* v. *White* is read without regard to other cases it may provide ostensible support for that theory.

It is not intended to present an exhaustive analysis of the earlier Canadian cases.[4] They may have left the point undecided, but it is difficult to reconcile them with the view that the obligation to appeal does not exist unless it is provided for by the membership contract. None of them calls for a contractual provision. They speak as if the obligation arose as a matter of law merely because the association's rules permit the appeal and not because they contain another clause stipulating that it is to be a condition precedent. Except in *Kuzych* v. *White* and two, or possibly three, other cases[5] neither the pleadings, evidence or arguments of counsel nor the reasons for judgment make any mention of a mandatory provision. Considering the associations in question and the dates when their constitutions were drafted, it appears unlikely that they contained any such provision. The inclusion of express conditions precedent is a later development.

If the two or three exceptional cases stood by themselves, they might be regarded as supporting, by negative implication, the result in *Tunney* v. *Orchard*. *Kuzych* v. *White et al.* is the leading case in this field and is typical of the exceptional group. Viscount Simon

[4] *Field* v. *Court Hope* (1879), 26 Grant 467; *Essery* v. *Court Pride of the Dominion* (1883), 2 O.R. 596; *Ash* v. *Methodist Church* (1900), 27 A.R. 602, and (1901), 31 S.C.R. 497; *Zilliax* v. *Independent Order of Foresters* (1906), 13 O.L.R. 155; *Re Errington* v. *Court Douglas* (1907), 14 O.L.R. 75; *Kemerer* v. *Standard Stock and Mining Exchange* (1927), 32 O.W.N. 295; *Bertrand* v. *Canadian National Telegraph Co.*, [1947] 1 W.W.R. 762, and [1948] 1 W.W.R. 49.

[5] *Local 1571 I.L.A.* v. *International Longshoremen's Association*, [1951] 3 D.L.R. 50; *McRae* v. *Local No. 1720*, [1953] 1 D.L.R. 327; *Dale* v *Weston Lodge* (1897), 24 A.R. 351.

did rely on a section of the union's by-laws—the Oath of Obligation—by which the member promised expressly that he would not become a party to any suit at law or in equity against the union until he had exhausted all remedies allowed to him by the constitution and by-laws of the union. Furthermore, his lordship did not suggest the possibility of a rule of law that would have the same effect as an express stipulation in the union's constitution. Yet the judgment did not intimate that if the action was premature it was only because of a contractual provision to that effect. The present question did not arise for decision and on it the Judicial Committee preserved a complete silence. What their lordships would have decided if the constitution before them had been similar to that of Local No. 119, in providing for an appeal but in not proceeding to require that it be pursued, can only be regarded as an open question. It is submitted that these cases provide only a minimum of support, if any, for the reasoning in *Tunney* v. *Orchard*. There is, of course, even less ground for claiming that they conflict with it.

If there is a conflict, and it is submitted that there is, it is with the rationale of the earlier cases, ranging from *Field* v. *Court Hope* to *Bertrand* v. *Canadian National Telegraph Company*.[6] Their language is consistent with the view that in refusing relief to the plaintiff they are enforcing, not a term in a contract, but a principle of law, the substance of which is that the court ought not to interfere until the member has exhausted his rights before the domestic fora. But although, it is submitted, their language leads to only one possible inference, none of them deal squarely with the present point or state categorically that the membership contract need not contain the additional provision.

So far as Citrine in his *Trade Union Law*[7] deals with the principle, he treats it as a rule of law illustrating the reluctance of the courts to interfere in the domestic affairs of trade unions. There appears to be no direct authority in the English cases.

American writers,[8] basing their opinions on American decisions, present the principle as a rule of law developed by the courts and existing independently of any contractual stipulation. Professor Clyde W. Summers speaks of it as an expression of judicial policy. They might, however, regard its inclusion in the union's constitu-

[6] See footnote 4, *supra*. [7] Pp. 221-222.

[8] Zechariah Chafee, Jr, The Internal Affairs of Associations not for Profit (1930), 43 Harv. L. Rev. 993, at pp. 1019-1020; Clyde W. Summers, Legal Limitations on Union Discipline (1951), 64 Harv. L. Rev. 1049, at pp. 1086-1092; Labor Relations and the Law (1953, Robert E Mathews, Editor in Charge) pp. 913-917.

tion as strengthening the rule and as reducing the possibility of the courts developing nullifying exceptions.

The rule of law for which this comment contends is perfectly consistent with, and probably has its origin in, the deep-rooted reluctance of the courts to interfere with the internal affairs of clubs, societies, trade unions and similar bodies.[9] The rule does, it must be conceded, lead to the anomaly that a clause in the constitution purporting merely to confer an optional privilege on the aggrieved member will often subject him to an obligation the detriment from which exceeds any benefit to be obtained from the privilege.

The learned Chief Justice gave other reasons for holding that, in the circumstances, the union's constitution prevented the plaintiff from commencing an action. He found that the expulsion was in bad faith, the procedural rules of the union's constitution had not been observed, the fundamental principles of justice had been disregarded, the conduct with which the plaintiff was charged could not possibly be deemed a contravention of the discipline section of the constitution and that all the members of the executive board who purported to try the plaintiff were disqualified for interest. In any event there was no jurisdiction over the alleged charge and the proceedings were entirely ultra vires. This sweeping condemnation of the proceedings may be intimating that the plaintiff is excused from appealing by the mere fact that the proceedings were so irregular and so tainted by bad faith and disqualifying interest, and the tribunal so bereft of jurisdiction, that similar defects in the case of a judicial tribunal would nullify the decision. Some parts of this reasoning may have the support of *McRae* v. *Local No. 1720.*[10] On the other hand, it is not an easy matter to reconcile the substance of it with *Kuzych* v. *White.*

The judgment also dwelt on the fact that the resolution of the executive board suspending the plaintiff was never concurred in at a regular meeting of the local. The resolution was reported to a special meeting of the local held on August 29th 1947, but, after much discussion, the meeting adjourned without taking any positive action. Therefore, the decision of the executive board never became effective. The constitution is open to the interpretation that the only decisions from which an appeal can be taken are those which have, at least in point of form, been made effective by the concurrence of a general meeting. On the interpretation of its

[9] *Dawking* v. *Antrobus* (1881), 17 Ch D 615; *Maclean* v. *The Workers' Union,* [1929] 1 Ch. 602, Citrine, Trade Union Law, pp 221-222

[10] [1953] 1 D L R 327 Commented on in (1952), 30 Can Bar Rev 525.

own contents the constitution does not provide the plaintiff with a right to appeal from his suspension. Consequently it does not succeed in making an intra-union appeal a condition precedent to his right to sue. If there is no right to appeal, there is no duty to appeal and no condition precedent.[11] The availability of further domestic remedies is a *sine qua non* to the application to the rule in *Kuzych* v. *White*.

The other obstacle surmounted by the plaintiff was the procedural problem of enforcing his rights against an unincorporated association.[12] The action was brought against the seven individual members of the executive board sued on their own behalf and on behalf of all other members of Local 119 except the plaintiff. The statement of claim alleged that the plaintiff was suing the defendants as individuals and also as comprising the local's executive board as representatives of the local. A year later, and after the defendants had filed a statement of defence, the plaintiff applied for an order that the defendants be authorized and directed to defend the action on behalf of all other members of the local, except the plaintiff, as well as on their own behalf. The order made by Campbell J. on this application was that the plaintiff be permitted to sue Local No. 119 in contract. From this order, which certainly was not the order asked for, the plaintiff appealed. The Court of Appeal allowed the appeal and ordered (1) that the named defendants represent and defend on behalf of all other members of Local No. 119, except the plaintiff, as well as on their own behalf, and (2) that all other members of the local, except the plaintiff, as well as the named defendants, be bound by the judgment and proceedings in the action.

In framing his action the plaintiff relied on Rule 58. It provides that:

> 58. Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorized by the court to defend, on behalf of. or for the benefit of, all.[13]

The first remedy claimed by the plaintiff was a declaration that the action taken by the local's executive board in suspending the plaintiff from his rights, benefits and privileges as a member of the local was null and void. The cases are virtually unanimous in holding that an action for a declaration establishing the right to member-

[11] *McRae* v. *Local No. 1720*, footnote 10, *supra*

[12] On this point reference should be made to: Dennis Lloyd, Actions Instituted By or Against Unincorporated Bodies (1949), 12 Mod. L. Rev. 409, and E. K. Williams, Some Developments of the Law Relating to Voluntary Unincorporated Associations (1928), 6 Can. Bar Rev. 16

[13] Ontario R. 75 is identical: English O. 16, r. 9, is similar

ship in an association can be maintained against representative defendants.[14] The only persons who could be interested in opposing the claim are the persons who are members of the association at the time when the action is commenced—the persons with whom the plaintiff will become a fellow member if he succeeds. It is not stretching the rule too far to hold that every present member has "the same interest" in opposing the plaintiff's claim. Authority to the contrary is completely lacking and, unless Rule 58 is to be reduced to a complete nullity, the opposite view cannot be supported. If the rule does not apply to this situation, it is difficult to imagine one to which it would apply.

The right to obtain the second remedy claimed by the plaintiff —damages—in an action against representative defendants lies on the boundary between procedure and substantive law and is the subject of the most bewildering maze of conflicting authorities. In the first few years of the present century *The Taff Vale Railway Company* v. *The Amalgamated Society of Railway Servants*[15] and the *Metallic Roofing Company* case[16] appeared to have decided it unequivocally in favour of the plaintiff. In a later era, *Local Union No. 1562, U.M.W.A.* v. *Williams*,[17] *Barrett* v. *Harris*,[18] *Robinson* v. *Adams*,[19] *Hardie and Lane, Ltd.* v. *Chiltern et al.*[20] and *Barker* v. *Allanson et al.*[21] were as unequivocal in rejecting the earlier cases and in deciding the controversy in favour of the defendants. The most recent cases,[22] instead of clarifying the issue, divide between the two views, demonstrating that neither has become conclusively established and that each is constantly gaining new support. There is more than one jurisdiction where the cases cannot be reconciled. One view is animated by sympathy for the plaintiff, and the other by respect for traditional modes of procedure, and, perhaps, by the thought that some of the represented members may be absolutely free from any possibility of liability to the plaintiff.

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[14] *Toews* v. *Isaacs et al.*, [1928] 1 W.W.R. 643, and [1929] 1 W.W.R. 817; *Kuzych* v. *White et al. (No. 6)*, (1952) 6 W.W.R. (N.S.) 567; *Andrews* v. *Salmon* (1888), W. N. 102; *Parr* v. *Lancashire etc. Federation*, [1913] 1 Ch. 366. See also: *Wood* v. *McCarthy*, [1893] 1 Q.B 775; *Ideal Films Ltd.* v. *Richards*, [1927] 1 K.B. 374.

[15] [1901] A C. 426.

[16] *The Metallic Roofing Co. of Canada* v. *Local Union No. 30 et al.* (1903), 5 O.L R. 424; (1905), 9 O.L.R. 171; (1905), 10 O.L R. 108; (1906), 12 O.L.R. 200; (1907), 14 O.L.R. 156; [1908] A.C. 514.

[17] (1919), 59 S.C.R. 240.

[18] (1921), 51 O.L.R. 484.

[19] (1924), 56 O.L.R. 217.

[20] [1928] 1 K.B. 663.

[21] [1937] 1 K.B. 463

[22] Compare *Smart et al* v *Livett et al*, (1950) 1 W.W.R. (N.S.) 49, and *Campbell* v *Thompson et al.*, [1953] 1 All E.R. 831, with *Walker* v. *Billingsley et al.*, (1952) 5 W W.R. (N.S.) 363.

The instant judgment does not provide any direct support for either view. The Chief Justice felt that he was bound by the order of the Court of Appeal and that he was not entitled to consider the purpose and effect of the representative action in the light of the facts. It is submitted that this approach to the trial of an action against representative defendants requires the incisive consideration of an appellate court.

The order of the Court of Appeal contained two distinct branches. The first ordered that the named defendants represent and defend on behalf of all other members of Local No. 119, except the plaintiff, as well as on their own behalf. Does this part of the order preclude the named defendants from contending at the trial of the action that the action is not one that can be brought against representative defendants? In defending on behalf of their fellow members, should not the named defendants be entitled to raise any relevant objection, including the objection that the form of the action is misconceived and that judgment for damages should not be given against the unnamed members or against their property? If the named defendants cannot raise that objection at the trial, it can never be raised. The represented members cannot defend on behalf of themselves because they are not parties to the action. It is implicit in Rule 58 that the named defendants cannot represent the other members or defend on their behalf unless and until they have been authorized to do so by an order of the court. Unless the named defendants can raise the objection at the trial of the action, they can never raise it at a time when they are defending on behalf of the others. Although no precise authority can be found on the point, it is submitted that there is substantial ground for the argument that, in spite of the representation order, the named defendants are entitled, and even bound, to contend at the trial of the action that judgment for damages cannot be given against the other members or against any part of their property. The present decision seems to involve the rejection of that contention.

The other branch of the order ordered that all other members of the local, except the plaintiff, as well as the named defendants be bound by the judgment and proceedings in the action. This clause has been included in some representation orders,[23] but omitted from others;[24] the practice is not uniform. Whether Rule 58

[23] *The Metallic Roofing Co. of Canada* v *Local Union No. 30 et al.*, referred to in footnote 16, especially (1905), 9 O. L.R. 171, and (1905), 10 O L.R. 108; *Cotter* v *Osborne* (1909), 10 W L R 354; *Sykes* v. *One Big Union et al.* (*No 2*), [1936] 1 W W R 237

[24] *May* v. *Newton* (1887), 34 Ch. D 347 Specimens of the English

authorizes the inclusion of such a provision may be open to doubt; probably a declaration to that effect is to be implied in whatever form of order the rule does permit to be made. The present submission is that, no matter what may be contained in the representation order, either expressly or by implication, it cannot be construed as denying the right to contend, in the course of the trial, that the form of the action does not entitle the plaintiff to damages against the represented members. If the contrary is true, then a calamity has befallen the other members as a result of an order made at a time when neither they, nor anyone entitled to speak for them, were able to submit their argument to the court.[25]

The formal judgment exemplifies the quandary arising from any attempt to award damages against represented parties. It awards the plaintiff "judgment for damages of $5,000.00 against the defendant members of the said executive board of the defendant Local Union No. 119 in their individual capacities, and also against the defendant Local Union No. 119 as represented by the members of the said executive board". The obvious motive is to enable the plaintiff to recover his damages from the local's property.

How can damages be awarded against the defendant local union? It is not an entity. Even if it is an entity, it is not a defendant and it is not represented by the named defendants. One of the underlying premises of the proceedings is that the members of the executive board represent the other members of the local as individuals, not the local union as an entity, and moreover that the need for representation has its origin in the fact that the local union is not a legal entity which can be either sued or represented. What is often referred to as the union's property is really the property of the members.

This sudden emphasis on the local union is traceable to a realization of the impropriety of awarding damages against the absent members. The form of the judgment only increases the confusion. The phrase "against the defendant Local Union" can only mean "against all other members of Local Union No. 119, but to be enforceable only against the property which they own in common as members of the said local". In substance the judgment is a judgment against each member personally and is enforceable against some part of his property. The anomaly of awarding damages

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form will be found in The Encylopaedia of Court Forms etc., Vol. 12, p. 220, and 1953 Annual Practice 248.

[25] *The Metallic Roofing Co. of Canada* v *Local Union No. 30 et al.* (referred to in footnote 16), especially (1907), 14 O.L.R. 156, at p. 160, is opposed to the argument advanced in these two paragraphs.

against persons who have not been named as defendants is not obviated by restricting the class of property that is to be exigible under execution. It has been said that the plaintiff's statement that he does not intend to seek damages, except as they may be realized out of the collective assets, is nothing to the purpose in an action against representative defendants.[26] Is there any authority for the judgment curtailing the property against which execution may be issued? In the case of partners who are sued in the firm name the rules of court[27] make special provision as to the property against which execution may be issued, but there is no comparable procedure in the case of the members of an association who are sued by representative defendants.

Under this judgment, what is the position of that part of the union property belonging to members who are not liable to the plaintiff, for example, the plaintiff himself and those members who joined after the cause of action arose or after the action was commenced? What is the financial burden on members who, though they were not named as defendants, were legally responsible for the plaintiff's damages, but who withdraw from the union before its property is seized under execution? The judgment appears to assume that the union's property is in some way subject to a lien or impressed with a trust, under which it continues to be liable for the obligations of its temporary owners even after its ownership has been changed by the withdrawal of some members and the admission of new members. The judgment becomes in effect a judgment against the property of the union rather than a judgment against the members of the union.

The reported attempts to award and enforce money judgments against persons who are not named as defendants except through representatives lead to such a series of procedural dilemmas that one is led to doubt the validity of the entire proceedings.[28]

Among the named defendants were the three trustees of the local's property. According to some cases,[29] the inclusion among the defendants of the trustees in whom the common property of

[26] *Toews* v *Isaacs et al*, [1928] 1 W.W.R. 643.

[27] English Order 48a, r. 8.

[28] A form of judgment awarding damages against the members of a union and declaring that the property of the union is liable to satisfy the plaintiff's claim is found in *The Metallic Roofing Co. of Canada* v. *Local Union No. 30 et al.* (1906), 12 O.L.R. 200, and (1907), 14 O.L.R. 156. An earlier decision in the same action—(1905), 10 O.L.R. 108—had displayed more hesitation on this point. Compare *Walker* v. *Sur et al.*, [1914] 2 K B. 930, and *Barrett* v. *Harris* (1921), 51 O.L.R. 484. See also: *Hollywood Theatres Ltd.* v. *Tenney et al.*, [1940] 1 W.W.R. 337.

[29] *Mitchell* v. *Forster* (1928), 35 O.W.N. 203. Many of the other cases contain opinions to the same effect

the members is vested provides a firm foundation for a procedure that might otherwise be open to objection. Other cases[30] take the view that the addition of the trustees is nothing but a device—something in the nature of a specialized form of equitable execution—designed to assist in the enforcement of the judgment after it has been obtained, but that it has nothing to do with the anterior problem of establishing liability against the owners of the property. The problem of using the property for the payment of the plaintiff's damages can hardly arise until the court has decided that its owners are liable to the plaintiff.

From the formal judgment it is not perfectly clear whether the injunction against enforcing the suspension of the plaintiff and interfering with him in the enjoyment of his membership is directed against every member of the local or only against every member of the executive board. If, as in some of the earlier cases,[31] it is directed against all the members of the local, then the same problems arise once again, though the authorities are fewer and the conflict among them less conspicuous. An injunction should not be granted against represented persons without careful consideration of the judgment of the House of Lords in *Marengo* v. *Daily Sketch and Sunday Graphic Ltd.*[32] Their lordships were so convinced that an injunction should not take the form of a direct order against persons who were not personally before the court that they directed a change in the common form of injunction, in spite of the fact that it had been used, as a matter of course, for over a century.

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CONFLICT OF LAWS—RECOGNITION OF FOREIGN DIVORCES IN NEWFOUNDLAND.—It may be assumed that Newfoundland, as one of the oldest jurisdictions where the common law operates, recognizes foreign divorces upon the same basis as other common-law jurisdictions, even though that renowned colony, Dominion, now province, did not before its entry into federation as Canada's tenth

[30] *Ideal Films Ltd.* v. *Richards et al.*, [1927] 1 K.B. 374, explained and commented on in *Barker* v. *Allanson et al.*, [1937] 1 K.B. 463, and *Toews* v. *Isaacs et al.*, [1929] 1 W.W.R. 817.

[31] *The Metallic Roofing Co. of Canada* v. *Local Union No. 30 et al.*, footnote 16; *Vulcan Iron Works Co.* v. *Winnipeg Lodge, No. 174* (1909), 10 W.L.R. 421, and (1911), 16 W.L.R. 649.

[32] (1948), 117 L.J.R. 787.

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province in 1949[1] grant divorces at all.[2] Has Newfoundland's new status as a province of Canada widened the potential horizon so far as recognition is concerned? The basis for recognition is, roughly, threefold. A common-law jurisdiction will recognize a foreign divorce (i) granted by a court of the territory in which the parties were domiciled at the time of the divorce, (ii) granted on a jurisdictional basis similar to that upon which a divorce could have been obtained in the present forum, and (iii) recognized as valid by the law of the domicile even though granted elsewhere. The first of these three need not trouble us here except to observe that this basis is applicable, it is submitted, despite the inapplicability of the second basis, that is, despite the absence of any jurisdiction to grant divorces in the territory where the validity of the foreign divorce is being recognized. Thus a divorce granted in Nova Scotia to persons domiciled in Nova Scotia would be recognized in Newfoundland even though that province does not grant divorces. The second basis (resting upon the recent decision of the English Court of Appeal in *Travers* v. *Holley*,[3] already discussed in this Review[4]) does not apply to Newfoundland. except that, in so far as legislative (as opposed to judicial) divorces may not have been recognized in Newfoundland before federation,[5] it would be difficult now to reject them, if granted by a legislature to persons domiciled within the territory over which it legislates.

It is the third basis where it might be thought that Newfoundland's horizon would be widened—the basis founded upon *Armitage* v. *A.G.*[6] and *Walker* v. *Walker*.[7] This rule would, of course, apply to Newfoundland both before and after federation. Thus a Nevada divorce granted to persons domiciled in New York would be recognized in Newfoundland, both before and after federation, provided that New York would recognize the divorce as valid (as it will in some situations under the provisions of the United States

[1] 12, 13 & 14 Geo. VI, 1949, c. 22 (U K.).

[2] Divorces may now for the first time be obtained by domiciled Newfoundlanders by special act of the Canadian parliament; to which petitions for divorce are directed each year, from Quebec in large numbers, in very limited numbers from Newfoundland, and conceivably from any other part of Canada.

[3] [1953] P. 246; [1953] 2 All E.R 794 (C.A.).

[4] (1953), 31 Can. Bar Rev. 799, 1077; see also Griswold (1954), 67 Harv. L. Rev 823.

[5] I do not believe that such divorces would not be recognized, assuming they were granted to persons domiciled in the territory of the legislature which grants the divorce, but there have been dicta occasionally in judgments and textbooks to the effect that a legislative divorce would not be valid in circumstances where a judicial one would be.

[6] [1906] P. 135 (Barnes P).

[7] [1950] 4 D.L.R 253 (B C.C.A.).

Constitution requiring one state to give full faith and credit to another state's decisions). In Canada there is no "full faith and credit" clause. But there is a federal statute—the Divorce Jurisdiction Act, 1930[8]—under which a wife may petition for divorce in the province of Canada in which she was domiciled with her husband immediately before his desertion (provided that province's courts have divorce jurisdiction and the desertion has extended for two years). Thus a wife deserted in Nova Scotia by a husband domiciled there until the desertion, and now domiciled either elsewhere in Canada or abroad, may petition for divorce in Nova Scotia. Her divorce granted there would be recognized in the other eight provinces of Canada (apart from Newfoundland) because the Divorce Jurisdiction Act, 1930, is, as a federal statute, part of the law of all nine provinces (up to 1949), even though there may be no occasion for its use in some provinces because they have no divorce court. And, flowing from this, before 1949 such a Nova Scotia divorce would be recognized in Newfoundland if the husband had deserted to another Canadian province or territory where he had established domicile, because, the divorce being recognized as valid in the province or territory of domicile, would be recognized in Newfoundland on the basis of the *Armitage* case. On the other hand, if the husband had deserted Nova Scotia for a non-Canadian domicile, Newfoundland, before 1949, would probably not have recognized the special Nova Scotia divorce just referred to. Has Newfoundland's entry into federation made a difference? Normally it would have been thought that all federal statutes would after federation apply to the new province. But by term 18 of the Terms of Union of Newfoundland with Canada, confirmed and given the force of law by the British North America Act, 1949, No. 1,[9] the laws of Newfoundland in force at the union shall, subject to the terms, continue until altered by appropriate authority, and the statutes of the Canadian parliament in force at the union "shall come into force in the Province of Newfoundland on a day or days to be fixed by Act of Parliament of Canada or by proclamation of the Governor General in Council issued from time to time".

Proclamations have been issued from time to time bringing a large number of Canadian statutes into force in Newfoundland. More recently a general proclamation[10] was issued bringing into

[8] Statutes of Canada, 1930, c. 15; now R.S.C., 1952, c. 84.

[9] 1949, c. 22 (U.K.) The terms of union appear as a schedule to the statute.

[10] SOR/52-236; amended, to include one further statute in the schedule, by a further order in council (SOR/52-294) dated June 28th, 1952.

force in Newfoundland as of July 1st, 1952, all the statutes of Canada that were in force at the date of union and were still in force on July 1st, 1952, "but not including those set out in the schedule hereto". The schedule of twelve statutes includes the Divorce Jurisdiction Act, 1930. This would seem to mean that the Divorce Jurisdiction Act, 1930, is not in force in Newfoundland. It was probably specially excluded because Newfoundland has no divorce court, but neither has Quebec, where it is in force. The 1930 statute is carefully worded in order not to give divorce jurisdiction to a province not exercising it, so that the statute's introduction into Newfoundland would not have created a divorce court. Has this specific exclusion from being "in force" in Newfoundland had the effect of continuing Newfoundland's pre-federation non-recognition of divorces granted under the Divorce Jurisdiction Act, 1930, to wives whose husbands are domiciled outside Canada?

From a purely technical point of view, it might at first glance seem to follow logically that, as the old Newfoundland laws are continued until altered and as only those federal statutes are in force which are proclaimed in force, there is no change. But is this correct? Does the validity in Newfoundland (or any other province) of a divorce granted under the Divorce Jurisdiction Act, 1930, stand simply upon the question whether or not that statute is formally in force as part of the law of the jurisdiction where it is questioned? That statute of 1930 says nothing about recognition in any province or territory of Canada. It is simply a statute conferring *jurisdiction* on divorce courts to grant a divorce to a wife not domiciled within the province where the divorce is obtained. The basis of recognition of divorces in Newfoundland is valid jurisdiction in the court which granted the divorce. Recognition in Newfoundland, it is thought, does not depend upon the statute being "in force" in Newfoundland, but upon its being in force where the divorce was granted and being the statute of a legislature which Newfoundland, as part of the territory within the purview of that legislature, cannot effectively challenge—a statute enacted by what is as much, today, Newfoundland's legislature, for this purpose, as it is for the same purpose the legislature of Nova Scotia.

It is recognized that there is a difference between Quebec and Newfoundland in this situation—the statute is "in force" in Quebec in the sense that it is a part of the law of Quebec.[11] It is not yet

[11] Note should be taken of the federal Interpretation Act, R.S.C., 1952, c. 158, s. 9(1), though probably it is of little assistance on this point. It reads: "Every Act of the Parliament of Canada, unless the contrary intention appears, applies to the whole of Canada".

part of the law of Newfoundland in the sense of being "in force" there. But my submission is that the difference is not material here because it is not the law in force in Quebec or Newfoundland that is relevant. What is relevant is the validity of the jurisdiction exercised by the court from which the decree is issued. By reason of its place in federation Newfoundland cannot deny the validity of jurisdiction given to the courts in another component part of the federation by the *federal* legislature (assuming constitutional competence, of which there is no question here). This does not say that status or jurisdiction conferred by a *provincial* legislature (for example, the status of a legitimated child, or divorce jurisdiction, assuming for the moment provincial competence constitutionally to legislate in relation to divorce) will automatically be regarded as valid and recognized by another province without reference to the ordinary rules of private international law. On the other hand, it *does* suggest that where the jurisdiction is a statutory one conferred upon some courts in a territory by the legislature having over-all jurisdiction, the normal rules of private international law will give effect to decrees made under that statute *throughout* the territory of that legislature.

On the other hand, if I am mistaken as to the basis of recognition, I suggest that there is a sufficient elasticity in the common-law rules of recognition of foreign divorces to meet and include the type of situation posed by the exclusion of the 1930 statute from those statutes "in force" in Newfoundland, when the whole picture is examined. What is the fundamental concern of the common-law rules of private international law when it looks at the problem of recognition? There is an attempt to say that a person's status as married or divorced shall be determined by the law of the district or territory with which he is then most closely associated—that in which he is domiciled. To this basis, of course, there are local modifications made by appropriate authority in any particular district. Normally that appropriate authority is considered to be the legislature. In a federation, this may be the local legislature, the general legislature or both (if they have concurrent power). Is there any reason to think that this new situation would not be capable of being included within the common-law rules of recognition, even though technically the appropriate legislature has made no law that is "in force" yet in the territory of the forum? A little relaxation (for example, of the term "foreign") in the application of the rules of private international law within a federation is a step not beyond the scope which the common law has shown for development.

In stopping at this point, it is realized that there are other situations apart from the two discussed. Noted already are (i) a statute specifically declared to be not yet in force in a *new* territory (the 1930 statute in relation to Newfoundland). (ii) a statute in force in a province in the sense that it is a federal statute not exempted from validity or operation in that province, but because of its terms not directly applicable to that province (the same 1930 statute in relation to Quebec). In addition there are (iii), a statute specifically applicable to only one or more provinces (the statute conferring divorce jurisdiction on the courts of Ontario only); and (iv) a statute applicable only to such provinces or parts of provinces to which by proclamation or otherwise it is declared applicable (the Juvenile Delinquents Act. also exempted from operation in Newfoundland). It is also appreciated that it is one thing to discuss the effect in Newfoundland of acts done elsewhere in Canada under a jurisdictional statute not yet "in force" in Newfoundland (as discussed). It *may* be something entirely different to discuss the effect under a substantive law statute, such as that permitting, for example, a man to marry his deceased wife's sister (also not yet in force in Newfoundland by the terms of the same order in council), where one or both of the parties to the second marriage are domiciled in Newfoundland and the marriage is celebrated in Nova Scotia. It is further to be noted that the effective area within which the problem discussed in this comment may arise is limited. Let us use the same illustration as that in the body of the comment — a divorce in Nova Scotia upon the application of a wife deserted there by a husband who was domiciled there immediately before the desertion but is now domiciled elsewhere. If the "elsewhere" is another part of Canada, we have already noted the recognition of this divorce in Newfoundland both before and after union under the principle of *Armitage* v. *A. G.* If the husband's new domicile is outside Canada. the principle in the same case may still be applicable if his new domicile recognizes as valid the Nova Scotia divorce. The probability is that most jurisdictions to which he may desert and establish his new domicile are jurisdictions that will either on the basis of *Travers* v. *Holley* recognize divorces granted under Canada's deserted wife legislation (for example, England and most of the Commonwealth, and possibly France and other continental countries) or will treat the wife as having a separate domicile in Nova Scotia and as therefore capable of securing a divorce with international validity (for example, the states in the United States of America). This leaves, largely. only such places as Ire-

land (where it is assumed no divorce is available) for potential operation of the problem in this comment.

GILBERT D. KENNEDY*

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MORTGAGES—FORECLOSURE AND SALE IN NOVA SCOTIA—WHETHER SUPREME COURT OF NOVA SCOTIA HAS JURISDICTION TO PERMIT REDEMPTION AFTER THE SALE—EFFECT OF CONFIRMATION OF SHERIFF'S REPORT—NOVA SCOTIA PRACTICE.—The fact that the procedure on foreclosure and sale in Nova Scotia is distinctive has been stated on many occasions, but the case of *Pew* v. *Zinck*, decided last year by the Supreme Court of Canada,[1] emphasizes the problems arising from the difference between the practice in Nova Scotia, on the one hand, and in England and other Canadian provinces, on the other. In England, an order nisi is first required, which fixes a time for payment, and the barring of the equity of redemption does not occur until the granting of a final order. In Nova Scotia, the first step is to apply for an order for foreclosure and sale immediately on default of appearance. This order does three things: (1) fixes the amount due as principal and interest on the mortgage sought to be foreclosed; (2) provides that the equity of redemption is barred and forever foreclosed; and (3) orders a sale of the property by the sheriff after proper notice. After the property has been sold pursuant to the foreclosure order and a deed delivered to the purchaser by the sheriff, it is the practice to apply to the court for an order confirming the sheriff's report. It should be borne in mind that what occurs in Nova Scotia is a judicial sale.

The facts in *Pew* v. *Zinck* are not complicated. Under the Nova Scotia practice, a mortgagee brought an action against a mortgagor for foreclosure and sale of certain lands. He was granted an order of foreclosure and sale in the usual form: the order provided that the mortgagor's rights in the land should be foreclosed and that the mortgaged lands should be sold by the sheriff of the county unless the amount owing were paid before the day of sale. It was further provided that once a sale was made the sheriff should execute a deed. The property was advertised to be sold at auction on March 25th, 1950, and on that day it was purchased by the highest bidder, who paid the required deposit. On April 13th, 1950, before

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[1] *Pew* v. *Zinck and Lobster Point Realty Corporation et al.*, [1953] 1 S.C.R. 285, 2 D.L.R. 337; reversing [1952] 2 D.L.R. 359, 29 M.P.R. 201; which had affirmed [1951] 3 D.L.R. 73. An appeal has been taken to the Judicial Committee of the Privy Council.

the execution of a deed to the purchaser, redemption was sought by the mortgagor, who tendered to the mortgagee the amount then owing on the mortgage. About a week later, on April 21st, the purchaser paid the balance of the purchase price and requested delivery of the deed. The sheriff, having been informed that the mortgagor was making an application to court to redeem the mortgage, refused to deliver the deed.

On May 6th, 1950, the mortgagee moved for confirmation of the sale or, in the alternative, for a declaration that the mortgagor was entitled to redeem. An order was made by Hall J. that the mortgagor was so entitled. The history of the subsequent proceedings may be briefly related. The purchaser applied to the Supreme Court of Nova Scotia *in banco* for leave to appeal from Hall J.'s order, and leave was granted.[2] Obviously the purchaser, though not a party to the foreclosure action, was prejudicially affected by the order. Her rights in the property, if any, would be determined by the answer given to the question when in equity, and in the circumstances of the case, the mortgagor loses his right to redeem.

Meagher J. had discussed this question at length in *Stubbings* v. *Umlah*, concluding:

> An absolute right of redemption exists in this Province, up to the completion of the sale, at least, if not, as I am inclined to think it does, up to the granting of the final order of confirmation.
>
> Even after that, especially where the plaintiff is the purchaser, and retains the title, the court, it seems to me, possesses a discretionary power to decree redemption, just as the court in England possesses such a power after a foreclosure order absolute has been made [3]

In *Ritchie* v. *Pyke et al.* Meagher J. again considered the problem:

> Then, it was said that no period for redemption was fixed. Under our practice, which has prevailed for nearly half a century, at least, no time for redemption is fixed where a sale is ordered; but the right to redeem, of course, endures until the proceedings have been finally confirmed by order of the court, after the sale, payment of the price, and conveyance to the purchaser have been completed.[4]

In allowing redemption in the instant case, Hall J. referred to *Stubbings* v. *Umlah* and took the view that he was bound by the prevailing practice of the court as enunciated by Meagher J., adding: "in any event I exercise my discretion in favour of the defendants". The Supreme Court of Nova Scotia *in banco*, although denying the absolute right to redeem, decided that there was a discretion to grant redemption and remitted the case to the trial judge to exer-

[2] [1951] 1 D.L R. 623.
[3] (1900), 40 N S R. 269, at p 271. [4] (1904), 40 N.S.R. 476, at p. 478.

cise the discretion in the light of any new evidence that might be adduced.[5] Whereupon Hall J. exercised his discretion in favour of redemption and the case came before the full bench a second time. On this occasion a majority of the court held that the equities in favour of redemption outweighed those against it. Ilsley C.J. (MacQuarrie J. concurring) considered that the grounds for the exercise of the equitable discretion were insufficient and dissented. The Supreme Court of Canada, in a unanimous judgment, denied that the right of redemption survived after the property had been sold by the sheriff under a court order. This denial was expressed in two judgments, one delivered by Rand J. on behalf of himself and Kellock, Estey and Cartwright JJ., the other by Locke J.

To appreciate the legal significance of the decision of the Supreme Court of Canada one must understand the distinctive Nova Scotia procedure on foreclosure and sale as contrasted with foreclosure proceedings in England. Rand J. described the Nova Scotia practice as follows:

> The rule, as far back as 1833, authorized and since then followed, is that long ago adopted in Ireland under which, instead of foreclosure as in England, the realization of a mortgage is by way of sale. The order formally forecloses the equity of redemption and directs a sale, but reserves a further right of redemption until the day of the sale. By c. 140, R.S.N.S. 1923, continuing, in this respect, the provision of preceding enactments, the sale, unless otherwise ordered by the court, shall be made by the sheriff of the county in which the lands lie, who is authorized to execute a deed which 'when delivered to the purchaser shall convey the land ordered to be sold'. The purchaser can pay the price and the sheriff execute the deed immediately upon acceptance of the bid. The sheriff renders a report of the proceedings to the court, but whether that report must be confirmed is disputed. Rule 8 of Order 51 of the Supreme Court practice provides that where an order is made directing any property to be sold 'the same shall, unless otherwise ordered, be sold, with the approbation of the court or a judge, to the best purchaser that can be got, the same to be allowed by the judge, and all proper parties shall join in the sale and conveyance as the judge directs'.[6]

In the opinion of the Supreme Court of Canada the gist of the Nova Scotia procedure is the statutory power to make an out-and-out conveyance of both the legal and beneficial interests of the mortgagor in the land.[7] Once the sale is concluded, therefore, the mortgagor's right of redemption is extinguished. As to when the sale *is* concluded, both Rand and Locke JJ. seem to agree that, in the

[5] [1951] 2 D.L.R. 667, 27 M P.R 1.

[6] [1953] 1 S.C.R. 285, at p. 286.

[7] See, for example, the statement of Rand J., *ibid.*, at p. 289: ". . . on the acceptance of a bid either a contract is entered into by the purchaser

absence of fraud, mistake, misconduct by the purchaser and similar grounds, which would justify the court in setting aside the sale,[8] the sale is concluded when the bid is accepted by the sheriff.

This view of the effect of the prescribed Nova Scotia procedure is in sharp contrast with that taken by all the members of the Supreme Court of Nova Scotia The Nova Scotia judges regarded what Ilsley C.J. called "the doctrine of the finality of the sale" as inconsistent with the fundamental equitable principle hitherto generally accepted in Nova Scotia practice that "a Court of Equity is always ready to hear a meritorious application for relief against a foreclosure".[9]

Taking the view it did of the matter, the Supreme Court of Canada did not feel called upon to explore the merits of the mortgagor's case. Here the sole question was "whether or not under the law of Nova Scotia the court has jurisdiction to allow a mortgagor of lands to redeem after a sale under decree but before conveyance and before a report has been made to the court and approved".[10] In the result, the Supreme Court of Canada denied that in the circumstances the Nova Scotia court had jurisdiction to permit redemption. In their judgments both Rand and Locke JJ. considered the effect of rule 8 of order 51 of the Supreme Court of Nova Scotia, which appears to require that the sheriff's report be later confirmed by the court. Doull J. had raised the point when Hall J.'s order first came before the Nova Scotia Supreme Court:

> It may be worth noting that while in my opinion the return of the Sheriff's report and the confirmation of this report do not affect the sale or the title of a purchaser on a foreclosure sale, it does not follow that the Sheriff's report is unnecessary It is an important finality to the record of the proceedings in the Court.[11]

Locke J. found that confirmation or approval of the report was required; Rand J., considering that it was immaterial whether or

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with the court in its own capacity or as representing the parties in interest, or in the case of Nova Scotia, conceivably with the sheriff, that the one will buy and the other sell the land, subject only to the approval of the report; or the purchaser submits to the jurisdiction of the court on those contractual terms".

[8] Rand J., *ibid*, at p. 289: "On what grounds, then, may the court refuse to confirm? Although it would be impossible to enumerate them all, fraud, mistake, misconduct by the purchaser, error or default in the proceedings are well established. But the controlling fact to which these grounds give emphasis, is that the purchase can be defeated only by juridical action" See also Locke J , *ibid.*, at p. 304

[9] This statement of the principle is from the judgment of Meredith C.J. C P. in *Dovercourt Land Building and Savings Co.* v. *Dunvegan Heights Land Co.* (1920), 47 O.L.R. 105, at p. 108, cited by Ilsley C J , [1952] 2 D L.R. at p. 366, and Parker J , *ibid*, at p. 373.

[10] [1953] 1 S.C.R 285, *per* Rand J. at p 286

[11] [1951] 2 D L R 667, at p 682

not confirmation is necessary, assumed for the purpose of his decision that it was. Having reached this point, both judges refused to accept the argument of counsel for the mortgagor that, "this being so, it cannot be said that the equity of redemption has been extinguished by the sale and that the matter still being under the control of the Court an order extending the time for redemption might properly be made".[12] Thus, whereas to the lower court the right of approving the sheriff's report appeared to keep the matter of redemption still under the control of the court, so that an order extending the time might properly be made, to the Supreme Court of Canada the alleged discretionary right of redemption appeared as a "burden" on the statutory sale, an "inverted equitable clog". "A sale under a power in the mortgage or given to the mortgagee by statute means what the term implies, a power to make an out-and-out transfer of ownership. . . . On what ground, then, should we attach to a like statutory power given the court a collateral condition that can nullify its exercise?"[13]

Rule 8 of order 51 of the Nova Scotia Supreme Court practice substantially reproduces rule 3 of order 51 of the Rules of the Supreme Court adopted in England in 1883 Rule 3 has been adopted almost verbatim in other provinces of Canada, namely, British Columbia, Alberta, Saskatchewan and Newfoundland. In reaching its conclusion the Supreme Court of Canada was presumably aware that, if it conceded to the Nova Scotia court a discretion to permit redemption after sale, it might be opening the door to a like interpretation of the similar rule of practice by the courts of the other provinces in which it is found. So that the case is of interest to members of the bar practising in other provinces as well as in Nova Scotia.

T. H. COFFIN*

Receive this kingly Sword, brought now from the Altar of God, and delivered to you by the hands of us the Bishops and servants of God, though unworthy. With this Sword do justice, stop the growth of iniquity, protect the holy Church of God, help and defend widows and orphans, restore the things that are gone to decay, maintain the things that are restored, punish and reform what is amiss, and confirm what is in good order: that doing these things you may be glorious in all virtue; and so faithfully serve our Lord Jesus Christ in this life, that you may reign for ever with Him in the life which is to come. Amen (From the Coronation Service of Her Majesty Queen Elizabeth II)

[12] [1953] 1 S.C.R. 285, as put by Locke J at p. 304.
[13] *Ibid., per* Rand J. at p 294
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