CASE AND COMMENT

MARRIAGE AND DIVORCE—NULLITY OF MARRIAGE—FOREIGN MARRIAGE FOLLOWING DIVORCE IN THE FORUM—REMARRIAGE PROHIBITED FOR TWO MONTHS—CONSTITUTIONALITY—CONFLICT OF LAWS.—The social problem involved in *Densmore* v. *Densmore*[1] is whether unhappy couples may obtain a "back-door" divorce by the fortuitous device of using nullity proceedings, thereby avoiding the expenses of private detectives, the "immorality" involved in hotel (or motel) evidence, and the unfounded fear of divorce as a solution to domestic differences. Nullity—especially of the *Densmore* type—offers a simple solution. The couple, or one of them, alleges that there was never a marriage because the ceremony of marriage took place within the time limited for appealing from a British Columbia divorce decree which one of them had earlier obtained. How simple. No evidence is required other than the earlier divorce decree and the certificate of the subsequent marriage. Co-respondents, "women named", and other unsavoury details are avoided. And the fact that some couples managed to wait two months (the time for appeal) from the divorce decree may not matter: they must, under British Columbia's unfortunate rules, wait two months, not from the granting of the divorce, but from the *entry* of the decree—a matter of a few days or many months, depending in some cases upon the diligence of the divorce petitioner's solicitor. The fact that a couple have had children who will now be bastardized is the least of their worries. They want to be separated from each other as quickly as possible and with the least amount of unsavoury details. A nullity decree offers the solution. And there has been a surprisingly large number of these petitions. Practically all are undefended. If the parties really want to live together as lawful husband and wife and are merely questioning the legality of their marriage, they could have gone through a further ceremony of marriage after

[1] Not yet reported. Decided June 27th, 1956, British Columbia Court of Appeal, affirming (1955) 1 D.L.R. (2d) 138 (Wood J.). The reasons for judgment of Davey J.A. did not appear until August.

the period of prohibition had clearly expired. But they desire separation. What, then, is the history of this fortuitous device and has the recent *Densmore* decision, in putting an end to it, properly said in effect, "If your remedy is dissolution, do not use nullity"?

In 1947, a husband succeeded in having his second marriage annulled on the ground that he lacked the capacity to enter into the marriage: *Gill* v. *Gill*.[2] Mr. Gill's first marriage had been dissolved by a divorce decree granted in British Columbia where he was domiciled. Less than two months later, Gill remarried at Point Roberts in the State of Washington. Wood J., in a very short judgment, declared this second marriage a nullity because it, his lordship held, violated what was then section 38 of the Divorce and Matrimonial Causes Act[3] as set out in the provincial statutes. The section is now numbered "42" in the current revision of the statutes. It was originally section 57 of the English statute of the same name enacted in 1857,[4] and will be referred to as section 57 throughout this comment to avoid confusion.

Eight years and many cases later, Wood J. had a defended case before him in which counsel for the first time raised the question whether section 57 did impose, *in British Columbia*, any impediment upon immediate remarriage. The problem is peculiar to the Canadian constitutional division of legislative power. In the interval the *Gill* case has been followed regularly, though only occasionally in reported cases.[5] Many of the second marriages were outside the province—it was difficult during the two months to get a licence or a clergyman within the province. And some of

[2] [1947] 2 W.W.R. 761 (B.C., Wood J.).

[3] R.S.B.C., 1936, c. 76; now R.S.B.C., 1948, c. 97, s. 42. The presence of the divorce statute in the province's collection of statutes, as revised from time to time, may excite some comment when it is remembered that each revision is "enacted" by the province, previous laws being then repealed. Yet the province cannot enact divorce legislation. This point has, as Sidney Smith J.A. said in the *Densmore* case, "attracted pleasantries from Mr. A. B. Harvey, Q.C., in (1954), 32 Can. Bar Rev. 333". There is no real difficulty, however. The English act, so far as not inapplicable, was brought into the colony by appropriate legislation before federation and has continued in force thereafter. See, *post*, text to footnotes 8 to 10. The real criticism should be, not to inclusion, but the place of insertion or inclusion. Rather than appearing as a separate statute taken over from England and included in an appendix for the convenience of the profession, it has been inserted along with the statutes enacted by the province and given a number in the usual way.

[4] 20 & 21 Vict., c. 85 (proclaimed in force, January 1858); amended, 21 & 22 Vict., c. 108 (which came into force on August 2nd, 1858).

[5] *Dahl* v. *Dahl* (1951), 2 W.W.R. 392 (B.C., Wilson J.); *Colvin* v. *Colvin*, [1952] 3 D.L.R. 510 (B.C., Wood J.); *Turner* v. *Turner* (1953), 9 W.W.R. 684 (Alta., Egbert J.); *Bevand* v. *Bevand*, [1955] 1 D.L.R. 854 (N.S., Doull J.). See also the *Toovey* case referred to, *post*, footnote 55.

the decisions were in other provinces and merely followed *Gill* v. *Gill* on the assumption that it correctly expounded the law of British Columbia as to the impediment.[6]

The English section 57, enacted in 1857, reads:

> When the time *hereby* limited for appealing any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death. Provided always, that no clergyman . . .[7]

The statute of 1857, of which section 57 was a part, probably became part of the law of British Columbia (mainland colony) by proclamation introducing "the Civil and Criminal Laws of England, as the same existed [on November 19th, 1858] and so far as they are not, from local circumstances, inapplicable to the Colony of British Columbia . . . till such times as they shall be altered" by appropriate authority.[8] After union in 1866 of British Columbia with the separate and older colony of Vancouver Island into the new colony of British Columbia, an ordinance of 1867[9] repealed the proclamation of 1858 and re-enacted its provisions for the new colony, saving amendments in either old colony or in the new colony made before the ordinance of 1867. There were no amendments affecting the subject of matrimonial causes either before the ordinance of 1867 or from 1867 to 1871. The English statute of 1857, so far as not from local circumstances inapplicable, was thus in force in the colony in 1871 when British Columbia entered the Canadian federation under section 146 of the British North America Act of 1867. Under that section British Columbia could

[6] The *Turner* and *Bevand* cases, *ante*.

[7] The proviso merely protected clergymen of the Church of England from being compelled to perform the remarriage ceremony for the guilty party. I have added the italics in the first line.

[8] Proclamation of Governor Douglas, November 19th, 1858. There may be some thought that this proclamation exceeded the governor's instructions of September 2nd, 1858, not to make "any law for the divorce of persons joined together in holy matrimony" (see Martin J. in *Sheppard* v. *Sheppard* (1908), 13 B.C.R. 486, at p. 516). It is true that the limitation about divorce laws appears in an instruction only, but the governor's commission as well as the order in council under which he received his power to make laws for the colony were both made subject to any instructions accompanying the commission and to future instructions (see B.C. Papers, 1859, pt. 1, pp. 3, 5 and 8). On the other hand the instruction against a divorce law did not necessarily apply to a proclamation bringing in English divorce law, but may have applied only to a separate colonial law. In any event, the instruction had long been removed by the time the ordinance of 1867 was passed (see next footnote).

[9] English Law Ordinance, March 6th, 1867. The name "Vancouver's Island" is used in older enactments, but by 1867 had been, in practice, shortened to "Vancouver Island".

be admitted to federation by order in council "subject to the provisions of this Act". By section 129 of the act, and by article 10 of the terms of union, existing laws were continued in force in British Columbia,

> subject nevertheless . . . to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of [British Columbia], according to the authority of the Parliament or of that Legislature under this Act.[10]

By the terms of the British North America Act, Parliament may enact laws in relation to "Marriage and Divorce"; the legislature of a province may enact laws in relation to "The *Solemnization* of Marriage *in the Province*" and in relation to "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts".

My historical recital shows that the substance of the English divorce legislation of 1857 was in force in British Columbia at federation in 1871, without alteration but subject to local circumstances. This view was confirmed by the Judicial Committee of the Privy Council in 1908,[11] when, in addition, it was held that the jurisdiction of the Supreme Court of the new province was sufficiently comprehensive to give it the divorce jurisdiction set out in the English statute of 1857. Some alterations in the divorce law of British Columbia have been made by Parliament and by the legislature since federation in 1871.

But before I discuss these amendments, it is well, first, to examine the effect of the famous section 57, especially in British Columbia. The section purports to restrict remarriage of either party during "the time hereby limited for appealing". It is not necessary to inquire, at least at the moment, into the validity or the wisdom of such a restriction in England, a reasonable restriction which is equally applicable to both parties and when enacted by competent authority has been held valid in English[12] and Australian[13] cases. But what is the "time hereby limited" in the English act of 1857? Sections 55 and 56 provide for appeals.[14] The

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[10] B.N.A. Act, 1867, s. 129.

[11] *Watts* v. *Watts*, [1908] A.C. 573.

[12] *Warter* v. *Warter* (1890), 15 P.D. 152 (Hannen P.).

[13] *Miller* v. *Teale* (1954), 92 C.L.R. 406.

[14] Neither section appears in the current printed statutes of British Columbia. When the English statute was first included in the printed revisions of statutes "within the power of the legislature to enact" (title page to R.S.B.C. 1897) section 55 of c. 62 appeared as section 39. It was carried forward in subsequent revisions until "repealed" by the pro-

former provides an appeal to the full court in matters to be heard by the Judge Ordinary alone; the latter provides for an appeal to the House of Lords "on any petition for the dissolution of a marriage".[15] By sections 10 and 9,[16] the jurisdiction to dissolve or to annul marriages was not only given to a court composed of at least three judges, but was expressly excluded from the powers of the Judge Ordinary acting alone. Appeals in divorce cases were thus clearly governed by section 56, which provided a period of "three months after the *pronouncing* thereof . . . if Parliament be sitting at the end of such three months"; or, if not, "within fourteen days next after its meeting". This is the time "hereby" limited for appealing during which section 57 prohibits remarriage. That time is obviously inapplicable to British Columbia and the English Law Ordinance cannot be said to have introduced it.

If, instead of passing the English Law Ordinance in 1867, the legislature of the colony had passed a divorce act in the language of the English statute of 1857 merely making such changes as would be necessary for local circumstances, two changes would have been required in so far as we are concerned in this comment. In 1867 there were not three judges. There was one judge for each of the two supreme courts[17] (united into one upon the retirement of the chief justice of the Supreme Court of Vancouver Island in 1870[18]). This difficulty was not serious and, despite views to the contrary from Begbie C.J.[19] and Clement J.,[20] the opinion generally prevailing in the province was upheld by the Judicial Committee in an opinion which expressly approved of the reasons for judgment of the majority in the *Sharpe* case[19] and of Martin J. in *Sheppard* v. *Sheppard*.[21] In these cases the judges had ruled that the introduction of English law to British Columbia included not only the superior-court jurisdiction exercised by specified judges sitting in particular courts (for example, probate, lunacy and

vincial legislature in December 1938 (c. 13) retroactively to February 23rd, 1937.

[15] Nullity cases were included in s. 56 by the amending statute of 1858, s. 17, referred to, *ante*, footnote 4. Some uncertainty had arisen because section 9 excluded nullity from the Judge Ordinary but s. 56 referred to dissolution only.

[16] Section 9 (excluding the Judge Ordinary) was never copied into the B.C. statutes; section 10 has appeared from 1897, and now appears as section 4.

[17] See the Supreme Courts Ordinance, 1869 (R.L.B.C., 1871, No. 112).

[18] *Ibid.*; also The Courts Merger Ordinance, 1870 (R.L.B.C., 1871, No. 135).

[19] Dissenting in *Sharpe* v. *Sharpe* (1877), 1 B.C.R. (Pt. 1) 25.

[20] *Watt* v. *Watt* (1907), 13 B.C.R. 281 (spelled "Watts" in the Judicial Committee; see footnote 11, *ante*).

[21] (1908), 13 B.C.R. 486 (Martin J.).

chancery matters) but also jurisdiction exercised by two or more judges. In all these cases, the sole judge of a colony's comprehensive supreme court exercised the jurisdiction of the various judges who, in England, sat alone or with other judges, whether in common law, equitable or statutory courts. English law was not "from local circumstances inapplicable" merely because the colony lacked judges or courts of the same quantity and name as those in England. A decision otherwise would have been intolerable, especially for colonies such as Vancouver Island and British Columbia, where the Supreme Court was the only court and was given "complete cognizance of all pleas whatsoever" and jurisdiction "in all cases, civil, as well as criminal, arising within" the colony.[22]

A second and more serious change that would have been required, had the colony enacted, before federation with Canada, its own divorce law in the pattern of the English statute of 1857, would have adjusted the language of sections 55 and 56, which provided for appeals, and the language of the famous section 57, which provided for remarriage "when the time hereby limited for appealing" had expired. There were no appeals in either colony, or in the united colony of 1866, except the old prerogative[23] appeal by special leave to Her Majesty in Council.[24] We can only guess what adjustment the colonies would have made. They might have provided for an appeal of some kind, perhaps specifying the appeal to Her Majesty; they might have assumed the existence of the appeal to Her Majesty to be sufficient; they might have not only said nothing about appeals but also deleted the first words of

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[22] See proclamation of June 8th, 1859, for British Columbia (R.L.B.C., 1871, No. 28); and Order in Council (U.K.) of April 4th, 1856, for the Island (portions of the latter document are referred to by Gray J. in the *Sharpe* case, *ante*, footnote 19, at p. 26). The language used for the Island was somewhat different, but any differences are merged, after the union of the courts in 1870, by the language of The Courts Merger Ordinance, *ante*, footnote 18, and the two enactments preceding it, ordinances 99 and 112. The proclamation and all four ordinances occurred before union with Canada, and no question of constitutionality arises on this point.

[23] "Prerogative" has been used in two senses. By 1867, an appeal to Her Majesty could be as of right in some cases or in others, notwithstanding local legislation providing for *no* appeal, was by special leave (the prerogative appeal). The old meaning in which the word was used in contrast to "statutory" had probably disappeared by this date in view of the Judicial Committee Acts of 1833 and 1844, which continued the old appeal but under statutory authority. Divorce appeals were not as of right.

[24] The English legislation authorizing the creation of a court in each colony expressly preserved the right of appeal in civil suits to Her Majesty "in the Manner and subject to the Regulations in and subject to which Appeals are now brought from the Civil Courts of Canada, and to such further or other Regulations as Her Majesty with the Advice of Her Privy Council shall from Time to Time appoint": Vancouver's Island, 1849, 12 & 13 Vict., c. 48, s. 3; B.C., 1858, 21 & 22 Vict., c. 99, s. 5.

section 57, which provide for the expiry of time for appeal before remarriage; or they might have specified a time for section 57 itself, if one was thought desirable. What is important is that whether the English divorce law came into the colony by way of a general declaration in the English Law Ordinance, as it did, or by way of separate and specific enactment, something had to be done about the opening words of section 57 if they were to have meaning. Nothing was done to give them meaning when the divorce legislation was introduced as part of English law in 1867. And no attempt was made to re-introduce them, with meaning, until after the colony of British Columbia had entered the Canadian federation in 1871.

When, after federation, an appeal was provided[25] for ordinary litigation, the courts held[26] that, because divorce was now a federal matter, the provincial legislation providing a right to appeal in all civil cases to the full court (later the separate Court of Appeal) could not include appeals in matrimonial causes. With much respect, it is difficult to understand the constitutional basis upon which the courts so ruled. However, the point whether there could be divorce appeals when, after federation, appeals generally were inaugurated, is now academic by reason of special federal and provincial legislation in 1937 and 1938 expressly providing for appeals in divorce and matrimonial causes.[27] It is not important, therefore, for our purposes to decide whether the courts were right or wrong in determining that the provision, after federation, of appeals generally did not include divorce cases. What does matter is not that English sections 55 and 56 dealing with appeals in England had no counterpart in British Columbia, but that section 57 prohibiting remarriage until the time for appeal had expired was meaningless and inoperative in British Columbia.

I have set out the history of the legislation in this matter in considerable detail in order to give a complete and fair picture. It is true that all that it adds up to for our purposes is that the opening phrase of section 57 had no application to British Columbia at federation. But it is an important point. It means that parties could remarry once the divorce decree was effective. It means

[25] Cf. 1878, 2nd sess., c. 20, s. 9; 1879, c. 12, ss. 5, 7-9, 17(5); c. 13, s. 4; 1881, c. 1, ss. 28-29; 1884, c. 1; 1885, c. 5, s. 7.

[26] *E.g.*, *Scott* v. *Scott* (1891), 4 B.C.R. 316 (F.C.); *Jamieson* v. *Tytler*, [1950] 4 D.L.R. 705 (B.C.C.A.). Was there an appeal *per saltum* to the Supreme Court of Canada during this period? See the *Sharpe* case, *ante*, footnote 19, at pp. 40-41, 53-54.

[27] 1937, c. 4 (Can.); 1938, c. 11 (B.C.). The provincial legislation was made retroactive to February 23rd, 1937, thirty-six days before the federal legislation came into force.

that at federation there was no impediment upon remarriage during a certain period after the granting of a divorce decree.[28] And the legal problem today is whether an impediment has now been provided. The argument that one now exists rests upon the provision of an appeal (by separate legislation) together with the province's removal of the word "hereby" from section 57, so that that section now provides a prohibition on marriage during the "time limited for appealing". The argument is attractive but I think, with respect, fallacious. No one questions the provision of an appeal or the province's right to provide the time within which the appeal is to be brought. In fact, when divorce appeals became a reality in British Columbia in 1937, the time limited was *three* months from the *entry* of the decree (a time quite different from any set out in the old sections 55 or 56). That time has now been shortened by provincial legislation in 1946[29] to *two* months from the same date (again quite different from the old 55 or 56).

To repeat: no one questions the power of the province to set whatever time it chooses for appeals. That is one point. But an entirely different point is whether, by setting a time for appeal, the province may provide for the first time an impediment to marriage, and if, assuming on some basis for the moment that it may do so, whether it may by varying that time change the terms of an impediment from time to time. Parliament at Ottawa may do so. I hesitate to think that a provincial legislature may. Marriage (but not solemnization) is a matter for federal legislative authority. A broad interpretation of the province's area—solemnization of marriage within the province—would include legislation providing for the refusal of a licence or other permission to marry within the province to persons who have been too recently in the province or elsewhere. But the province's power does not include authority to impose an impediment or other incapacity to marry to be carried outside the province by British Columbians or others seeking to marry outside the province. In the *Densmore* case

[28] The decree nisi, to be made absolute later, was not introduced into the English act until later and therefore did not automatically come into British Columbia with English law as of November 19th, 1858. It is not in use today, but was apparently in use for at least the first thirty years: see the reference by Martin J. in the *Sheppard* case (1908), 13 B.C.R. 486, at p. 527, to ten decrees granted in the Vancouver registry in 1907, "of which six were absolute and four *nisi*, which doubtless have been made absolute by this time", and the discussion by the same judge of the practice of granting decrees nisi in the first instance, *ibid.*, at p. 528. The time allowed between nisi and absolute was then six months. The Divorce Rules promulgated by the judges on March 21st, 1877, make no mention of this problem.

[29] 1946, c. 18.

giving rise to the present discussion, the trial judge saw the present point clearly in his last paragraph:[30]

> My conclusion is that the British Columbia amendment of 1938 striking out the word 'hereby' created an incapacity to marry which did not previously exist. The Province cannot create such an incapacity. If such legislation had to do with Marriage and Divorce it is *ultra vires* of the Legislature; if it had to do with Solemnization of Marriage it does not affect marriages unless they took place in the Province.

I have outlined the problem and some of the history. What are the facts of the *Densmore* case[31] and the solution reached there to the problem? Mrs. Densmore petitioned for a declaration that her marriage to Densmore on January 19th, 1949, in Alberta, where both were domiciled, was invalid because it was celebrated within the "time limited for appealing" from a British Columbia divorce decree which she had obtained from her former husband on November 18th, 1948. She had waited two months from the *pronouncing* of the divorce, but not two months from its *entry*—November 27th, 1948. The only other fact, a social fact, is that the Densmores had a daughter born on November 9th, 1949. On the basis of the *Gill* case in 1947,[32] she was entitled to succeed. But her petition was opposed and the court had an opportunity to examine the problem more fully. By an accident of fate the same trial judge that had heard the *Gill* case heard the *Densmore* petition in June 1955. After a constitutional point had been raised and the Attorneys-General notified, re-argument occurred in November.[33]

Wood J. examined some of the early history of divorce in this province, noted particularly the absence of any appeal before federation, and concluded, as to the provincial amendment striking "hereby" out of section 57:[34]

> As the amendment attempted to deal with something more than the solemnization of marriage and dealt with the capacity to marry it would seem to fall within the Dominion's sphere although it may have validity within the Province insofar as it can be said to deal with solemnization of marriage.

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[30] (1955) 1 D.L.R. (2d) 138, at p. 147 (B.C., Wood J.).
[31] *Ibid.* See also footnote 1.
[32] [1947] 2 W.W.R. 761 (B.C., Wood J.).
[33] At the trial, Mr. *James* Sutherland appeared for the petitioner and Mr. Gilbert Hogg for the attorney-general of the province; in the Court of Appeal, Mr. Sutherland appeared for the attorney-general and separate counsel for the petitioner. The reports of the trial do not indicate that any counsel appeared for the attorney-general.
[34] (1955) 1 D.L.R. (2d) 138, at p. 145.

> If, therefore, we read the statute as it stood originally it does not prevent a divorced person from marrying as soon as the decree absolute has been perfected.

His lordship then dealt with an argument by counsel for the Attorney-General of the province that the courts had been wrong in holding that there was no appeal in divorce matters when a general appeal had been provided by the province. His lordship found that there was no power to hold otherwise in the light of the rulings of his own Court of Appeal and its predecessor, the old Full Court. But even when Parliament did provide an appeal, it did not provide an impediment to remarriage as it very easily might have done. "If, therefore, we read the statute as it stood originally it does not prevent a divorced person from marrying as soon as the decree absolute has been perfected for there is no time 'hereby' limited for appeal. It follows from what I have said that my judgments in *Gill* v. *Gill* . . . were wrong. . . . In none of these cases was this point raised."[35] Wood J. then concluded his judgment with the statement already quoted[36] to the effect that the provincial legislation was *ultra vires* or valid only with respect to solemnization.

On appeal to the Court of Appeal, the appeal was dismissed, two judges dissenting.[37] The majority, O'Halloran, Davey and Coady JJ.A., did not deal with the main issue, and therefore assumed for the purposes of the appeal the validity of the provincial legislation "relating to appeals in divorce matters, including the restriction on remarriage". Coady J.A., with whom O'Halloran J.A. concurred, held that there was *prima facie* evidence of a valid marriage in Alberta where both the parties were domiciled immediately before the marriage, that there was no evidence that the marriage was invalid in Alberta or that Alberta would recognize as constituting an incapacity the restriction imposed in British Columbia, and that British Columbia, on principles of private international law, recognizes a foreign marriage performed in the domicile of the parties and in compliance with the laws relating to celebration of marriages in that jurisdiction. His lordship noted the comment by the present editors of Dicey that the principle that capacity to marry depends upon the law of the domicile applies to foreign marriages prohibited in England (British Columbia).[38]

Davey J.A. concurred in a separate judgment with the basis

[35] *Ibid.*, at p. 146.
[36] See text to footnote 30.
[37] See footnote 1.
[38] Conflict of Laws (6th ed., 1949), comment at p. 781 to rules 168-169.

and reasons upon which Coady J.A. dismissed the appeal. But Coady J.A.,[39] in discussing the nature of a divorce decree and the restriction in British Columbia, used language to suggest that if valid it has no effect outside that province. Is a decree of dissolution "conditional or inconclusive until the time limited for appealing has expired, or, if an appeal is taken, until that appeal has been disposed of", or is the decree "final and complete in every respect [restoring] the parties to the status of single persons", but subject to "another provision in the same statute under which the decree was granted [imposing] an impediment on re-marriage"? In the latter case any incapacity would not spring "from the decree but from the statute itself which provided that it should not be lawful for the parties to re-marry during the prescribed period"—a provision quite separate from the divorce decree and one that "could have no more effect on the status of the parties than if it had appeared in the Marriage Act instead of in the Divorce and Matrimonial Causes Act". His lordship adds:

> It is clear . . . if the latter view prevails, then the restriction or impediment on re-marriage imposed by the statute is entitled to no extra-territorial recognition in the foreign jurisdiction where the parties were domiciled. This latter view of the final nature of the decree, it seems to me, is the correct one.

Davey J.A. in a separate discussion of this problem agrees, for the reasons given by Coady J.A. and by Kitto J. in a recent Australian case,[40] that the divorce decree in British Columbia is not conditional; the impediment is a pure personal prohibition having no extra-territorial effect in Alberta unless Alberta gave it some by appropriate legislation. British Columbia had not done so with respect to comparable personal prohibitions (if any) from other Canadian provinces. The court could not infer that such legislation existed in Alberta, and none was proved.

In other cases, or even in the *Densmore* case in a higher court,

[39] O'Halloran J.A. concurring.

[40] *Miller* v. *Teale* (1954), 92 C.L.R. 406. This case involves the same facts as the *Densmore* case: divorce in state of South Australia, followed by acquisition by wife of bona fide domicile of choice in New South Wales, where she marries Miller during the period of prohibition following the granting of the divorce in South Australia. There was in that case no question about the constitutional validity of the South Australian impediment on remarriage because (a) the subject of marriage and divorce is within the power of the state legislature—any state in Australia may enact legislation dealing with the capacity to marry; (b) section 118 of the Australian constitution provides that full faith and credit shall be given throughout the Commonwealth of Australia to the laws, public acts, etc., of every state. It is not necessary here to examine how far s. 118 was applicable in *Miller* v. *Teale*; it is sufficient that we recognize its existence when attempting to use that case in Canada.

the Supreme Court of Canada, one point taken by the majority (lack of proof of Alberta law) will not be available, and the issue dealt with by Wood J. will have to be met. The minority, Sidney Smith and Sheppard JJ.A., dealt with that issue and held that the legislative action of the province is valid. The historical events in relation to divorce in British Columbia are set out fully earlier in this comment. Sidney Smith J.A., after giving an excellent review of many of them, then puts the issue in this way: "Whether the striking out of the 'hereby' in 1938 'created an incapacity to marry which did not previously exist' ". After discussion his lordship holds that the constitutional validity of the removal is immaterial. Even assuming that the deletion of "hereby" was *ultra vires*, the deletion was unnecessary because it was not in force anyway:

> All applications of an English Act involve its being applied *mutatis mutandis;* and the necessity of omitting the word 'hereby' in order to apply the section is as nothing to the incongruities that must be passed over to apply the Act for other purposes; for example, in order to try divorce petitions. So if the right of appeal in the Province had existed in 1857, I would see no difficulty from the words 'hereby limited'. The question remains whether it is material that the remedy of appeal was only made available later, that is, in 1937 or 1938.

Here is a very clear statement of the problem at this point, especially when it is recalled that by 1937 or 1938 the power to impose an impediment on marriage of the type here involved had passed from the colony to Canada, not to the province. And it will be obvious that to this point I agree with what his lordship has said very clearly about appeals. His reference to the difficulties of transplanting other parts of the statute refer, obviously, to the necessity for three judges, one of whom must be the Judge Ordinary, the others to be drawn from the Lord Chancellor, the Lord Chief Justice of the Court of *King's* Bench, the Lord Chief Justice of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer and others obviously not available in the colony or in the province today, yet all of whom are dutifully listed[41] in the province's present statute as the judges of the "Court for Divorce and Matrimonial Causes".

But is his lordship on firm ground, in his answer to the quest-

[41] At the first opportunity after the death of Queen Victoria, a learned revisor of the statutes of the province changed "Lord Chief Justice of the Court of *Queen's* Bench" to "Lord Chief Justice of the Court of *King's* Bench", even though there has been at no time in the statute's ninety-nine years of existence any such officer. In 1857 Queen Victoria reigned. Many years before her death in 1901 the office had ceased to exist.

ion at the end of the last quotation: Is it material that the remedy of appeal was only made available later, after federation? The judgment proceeds:

> The answer to that is indicated by Martin J. in *Sheppard* v. *Sheppard*. He states that even where machinery is lacking to make an English Act operative here, still its provisions could 'be viewed as a partially dormant or abeyant principle of jurisprudence to become effective later on as the machinery arrived',[42] *and he particularly related this view to the subject of appeal.*
>
> That view seems to be only common sense, and I think the general principle is inherent in the views of Gray and Crease JJ. in *Sharpe* v. *Sharpe*.
>
> I cannot see how the age of our courts or of the machinery or of any special jurisdictions that may be given, has any relevance in the application of English statutes. . . . Nor can it be doubted that the Act would be equally applicable to appellate courts as soon as they were duly set up.
>
> Any distinction between types of courts seems altogether arbitrary. . . . I therefore consider that, even assuming that the amendment changing the phrase 'time hereby limited for appealing' to 'time limited for appealing' was *ultra vires*, the amendment was quite unnecessary, and if valid would not have changed the operation that the English section 57 would have had as it stood.

With respect, I cannot agree that the principle of Martin J. in the *Sheppard* case is applicable to anything more, in the case before us, than appeals. Even Sidney Smith J.A. suggests this in the passage I have italicized. The fact that provisions of an English statute may be "dormant" or "abeyant" until proper machinery is provided does not necessarily mean that all provisions of substantive law remain dormant or abeyant until the proper "machinery" is provided. Martin J. in the *Sheppard* case[43] was dealing with the presence in the two colonies of only one judge each and their power to exercise jurisdiction given to three judges holding named English judicial offices. The application of his remarks to the question of appeals by Sidney Smith J.A. appears very suitable. But I need to discuss the merits of its application to them. There are limits. A few pages further on, and after many illustrations, Martin J. clearly indicates that the "dormant" principle is not of general application. There is another solution: reject the inapplicable part, that is, treat it as not applicable at all, not merely dormant. Martin J. said in answer to the argument that the English divorce statute was inapplicable in British Columbia because some of it could not be applied to local conditions:[44]

[42] Quoting from Martin J. in the *Sheppard* case (1908), 13 B.C.R. 486, at p. 503.

[43] (1908), 13 B.C.R. 486, at pp. 503-504.

[44] *Ibid.*, at p. 511.

> The truth is, as the Upper Canada Court of Common Pleas (Draper, C.J., Richards and Hagerty, JJ.), said in a leading case on this subject, *Mercer* v. *Hewston*,[45] that where a provision in a statute applicable in principle is wholly impossible of application to the conditions of a new country, that does not mean that the statute must be rejected, but that the provision should be dispensed with.

In the *Mercer* case, the Ontario court had before it the Mortmain Act, which enacted that certain instruments were void unless enrolled in the "Court of Chancery". There was no such court in Upper Canada at the date of the instruments, and the provision for enrolment was held inapplicable—"it must be considered virtually dispensed with".[46] And what is perhaps more significant is that a Court of Chancery had come into existence in Upper Canada, and had been in existence for many years, when the *Mercer* case was decided in 1859. There was no suggestion that the *Mercer* decision was decided upon special facts—execution of the instruments before the court was created—or that in the future enrolment would be required now that a court existed.[47] The provision for enrolment contained in the Mortmain Act was ineffective upon introduction of the statute and was therefore dead. It was not dormant or abeyant while awaiting a Court of Chancery. It is in this light that we must read the remarks by Martin J. in the *Sheppard* case about a dormant provision in a statute. The context in which Martin J. referred to the "dormant" suggestion shows that he clearly knew of and accepted the cases where provisions of English statutes which were inapplicable because of an absence of machinery were held to be totally inoperative or dispensed with.

When we try to apply the "dormant" suggestion to the *Densmore* case, we find a statute dealing primarily with jurisdiction in matrimonial causes, a statute held to be in force in the province at least in so far as it gives jurisdiction to the superior court in the province. Is it fair to say that a provision restraining remarriage, not pertinent to questions of a court's jurisdiction, and which is clearly inapplicable at the time of introduction, is dormant rather than dead? It would seem strange that *A* and *B*, divorced

[45] (1859), 9 U.C.C.P. 349, at p. 355. [46] *Ibid.*

[47] Nor is there in any of the later cases which followed the *Mercer* case, including a court with power to overrule the *Mercer* decision: *Whitby* v. *Liscombe* (1876), 23 Gr. 1, at p. 29 (C.A.). In an earlier case it had been suggested that registration should, in Ontario, be substituted for enrolment: *Hallock* v. *Wilson* (1857), 7 U.C.C.P. 28. In obiter, the *Mercer* court made it clear that it did not accept this view. In *Hambly* v. *Fuller* (1871), 22 U.C.C.P. 141, the court repeated the *Mercer* and *Hallock* opinions, with no suggestion that the *Mercer* one was now modified by the presence of a Court of Chancery.

in June, could remarry at once, but that *C* and *D* divorced in July could not do so—not by reason of a deliberate attempt of the legislature to prevent them from doing so, but by an accidental result of the intervening provision of appeals in divorce actions by the appropriate legislative body. As with the case of enrolment of instruments in the Court of Chancery to avoid invalidity under mortmain laws, the provision against remarriage during a non-existent period never did come into the colony. Not only did "hereby" not come in; the whole phrase did not come in.

In the second dissenting judgment in the *Densmore* case, Sheppard J.A. said:

> I agree with the judgment of my brother Sidney Smith subject to the following.
>
> Section 42 of the Divorce and Matrimonial Causes Act [English section 57, as amended by the province] deals with a matter of procedure within section 92 (14) of the British North America Act, and therefore within the legislative jurisdiction of the province. The purpose of section 42 is to fix the time when the decree for divorce should become operative for the purpose of removing the incapacity to remarry. . . . It is a matter of procedure to fix the time of pronouncing or the time of entry, as the case may be, as the effective date from which time runs for appeal or from which the order speaks and it would appear equally a matter of procedure to provide that the decree in divorce should operate for the purpose of removing the incapacity to remarry only from the time when the right of appeal ends particularly when it is borne in mind that section 42 is 'an integral part of the proceedings' [*Warter* v. *Warter*[48]]. Such postponement is not inconsistent with the decree operating from some other and earlier time for purposes other than that of remarriage as, for example, for succession: *Marsh* v. *Marsh*.[49]
>
> In consequence there was under the decree in the case at bar a want of capacity to remarry until the expiry of the time designated by the statute (section 42) but that incapacity was created not by the statute but by the previous marriage and that incapacity arising from the previous marriage continued until the time designated for the final decree to become operative for the purpose of removing that incapacity.

It is not clear whether Sheppard J.A. concurs with Sidney Smith J.A. in holding that the opening words of section 57 ("when the time hereby limited for appealing") were, with the exception of the word "hereby", in force but dormant until appeals were provided,

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[48] *Ante*, footnote 12.

[49] [1945] A.C. 271 (J.C.P.C.). See the discussion of this case by Manson J. in *H.* v. *H.*, [1955] 3 D.L.R. 486 (B.C.), and the cases cited at pp. 491-492. In the light of the latter cases, it may be that the *H.* decision rests upon a different ground than that stated in the first headnote. The second headnote is inaccurate in that it reverses the parties.

or whether his lordship is relying upon the independent introduction of the opening words by the province when it deleted the word "hereby" in 1938 or otherwise introduced the section by its own legislative act. It is not necessary to answer this question because his lordship's main point is, in effect, that, whether in force or not by reason of the introduction of English law, the province had power to enact the provision under its power to legislate in relation to procedure in its courts. It is true that a province has this power, but can it be truly said that the province was exercising it? The province has *not* said: "A decree of divorce is not effective until the time limited for appealing has expired". The decree clearly operates from an earlier date for succession and other purposes, as his lordship notes. What the province is attempting to do, then, on the argument of his lordship, is to say: "A decree of divorce is not effective *for purposes of remarriage* until the time limited for appealing has expired". In this modified form, is the provision valid legislation in relation to procedure in the courts or is it really a colourable attempt to enact what is in pith and substance marriage legislation? From another point of view, is it fair to say that this provision is an attempt to legislate upon procedure at all? It is a section dealing with remarriage, not with the effective date of a divorce decree. In effect, I suggest that the section is not dealing with procedure in the courts at all, but, if it is an attempt to do so, it fails because the attempt is bad constitutionally—the legislation is in pith and substance marriage legislation. And we may recall the views of all members of the majority on this point—a divorce decree in British Columbia is not conditional or inoperative during the time for appeal.

The judgment of Sheppard J.A. does illustrate, however, one of the two ways by which the province could make an effective delay in remarriage—by providing a period during which its decree is ineffective for all purposes, on a basis comparable to the decree nisi introduced into England sometime after 1857 and in use in most of the other provinces of Canada. But in that situation the parties would continue to be husband and wife during the intervening period. They do not under the period provided for in section 57. It is probable that they cease to be husband and wife even before *entry* of the decree, subject to the power of the judge to vary his judgment after pronouncement but before entry.[50] The decree nisi is not presently part of the law of British Columbia.[51]

[50] See discussion in *H.* v. *H.*, *ante*, footnote 49.
[51] See *ante*, footnote 28.

It would seem constitutionally possible for the province to introduce such a procedure.[52] Many of the provinces which use it have in recent years reduced the normal six-months interval[53] to a much shorter period. The legal merits of this approach are many. The continuance of the first marriage bond applies both within and without the province in which the divorce was obtained and the couple continue married to each other for all purposes until the pronouncing of the decree absolute. They are not one thing for some purposes, another thing for others. Then, upon the granting of the decree absolute, let them remarry immediately, as has been done daily in Ontario where the possibility of appeal was ignored, at least until 1950. And that possibility, though rare, continues today. Does the famous section 57 apply in that province to delay remarriage after the decree *absolute*? The English divorce law as of July 15th, 1870, was introduced into Ontario by federal and provincial legislation in 1930.[54] Section 57 was part of this English law, but had been subjected to alteration in England in 1868 by reason of the removal of the right to appeal in most cases from a decree absolute. By the 1868 amendment, section 57 was declared to permit an immediate right to remarry where there was no appeal.[55] It may be that the provisions about the right to appeal were not considered in Ontario as part of the English divorce law introduced in 1930.[56]

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[52] Note should be taken, however, of *Andrews* v. *Andrews*, [1945] 1 D.L.R. 595 (Sask. C.A.).

[53] The decree nisi was introduced into England in 1860, c. 144, s. 7; the period was three months; by 1866, c. 32, s. 3, the period became six months.

[54] Now the Divorce Act (Ontario), R.S.C., 1952, c. 85; Matrimonial Causes Act, R.S.O., 1950, c. 226, s. 10. The Ontario legislation was not enacted until 1933, but was made retroactive to the date of the federal legislation in 1930.

[55] Matrimonial Causes Act, 1868, c. 77, ss. 3, 4. The same date in 1870 is used for the introduction of English divorce law into the prairie provinces and it is therefore a little difficult to understand the British Columbia case dealing with an Alberta divorce, unless Alberta has, on its own, introduced a general impediment following decrees absolute, an improbability, or has restored a general appeal following decrees absolute. In the *Toovey* case, [1950] 2 W.W.R. 142 (B.C., Wood J.), the court quoted an English text-book to the effect that an appeal lies from a decree absolute. But it does so only in rare instances, of which the *Toovey* case would not appear to have been one, had it been in England. The judge quotes section 57 as it stood in 1857 and not as modified by English legislation in 1868, introduced into Alberta as of 1870. It may be that a right to appeal from all judgments absolute exists in Alberta today: Power on Divorce (1948), p. 105, suggests otherwise.

[56] And Ontario has by legislation in 1949 now removed to all intents and purposes any appeal from a judgment absolute granted after April 1st, 1950: 1949, c. 56, s. 1; now R.S.O., 1950, c. 226, s. 7.

Socially, the existence of immediate remarriage in Ontario and elsewhere has prevented, over the years, the difficulties incident to British Columbia's second marriages which turn out to be nullities. Primarily, the solution in England and the provinces of Canada[57] other than British Columbia avoids the bastardizing of issue of the second marriage, so often the case in British Columbia in the eight years of the *Gill* rule. Experience has shown that the decree nisi, or its counterparts, provides fewer nullities and works less hardship than the rule which a minority of judges in the *Densmore* case would impose upon British Columbia. It is better to risk the occasional invalid marriage during the period of the decree nisi than to divorce the parties for all purposes except remarriage. Perhaps the social factors will help solve the *Densmore* problem when next it arises.

A second remedy for British Columbia, apart from that suggested as arising out of the reasons for judgment of Sheppard J.A., lies in the province's power to enact legislation dealing with solemnization of marriage. Neither of these remedies is necessary if on the merits it is decided that no delay is needed. But, assuming that one is thought desirable, the use of the solemnization power would cover all marriages within the province whether following British Columbia divorces or those granted elsewhere. Saskatchewan provided an illustration in 1947,[58] but repealed it in 1948. Its effect would bar persons, entitled to marry immediately where the divorce was obtained, from marrying in Saskatchewan during the time limited for appeal—presumably to any court to which an appeal may be taken. The solution by way of decree nisi, or comparable solution withholding for a period the effect of the decree for all purposes, plus an immediate right to remarry the moment the marriage comes to an end, applies only to local divorces, but carries its effect outside the province and is more suitable socially.

Should British Columbia decide that a delay in remarriage is necessary and that new and clarifying legislation is desirable, I prefer the practice either in Nova Scotia (one decree but not issued for some time after the hearing and decision) or in the other divorce provinces (where a decree nisi is used), with no appeal beyond the decree absolute. But, should the province desire to preserve some form of prohibition during a "time limited for

[57] Nova Scotia's solution does not use the decree nisi, but in effect achieves the same result because the judge withholds the issuance of the order for a certain period.

[58] 1947, c. 79; repealed 1948, c. 91.

appeal", it should remove two serious anomalies. The time for appeal should be clarified—make it run from the date of the decree or of pronouncement (usually the same date under British Columbia rules), not from the date of entry. And, in the second place, make clear what courts are covered by the phrase "time limited for appealing". Does it include the time for appealing to the Supreme Court of Canada? This is a present problem, even in Ontario today, if section 57 is in force there, because the provincial legislation cutting out appeals in most cases from a judgment absolute cannot remove the appeal, by leave it is true, to the Supreme Court of Canada.

So far I have dealt with the right to remarry following a divorce decree granted in British Columbia. I have not discussed the question raised by counsel for the Attorney-General for the province before the trial judge in the *Densmore* case, whether there is any right to remarry apart from that contained in section 57. I should have thought that there was no doubt in view of the long history and practice in England under parliamentary divorces before 1858. The "innocent" party was given an express right to remarry but the absence of any provision in favour of the other party was never interpreted as preventing his remarriage. Indeed Shelford[59] tells us of the clause which under the parliamentary rules had to be inserted in each divorce bill, prohibiting the respondent from marrying the co-respondent, but which was always deleted on motion in the Lords in order that such a marriage could take place if desired. No express permission to marry was given. That right followed, as Davey J.A. points out in the Court of Appeal, as a matter of course from the dissolution of the marriage and the consequent restoration of single status. The same thing is true of Canadian parliamentary divorces today.

This discussion relates solely to remarriage following a *divorce* decree. That was all that was included in section 57. That is all that is included in England today, despite major revisions of the divorce legislation, of which this section was a part, in 1925, 1949 and 1950. But British Columbia, in 1948,[60] attempted to extend the ban on remarriage to parties who have obtained, not a divorce decree, but a *nullity* decree, Constitutionally, the province has no power to do this, except by way of solemnization legislation (when it would not affect marriages outside the province) or by way of court-procedure legislation (when in any

[59] Marriage and Divorce, p. 476.

[60] 1948, 1st sess., c. 16; now incorporated into the present revision of section 57: R.S.B.C., 1948, c. 97, s. 42.

event it would not bar "remarriage" after a marriage that was void, as distinct from voidable). Even on the basis used by Sheppard J.A. for upholding the effectiveness of section 57 for remarriages after divorce—the "incapacity was created not by the statute but by the previous marriage"—the section as amended by the province cannot apply to nullity decrees where there was no previous marriage at all—the void cases. For the voidable cases, the same arguments as for divorce apply.

In summary, the result of the decision of Wood J. in the *Densmore* case, affirmed by the Court of Appeal, would appear to be sound, legally as well as socially.

GILBERT D. KENNEDY*

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CRIMINAL LAW—CAPITAL PUNISHMENT—CORPORAL PUNISHMENT—LOTTERIES—JOINT COMMITTEE REPORTS.—A recent flurry of committee reports has evoked a spate of public interest in penal topics. A Special Joint Committee of the Senate and House of Commons that has been studying Capital Punishment, Corporal Punishment and Lotteries since 1954 presented its final report on Capital Punishment on June 27th.[1] Before this had quite faded from the pages of the newspapers, the committee, on July 11th, rendered its final report on Corporal Punishment.[2] On July 19th the Minister of Justice made public the report of a committee appointed by him, and presided over by Mr. Justice Fauteux of the Supreme Court of Canada, on problems of Remission.[3] The Fauteux Report will be dealt with later in the Review. And finally, on July 31st, the Joint Committee tabled its final report on Lotteries,[4] which, while it has nothing to say on penalties, proposes some new departures in Canada in the control of the occasions of crime and disorder.

These reports show a healthy development of governmental

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[1] Debates of the Senate (unrevised ed.), Vol. 102, No. 63, p. 824. The committee was set up in February 1954, and held 30 sittings in that session, was reconstituted in February 1955, and held 29 sittings in that session, and was again reconstituted for the latest session. Printed Minutes of Evidence were tabled by the 1954 and 1955 committees. All sittings of the last committee were in camera.

[2] Debates of the Senate (unrevised ed.), Vol. 102, No. 66, p. 872.

[3] Report of a Committee appointed to inquire into the Principles and Procedures followed in the Remission Service of the Department of Justice of Canada (Queen's Printer, Ottawa, 1956).

[4] Debates of the Senate (unrevised ed.), Vol. 102, No. 69, p. 927.

and parliamentary interest in fields where we have been lagging in Canada and the committees and the minister are to be congratulated. A curious feature of the business, which has caused some puzzlement not unmixed with amusement, was the lumping together of Capital and Corporal Punishment with Lotteries. The story seems to be this. When the new Criminal Code was introduced in Parliament it was feared that the partisans of various "reforms" might try to use it as an opportune vehicle to get them enacted, a possible obstacle to the passage of the bill if strong reaction developed. To forestall this, and also because the matters involved required further investigation, the government decided to refer the principal questions to committees, and the nature of the questions seems to have determined the destinations of the references. Two topics, Insanity as a Defence in Criminal Law and Criminal Sexual Psychopaths, involved the consideration of medico-legal points demanding considerable professional knowledge to appreciate and determine, and accordingly these were referred to two royal commissions,[5] both under the chairmanship of Chief Justice J. C. McRuer, of the High Court of Justice of Ontario, and with nearly the same personnel on each. The remaining problems were, it seems, considered political, in the sense that the solutions required a measurement of public feeling and appreciation by the public in order to be effective, and were thus handed over to a body sensitive to the popular mind, the Joint Committee.

As the Joint Committee has produced three sociological studies of high quality, the action taken seems justified by its results. While the three reports may have aroused more public attention so far than the Fauteux Report, the subjects they deal with are not really as important as Probation, Prisons and Parole, either in the numbers affected or in the persistence and impenetration of their action in the community. Capital punishment is indeed important, and permanent so far as concerns the offender, but the Joint Committee's report on the subject and the studies upon which it is based indicate that its social effect is too subtle for calculation. Probation, prison improvement and parole, on the other hand, while they do not seem to rouse any violent emotions, promise relief and restoration to many thousands, public savings of considerable amount, a diminution of the ratio of

[5] The Royal Commission on Insanity as a Defence in the Criminal Law of Canada and the Royal Commission on Criminal Sexual Psychopaths.

crime and an eventual improvement in the temper of society. Again, lotteries are not really a criminal problem at all, except on the fringes, and controlling them is analogous to controlling strong drink or highway traffic.

This is not to say that the Joint Committee's reports are unimportant: they are only relatively so. Considering the sacredness of human life and the dignity of human personality, it is only right that a great amount of parliamentary time and the anxious and detailed attention of the Joint Committee and many other bodies and persons should be given to the death penalty and the lash. With respect to lotteries, the current disrespect for the law has become a public scandal. It is not, then, the purpose of this comment to inquire whether the committee's exertions were worth while, but what kind of fruit they have produced.

II

The Joint Committee's Report on Capital Punishment, although it is the product of a large committee that included persons of very diverse opinion and although it runs to but thirty pages of Hansard, is surprisingly comprehensive and convincing. One method used to achieve this result is reference to the Gowers Report published in England in September 1953,[6] which does contain an exhaustive review of the evidence heard and the arguments considered by the royal commission, under the chairmanship of Sir Ernest Gowers. Indeed, the Gowers Report is a very argumentative document: the Joint Committee report is not and is the better for it. While accepting and using the material provided by the Gowers Commission, the Joint Committee has not hesitated to differ in its conclusions, for example in favouring the retention of the doctrine of constructive malice and the mandatory death penalty for murder, and in preferring electrocution to hanging. And, of course, the Canadian report displays none of that peculiar fear of cure by legislation that highlights the British one. The Gowers Commission went so far, for example, as to draft a perfectly good definition of murder (excluding constructive murder) and then rejected it because they feared it was too wide (see § 482). They cite *Andrews* v. *D.P.P.*, [1937] A.C. 576, in which the House of Lords strictly limited the common-law rule of criminal negligence, and stated that they were afraid that legislation would pre-

[6] Royal Commission on Capital Punishment (1949-1953) Report (H. M. Stationery Office, London, September 1953. Cmd. 8932. 12s. 6d. net).

vent the exercise of judicial discretion. No doubt the commission did not learn how the *Andrews* case was used in Canada by judicial necromancy to subvert our former codified rules of criminal negligence.

The Joint Committee's report is written in a concise, straightforward style that allows a ready grasp of its message. The main conclusion is that the death penalty should be retained, but that electrocution should replace hanging. There is much more than that to the report, however, and a survey in some detail is justified.

The two opening chapters deal with the scope of the inquiry and with the existing law and practice, and include some statistical material. One anomaly that appears is that extension of the time for appeals is prohibited in capital cases only. The committee solves this rather neatly by proposing that in capital cases an appeal from conviction be automatic. The statistical tables yield some food for thought. It would appear that of late years between one fifth and one tenth of the cases diagnosed by the police as murder result in murder convictions, while something between a third and two-fifths yield the alternative verdict of manslaughter. As only about half of the murder convictions end in executions, murder is not one of those crimes where the much overworked certainty of conviction factor can have much influence. The statistics suggest that the law of evidence is imperfect and that our investigatory processes are not thorough enough: the writer submits that serious consideration should be given to reinstating the preliminary inquiry as a true investigation, as it was of yore, rather than a rather futile first run over the case for the prosecution. The report, indeed, notes that the figures given are not too reliable (for some reason, for example, Quebec Provincial Police reports were not available to the committee).

Chapter III deals with the arguments for and against capital punishment. Quite good summaries are given of various points of view that were pressed upon the committee as set out in the Minutes of Evidence. The summaries do not quite come to grips, however, with the arguments of the clerical members of a panel that discussed capital punishment, reported in a past number of this Review,[7] which is known to have been considered by the committee. These arguments are set out most explicitly in Father Kelly's contribution: that is, if, and only if, it promotes the com-

[7] The Abolition of Capital Punishment (1954), 32 Can. Bar Rev. 485. See Ven. Archdeacon G. B. Snell at p. 497, Rev. Father John Kelly at p. 502 and Rabbi Abraham L. Feinberg at p. 511.

mon good in a unique manner is the state justified in punishing a man with death, and it is not at all clear that the death penalty is any more effective than life imprisonment. The committee, as was to be expected, did not decide any point of morality, except by indirection. What they did decide is that the death penalty is uniquely deterrent, at least in Canada, and thus removed Father Kelly's minor premise, an adequate response to his syllogism.

In arriving at this conclusion the committee considered certain comparative figures on the effects of abolition that were gathered by Professor Thorsten Sellin of the University of Pennsylvania, which were also presented to the Gowers Commission. The report points out (§ 49) that Professor Sellin went beyond his stand before the Gowers Commission and stated to the Joint Committee that he thought his statistics proved the case against the general deterrent effect of the death penalty. In rejecting this conclusion as applicable to Canada at present, the committee relied on the views of law-enforcement officers, on their appraisal that Canadian public opinion does not favour abolition and on an *a priori* analysis of the force of the death penalty akin to that given by Sir James Fitzjames Stephen, who noted that no one condemned to die rejects commutation.[8] In making this finding, the committee underlines the high incidence of robbery as an occasion of murder in this country and, to buttress it, asserts that there has been no known instance of the execution of an innocent person for murder in Canada. They do, however, call for periodic review of the question, especially in the light of United Kingdom experience if and when the death penalty is abolished there.[9]

Is the conclusion acceptable? It rejects the statistical argument as not conclusive. It is directly contrary to the viewpoint that holds the death penalty to be immoral *per se*, which is thus, by implication, rejected. As the intrinsic immorality of the death penalty is rarely if ever supported by any argument beyond an emotional appeal or an *ipse dixit*, the committee may be excused for omitting to reason about it. Considering the divergent views of committee members exhibited in the minutes of evidence and the time and care taken to reach the result, it is apparent that the committee's finding was made in jury fashion after a weighing of all the evidence and, as it is consonant with the most widespread view of

[8] See the passage quoted in the Gowers Report, § 57.

[9] A private member's bill introduced by Sidney Silverman, M.P., passed the U. K. House of Commons on a "free" vote, but was rejected in July by the House of Lords. This led to serious journalistic proposals to abolish the upper chamber!

what is suitable, it should be accepted as sound. A group of experts might have reached a different opinion depending on their fields of expertness, but indeed the committee, composed as it was of politicians for the most part, can justly claim a more expert acquaintance with ordinary human nature. And ordinary human nature is the key to the solution.

Two questions that do not perhaps appeal to the modern mind linger to nag the mediaeval conscience of this commentator. Firstly, should any man be encouraged to take on the trade of hangman with the peril of corrupting his evaluation of human life that it carries with it? Secondly, do we bring ourselves, or the murderer, closer to Hell by rushing him into the hereafter before he has had time to remake his soul? Distinct from the argument that the death penalty is immoral *per se*, these are questions of immoral situations arising *per accidens*, that is, not by the essence of the act but, for example, by the state of mind of the actor; but it is impossible to discuss them in this space.

In chapter IV the report discusses various suggestions for limiting capital punishment, especially by excluding from its scope the classes of cases where executive clemency is now usually given. This might be done, it was submitted, by a more restricted definition of murder, either with or without new degrees of homicide, or by giving the judge or jury power to decide on the penalty. The Gowers Report must have been of the greatest assistance in this study, because it exposes convincingly the defects of the various suggestions as they appear in the places where they have been tried. The Gowers Commission found, for instance, that degrees of murder have proved largely meaningless where they have been adopted and result in an undesirable trading in verdicts by the prosecution and defence. Redefinition of murder in terms of moral culpability, on the other hand, has been found impossible because it involves a classification of motives that simply cannot be made satisfactory. In effect the committee found that, although one class, murderers under eighteen, might be given statutory exemption from the death penalty, the bulk of the commutations now given, while relatively large in number, are true exercises of the prerogative function and are not amenable to legal definition. The committee also rejected a transfer of the function to the judge or the jury and, while transfer to the jury found favour with the Gowers Commission, it is probably correct to say that the discretion would not be suitable for Canadian juries, which do not seem to be as tough minded as British ones.

In view of certain comments on constructive murder in a past issue of the Review,[10] it is more difficult to accept the committee's opinion that the present definition is satisfactory. As Mr. Sedgwick there points out, the new Criminal Code in section 202 has enlarged the liability by omitting the words "of its use" at the end of the phrase "death ensues as a consequence of its use". Thus if a gun, falling from the pocket of a fleeing burglar, by chance goes off and kills someone, it would be murder, although in other circumstances than burglary it might not even be manslaughter. The learned author gives a similar example.

In chapter V, dealing with trials and appeals, the Joint Committee makes some interesting recommendations: "First, that the accused should be fully advised of the facts upon which the prosecution will base its case. Secondly, the accused should have the benefit of the advice and defence of competent, experienced counsel at all stages including the preliminary hearing, trial, and appeal and should have facilities and funds to procure evidence and witnesses essential to a proper defence" (§ 78).[11] The first is to be secured by amendment to the Criminal Code, the second is pressed on the provincial governments. The committee also urges a mandatory plea of Not Guilty, an automatic appeal from conviction to the provincial court of appeal (previously noted) and an appeal as of right to the Supreme Court of Canada. Two of these proposals require some comment.

The accused's right to full disclosure is conceded by every fair-minded person and the practice that has been urged and even insisted upon by the courts is for Crown counsel to advise the defence of any evidence he intends to call that was not disclosed by the preliminary inquiry.[12] Judges have a wide discretion to deal with failures to comply. The discretion might be made statutory, but the proposed rule seems to go further and might, unless very carefully drafted, call forth a system of unamendable pleadings binding the prosecution to a rigid line of evidence. Such rigidity is impossible in practice: in almost every case the second hearing of the evidence takes a different colour and direction requiring further material to complete the picture. An obligatory adherence to what is foreseen would be most unjust to the public interest.

[10] Joseph Sedgwick, The New Criminal Code: Comments and Criticisms (1955), 33 Can. Bar Rev. 63, at pp. 71-72.

[11] See, Inequalities in the Criminal Law (1956), 34 Can. Bar Rev. 245, for a discussion of these points.

[12] In Ontario, Quebec and Saskatchewan (*per* the discussion referred to in footnote 11, Arthur Maloney, Q.C., dissenting) and in Nova Scotia, subject to human frailties of course.

The writer fears that the proposed rule may introduce a new and, in the light of the existing practice and judicial powers, an unnecessary technicality. It would seem preferable to give the defence a right to an adjournment, or even a new trial, if it is taken by surprise in a matter of substance.

Much can be said for and against appeals as of right to the Supreme Court of Canada.[13] The added number of cases would not at present be insupportable and such public furores as the *Coffin* case exhibited in its last stages would be avoided. But the idea is at odds with the principle that the function of the Supreme Court is to settle questions of law, for not every capital case contains serious points of law. At the last session of Parliament the government introduced a bill to increase the quorum to hear applications for leave to appeal, and an amendment to give the appeal as of right in capital cases was defeated. The bill is now law.[14]

The most radical proposal contained in the report is the substitution of electrocution for hanging. Chapter VI, on Methods of Execution, also recommends that, if hanging is to be retained, post-mortems be held in every case and that executions remain the responsibility of the provinces but take place at central locations. The committee chose electrocution because of convincing evidence that many hangings have been bungled in Canada, in contrast to the British experience.[15] One suspects also that the committee found the rope too direct and brutal compared to the remote and mechanical process provided by electricity.

III

The Joint Committee's Report on Corporal Punishment is also brief, taking thirteen pages of Hansard, but it is an effective summary of all that need be said on the question. It deals with whipping and strapping in two relations: (1) as a penalty for crimes, (2) as a method of enforcing prison discipline.

In the first aspect, the report notes that the imposition of the penalty has dropped from 12.1% of possible cases in 1921 to 0.6% in 1954 and that the punishment is becoming as rare as convictions for murder. The committee points out that the police

[13] See, for example, the contribution of Arthur Maloney, Q.C., at pages 283 and following of the discussion cited in footnote 11.

[14] An Act to amend the Supreme Court Act and the Criminal Code, Statutes of Canada, 1956, c. 48.

[15] Compare Minutes of Evidence taken before the Joint Committee, 1955, Nos. 17 and 18, and Dr. Malcolm MacLean's contribution (at pp. 508 ff.) to the panel mentioned in footnote 7, with the Gowers Report, § 730.

and prosecuting authorities generally favour retention of the lash as a most appropriate penalty in some cases and a deterrent. It also points out that many prison authorities, and those having much to do with prisoners, do not support this and doubt that whipping has any reformative or deterrent value.[16] The committee accepted the latter view and, it is submitted, rightly so. While the views of the police on punishment are entitled to respect, because they do get to know the "criminal mind", their dealings with criminals are the hurly-burly of fighting crime, an atmosphere giving rise to the belief that force and severity are the only answer. Very few policemen know the conditions under which punishment is undergone, or have made any careful study of penal effects, and thus they lack faith in the powers of reason and humanity. That is the tendency at any rate.

The committee evidently made a careful study of whipping as a deterrent to the person whipped and to others, including what figures were available, and concluded that it has no particular value as such and might even confirm an offender's bias against society. The members especially considered the effects of whipping on young offenders and decided that other methods of correction are better. On the other hand, they recognized that prison conditions are sufficiently different to require strapping as an *ultima ratio*, but urged that the penalty be awarded only in the cases suggested in the Archambault Report[17] and for violence to fellow prisoners and serious damage to prison property.

The report will surely meet with general acceptance because the findings make sense. No doubt, everyone can think of cases where the lash seemed appropriate, and the argument that its use is barbaric and mere revenge does not sufficiently take account of the justified indignation of a disinterested judge and of the public. Punishment is just and the need to punish must sometimes override any considerations of reform, as where a highly placed person breaks his trust to the great scandal of the public. Where reformation is the desideratum, however, it is simply nonsense to inflict a birching on a young, selfish "big feeling" thug and expect him to react as if he were a class-conscious candidate for Eton or Harrow. The like considerations apply to the older, more hardened felons who are subject to this penalty. No doubt

[16] Minutes of Evidence taken before the Joint Committee: *e.g.*, Warden Hugh Christie, 1954, No. 14, pp. 567-621; Major General R. B. Gibson, 1955, No. 10, pp. 292 ff.

[17] Report of the Royal Commission to investigate the Penal System of Canada (Queen's Printer, Ottawa, 1938) p. 356.

they deserve it, but it has no continuing influence to sustain more than a brief outward semblance of a change of heart and habits.

IV

The Joint Committee's Report on Lotteries, which will certainly become known as the Bingo Report, uses the vulgar tongue with an economy of space (eleven pages of Hansard) to say a great deal about its subject matter. While not as all-embracing as the two other reports, the brevity seems justified by the less serious nature of the subject and the irrational by-ways a fuller treatment might lead to. Indeed the committee points out that there are only two serious aspects to the topic: the danger of organized gambling becoming a focus for criminal activity; and the present disrespect for the law, reminiscent of the days of Prohibition, in a lesser way.

The main conclusions of the report may be summarized as follows:

(i) lotteries as a class should be redefined so as to include all methods of distributing wealth by a mode of chance, including bingos, advertising give-aways, sweepstakes;

(ii) chance should be the criterion and the elements should not include consideration or any distinction between chance and mixed chance and skill;

(iii) existing provisions and penalties, including forfeiture, should be more fervently enforced; and

(iv) all lotteries, as redefined, should be prohibited, excepting charitable lotteries under a licensing system, petty raffles incidental to meetings held for other purposes, and midways at agricultural fairs.

The committee based its conclusions upon a survey of the present situation which seems to the writer to be just. It found that the law was being broken by people and organizations of the utmost respectability and aptly compared the results to the conditions existing under Prohibition, although they are by no means as serious. The committee found that the great majority of the Canadian people simply do not believe that bingo and similar sports are wrong in themselves and that enforcement of the law is made impossible in this climate of opinion. The report, indeed, finds a principal obstacle to effective enforcement in the confused state of the law. As a matter of personal opinion and experience, the writer would be inclined to disagree. True there is confusion in the text of the Criminal Code and an apparent contradiction

between the gaming and lottery provisions on charitable lotteries, but the greatest defect of the law has been its too great particularity, making it difficult to choose the appropriate clause. Thus section 179 has ten clauses most of which enact more than one offence. But the textual difficulty is not to be compared to the psychological ones. Police and jurors share the majority opinion of the public and will not enforce the law. The jury hazard has been overcome by placing most of the gaming sections within the absolute jurisdiction of magistrates, but the reluctance of the police will only be overcome by giving them a workable scheme of control. Such a system seems to have been found in the plan to license charitable lotteries under supervision, which will eliminate private profit, and to prohibit all others. The novelty of the scheme of dealing with a supposedly criminal tendency by licensing is merely an appearance. As previously pointed out, the evils are accidental trimmings of a sport no more inherently bad than any other form of mass entertainment. It is to be hoped that the recommendations will be implemented with reasonable speed.

V

As noted earlier, each of the reports of the Joint Committee deals with a subject that has "political" overtones in the sense that the solution need not necessarily please the majority but should, and indeed must, suit the moral climate, so that the moral forces of the community would sanction it. The death penalty, for example, would be unsuited to a community that did regard it as morally wrong, because law that smacks of injustice is a cause of social disruption. If we come to that opinion in Canada, capital punishment should be abolished. This would not necessarily be a forward step in civilization: it might indeed indicate a loss of moral fibre and an inability to distinguish good and evil. On the other hand, a view of games of chance widely held in the seventeenth century has no secure home in the twentieth: whether or not it was ever a view that pleased the majority, it is no longer respected and calls forth no significant conformity due to public sentiment and tradition.

Human respect and public tradition are perhaps the most potent forces making for obedience to law. The committee has recognized this and has based its various proposals upon a thorough sociological study of the Canadian people within the scope of its inquiries, and has developed solutions that correspond to

the nation's present needs and outlook. In this respect the reports are of the utmost value and the Joint Committee by its arduous work and earnest thinking has earned the thanks and respect of us all.

P. J. O HEARN*

* * *

MECHANICS' LIENS—TRUST FUND PROVISIONS—INDEPENDENT REMEDY PROVIDED—FUND INDESTRUCTIBLE BY PRIOR ASSIGNMENT.—In 1942 the Mechanics' Lien Act of Ontario[1] was amended[2] by the interpolation of an entirely new section (now section 3) which, according to the marginal note, constituted the "contract price a trust fund".[3] British Columbia followed suit in 1948[4] by enacting a section in almost identical terms, which appeared until recently as section 19 of the Mechanics' Lien Act of that province.[5] As a result, perhaps, of the quashing in 1949 of certain convictions arising out of breaches of the provisions of the Ontario section,[6] there were added to it by amendment in 1952 two additional subsections.[7] These provided, respectively, an express offence and penalty for unauthorized use of the trust money and a saving pro-

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[1] Now R.S.O., 1950, c. 227. [2] By 1942, c. 34, s. 21.

[3] A section in virtually the same terms had, however, been enacted in Manitoba in 1932 (by 1932, c. 2, s. 1) as an addition to an entirely different statute—The Builders' and Workmen's Act (R.S.M., 1913, c. 20). This will be referred to later in the present comment.

[4] By 1948, c. 48, s. 2.

[5] R.S.B.C., 1948, c. 205. S. 19, read as follows: "All sums received by a contractor or a sub-contractor on account of the contract price shall be and constitute a trust fund in the hands of the contractor or of the sub-contractor, as the case may be, for the benefit of the owner, contractor, sub-contractors, Workmen's Compensation Board, labourers, and persons who have supplied material on account of the contract; and the contractor or the sub-contractor, as the case may be, shall be the trustee of all such sums so received by him, and, until all labourers and all persons who have supplied material on the contract and all sub-contractors are paid for work done or material supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto, shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust". This act has now been repealed by 1956, c. 27, assented to 2nd March, 1956, enacting the Mechanics' Lien Act, 1956. The former s.19 appears in slightly modified form as s.3(1) of the 1956 act and there have been added as s.3(2) and (3) of the 1956 act two new subsections which correspond substantially but not entirely to the subsections added to the Ontario trust fund section in 1952 and referred to in footnote 7 *post*. The present comment refers to s.19 as it stood down to 2nd March, 1956.

[6] See Macaulay and Bruce, Handbook on Canadian Mechanics' Liens (1951) p. 68.

[7] By 1952, c. 54, s. 1.

vision. Until 1954, however, there were few reported cases in British Columbia, and none in Ontario, dealing with the sections.

It can be safely said that the scope and effect of these so-called trust-fund provisions of the Ontario and British Columbia acts —which find no counterpart in the mechanics' lien legislation of the other provinces of Canada — [8] have until quite recently remained obscure to practitioners. They have also to some extent baffled the courts, if the diverse opinions expressed by the nine judges concerned with *Minneapolis-Honeywell Regulator Company Limited* v. *Empire Brass Manufacturing Company Limited* during its course from trial in British Columbia to the Supreme Court of Canada can be regarded as typical.[9] But this case (and three preceding British Columbia cases referred to by the trial judge), together with an Ontario decision reported almost concurrently with it,[10] constitute the entire available jurisprudence upon an enactment that, as will appear, must certainly be regarded as a fundamental and far-reaching extension of the protection afforded by the mechanics' lien legislation in two Canadian provinces. Because the judgments throughout the *Minneapolis-Honeywell* case are lengthy and it reached the court of ultimate resort in Canada, the profession now has at hand both a substantial volume of material and an authoritative pronouncement upon the subject. The purpose of this comment is to consider the *ratio* of the Supreme Court of Canada's decision and to refer, incidentally, to the sole Ontario case.

The plaintiff *M-H* (a supplier and installer of heating controls) sued *I* (a plumbing and heating contractor with whom it had contracts to supply and install its products) and *E* (an assignee of *I*'s book debts) as defendants for an account of money they or either of them held in trust under section 19 of the British Columbia act and for judgment for the amount due the plaintiff under the trust. The assignment of book debts from *I* to *E* was antecedent to the contracts between *I* and *M-H*. All cheques received by *I* on account of the work covered by its contracts with *M-H* were,

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[8] It may be wondered, however, whether some other provinces may not have inserted a similar section in some other act, as did Manitoba — see footnote 3 *ante*. No indication that this is the case has appeared to the writer, but the possibility should not be overlooked. He has not attempted to examine all the remaining legislation of the other provinces.

[9] The trial decision of Davey J. is reported in [1954] 1 D.L.R. 678, 11 W.W.R. (N.S.) 212; the decision of the British Columbia Court of Appeal in [1954] 4 D.L.R. 800, 13 W.W.R. (N.S.) 449, and of the Supreme Court of Canada in [1955] S.C.R. 694, 3 D.L.R. 561.

[10] *Bank of Montreal* v. *Township of Sidney*, [1955] 4 D.L.R. 87, O.W.N. 581 (LeBel J.).

by arrangement, drawn in favour of *I* and *E* jointly. By a further arrangement, all or part of the proceeds of some of the cheques were used to pay creditors of *I* other than *E* (including *M-H*), evidently selected indiscriminately, and the remaining cheques or proceeds were applied against *I*'s indebtedness to *E*. Subsequently, having completed its contracts, *M-H* sued and recovered default judgment against *I* for the balance owing to it. *M-H* had, by passage of time, meanwhile lost its right to file mechanics' lien claims against the real property involved. *I* shortly afterwards went into liquidation and *M-H* brought the present action.

Mr. Justice Davey at the trial, in considering section 19, held that (a) the section was not penal in nature, since no offence was created or punishment specified, (b) civil rights were conferred, and the trust was enforceable by appropriate civil proceedings, (c) the section provided an independent remedy not confined to those entitled to mechanics' liens, (d) moneys effectively assigned to a third party and reduced into his possession would fall outside the scope of the section, and (e) the trust fund need not be distributed rateably among the beneficiaries. The first proposition was not explored in any subsequent judgment and the second was dealt with only perhaps by inference in the judgments of O'Halloran J.A. and Locke J. when considering the proper forum. The former found that the County Court's jurisdiction was exclusive and the latter that the provincial Supreme Court had jurisdiction. The remaining three propositions were those to which most attention was paid in the higher courts. There was, indeed, no difference of opinion upon the last, and it was upheld in the Supreme Court of Canada. The "independent remedy" aspect became the main basis of reversal in the Court of Appeal as well as the foundation of the restoration by the Supreme Court of Canada of the plaintiff's success at trial. The question of the effect of an assignment upon the trust created by the section proved even more divisive in all the courts. The view taken by Mr. Justice Davey required him to examine in detail the document of assignment in the case before him, with the result that he found it operated to the extent of placing *some* moneys beyond the reach of the section. His broad finding upon the effect of assignments found favour with both Robertson and Sidney Smith JJ.A. in the Court of Appeal and Locke J. in the Supreme Court of Canada. But Sidney Smith J.A. differed in his interpretation of the document, and held it placed *all* moneys in question beyond the purview of the trust. The majority of the Supreme Court of Canada,

on the other hand, as will be seen, took a view opposite from the trial judge and held that an assignment could not take any moneys out of the scope of the section.

The judgment at trial also dealt with some matters that will not be examined in detail in the present comment. It held, for example, that the section imposed joint and several liability and consequently the rights of the plaintiff against one of two persons liable under it did not merge in a judgment already secured against the other. Also, the trial judge expressly directed that, for the purpose of accounting, certain moneys already received by the parties be brought into hotchpot. The final directions made by the Supreme Court of Canada would seem to achieve the same result.

The British Columbia Court of Appeal, by a majority of two to one, reversed the trial judgment. Mr. Justice O'Halloran, with whom Mr. Justice Sidney Smith substantially agreed, found it unnecessary to interpret section 19 because, in his opinion, it could not be invoked by one who had lost his right to file a mechanics' lien.[11] This right had of course expired in the present case before the action was brought. Having differed from the trial judge upon one of the latter's fundamental premises, O'Halloran J.A. did not pursue the remaining matters dealt with at trial. Mr. Justice Sidney Smith found another ground upon which he would have allowed the appeal—his interpretation of the scope of the document of assignment,[12] which, as has already been noted, he regarded as embracing all moneys alleged to be affected by the trust. He agreed with Davey J. that an assignment could defeat the trust but differed from him in finding that the relevant document wholly (rather than partially) did so. Consequently, he did not find it necessary to deal with the remaining points considered by the trial judge. Robertson J.A., who dissented, supported in large measure the reasoning and conclusions of Mr. Justice Davey.

Mr. Justice Rand delivered the principal judgment in the Supreme Court of Canada, with which three[13] of the other four mem-

[11] See in particular [1954] 4 D.L.R. at pp. 805-806, where O'Halloran J.A. states: "If s. 19 was intended to create a new remedy, or a new protection divorced from the necessary existence of a lien under *the Mechanics' Lien Act*, it could easily have been so stated in the section itself; or s. 19 could have formed the subject-matter of a separate statute, or have been incorporated in some general purpose statute." This sentence would seem to contain the rationale of the position adopted by his lordship.

[12] The material terms of the assignment—and they are not lengthy—are reproduced in the reports. It is cause for no small wonderment that two opposite conclusions could have been reached upon what seems a narrow and (one would have thought) readily discernible facet of its meaning.

[13] Kellock, Estey and Fauteux JJ.

bers of the court concurred. Mr. Justice Locke, the remaining member who sat, rendered a more lengthy judgment than his colleague and, although he too allowed the appeal, he differed upon one vital issue, as will be later discussed.

With characteristic force and conciseness of language, Mr. Justice Rand disposed of the difficulties that had beset the lower courts. In so doing, he neither referred to the reasons expressed in the judgments below nor to any of the cases referred to in them. He dealt in these words with the basic problem of whether section 19 is a remedy standing independently of the right to a lien:

> The Act is designed to give security to persons doing work or furnishing materials in making an improvement on land. Speaking generally, the earlier sections give to such persons a lien on the land, but that is limited to the amount of money owing by the owner to the contractor under the contract when notice of the lien is given to him: only thereafter does he pay the contractor at any risk.
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> For obvious reasons this is but a partial security; too often the contract price has been paid in full and the security of the land is gone. It is to meet that situation that s. 19 has been added. The contractor and sub-contractor are made trustees of the contract moneys and the trust continues while employees, material men or others remain unpaid.

Then, passing to the particular situation created by the prior assignment of book debts in the case at hand, he stated:

> . . . I cannot interpret the word 'received' in s. 19 as not including money paid to an assignee. The money 'received' on account of the contract is the same as that paid by the contractor: payment the correlative of receipt. The assignee acts through the right and power of the assignor; and the receipt by him is likewise that by the creditor. If this were not so, the entire purpose of the section could be nullified by an assignment contemporaneous with the contract. S. 16 declares that 'no assignment by the contractor or any sub-contractor of any moneys due in respect of the contract shall be valid as against any lien given by this Act'. But this does not prevent valid payment to the assignee prior to a notice of lien. The statute contemplates payments to the contractor whether direct or to his assignee, but these remain subject both to s. 16 as respects liens and to s. 19 as to the beneficiaries of the trust. The assignee of such moneys must either see to the satisfaction of the rights under the trust, either directly or by way of subrogation to them, or run the peril of participating in a breach of it. I have no doubt that no assignment can destroy the rights created by s. 19 in the moneys so paid over.

This view, of course, made it unnecessary to interpret the assignment and avoided the troubles encountered by the courts below and by Mr. Justice Locke in so doing.

And finally, as to the mode of distribution of the trust moneys, Rand J. held:

> S. 19 does not, however, require that they be distributed on a pro rata basis. The sub-contractor has, in this respect, a discretionary power, and his obligation is satisfied when the trust moneys are paid out to persons entitled, whatever the division. This, of course, might be affected by rights of unpaid trust creditors under other provisions of law.

The learned judge then passed to an examination of the specific problem of accounting and payment presented by the case before him, which will not be further pursued here.

Mr. Justice Locke, in reaching the same result as Rand J. upon the fundamental point that section 19 provides an independent remedy, expressed these views:

> *The Mechanics' Lien Act of British Columbia* has since 1879 afforded to labourers, material men, contractors and others a means of enforcing their claims against the work produced as a result of their efforts, or with the materials they have supplied, by filing claims of lien within a defined period and, if default were made, instituting proceedings to realize the amounts payable. S. 19 was apparently designed to provide further security for such persons by providing that moneys received as payments on account of the principal contract or of any sub-contract should, in the hands of the recipients, constitute a trust fund for their benefit.
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> . . . Had it been the intention of the legislature that these rights should be extinguished in the same manner as the right of lien against the property, as provided by s. 20, I think an appropriate amendment to that section would have been made when s. 18A was added in 1948.

In one important respect Locke J., as already observed, differed from his brethren of the Supreme Court. He agreed with all the judges below, who had considered the point, that moneys could by prior assignment be made to fall outside the scope of the trust. Rand J. and the majority of the Supreme Court of Canada held, as we have seen, that no assignment could destroy the rights created by section 19, a view which was shared by Mr. Justice LeBel in the Ontario case[14] referred to at the outset of this comment.

Locke J. also expressly held, contrary to Mr. Justice O'Halloran, that, notwithstanding certain proceedings are by the British Columbia Mechanics' Lien Act required to be taken in the County Court, the Supreme Court of the province has jurisdiction to entertain an action under section 19.[14] This finding is, of course, implicit in the disposition of the case by Rand J.

[14] Two further features of the judgment of Locke J. should perhaps

The *Minneapolis-Honeywell* case has, it is suggested, established these main points concerning section 19 of the British Columbia Mechanics' Lien Act:

(1) it creates rights enforceable in civil proceedings, which rights are independent of the right to a lien under the act;

(2) no assignment of money due upon a contract can destroy or reduce the trust fund constituted by the section;[15]

(3) proceedings for the enforcement of rights under the section may be brought in the Supreme Court of British Columbia;

(4) the trust fund need not be distributed pro rata and there is full discretion as to payment subject only to rights of unpaid trust creditors under other provisions of law.

Had the Ontario trust-fund section not been amended in 1952 or that of British Columbia in 1956, there can be little doubt that the *Minneapolis-Honeywell* case would now wholly govern the interpretation of both.[16] One is left, however, with reservations as to enforceability civilly in view of the penal provisions added in these years. Although the appellate courts did not deal with the point, the judgment at trial was premised upon a finding that the trust-fund section was not penal in nature. Possibly the added penal provisions could be regarded, in the words of Davey J. (in speaking of the penalty provided by the Summary Convictions Act of British Columbia[17]), as "merely an additional deterrent to a breach . . . which does not derogate from the civil rights conferred on the persons mentioned therein".[18] In the *Sidney*

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be noted, notwithstanding they are in the nature of obiter dicta: (a) he refers to a decision of the Manitoba Court of Appeal, *Castelein* v. *Boux*, [1934] 3 D.L.R. 351, 42 Man. R. 97, which dealt with the section mentioned in footnote 3 *ante*, and in doing so seems to regard it as of no significance that the section is not part of the mechanics' lien legislation of Manitoba (although undoubtedly the fact would have had some importance for O'Halloran J.A., see footnote 11 *ante*); and (b) he refers to the Ontario Mechanics' Lien Act, as amended in 1942 (footnote 2 *ante*). The meaning of this added section he says "is indistinguishable from that of the British Columbia Section". But in 1952 the Ontario section was expanded by the addition of offence and penalty provisions (footnote 7 *ante*). Such a modification appears clearly to affect the view Davey J. would have taken of the section in the light of his reasons in the present case.

[15] What about a garnishee order attaching the moneys due to the contractor? It would be interesting to have a pronouncement by the Supreme Court of Canada on this point in view of the three-two split in the Manitoba Court of Appeal in *Castelein* v. *Boux*, [1934] 3 D.L.R. 351, 42 Man. R. 97. The minority held that such an order could not destroy the rights in the trust moneys.

[16] *Semble*, it would also so far as applicable govern the interpretation of s. 3 of the Manitoba Builders and Workmen's Act, R.S.M., 1954, c. 28.

[17] R.S.B.C., 1948, c. 317, s. 4(2). [18] [1954] 1 D.L.R. at p. 685.

case, decided in Ontario in 1955,[19] the trial judge, Mr. Justice LeBel, did not refer to the *Minneapolis-Honeywell* decision.[20] He did refer to the 1952 additions to the trust-fund section, saying that "the abuse it seeks to remedy is made even clearer by the recent addition of two subsections". His lordship made no comment indicating that he had considered the aspect of possible derogation from civil rights which troubled Davey J. in *Minneapolis-Honeywell* and which, in the circumstances, he did not of course have to consider. Hence, it may be that, before the *Minneapolis-Honeywell* decision can be regarded as applicable to the enforceability aspects of the sections as they now stand, the precise point should be dealt with by a court competent to rule upon it. Alternatively, the legislature could by a further amendment to the respective sections remove all doubt that, notwithstanding the penal provisions, full civil rights exist to enforce the trust.

[19] *Bank of Montreal* v. *Township of Sydney*, [1955] 4 D.L.R. 87, O.W.N. 581. The case involved a contest between the assignee of moneys payable to a contractor under a contract, on the one hand, and lien claimants, on the other, upon facts not unlike those in the *Minneapolis-Honeywell* case. Furthermore, it was disposed of upon grounds which were strikingly similar to those of Rand J. in the latter case. Mr. Justice LeBel was not concerned with the question of the trust in relation to those who had lost their lien rights — for the rights had not been lost in the case before him. The only issue for decision was the effectiveness of a prior assignment by the contractor to a bank of moneys payable under the contract. Compare the following statements with those of Rand J. in *Minneapolis-Honeywell*:

"The Bank's contention strikes me as startling because if it is sound, all those whom the Act was designed to protect since 1873 — the year of [*sic*] our first *Mechanics' Lien Act* was enacted — might have had their claims for liens defeated by a very simple expedient. The contractor or builder had only to assign the moneys payable to him under his contract before the first lien arose. It was, and still is, all as simple as that, according to the Bank." [1955] 4 D.L.R. at p. 89.

"It is unnecessary to consider whether the assignment to the Bank amounted to an appropriation or conversion in this case, because it is plain that any sum received by a builder or contractor on account of the contract-price does not become his property 'until all workmen and all persons who have supplied material on the contract and all subcontractors are paid for work done or materials supplied on the contract'. An assignor may not give his assignee a better title to property than he has himself." [1955] 4 D.L.R. at p. 91.

There was a distinction between the two cases, perhaps not unimportant in considering the enforceability of the trust by civil proceedings. The Ontario case was one in which an assignee sought a declaration that its rights to moneys payable under the contract took priority over the rights thereto of lien claimants. No one was seeking to enforce the trust and indeed the existence of the trust fund was only regarded by the learned trial judge as "a further safeguard for the benefit of those" whom the act was designed to protect. In deciding that the assignment could not affect those rights, and in dismissing the action, he did not, of course, have to consider how the trust could be enforced. This issue was, on the contrary, basic to the British Columbia case, for there the plaintiff brought the action for no other purpose than to enforce the trust.

[20] The trial and appellate court judgments had already been reported but not that of the Supreme Court of Canada.

Perhaps the most important impact of the Supreme Court of Canada's decision, both in British Columbia and Ontario (and also possibly in Manitoba), will be, or should be, that felt by banks and other lenders who have been accustomed to take and to rely upon assignments of book debts as security for advances made to building contractors. Whether the eventual result is likely to prove as serious to the building industry as Mr. Justice Richards of the Manitoba Court of Appeal predicted in 1934 remains to be seen. He stated that, if such a conclusion as has now been reached by the Supreme Court of Canada were arrived at, it

> would have such far-reaching effects in limiting and lessening the necessary credits to many builders and contractors, who have in the past obtained legitimate loans on the security of assignments of the moneys payable or to become payable under their contracts, that it would be difficult for them to carry on their important businesses.[21]

MAXWELL BRUCE*

Research: Legal and Other

But legal education is something more than indoctrination in what has been an acquirement of technical expertise. It also contemplates that at least the principal centers of legal education have in effect a scientific mission, a responsibility for the constant refinement and extension of our knowledge of law, regarded as the practical realization of justice. This idea may be illustrated by a passing analogy to another branch of education, in which theory is also closely allied with practice, namely medicine. It needs no argument today—though it did in Molière's time—that in the field of medicine, devoted to the cure of disease and public health, the great medical centers are expected to do more than to imbue the acolytes of Hippocrates with the accepted materia and methods of medicine; their intensive training is integrated with extensive hospital services, and in particular, with persistent, elaborate research to improve medical practice. The field of engineering offers a significant, if later, parallel. The conception that research is an essential responsibility of education is not peculiar to medicine; it pervades the physical and social sciences generally, and its value has been demonstrated beyond question. The lesson for legal education is obvious. (Hessel E. Yntema, Comparative Legal Research—Some Remarks on "Looking out of the Cave" (1956), 54 Mich. L. Rev. 899, at p. 901)

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[21] [1934] 3 D.L.R. 351, at p. 358.

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