CASE AND COMMENT

MARRIAGE—CONFLICT OF LAWS—VALIDITY OF POLYGAMOUS MARRIAGE OF PERSON DOMICILED IN BRITISH COLUMBIA.—In *Kaur* v. *Ginder*[1] the British Columbia Supreme Court had the opportunity to pronounce upon some interesting questions in the law affecting polygamous marriages. The petitioner sought a decree of nullity on the ground that the respondent was already married at the time he went through a ceremony of marriage with her in the United States. In 1928, the respondent, a native of the Punjab, had gone through a form of marriage there with Argen Singh, both parties being Sikhs of the Jat caste. This caste practiced polygamy. So far the case is on all fours with *Baindail* v. *Baindail*[2] but a further fact establishes an important distinction. Argen Singh had lived in British Columbia for twenty years before the marriage ceremony, and had acquired a domicile there. Furthermore, he returned to British Columbia a little more than a year after the ceremony, and lived there with his wife until 1946; Brown J. decided the case on the basis that Singh was domiciled in British Columbia at the time of the Jat ceremony. Whilst recognising that this fact distinguished the present case from *Baindail*, the learned judge was nevertheless of the opinion that nothing turned on the question of domicile, and that the matter was concluded by the well-known dictum of Lord Dunedin in *Berthiaume* v. *Dastous*:[3]

> If the marriage is good by the laws of the country where it is effected, it is good all the world over no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses.

He, therefore, held that the Jat ceremony created a marriage which, although polygamous, was valid "at least to the extent that she could not validly remarry during her first husband's lifetime",[4] and granted the decree of nullity accordingly.

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[1] (1958), 13 D.L.R. (2d) 465, 25 W.W.R. 532.
[2] [1946] P. 122.
[3] [1930] A.C. 79, at p. 83.
[4] *Supra*, footnote 1, at p. 470 (D.L.R.).

It is, with respect, to be regretted that Brown J. should have applied a dictum concerned with the problem of the form of marriage to the question before him, without considering whether he was, in fact, dealing with a problem of that nature. The facts of the case raise two important questions, neither of which is considered in the judgment:

(1) If the 1928 marriage was polygamous, did Argen Singh, a British Columbian domiciliary, have the capacity to enter into such a marriage?

(2) By what test should the court determine whether the 1928 marriage was monogamous or polygamous?

(1) Relying upon Lord Dunedin's dictum to cover the case, Brown J. does not consider the question of Singh's capacity to enter into a polygamous marriage. Since, however, he held that there was a valid polygamous marriage, his judgment may be taken as authority *sub silentio* for the proposition that a person domiciled in a monogamous jurisdiction does have the capacity to enter into such a marriage. It is submitted that this is a satisfactory proposition, but, in view of the contrary opinion expressed by academic writers,[5] it is regrettable that the learned judge did not apply his mind to the problem of capacity and did not discuss the relevant authorities. Whilst it is accepted that a person domiciled in a polygamous jurisdiction has the capacity to enter into a monogamous marriage,[6] *Re Bethell*[7] is often cited as authority for the view that a person domiciled in a monogamous jurisdiction does not have a similar capacity to enter into a polygamous marriage. In that case, the question in issue was the validity of the "marriage" of Bethell, a domiciled Englishman, to the daughter of a Baralong chieftain, which "marriage" had been celebrated according to the rites of the polygamous Baralong tribe. Stirling J. held the "marriage" invalid, but the arguments of counsel and the judgment are directed to the question whether the ceremony could be classified as a marriage ceremony in a sense acceptable to an English court, rather than to the question whether Bethell had the capacity to enter into a polygamous union:

> The question is whether the relationship described by the chief of the tribe is a marriage at all.[8]

In *Risk* v. *Risk*[9] the petitioner, domiciled in England, sought the annulment of her marriage in Egypt to an Egyptian domiciliary

[5] Beckett, (1932), 48 L.Q.Rev. 341, at p. 360; Morris, (1952), 66 Harv L.Rev. 961, at p. 983.

[6] *Chetti* v. *Chetti*, [1909] P. 67.

[7] (1888), 38 Ch.D. 220.

[8] *Ibid.*, at p. 225.

[9] [1951] P. 50.

on the ground that it was polygamous, and she had no capacity to contract it. Barnard J. held that, as the marriage was clearly polygamous (the marriage contract providing for four wives), the court had no jurisdiction to entertain the suit. It is not possible to extract from the brief judgment any definite view as to the outcome of the suit if it had been entertained, but it might be argued that such references as that "the matrimonial law of England recognises no other marriage (than a monogamous one)"[10] indicate that the learned judge was of the opinion that the marriage was invalid.

In opposition to the doubtful authority of these two cases stands the dictum of Denning L.J. (as he then was) in *Kenward* v. *Kenward*:[11]

> Where a domiciled Englishman marries a woman of polygamous race . . . in her homeland by the ceremonies of her country, intending to live with her there, well-knowing the kind of marriage which he is entering . . . the marriage is valid by the law of her country, and should also for many purposes be regarded as valid here.

This is the approach to the question which has now been adopted, without consideration, by the British Columbia Supreme Court as the result of the decision under review. Once a degree of recognition is afforded to polygamous marriages there is no logical reason for refusing to recognise as valid a polygamous marriage entered into by a person domiciled in a monogamous jurisdiction. In one sense, every marriage is potentially polygamous. A spouse may, at any time, change his domicile from a monogamous to a polygamous jurisdiction, and so acquire the capacity to marry a second wife. As long, of course, as he retains a monogamous domicile, he cannot take a second wife even though his first marriage may be classified as "polygamous". This point is necessarily bound up with the question of determining the nature of the marriage.

(2) So far as this question is concerned, Brown J. clearly assumed that he was dealing with a polygamous marriage, because it had been celebrated according to polygamous rites in a jurisdiction recognising polygamy *i.e.* because the *lex loci contractus* recognised polygamy. As a result "under the doctrine propounded in *Lim* v. *Lim*[12] the respondent could not have proceeded against Argen Singh in the British Columbian courts to enforce the obligations incident to a valid marriage contract".[13] In the *Lim* case,

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[10] *Ibid.*, at p. 53.
[11] [1951] P. 124, at p. 145.
[12] [1948] 2 D.L.R. 353, [1948] 1 W.W.R. 298.
[13] *Supra*, footnote 1.

Coady J. (in the same court) had followed *Hyde* v. *Hyde*[14] to the extent of holding that the court had no jurisdiction to entertain a prayer for alimony by the second wife of a polygamous Chinaman who, since his marriage, had become domiciled in British Columbia. The learned judge expressed his regret at being driven to this decision by the terms of Lord Penzance's judgment which restrained the court from exercising any matrimonial jurisdiction over a polygamous marriage. He was clearly of the opinion that, whereas such a restraint might have been reasonable in the England of 1866, it was not reasonable in a province with so large a Chinese population as British Columbia. In this case the respondent was, at least, an effective polygamist. The effect of the dictum in *Kaur* v. *Ginder* is to take out of the jurisdiction of the British Columbian courts any marriage celebrated according to rites which and in a jurisdiction which permits of polygamy, even where one, or perhaps even both, of the parties are domiciled in monogamous jurisdictions.

To escape this conclusion, one must go back to the basic question of the test for determining whether a marriage is monogamous or polygamous. Brown J. seems to have assumed that the Jat ceremony could only create a polygamous marriage. In this context, his attention does not seem to have been drawn to the early Canadian decision of *Connolly* v. *Woolrich*.[15] In that case, the facts were similar to those in *Re Bethell*.[16] In 1803, a certain Connolly, a fur-trader amongst the Indians of the North-West Territories, went through a form of marriage in accordance with Cree ceremony with Suzanne Pas-de-Nom the daughter of an Indian chief. This girl bore him six children, and the evidence was that he lived with her faithfully, even though the Cree Indians practiced polygamy. In 1831, he brought his "wife" to Lower Canada, and, in the following year, he deserted her, and went through a Catholic marriage ceremony with Julia Woolrich. After the death of Connolly and of his first "wife", one of the six children commenced these proceedings to establish that the first "marriage" was valid, and had established a *communauté de biens* between Connolly and Suzanne Pas-de-Nom. In a judgment, notable as much for its learning as for its length, Monk J. held that Connolly had contracted a valid monogamous marriage. Even though the Crees practiced polygamy, and such law as was in force in the area at the time recognised the practice, he looked at the particular mar-

[14] (1866), L.R. 1 P. & D. 130.
[15] (1867), 11 L.C.J. 197 (Que.).
[16] *Supra*, footnote 7.

riage, and based his decision on the fact, that, after the ceremony, the parties had lived monogamously for so long. It is possible to argue that the decision turned upon the fact that the Cree ceremonial was the only marriage ceremonial available in the area, or that, by assuming that Connolly could not contract a polygamous marriage, the only question which Monk J. decided was the same as that decided in *Re Bethell*, that is, whether in fact there was any ceremony which could be classified as a "marriage". But it remains true that Monk J. accepted that a polygamous ceremonial could create a monogamous marriage:

> I have strictly speaking nothing to do with polygamy in this case . . . no doubt this is law which Christianity expressly condemns, but its existence amongst the Crees did not render Mr. Connolly's marriage with the Indian a nullity. . . . I am not aware of any English law which prevents a British subject from marrying an infidel, or which would render his marriage with a pagan illegal.[17]

It is submitted that the decision in *Connolly* v. *Woolrich* is in accordance with further dicta of Denning L. J. in *Kenward* v. *Kenward*,[18] and with the judgment of Barnard J. in *Mehta* v. *Mehta*[19] and of the Committee of Privileges in the *Sinha Peerage* case.[20] In *Mehta* v. *Mehta*, the wife, an English domiciliary, petitioned for the annulment of a marriage celebrated in India with an Indian domiciliary according to the rites of a sect which practiced monogamy. Although the husband could have changed his sect and practiced polygamy according to the law of India, the marriage was held to be monogamous:

> It is perfectly clear that this marriage was monogamous in its inception, and that monogamy was the essence of the contract into which these two parties entered.[21]

In the *Sinha Peerage* case, the Committee of Privileges seems to have been prepared to recognise as monogamous a marriage celebrated according to polygamous rites when the parties had shortly thereafter become members of a monogamous sect. It is clear from these cases that it is impossible to establish a simple rule for determining whether a marriage is monogamous or polygamous. Not only is the test of the *lex loci celebrationis* unsuitable for many Eastern countries with their mixture of personal laws, but also it is highly unsatisfactory to treat every marriage entered into by a ceremony and law which permits polygamy as automatically polygamous. Similarly, the *lex domicilii*, may be unhelpful when the

[17] *Supra*, footnote 15, at pp. 246-7.
[18] *Supra*, footnote 11.
[19] [1945] 2 All E.R. 690.
[20] [1946] 1 All E.R. 348.
[21] *Supra*, footnote 19, at p. 693.

domicile or personal law of the parties differ. Perhaps the proper test, which is one best supported by the authorities, is to consider the intention of the parties at the time of the ceremony.[22] A polygamous ceremony will, of course, raise a presumption of polygamy, but this may be rebutted by evidence of long exclusive cohabitation as in *Connolly* v. *Woolrich*,[23] or of a clearly expressed intention to practice monogamy as in the *Sinha Peerage* case.[24] A monogamous ceremony, likewise, raises a presumption of monogamy, even when a spouse is domiciled in a polygamous jurisdiction.[25] It is possible that, had Brown J. considered these authorities, he might have reached the conclusion that the Jat marriage was, in fact, monogamous. Singh had lived in British Columbia for twenty years, and returned to live with his wife there shortly after the marriage. They lived there monogamously for about seventeen years. Such facts might well be sufficient to establish that the intention of the parties in 1928 was to create a monogamous marriage. This would clearly be the more satisfactory conclusion. If Singh had deserted his wife, should she be denied alimony in the British Columbian courts simply because he went to India to marry her rather than she coming to British Columbia to marry him? One shrinks from the conclusion that the conflict rules on polygamy could be so unreasonable.

L. J. LIBBERT*

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SALE—BREACH OF FIXED-PRICE RESALE COVENANT MADE PURSUANT TO GOVERNMENT REGULATIONS—MEASURE OF DAMAGES—SURREPTITIOUS MARKET—OPEN MARKET.—The awkward results produced by price-fixing in the sale of goods were demonstrated once again in the recent decision of the Privy Council in *Mouat* v. *Betts Motors, Ltd.*[1] on appeal from the New Zealand Court of Appeal.

[22] The view that the nature of the marriage may depend upon the intention of the parties was put forward in (1931), 47 L.Q.Rev. 253, and criticised in the articles referred to in Beckett, *supra*, footnote 5, at p. 360; Morris, *supra*, footnote 5, at p. 983.

[23] *Supra*, footnote 15.

[24] *Supra*, footnote 20.

[25] *Chetti* v. *Chetti*, *supra*, footnote 6: "Although by the law affecting one of the parties to a monogamous marriage he may be entitled to take a second wife, yet if the contracted marriage is his first, and he uses words and so contracts as to leave no doubt that he binds himself towards his spouse to live monogamously, then his taking any second woman to wife . . is an infringement of the contract of monogamy (per Lord Mackay, *Lendrum* v. *Chekravati* (1929), S.L.T. 99)".

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[1] [1958] 3 W.L.R. 598.

In 1955 the appellant wished to purchase an American Chevrolet car, and approached the respondent dealer for this purpose. At the time, due to the dollar shortage, the New Zealand Government had restricted the import of North American cars, and to obtain a licence for import under Board of Trade regulations[2] the would-be purchaser had to show particular need, for example, professional purposes. If the application was approved, the dealer was permitted to sell the car, but only at a price fixed by the Government Price Control Division under the Control of Prices Act, 1947. Moreover, under the same Board of Trade regulations, the dealer was required to enter into a covenant with the purchaser that, if the latter desired to sell the car within two years of date of purchase, he would resell it to the dealer, and at the sale price less depreciation at a fixed rate. The regulations also prohibited the dealer from selling the car to another purchaser at other than the original sale price plus reconditioning costs at ordinary values, and necessitated the conclusion of a similar covenant with that purchaser for the unexpired period. The appellant obtained a licence, was sold a car, and in breach of the covenant with the dealer sold it to a third party within three months for a profit of £543. Had the appellant resold to the respondent dealer, the latter would have paid the original sale price less £50 depreciation.

The main question was whether the covenant was illegal as being an additional consideration to the maximum price within the terms of the Control of Prices Act, 1947. The Privy Council dismissed this argument, as had the courts below, and the issue remained as to whether the measure of damages was £543 or £50. The trial court, the Court of Appeal, and the Privy Council each resorted to the open market created by those who "surreptitiously" bought and sold cars which were the subject-matter of breached covenants, and on this basis the respondent recovered £543, being the difference between the covenant and the apparent surreptitious market price.

The first question arising from the judgment of the Privy Council is why this surreptitious market was not in fact an illegal market. The relatively short judgment merely says,[3] "Under the Customs Act, it was provided that if any person committed any breach of the conditions [*i.e.* the regulatory 'Conditions relating to Distri-

[2] Issued as Import Control Regulations, 1938 (S.R. 1938/161), under the Customs Act, s. 46(2), as amended by Customs Amendment Act, 1921, s. 32 and 5th Sched. The statutes enabled the Governor General by Order in Council to license imports and impose conditions and restrictions.

[3] *Supra*, footnote 1, at p. 602. Customs Act Amendment Act, 1953, s. 3.

bution'] or was knowingly concerned in any such breach, he was liable to a penalty of £200 or the value of the goods." This could suggest that any person who dealt in cars still covered by the two-year restraint might be committing a criminal offence, but the judgment of F. B. Adams J.[4] in the Court of Appeal is emphatic that "there was no law binding the appellant to execute the covenant, or binding him to act as required by the covenant, or exposing him to the liabilities created by the covenant . . . and the sale by the appellant . . . was not a breach of any statutory duty but only a breach of the covenant."[5] The dealer was directly subject to the statutory punishment, but the appellant was only caught by the Act if he was knowingly concerned in any breach of the conditions "committed by an importer or dealer."[6] It is therefore clear that no buyer or dealer in the surreptitious market was subject to statutory penalties.[7] Legislation and regulation left the dealer to enforce his covenant at common law.

The second question concerns the open market. Neither Barrowclough C.J. at first instance[8] nor the Privy Council mentioned the New Zealand Sale of Goods Act, 1908, and in the Court of Appeal Gresson J. did not discuss the damages issue. However, McGregor J. noted that the "available market" of section 52(3) of that Act was the ordinary rule, and Barrowclough C.J. felt constrained, as had Danckwerts J. before him in the similar English circumstances of *British Motor Trade Association* v. *Gilbert*,[9] to follow the Court of Appeal decision in *Rodocanachi* v. *Milburn*.[10] In the latter case the classic rule was stated by Lord Esher M.R. that "if there is a market there is no occasion to have recourse to [any other] mode of estimating the value [of the goods] . . . the value is to be taken independently of any circumstances peculiar to the plaintiff",[11] and in *Williams Brothers* v. *Ed. T. Aguis, Ltd.*,[12] Lord Haldane, in commenting upon *Rodocanachi* v. *Milburn*, did "not think that the law so laid down [had] been affected by section 51 of the Sale of Goods Act, 1893."[13] The Privy Council followed *Williams Brothers* v. *Ed. T. Aguis, Ltd.* in the case under review,

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[4] An otherwise dissenting judgment on the grounds that the covenant did constitute an additional consideration, and was therefore illegal.
[5] [1957] N.Z.L.R. 380, at p. 292.
[6] *Ibid.*
[7] *Ibid.*, at p. 400.
[8] *Ibid.*, at p. 380.
[9] [1951] 2 All E.R. 641.
[10] (1886), 18 Q.B.D. 67.
[11] *Ibid.*, at pp. 76, 77.
[12] [1914] A.C. 510.
[13] *Ibid.*, at p. 520. He went on, "By sub-section three of the section the general principle is recognised as the rule which obtains *prima facie*, and I do not find in sub-section two anything inconsistent with this recognition."

and also approved and followed Danckwerts J.'s decision in the *Gilbert* case.

In the circumstances of this case there were certainly buyers and sellers available so as to constitute a market for Chevrolet cars, and the market price was equally arrived at by the ordinary course of trade and competition. But, though no court directly said as much, there were in fact two markets here. A regular market for cars free from the two-year restriction, and a surreptitious market for cars which were not free. The considerable excess of demand over supply in the former market no doubt encouraged the growth of the latter, but it is possible that, though there was merely a supply of Chevrolet cars in circulation, there were two market prices. The very fact that original vendors in the surreptitious market were exposing themselves to actions for breach of covenant might have enhanced still further the prices demanded in that market, and, alternatively, some furtive covenant-breaking vendors might have been content to accept less than the market price provided there was little fuss and the sale resulted in a handsome profit. Yet, having embarked upon a consideration of this dubious market, it does not appear that the courts fully examined its nature and real prices.[14] Though there was evidence that the third party purchaser had resold to a fourth party one month later for a £743 profit over the fixed price, and the fourth party informed the trial court that he considered this further price to have been the fair market price for the time also at which the appellant sold, little seems to have been made of this evidence.[15] Without mentioning the above alternatives, the lower courts were prepared to accept the price at which the appellant sold as being the market price for the purposes of the action. The Privy Council made no mention even of the further more profitable sale, being content in its turn to say, "the market price of this car in that market was £1,700. At any rate, Mouat can hardly deny that was its market price, since that is the sum for which he sold it."[16] Though it is true that the court did not need to establish further that there were available buyers and sellers, but was simply concerned to discover

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[14] McGregor J. seems to be considering the price produced by the interaction of both markets when he says (*supra*, footnote 5, at p. 400), "In my view this market value must be determined by the general market for a similar article. The real value of the car is determined on a comparative basis, taking into account the value of other comparative cars, which are, or may be, free from restrictions."

[15] The reported judgments of Barrowclough C.J. and McGregor J. are not clear on why this evidence was not accepted.

[16] *Supra*, footnote 1, at p. 604.

the market price,[17] yet with respect the Privy Council argument rather smacks of convenience—that, as between the appellant and the respondent, it was a fairer solution that the respondent should have the difference between the £50 and the £543 profit. But, if Mouat had been prepared to, and did, sell below the market price in Christchurch, as between himself and Betts Motors, Ltd., this was accidental and the respondent was entitled to that market price.[18]

It is possible, however, that the court could have avoided the latent embarrassment of enquiring into the surreptitious market by looking elsewhere for the market.[19] It was recently argued by the present writer[20] that section 50(3) and section 51(3) of the English and Scottish Sale of Goods Act, 1893, and similar provisions in Canada, Australia, and New Zealand, are satisfied before the case comes into court when, either by government or the trade, the price is fixed. For the statutory purposes the market or current price is the fixed price, and injured vendors and purchasers can sell and buy elsewhere in the market at the same prices as those in their original contracts. On the facts under review there was a controlled price; evidently there were always buyers for every Chevrolet the dealer recovered by covenanted resale to himself, and there was a discoverable price at which vendors and purchasers of cars not yet free of the two-year restriction might sell and buy. Of course, the controlled market price assumes that original purchasers will honour their covenants, since the vendor must have re-acquired a car before he can sell at the controlled price. Nevertheless, failure by an original purchaser to resell to the vendor is similar to the purchaser's refusal to accept. The disappointed vendor in the second case has an item yet to sell; the disappointed original vendor, now purchaser, in the first case has no item which he would have sold—in both situations at a controlled price. For, though the original vendor, now purchaser, has to secure an article to sell, he must pay the same fixed price for it, less depreciation.

On this basis it was no concern of Betts Motors, Ltd. what

[17] See further (1958), 36 Can. Bar Rev. 360, at p. 380.

[18] In the *Gilbert* case Danckwerts J. did consider the markets of restricted and unrestricted cars, but came to the conclusion on the scanty evidence that the prices would be roughly the same. See *supra*, footnote 9, at p. 644.

[19] "It does appear to me strange that the plaintiffs should be entitled to demand payment of a sum of money which can only be considered at the present time, so far as dealings at the present time are concerned on the footing that the scheme of the plaintiffs [the British Motor Trade Association] is not being carried out, but is being, surreptitiously or otherwise, evaded." *Per* Danckwerts J. in the *Gilbert* case, *ibid.*

[20] *Supra*, footnote 17.

price Mouat acquired from a third party. The dealer was concerned to show loss to himself, and, if he could prove loss arising directly and naturally beyond that which was satisfied by the acquisition of the £50 under section 52(3) of the 1908 Act, he was free to do so. It is at this point that McGregor J.'s remark is important, namely, that the dealer might want to keep the car until the two years expired.[21] This might have been a ground for computing the value of the car at the expiration of the two-year period, and awarding that greater sum to the dealer.[22] Of course, this involves the dealer in establishing under section 52(2) that Mouat foresaw this possibility as a result of his (Mouat's) observing the covenant. It also results in an evaluation of the prices which prevail at the close of the particular restriction period in the regular market of restriction-free cars. But both these features are the result of price control; in the first that the control exists, in the second that it exists only for a period.

The unfortunate feature of price-fixing, and this type of price-fixing in particular, is that it produces several possible markets each with its discoverable price. In this case there were three; all that could be said for the surreptitious, but legal market more than the other two was that it worked like clockwork, and produced an obvious justice. The dealer acquired the "excess" profit, and the controlled price was dismissed as a circumstance peculiar to the dealer, and therefore accidental as between him and Mouat. But it is surely in this ambiguity and conflict of markets that market evaluation of damages is breaking down. Moreover, if the courts are going to adopt the prices of the ungainly surreptitious markets, where does this stop? If the New Zealand Customs Act, as amended, had been drafted or amended to make this surreptitious market illegal, as perhaps it ought to have been when these Board of Trade conditions were contemplated, the prices of such a market would have been plainly incapable of recognition. On the other hand a government policy may be some justification to the courts in the interpretation they have made, and the results they have produced. In the *Gilbert* case, though it was not illegal to break the covenant, the scheme set in motion by the British Motor Trade Association had been sponsored by the government, and government policy itself had set in motion the New Zealand restrictions. But what is to be the position when the market in a particular item is corn-

[21] *Supra*, footnote 5, at p. 400.
[22] Less the £50 in this case since the dealer has only one notional car to sell.

ered, the price is fixed to the retailer and the customer, and by covenant imposition an artificial and high priced surreptitious market is produced?[23] If the purchaser breaks his covenant, the monopolist, as a successful plaintiff, can rely on securing the difference between the contract price and the artificial market price.[24] And, if this is to be avoided, everything may turn upon the reasonableness of the restraint, upon which issue trial and appeal courts may take different views. This fact immediately puts pressure upon the intending covenant-breaker to keep his covenant, since in a great many cases, unlike the monopolist, he will hesitate before being prepared to pursue the matter up through the courts.

The adoption of the controlled price as the market price has the additional advantage that it avoids the arbitrary damages necessarily awarded, where prices are not fixed, by the present indiscriminate application of the market price produced by free bargaining. It is perhaps to be regretted that the Privy Council did not discuss this point, since in the *Gilbert* case, which the Council followed, Danckwerts J. expressed doubts on the merits of the universal application of the market value "without regard to the special circumstances of the particular plaintiff",[25] and Barrowclough C.J. reiterated those doubts; "I share with Danckwerts J. the feeling that there is some anomaly in resorting to the open market to assess the damages in a case where, if the covenant had been honoured, the profit that the plaintiff could have made would not have exceeded £50."[26] However, having regard also to the general provisions of the Sale of Goods Act, 1893, Danckwerts J. found himself bound to follow *Rodocanachi* v. *Milburn*, and Barrowclough C.J. found those cases which had bound Danckwerts J. to be "equally impelling".[27]

Apart from the question of price-fixing, which in this case produced the material for the doubts, these remarks raise a genuine query on the overall merits of the market test. And, indeed, the market evaluation produces some questionable results. In a case

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[23] In the United Kingdom under the Monopolies Act, 1948, which decrees monopoly conditions to exist, broadly, when one firm or a group of firms acting together supply one-third or more of the goods in question, the Monopolies Commission is steadily investigating such practices on a case-by-case basis. See further (1956), 19 Mod. L.Rev. 63. It is too early as yet to discuss the long-term merits of the Restrictive Trade Practices Act, 1956, as seen in the work of the Restrictive Practices Court.

[24] In the *Gilbert* case the relevant part of the covenant was taken in favour not of the dealer, but the Motor Trade Association, and the Association brought the action against the purchaser.

[25] *Supra*, footnote 9, at p. 645. [26] *Supra*, footnote 5, at p. 388.

[27] *Ibid.*

of non-delivery by a vendor, sub-contracts for resale concluded by the purchaser before the breach, if not actually foreseen by the vendor, are normally not constructively foreseeable.[28] But, if the purchaser contracts to resell at a price lower than the market price, even if he intends, and in fact acquires, a long-term gain, he is awarded damages based on the market price. On the other hand, in the event of non-acceptance by a buyer the vendor's resale of the unaccepted goods merely mitigates the vendor's loss, and, if he resells below (as well as above) the market price, and demand exceeds supply, he is compelled to show that the state of the trade was actually or constructively known to the breaching purchaser. This means that only when the injured purchaser sub-contracts above the market price are his "peculiar circumstances" not reflected in the random advantages of market-price damages, while the injured vendor's "peculiar circumstances" must always be argued as actually or constructively foreseen. Indeed, this arbitrariness of market evaluation is the more disturbing when one reflects that remoteness of damage in contract, unlike tort, is limited by foresight.

In the *Gilbert* case Danckwerts J. referred to similar doubts in the judgment of Evershed J. in *Brading* v. *F. McNeill & Co., Ltd.*[29] In the latter case, confessing that he was not happy about the matter, and declaring that he was not to be taken to decide "whether it would be just or logical strictly to apply the principle in *Rodocanachi* v. *Milburn* in all cases",[30] Evershed J. stressed the distinction between cases in which the matter accidental to the purchaser is a sub-sale by him at an enhanced profit, and those cases where the purchaser is passing on the property without any profit to himself at all or at less than the market price. The implication is that the learned judge would have restricted the application of the principle solely to the former class of cases.[31] Evidently

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[28] *The Arpad*, [1934] P. 189.

[29] [1946] Ch. 145.

[30] *Ibid.*, at p. 152.

[31] It is not without interest that *Rodocanachi* v. *Milburn* and *Williams Brothers* v. *Ed. T. Aguis, Ltd.* were both cases of vendor's non-delivery, and injured purchaser's sub-contract to resell at less than the market price. Though involving real property, *Brading* v. *F. McNeill & Co., Ltd.* was also a case of vendor's breach, but the value of the property at the date of repudiation was very considerably higher than that which existed at the date of contracting, and of the purchaser's sub-contract with the third party It is not really clear from Evershed J.'s words (*ibid.*)—"But it seems clear from the two authorities cited [as above] that there is no ground for such a distinction, both the authorities being in fact cases (like the present) of the latter kind"— whether the market test ought to be withheld from the latter class of cases, or whether he felt bound to follow *Rodocanachi* v. *Milburn*, involving, as it did, a similar case of vendor's breach.

Danckwerts J. and Barrowclough C.J. were equally doubtful whether the principle ought to be applied to the latter class of cases.

Nevertheless, though it would possibly be more just on many occasions for the courts to be able to assess the damages after an enquiry into the facts of each case, it is true, as Evershed J. admitted, that this may involve the courts in often difficult, elaborate, or extensive investigation, but this in itself, it is thought, does not justify the adoption of an arbitrary rule of thumb. It is daily evident that damages in many fields are rarely easy to assess. In any event it is suggested that the subject warrants re-examination and the opportunity of considering the advantage of amending legislation. In this connection the words of Lindley L.J. in *Rodocanachi* v. *Milburn* often seem significant. "It must be remembered", he said, "that the rules as to damages can in the nature of things only be approximately just, and that they have to be worked out, not by mathematicians, but by juries."[32] Since 1886 the rapid disappearance of juries in civil cases, at least in the United Kingdom, suggests that the time is ripe for a profitable re-examination.

Meanwhile, when, as in *Mouat* v. *Betts Motors, Ltd.*, a controlled price exists, sub-section three is thereby automatically satisfied, and damages can be based upon a detailed investigation of loss, is there any greater advantage in looking for alternative open markets in order to preserve the rule of thumb?

D. W. M. WATERS*

* * *

CO-TENANCY—TENANCY BY ENTIRETIES REVIVED—EFFECT OF EXECUTORY AGREEMENT OF SALE TO HUSBAND AND WIFE.—Without elaboration of principle or even reference to, let alone discussion of, applicable authorities, the Ontario Court of Appeal has resuscitated tenancies by the entireties, perhaps in their pristine glory, by affirming the judgment of Stewart J. in *Campbell* v. *Sovereign Securities & Holding Co. Ltd.*[1] The central issue in the case was whether a widow, who had been a purchaser of land along with her husband under a contract of sale which was still executory at his death, could give a marketable title to a purchaser from her. The answer was in the affirmative. The agreement of sale to the spouses contained no specification of their interests

[32] *Supra*, footnote 10, at p. 78.

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[1] [1958] O.R. 441, 13 D.L.R. (2d) 195, aff'd [1958] O.W.N. 414.

nor of the kind of tenancy which they were to take. While evidence was given (which the trial judge believed) that a joint tenancy was intended, Stewart J. declined to rule on its admissibility and disposed of the case as if it were either inadmissible or non-existent. On this view, he was obliged to consider the effect on the transaction of section 12 of the Conveyancing and Law of Property Act of Ontario[2] and section 2 of that province's Married Women's Property Act.[3] Despite a cryptic reference in his conclusions to the wife being a surviving joint tenant, the Court of Appeal correctly interpreted Stewart J.'s judgment as finding that a tenancy by the entireties was created in the spouses, presumably carrying with it all the common-law consequences of that institution. It will be noticed, of course, that such property interests as arose under the executory agreement existed in equity only.

This finding was based on two preliminary conclusions; first, that section 12 of the Conveyancing and Law of Property Act (speaking as it does of "any letters patent, assurance or will" in reversing the common-law preference for joint tenancies rather than tenancies in common and bringing spouses within its terms) did not apply to agreements for sale; and secondly, that the Married Women's Property Act did not destroy or affect the unity of husband and wife, at least in respect of their co-acquisition of land under an executory agreement which did not specify how they were taking. These underlying conclusions were affirmed by the Court of Appeal, although without any reference to the Married Women's Property Act; and this could be taken to mean that, like the trial judge, the Court of Appeal saw no relevance in that Act.

Accepting the judicial opinion that an executory agreement of sale was not an "assurance" within section 12 of the Conveyancing and Law of Property Act and that consequently the common law applied to the determination of the kind of tenancy taken by the spouses, the choice was between a joint tenancy and a tenancy by the entireties. The difference between these two tenancies lies in one additional unity to the four that characterize a joint tenancy, namely, the conjugal unity of the co-tenants. If it be the case that the Married Women's Property Act has destroyed that unity in relation to property transactions, then clearly the spouses in this case were not tenants by the entireties (and hence without effective power to sever the estate so as to destroy survivorship), but at the most joint tenants. It is submitted that the Married

[2] R.S.O., 1950, c. 68. [3] *Ibid.*, c. 223.

Women's Property Act has that effect, and that Stewart J. was wrong in refusing to recognize this, and wrong too in his appraisal of two long-standing Ontario authorities on the subject, *Re Wilson and Toronto Incandescent Electric Light Co.*[4] and *Spring* v. *Kinnee*,[5] the latter a judgment of the Ontario Appellate Division.

Appreciation of this contention involves prior consideration of the common-law consequences of an estate by the entirety whereby it was the husband who was entitled to rents and profits during coverture or joint lives of his wife and himself; it was the husband alone who could convey an interest during the joint lives but without right to impair the wife's right of survivorship. Tenancies by the entireties apart, the common law gave the husband an estate *jure uxoris* in his wife's freeholds, entitling him to rents and profits during coverture and inhibiting any sale by the wife during that time without his consent. It is hence a material question whether the husband's control of an estate by the entireties, no less than of his wife's separate freeholds, was a result of the marital tie or whether it was an incident of the estate itself.[6] The English and Canadian case law indicates that this control during the joint lives was implicit in the marital status rather than being also or separately an incident of an estate by the entireties. This was not the invariable rule in the United States.[7] But taking the situation as it existed in English and Canadian law, it followed that the Married Women's Property Act in destroying the husband's control over his wife's real property during their joint lives ended those features of an estate by the entireties which distinguished it from a joint tenancy.

These features included, as already pointed out, the certainty of survivorship because of unseverability, and the husband's right of control and enjoyment during coverture. Unseverability meant, of course, that there could be no partition.[8] In addition, a creditor of the wife could not at common law realize his claim against an estate by the entireties during coverture; and while a creditor of the husband could get at the latter's interest existing during the joint lives he could not defeat the wife's right to survivorship. In some jurisdictions in United States, married women's

[4] (1891), 20 O.R. 397. [5] [1928] 4 D.L.R. 723, 62 O.L.R. 562.

[6] See Ritchie, Tenancies by the Entirety in Real Property with Particular Reference to the Law of Virginia (1942), 28 Va. L. Rev. 608; Note, Tenancies by the Entirety in New York (1952), 1 Buff. L. Rev. 279; Phipps, Tenancy by Entireties (1951), 25 Temple L.Q. 24.

[7] See 2 American Law of Property, p. 23 *et seqq.*

[8] It may be noted that the Partition Act, R.S.O., 1950, c. 269 does not include tenants by the entireties within its terms.

property legislation has been construed to defeat the husband's unilateral right of control and enjoyment during the joint lives but not to defeat the principle of unseverability.[9] This result, applied to the situation in the *Campbell* case, would give us an unseverable joint tenancy but with equal rights of husband and wife to enjoyment of the property during coverture and, hence with equal rights of creditors of the spouses to attach their respective interests during coverture, subject only to the certainty of survivorship.

There is no indication in the judgments in the *Campbell* case of any such relaxation of the common law governing tenancies by the entireties. Stewart J. in a quixotic passage of his judgment stated that "it must always be remembered . . . that the Married Women's Property Act was enacted in order to give rights to and protect the interests of the wife and that it therefore should not be construed as taking any rights away unless the Act clearly says so".[10] This passage is clearly misdirected. Would the learned judge have it that the Act does not even affect the common-law rights of the husband *jure uxoris?* It is difficult to see what rights of the wife would be taken away in a common-law tenancy by the entireties unless the right of survivorship, and in this particular case it was the wife who survived. A speculative right of survivorship is less meaningful as an incident untouched by the Married Women's Property Act than would be the right of severance which previous Ontario cases have regarded as a consequence of that Act.

It is this consequence which underlies *Re Wilson and Toronto Incandescent Electric Light Co.* and *Spring* v. *Kinnee;* and it is equally the clear result of the judgment of the English Court of Chancery in *Thornley* v. *Thornley*.[11] This consequence and result is not only a reasonable application of married women's property legislation but is eminently dictated by the modern relationship of husband and wife and by the existence of other means of protecting their interests without defeating claims of creditors of one of the spouses. It is beside the point that in the case at bar the result on the facts would have been the same had the courts construed the transaction to create merely a joint tenancy.

While there can be little quarrel with the conclusion that an "assurance" within section 12 of the Conveyancing and Law of

[9] See *supra,* footnote 7.
[10] [1958] O.R. 441, at p. 445, 13 D.L.R. (2d) 195, at p. 201.
[11] [1893] 2 Ch. 229.

Property Act does not include an executory agreement of sale, it is odd indeed that under the law as declared in the *Campbell* case, purchasers who are husband and wife, and who take under a deed which does not specify the tenancy by which they hold, will take as tenants in common under present Ontario law, but if they take under an agreement for sale they are tenants by the entireties. Even apart from married women's property legislation is this the necessary result under an executory agreement? It is my submission that this is an indefensible position for the following reasons.

If, at strict common law, a vendor contracted to sell land to a married woman no rights or obligations would flow from that contract in favour of or against the married woman, subject of course to the contract being executed by a conveyance.[12] Equally, if the contract was for a sale to husband and wife, it would in the eyes of the common law be a contract with the husband alone; the wife would not be regarded as a party, again subject to the contract being executed by a conveyance. If these propositions are applied to the facts in the *Campbell* case, the decision is obviously wrong as a matter of common law. Nor is it improved, in terms of principle at least, if we regard the matter from the standpoint of equity. While the wife's common-law incapacity to contract was relaxed in equity, it was modified to the extent only of subjecting her separate estate (already acquired) to contractual obligations expressly or, by inference from surrounding circumstances, entered into with reference to such separate property.[13] Where, however, the issue concerned a married woman's attempted acquisition of realty under a contract of sale, such authority as there is underlines the fact that she could not, apart from statutory reform, obtain a decree of specific performance.[14] Moreover, specific performance would not be decreed against her (again, apart from statute) under an agreement by her to sell land belonging to her. Ames suggests that there would be no objection, under the old law, to the grant of a decree of specific performance at the suit of a wife in an action in which her husband was joined as plaintiff and where they tendered an executed deed of the land which she promised to convey; but he admits that "no case precisely like this has been found".[15] The case envisaged by Ames is,

[12] See 1 Williston on Contracts (revised ed.), Ch. XI.

[13] *Cf.* 4 Pomeroy, Equity Jurisprudence (5th ed.), Ch. 2.

[14] 5 Williston on Contracts (revised ed.), p. 1438n. Fry, Specific Performance (6th ed.), p. 712n. See *Davies* v. *Treharris Brewery Co.*, [1894] W.N. 198.

[15] Ames, Lectures on Legal History, p. 377.

in any event, not the situation considered by Stewart J. and by the Court of Appeal. On this state of the authorities, the *Campbell* judgment involves a dilemma if the view taken therein is correct. Unless the Married Women's Property Act applies, the wife in the *Campbell* case would have had no enforceable interest in the land during her husband's lifetime, and there could be no estate by the entireties nor, indeed, any other estate in equity. If the matter be considered afresh as of the time following the husband's death, then it is clear that, the disability of coverture being removed, the widow would be entitled to take in her own right; and again no co-tenancy would be involved in equity.

This brings me to a further consideration of the Married Women's Property Act in its application to contracts of married women. Accepting, (and in truth I do not accept) that the Act had no effect on tenancies by the entireties arising by conveyance, it surely cannot be denied effect on a married woman's capacity to contract and to hold in her own right the fruits of her contracts as if she were a *feme sole* and to bind her existing and future estate by contractual obligations. This statutory prescription is incompatible with a conclusion that a tenancy by the entireties arises under an executory agreement of sale to husband and wife. In fine, the *Campbell* case deserved more consideration than it got in the trial court and much more than it got in the Court of Appeal.

BORA LASKIN*

* * *

PRESCRIPTION — QUASI-CONTRACT RESULTING FROM THE RECEPTION OF A THING NOT DUE — WHETHER CLAIM PRESCRIPTIBLE BY FIVE OR THIRTY YEARS. — In the Quebec Court of Appeal, *New York Central System* v. *Sparrow*[1] raised the question whether the claim of a farmer against a railway carrier for reimbursement of overcharges of freight on milk shipments extending over a period of twenty-six years, was subject to the five-year prescriptive period[2] or to the general thirty-year period.[3]

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[1] [1957] Q.B. 808 (Bissonnette and Owen JJ.A.; the late Mr. Justice Gagné took no part in the decision).

[2] Art. 2260 (4) of the Civil Code is applicable to "any claim of a commercial nature".

[3] Art. 2242 of the Civil Code states that "All things, rights and actions the prescription of which is not otherwise regulated by law, are prescribed by thirty years, without the party prescribing being bound to produce any title, and notwithstanding any exception pleading bad faith."

The entire claim was allowed by Mr. Justice Ferland[4] whose decision was affirmed by the Court of Appeal.

In a previous comment on a similar case involving a water carrier,[5] I suggested that support could be found there in the form of an *obiter* for the proposition that since the maritime contract of affreightment is commercial by nature and never civil or *mixte*, a claim for overcharges against a water carrier is always subject to the five-year prescription. The *Sparrow* case, in my opinion, shows that land carriage differs in that respect from water carriage.

Sparrow was said by the trial judge to be "un cultivateur non-commerçant".[6] In the technical sense, he was a non-trader. This finding would appear to be the pivot upon which the case turned. It followed that the matter in litigation was *mixte*, civil for the non-trader (the plaintiff dairy farmer) and commercial for the trader (the defendant railway carrier). The non-trader's claim was prescriptible by the long period, but if the claim had been by the trader against the non-trader, it would have been subject to the five-year period.[7]

The judgments delivered, however, may tend to create confusion. Both the trial judge and Bissonnette J.A. thought the action to be *de in rem verso* and founded upon unjust enrichment. I believe this to be an erroneous point of view. As Mr. Justice Owen put it:[8] "[This] is an action based on the quasi-contract resulting from the reception of a thing not due, that is, an *action en répétition de l'indû*.[9] The prescriptive period is thirty years".

The prescriptive period of this particular *action en répétition de l'indû* is thirty years, because the plaintiff was found to be a

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[4] Unreported, S.C., Beauharnois, No. 1014, dated February 4th, 1955.

[5] *United Nations* v. *Allied Steamship Lines Limited*, [1957] S.C. 372; see comment (1957), 36 Can. Bar Rev. 979.

[6] Joint Record, p. 265. Mr. Justice Owen agreed with this finding, at p. 812: ". . . from the point of view of plaintiff, a farmer, the quasi-contract or the original contract would be civil". Mr. Justice Bissonnette makes no reference to it.

[7] See authorities cited in my comment, *supra*, footnote 5 at p. 980, footnote 11, some of which are referred to in *Naud* v. *Dolbec*, [1959] S.C. 120.

[8] At p. 813, *in fine*.

[9] Arising under arts. 1047 and 1140 of the Civil Code. Art. 1047: "He who receives what is not due to him, through error of law or of fact, is bound to restore it; or if it cannot be restored in kind, to give the value of it.

If the person receiving be in good faith, he is not obliged to restore the profits of the thing received."

Art. 1140: "Every payment presupposes a debt; what has been paid where there is no debt may be recovered.

There can be no recovery of what has been paid in voluntary discharge of a natural obligation."

non-trader and the matter was *mixte*. But there is good authority for the proposition that a claim *en répétition de l'indû* can be commercial and prescriptible by five years. Thus the late Mr. Justice Philippe Demers in *St. Maurice Lumber Co.* v. *Scott*, stated:[10]

> Les matières commerciales (C.c. 2260, par. 4) ne sont pas définies dans notre code, cependant, avant le code, les tribunaux décidaient que les transactions qui étaient de la juridiction consulaire française, doivent être considérées comme des matières commerciales.

Of the many references by the learned judge one is to Fuzier-Herman, which reads as follows:

> Ainsi encore, lorsqu' on paie à un commerçant une dette relative à son commerce et que, par suite d'une erreur on paie plus qu'il n'est dû, l'obligation, pour le commerçant, de restituer ce qu'il a reçu en trop est commerciale, et les tribunaux consulaires sont compétents pour statuer sur l'action en répétition de l'indû.[11]

My conclusion is that *répétition de l'indû* is not by its nature civil; it can be commercial, as in maritime matters, or *mixte*, as in the *Sparrow* case.

LÉON LALANDE*

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CRIMINAL LAW—EXTRADITION OF FUGITIVES—CANADIAN PROCEDURE.—This comment deals with the procedures which must be followed (I) in securing the extradition of a fugitive from Canada to a foreign country and (II) in obtaining the return to Canada of a fugitive who has fled to a foreign country. The procedures are usually of a reciprocal nature between Canada and the foreign country and are governed by the Extradition Act[1] and the terms of the extradition treaty in force with the foreign country concerned. Where the extradition matter involves Canada and a Commonwealth country, or areas over which the Queen has some jurisdictional connection, the procedure is governed by the Fugitive Offender's Act, 1881,[2] and the United Kingdom Orders in Council applying this Act.

[10] (1908), 33 S.C. 532, at p. 533.

[11] Actes de Commerce, no. 1309. The edict of 1563 which defined the consular jurisdiction, ancestor to the modern French commercial courts, included conntestations as to *calculs ou erreur en iceux*. See Perrault, Traité de droit commercial, vol. 1 (1936), p. 295.

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[1] R.S.C., 1952, c. 322, as amended.

[2] Imp., 44-45 Vict., c. 69.

The comment is intended to be a guidepost to the practitioner and will not deal therefore with the substantive law of extradition but rather with the detailed steps that must be followed to secure the extradition of a fugitive. From a practitioner's viewpoint the steps are generally the same whether the proceedings are taken under the Extradition Act or the Fugitive Offender's Act. For brevity the present analysis will deal only with proceedings under the Extradition Act, which is the Act Canadian solicitors are more concerned with in their normal practice.

As will be noted, the machinery which must be set in motion is both legal and diplomatic. The local prosecuting authorities are normally responsible for instituting and prosecuting the judicial proceedings. On the other hand, the diplomatic proceedings for the requisition of the fugitive or the correspondence connected with the actual surrender of the fugitive are conducted by the federal government, because in effect the proceedings are a demand made by one state on another state to surrender a fugitive in the second state.

I. *Extradition from Canada to a Foreign Country*

1) *Provisional Arrest of the Fugitive in Canada:* The foreign consul in Canada nearest to the Canadian police jurisdiction in which the fugitive has been located applies to the local police for the fugitive's provisional arrest. The information and complaint is laid by a member of the local police force or by the local consul. This information may be based upon a letter or telegram purporting to be from a diplomatic or judicial authority stating the alleged offence and that a warrant has been granted for the apprehension of the fugitive. The arrest is made on the basis of a warrant confirming the warrant of arrest supplied by the country requesting the extradition, if one exists, or on the basis of a provisional warrant.

2) *Committal of the Fugitive by a Canadian Judge for a Hearing:* After the fugitive has been arrested he is brought before the extradition judge who may be either a county court or Supreme Court judge, depending on which one is available. Usually a county court judge hears the matter. The judge will commit the fugitive into custody as long as there is:

(i) A person clearly authorized by the foreign government requesting the extradition.
(ii) Sufficient evidence of identification of the fugitive.
(iii) Sufficient evidence of a crime having been committed according to the relevant treaty and municipal law.
(iv) A *prima facie* case properly presented.

3) *Application for Extradition:* The mission in Ottawa of the country requesting the extradition makes a formal request to the Department of External Affairs for the extradition of the fugitive. This is accompanied by evidence such as a transcript of any proceedings abroad, fingerprints, warrant of arrest, and other pertinent documents. The Department of External Affairs sends this material to the Department of Justice which notifies the deputy attorney general of the province in which the fugitive is living, the Royal Canadian Mounted Police, and the counsel of the country requesting the extradition if one has been retained by this time.

4) *Extradition Hearing:* The country requesting the extradition is always asked to appoint counsel to present the evidence on which the request for extradition is based. This is often the Crown prosecutor because the foreign country knows he is a reputable, experienced criminal lawyer but it may be any lawyer. It is this counsel who conducts the case through the court; the Crown does not enter into the proceedings. The extradition judge, after a hearing which is similar to a preliminary hearing, either commits the man or orders his release. However, before the fugitive can be extradited, fifteen days must elapse in order to provide time for an application for a writ of habeas corpus to be made. This fifteen days period is provided for by statute. The application for the writ is, of course, heard by a Supreme Court judge.

5) *Warrant of Surrender:* After the fifteen days have elapsed, the Minister of Justice *may* issue, on the basis of the warrant of committal and the transcript of the hearing, a warrant of surrender of the fugitive to the foreign escorts. Before the warrant is issued, care is taken to see that the demanding country does not wish to try the fugitive for a political offence, and this is almost without exception the only reason the warrant is refused.

The warrant of surrender, in duplicate, is sent to the Department of the Secretary of State which arranges to have it recorded and thereafter forwards it to the Department of External Affairs which in turn forwards it to the mission in Ottawa of the country requesting the extradition. The warrant is then sent to the counsel retained by the foreign country. In the meantime, the deputy attorney general of the province is consulted to make sure that the fugitive is not involved in a hearing before a provincial court or serving a sentence in the province. If such is the case, the man is not extradited until the proceedings in the provincial court have been completed or his sentence served.

6) *Warrant of Recipias and Despatch of Escort:* The counsel

for the foreign country gives one copy of the warrant of surrender to the gaoler and the other to the escort who then takes the fugitive into custody for delivery to the country requesting extradition. A warrant of *recipias* is issued by the ministry of justice of the foreign country to enable the escort to bring the fugitive across the border of the foreign country. This warrant must also be presented to the gaoler by the escort before the fugitive is released.

II. *Extradition from a Foreign Country to Canada*

1) *Provisional Arrest of the Fugitive in the Foreign Country:* After a Canadian warrant has been issued and the local Canadian police force has learned the whereabouts of the fugitive, the Canadian police force usually informs the foreign police force. At the same time the provincial attorney general writes or telegraphs to the Department of Justice requesting that application be made to the foreign country's authorities for the provisional arrest of the fugitive. The letter or telegram will also set out in detail the identity of the fugitive and the description of the alleged crime.

If in agreement with the request, the Department of Justice will pass it on to the Department of External Affairs which will telegraph the Canadian diplomatic representative in the foreign country to retain local legal counsel on behalf of the provincial attorney general and lay the complaint. If "information and belief" on the part of the Canadian diplomatic representative is sufficient under the particular foreign law, the foreign judicial authority will issue a warrant for the provisional arrest of the fugitive. If "knowledge" is required, then the original Canadian warrant and supporting documents must be forwarded by airmail to the Canadian diplomatic representative.

The Canadian diplomatic representative telegraphs the name and address of the foreign counsel retained by him on behalf of the provincial attorney general to the Department of External Affairs who transmits the information to the provincial attorney general. Direct instructions may then ensue between the provincial attorney general and the foreign counsel.

2) *Committal of Fugitive by a Foreign Judge for Hearing:* The foreign judge will commit the accused for extradition on the same basis as described in the first part of this comment.

3) *Application for Extradition:* Coincidental with the application for provisional arrest the provincial attorney general forwards to the Department of Justice the original and all certified copies of the following documents supporting the application:

(a) the information;
(b) the warrant of arrest;
(c) a police description of the accused, including his nationality;
(d) a statement of the evidence available which should constitute a *prima facie* case of the commission by the fugitive of the offence charged such as, in Canada, would justify committal for trial;
(e) a petition certifying that the application is made in good faith and not to enforce a private debt.

Pursuant to section 30 of the Extradition Act, the Department of Justice checks the record and if in agreement, transmits the documents and request for surrender of the fugitive to the Department of External Affairs. This Department in turn forwards the request and the supporting documents to its representative in the foreign country who presents it in a formal note to the government of the foreign country. At the same time the Canadian diplomatic representative turns over the record to the counsel who is acting for the provincial attorney general.

4) *Extradition Hearing:* The foreign judge follows the same procedure as outlined earlier in this comment. At this hearing the provincial attorney general's counsel must show:

(a) that the crime charged is within the Extradition Act;
(b) that there is evidence to establish a *prima facie* case;
(c) that the facts contained in the evidence submitted by the demanding state constitute a violation of the law of that state. Submission of a copy of the statute under which the accused is charged is not enough. Expert evidence must be given by a lawyer.

5) *Warrant of Surrender:* The foreign government sends the foreign warrant of surrender, signed by its foreign minister to the Canadian diplomatic representative who in turn forwards the warrant to the External Affairs Department. This Department sends the warrant to the Justice Department which forwards it to the provincial attorney general. The foreign government should return all the original documents along with the warrant of surrender, so that they may be used at the trial in Canada.

6) *Warrant of Recipias:* The Department of Justice requests the Department of the Secretary of State to issue a warrant of *recipias* which is forwarded to the provincial attorney general who gives it to the escort being sent to take custody of the fugitive.

EDWARD G. LEE*

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