COMMENTS
COMMENTAIRES

LEGITIMACY—INTERPRETATION OF A WILL—CONFLICT OF LAWS—STATUS AND ITS INCIDENTS.—In its interpretation of a deed or a will, an English court will presume that a gift to a class of the donor's relatives such as "issue" will go only to legitimate issue. A claim to be entitled under a settlement or to succeed under a will or an intestacy will depend upon the claimant's establishing his legitimacy. In England legitimacy is a question for the personal law, because it is a matter of status. The English court looks to the *lex domicilii* for an answer to the question, "What is the status of the claimant?"; it does not go to the *lex domicilii* with the question, "What (in your system) are the consequences of the claimant's having this status?". Moreover, the English court's question, "What is the status of the claimant?" is in fact posed in narrower terms, for it is, "Is the claimant legitimate or illegitimate?"[1] In general principle, a child declared by the *lex domicilii* to be legitimated will be regarded as "issue" in the English courts, no matter what disabilities vis-à-vis children begotten in lawful wedlock the *lex domicilii* may still impose upon him. Conversely, a child regarded by the *lex domicilii* as illegitimate will not be regarded as "issue" in the English courts, whatever privileges the *lex domicilii* may have conferred on him (for example, by virtue of an act of recognition, not amounting to legitimation, by his father). These principles are usually summarized in the proposition that the English court will be concerned solely with his status, and not with its incidents, as declared by the *lex domicilii*.

This being so, the decision of the Ontario Court of Appeal in *Re MacDonald*,[2] applying the law of Ontario, which in this matter is in all material respects the same as English law, is, at first sight,

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[1] "A child is legitimate or illegitimate", Rabel, The Conflict of Laws: A Comparative Study (2nd ed., 1958), Vol. 1, p. 680. "A child is either legitimate or illegitimate *qua* its parents, and cannot occupy a position half-way between legitimacy and illegitimacy; the fact that the child is either legitimate or illegitimate constitutes its status." Inglis, Comment (1957), 35 Can. Bar Rev. 571, at p. 573.

[2] [1962] O.R. 762.

somewhat surprising. The court there held that a share in personalty situated in Ontario, bequeathed by a testator domiciled in Ontario to the "issue" of a grandson could be claimed by a daughter of that grandson even though that daughter was declared to be illegitimate by the law of Mexico, where at all relevant times she and her father and mother were domiciled. She was born out of wedlock, but her birth certificate recited that her father acknowledged her as his child, and she obtained an order of the Mexican court (after her father's death) declaring that she was the daughter of her father. By the Mexican Civil Code she thereby obtained the same rights of inheritance and the same rights and obligations of support as a legitimate child and she was entitled to use her father's name; indeed, the expert witness asserted that "she has at any time equal rights like any son or daughter". But she was none the less termed illegitimate by Mexican law,[3] and at the forefront of the Ontario court's judgment, it is stated that "she was born out of wedlock and is an illegitimate daughter".[4] One may assume that the Ontario court proceeded on the basis that Mexican law unequivocally termed her illegitimate.

The court had little difficulty in disposing of the objection that the claimant was born out of wedlock: there is now no question of going behind the line of authority stemming from *Re Goodman's Trusts*[5] which clearly establishes that a person legitimated by the appropriate *lex domicilii* is to be regarded as legitimate for the purpose of succession to personalty in an English court.[6] These

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[3] In examination-in-chief, the expert witness stated unequivocally, "We consider her as illegitimate". On cross-examination, however, he acceded to counsel's suggestion that "she has the status of legitimacy for all purposes"; but the witness seems to have been concerned solely with the "incidents" arising from the decision of the Mexican court. One recalls the dictum of Lord Cranworth in *Doglioni* v. *Crispin* (1866), 1 H.L. 301, at p. 314, that "evidence from learned foreigners as to what the law of the domicile is . . . is in general far from satisfactory . . .".

[4] Later, the court remarked that it was "ably argued" by counsel that M.S. was illegitimate; but, in fact, the uncontradicted evidence of the expert was that she was illegitimate in Mexican law; and the court had already stated this as a fact; *supra*, footnote 2, at p. 769.

[5] (1881), 7 Ch. D. 266.

[6] A strong line of authority to the contrary was abandoned by the majority of the Court of Appeal in *Re Goodman's Trusts*, *ibid.*, in the face of strenuous opposition from Lush L.J., and it is not without its supporters today; see Falconbridge, Conflict of Laws (2nd ed., 1954), p. 792. Dr. Mann has pointed out that in reality the *Goodman* line of cases "involved a question of interpretation in addition to that of status": see Legitimation and Adoption in Private International Law (1941), 57 L.Q. Rev. 112, at p. 137; *cf.* Welsh, Legitimacy in the Conflict of Laws (1947), 63 L.Q. Rev. 65. If, in *Re MacDonald*, *supra*, footnote 2, the bequest had been to the issue of the grandson "provided they shall be declared to be legitimated by their *lex domicilii*", the result would not have been the same.

cases[7] all concern claimants who have been legitimated by the *lex domicilii*. But was the claimant in *Re MacDonald*[8] legitimated? By virtue of the paternity judgment, she had obtained the same rights and obligations as her legitimate sister, but she was none the less termed illegitimate. It might be thought that the court's decision that she could succeed as issue under Ontario law was based on its acceptance of the "incidents" of her status, of her rights and obligations in Mexican law and on a refusal to accept the status itself as declared by Mexican law, which termed her illegitimate. If this were so, it would be contrary to the weight of authority. But in fact the court rightly considered that the question to be determined related to "the status of M.S., that is whether . . . she is to be considered as issue. . . . As the matter was put in argument by both counsel, this involves the question of the status of M.S.".[9] In answering this question, the court refused to be bound by the fact that Mexican law declared her to be illegitimate.[10] "Is it the name which the foreign law attaches", asked MacKay J.A., on behalf of the court, "or do we look behind to determine what incidents, capacities and obligations the foreign law imposes? In other words, is status the name which the foreign jurisdiction employs to describe the child in question or do we look behind to examine the rights and obligations imposed by the foreign law to determine whether those rights and obligations are so closely akin to those imposed in this jurisdiction in the case of a child born in lawful wedlock?" As the sum total of the capacities and obligations vested in M.S. appeared to be the same as those vested in her legitimate sister, the court held that her status in Mexican law for the purpose of this case was such that she came within the term "issue".

Although Mexican law unequivocally termed M.S. illegitimate, it might be argued that she had by that law a status unknown to the common law, namely that of a recognized, but not legitimated, bastard. Since "the modern tendency has been toward considering the benefits to be given to the innocent child rather than conceptual

[7] And the passages cited by the court from Cheshire's Private International Law (5th ed., 1957), pp. 392, 413.

[8] *Supra*, footnote 2. [9] *Ibid.*, at p. 766.

[10] "There is no need to consider what name the creating state gives to the status, the significant elements are the fact-group and the nature and extent of the attributed incidents": Taintor, Legitimation, Legitimacy and Recognition in the Conflict of Laws (1940), 18 Can. Bar Rev. 589, 691, at p. 695. *Cf.* Ehrenzweig, Conflict of Laws (1959), p. 184 (dealing with the analogous problem in adoption): "All our enquiry into the 'foreign created' status does is to raise the question whether a foreign transaction, designated as adoption under the foreign law . . . should be thus characterized under the law of the forum for its specific purpose" (n. 45).

justification of the decision",[11] it has been suggested that a common-law court could examine the incidents of this unknown status and equate them with the incidents of the nearest parallel status existing in its jurisdiction.[12] When it appears that the recognized bastard is given all the rights and duties of a legitimate child, the court may then regard it as legitimated, even though it is not so called in the law under which the act of recognition operates. In *Atkinson* v. *Anderson*,[13] however, recognized natural children who by the appropriate *lex domicilii* were entitled to succeed were none the less held by an English court to be strangers in blood to their father.[14] Counsel did not argue that their status in Italy was sufficiently equivalent to that of a legitimated child. There would, therefore, appear to be no authority in the English courts which goes so far as the principle claimed by Professor Taintor.[15] But in the analogous case of an adopted child, it was stated by Romer L.J. in *Re Marshall*,[16] that, in making exceptions to the rule that "issue" must be legitimate, "only those who are placed by adoption in a position, both as regards property rights and status, equivalent, or at all events substantially equivalent, to that of the natural children of the adopter can be treated as being within the scope of the testator's contemplation".[17] Where, as in *Re MacDonald*,[18] the child has equivalent rights and she is a blood relation, her claim seems even stronger.

If a legitimate status resulted normally in incidents *a* to *z* and

[11] Taintor, *op. cit.*, *ibid.*, at p. 627. It is suggested in Cheshire, *op. cit.*, footnote 7 (6th ed., 1961), p. 426, that, if an English court were to declare legitimate a person declared illegitimate by his *lex domicilii* (for instance, a child born in lawful wedlock but declared illegitimate by its *lex domicilii* on the ground that it was not conceived in lawful wedlock), "this break with principle might be justified by the paramount importance of communicating to the child the beneficial status of legitimacy if some rational ground for doing so exists".

[12] *Contra:* Beale, Treatise on the Conflict of Laws (1935), Vol. II, pp. 651-652, sec. 120(1); Restatement of the Law of Conflict of Laws (1934), §20. Taintor, *op. cit.*, *ibid.*, at p. 629, assumes that "in the English courts a foreign status which is of unknown type produces no legal effect"; but he asserts (at p. 718) that "the courts are prepared to examine the events upon which it is claimed a status, beneficial to the child, is created; to examine the incidents attributed to that status by the foreign state; to assimilate the foreign status to the local status which is most similar; and to give the effects which are given to the local status".

[13] (1882), 21 Ch. D. 100.

[14] The converse decision in *Re Moretti's Estate* (1929), 16 D. & C. 715, appears to have proceeded on the court's (erroneous) belief that the *lex domicilii* gave such children all the rights of inheritance given to legitimate children. The majority decision in *Pfeifer* v. *Wright* (1930), 41 F. 2d 464, supports *Atkinson* v. *Anderson*, *ibid.*; but Taintor, *op. cit.*, footnote 10, at p. 706, thinks the dissenting judgment of McDermott C.J. is "clearly right".

[15] *Op. cit.*, *ibid.*

[16] [1957] 3 All E.R. 172.

[17] *Ibid.*, at p. 179.

[18] *Supra*, footnote 2.

the *lex domicilii* afforded a child incidents *a* to *y* (but excluded *z*), would a common-law court hold such a child legitimate on the ground that incidents *a* to *y* are substantially equivalent to *a* to *z*, even though the *lex domicilii* had not changed his status in name? If so, would a common-law court, upon so finding the child to be legitimate, concede to him in its system the incident *z* (which the *lex domicilii* refused him), on the ground that *z* was one of the incidents of a legitimate person at common law? For instance, would an illegitimate child, conceded by its *lex domicilii* to possess all the rights of legitimate children save those of succession to its father's estate, be held to be legitimate by a common-law court and then able to succeed as "issue" to that estate?[19] If "a variation . . . of the rights and obligations of a person having a particular status does not necessarily affect the status of that person",[20] the common-law court's determination of such a claimant's status as legitimate will of itself allow him to succeed as "issue". Is the converse true? If the *lex domicilii* declares the claimant to be illegitimate, can a variation of the rights of such a person affect his status? It is clear that in *Re MacDonald*[21] Mexican law was in no sense relevant to assist the court to decide whether the "issue" included anyone other than legitimate issue. The Ontario court's only use of Mexican law was to determine whether by that law the claimant was legitimate. When Mexican law declared M.S. to be illegitimate, this presumably purported to describe her status according to that law. Upon what principle does a common-law court go behind that declaration, to hold that a person having the rights attributed to her ought to be declared by Mexican law to be legitimate? Does it not come very near to saying, "Because we would call a person with such rights legitimate, we think you ought to do so and we shall therefore treat such a person as if you did so"? To maintain that the decision in *Re MacDonald* proceeded on that basis would not be wholly accurate, for the rights conferred on M.S. by Mexican law were regarded by that law (as well as by the common law) to be the equivalent of those

[19] For this problem in the context of a child legitimated by his *lex domicilii*, but not able to succeed thereunder, see *Thompson* v. *Thompson* (1950), 51 S.R.N.S.W. 102. *Cf.* Inglis, Conflict of Laws (1959), pp. 213-215, where the problem is thoroughly and lucidly examined. In Cleveland, Status in Common Law (1925), 38 Harv. L. Rev. 1074, at p. 1082, it is suggested that "if the law of the forum gives greater privileges to the [legitimated child] than his home law gives, he gets the better of the two choices. The forum in each case says, 'Yes, you are a legitimate all right. By our law, therefore, you are entitled to whatever our own legitimates could have'".

[20] *Per* Latham C.J. in *Ford* v. *Ford* (1947), 73 C.L.R. 524, at p. 530.

[21] *Supra*, footnote 2.

of legitimate children. But the test enunciated by the court was "whether those rights and obligations are so closely akin to those imposed *in this jurisdiction* in the case of a child born in lawful wedlock".[22] To this test, the question posed above would seem to be applicable. If "legitimation is a legal process by which a child . . . is granted the status . . . by act of the law",[23] then "if the acts relied on for legitimation do not, by that law [of the appropriate domicile] legitimate, no legitimation is effected".[24] If that law still terms the child illegitimate, has it legitimated it?

Upon the assumption that the claimant in *Re MacDonald*[25] had all the rights granted to a legitimate child, the decision in that case might be supported on the ground that where, as in Russia and China, there is no difference between legitimate and illegitimate children, a common-law court must regard all as legitimate.[26] There is nothing in the Report to weaken the assumption made.[27] But presumably an illegitimate child in Mexico cannot obtain the same sort of birth certificate as a legitimate child.[28] Nor will her right to have recognized elsewhere the rights conferred on her by Mexican law be the same as her legitimate sister's. Had her father been English, she would have had no claim to British nationality either before[29] or after[30] 1948. Assuming her father to have been a Canadian citizen, could she apply for Canadian citizenship as one "who . . . in a province of Canada pursuant to the law of that

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[22] *Ibid.*, at p. 769.

[23] Graveson, Conflict of Laws (4th ed., 1960), p. 171.

[24] Goodrich, Conflict of Laws (3rd ed., 1949), p. 435. *In re Lund's Estate* (1945), 26 Cal. 2d 472, which Goodrich finds "difficult to explain" is best regarded as a case in which no conflict of laws arose, the court construing a local statute as operating independently of the domicile of the recognizing parent: see comment (1945), 59 Harv. L. Rev. 128. When a statute provides for inheritance by a recognized bastard, the question of his legitimation does not arise: this is the explanation of cases such as *van Horn* v. *van Horn* (1899), 107 Ia. 247; *Moen* v. *Moen* (1902), 16 S.D. 210.

[25] *Supra*, footnote 2.

[26] See Rabel, *op. cit.*, footnote 1, p. 607. The statutory rule in Arizona which declares all children to be the legitimate offspring of their natural parents put the matter beyond question.

[27] *Supra*, footnote 2.

[28] M.S.'s certificate recited that her father acknowledged her. Her legitimate sister's certificate was presumably in a different form; *ibid.*, at p. 764.

[29] As an illegitimate child has at birth no father, the benefit of the British Nationality Act, 1730, 4 Geo. 2, c. 21, cannot be claimed: *Abraham* v. *A.-G.*, [1934] P. 17.

[30] Until she also established her parents' marriage and so gained the advantage of s. 23(2) of the British Nationality Act, 1948, 11 & 12 Geo. 6, c. 56. In *Re MacDonald*, it was (rightly) agreed that the claim that her parents had married was immaterial for the purpose of her claim to succeed under her great-grandfather's will.

province . . . has been legitimized"?[31] The internal law of Ontario does not recognize legitimation by recognition:[32] does the term "the law of that province" refer to the local law only or to the law, including the conflicts rules, of that province? But *Re MacDonald* proceeded upon the assumption that the incidents of M.S.'s relationship with her father were the same as those of her legitimate sister.

It has been asserted[33] that in cases of alleged foreign legitimation "the English courts have invariably taken the word of the domicile, and no questions asked, where legitimacy is a collateral issue". But it might appear that the decision of the Ontario court in *Re MacDonald*[34] was to the effect that a system of foreign law cannot be permitted to confer all the rights which a common-law court regards as appropriate to a particular status and, at the same time, withhold that status. "What is status", asks Westlake,[35] "except the sum of the particulars in which a person's condition differs from that of the normal person?" Can the decision in *Re MacDonald* be regarded as a rejection of "the once current jargon about occult qualities", in favour of the view that status is no more than "an aggregate of rights and duties"?[36] If the court had thought that M.S.'s rights were sufficiently like the common-law rights of a legitimate person, would this have sufficed, even if those rights had not been equal to the Mexican rights of a legitimate person? Such a decision would go far to support Dr. Mann's claim[37] that a status "is once and for all and immutably characterized by certain phenomena" and Scott L.J.'s opinion[38] that a status once established should be universally recognized. To others,[39] Scott L.J.'s opinion would seem merely to confuse status and its incidents. The actual decision in *Re MacDonald*, however, does not go so far. The decision is to be welcomed as a successful effort to get away from the names of concepts and to examine the substance of the relations between the parties. Mexican law un-

[31] Under s. 11(2) of the Canadian Citizenship Act, R.S.C., 1952, c. 33.

[32] It is confined to legitimation *per subsequens matrimonium* and from birth from a putative marriage or from an annulled marriage (Legitimacy Act, 1961-62, S.O., 1961-62, c. 71).

[33] Cleveland, *op. cit.*, footnote 19, at p. 1082.

[34] *Supra*, footnote 2.

[35] Private International Law (7th ed., 1925), p. 49.

[36] Austin, Jurisprudence (5th ed., 1885), Vol. 2, pp. 697, 716.

[37] *Op. cit.*, footnote 6, at p. 125.

[38] In *Re Luck*, [1940] 3 All E.R. 407.

[39] See, for instance, Beale, *op. cit.*, footnote 12, p. 167; *cf.* Falconbridge, *op. cit.*, footnote 6, p. 806; contrast *Thompson* v. *Thompson*, *supra*, footnote 19; Inglis, *op. cit.*, footnote 19, p. 211 and *op. cit.*, footnote 1, at pp. 573-576. Cleveland, *op. cit.*, footnote 19, at p. 1079, rejects Beale's "indestructible residuum of a platonic idea".

doubtedly meant to confer on the claimant not merely local, but total, rights: the court's claim to have given effect to "the purpose of the Mexican law . . . to equalize the rights of children whether they are legitimate or illegitimate" [40] is well founded.

J. A. COUTTS*

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LAND LAW—TORRENS SYSTEM—JOINT TENANCY—TRANSFER OF INTEREST—ABSENCE OF REGISTRATION—SEVERANCE OF JOINT TENANCY—MEANING OF "EXCEPT AS AGAINST THE PERSON MAKING THE SAME".—In *Stonehouse* v. *Atty. Gen. of B.C.*,[1] the Supreme Court of Canada completely reversed the meaning of the phrase "except as against the person making the same" in the Land Registry Act of British Columbia,[2] and, by inference, in the Saskatchewan Land Titles Act.[3]

The facts of the *Stonehouse* case are simple. In 1956 Mrs. Stonehouse, joint tenant with her husband, the registered owner of some land in British Columbia, conveyed "all her interest in and to" this property to a daughter by a previous marriage, "without telling her husband what she was doing". The deed remained unregistered until the day following Mrs. Stonehouse's death in 1959 when the daughter "made application for its registration at the office of the registrar of titles at Vancouver", and a certificate of indefeasible title was issued to her. The action was brought by the husband to recover from the assurance fund under the British Columbia Land Registry Act, alleging damage as result of an omission, mistake or misfeasance of the registrar, on the ground the *jus accrescendi* operated immediately on the death of Mrs. Stonehouse and that when the daughter applied to register the conveyance there was "no interest in the grantor to convey". Further that the registrar was negligent in not making inquiries when in 1959 he received for registration a conveyance made by a joint tenant in 1956. Manson J. in the Supreme Court of British Columbia[4] found for the plaintiff on the above grounds,[5] and also on the ground that the transfer was intended as a testamentary

[40] *Supra*, footnote 2, at p. 766.

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[1] [1962] S.C.R. 103, (1962), 37 W.W.R. 62.

[2] R.S.B.C., 1948, c. 171, s. 35, now R.S.B.C., 1960, c. 208, s. 35.

[3] The Land Titles Act 1960, S.S., 1960., c. 65., s. 66(1).

[4] (1960), 33 W.W.R. 66.

[5] It is not stated why there was no action for rectification of the register.

document and was void for non-compliance with the British Columbia Wills Act.[6] The British Columbia Court of Appeal reversed the lower court and on appeal, the Supreme Court of Canada, Ritchie J. delivering the judgment of the court, ignored the testamentary aspect of the case and concentrated on the question of whether "the joint tenancy in question was severed at the time of the execution and delivery of the deed . . .".[7]

Ritchie J. found the relevant portions of section 35 of the Land Registrary Act to be: "35. *Except as against the persons making the same, no instrument* . . . executed and taking effect after the thirtieth day of June, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein, *shall become operative to pass any estate or interest, either at law or in equity, in the land . . . until the instrument is registered in compliance with the provisions of this Act* . . . ."[8] and decided that the effect of the phrase in question was to distinquish the case of *Wright* v. *Gibbons*,[9] where the High Court of Australia held that under the Real Property Act of Tasmania "a registered estate as joint tenants can only be severed by some dealing which results in an alteration of the register book", as the judgment clearly indicated that the Tasmania Act[10] "did not include the exception which is made part of the British Columbia scheme of transfer, and registration". The Supreme Court of Canada noted with approval the words of Estey J. in *Davidson* v. *Davidson*.[11]

> These Words, "except as against the person making the same," expressly make operative an unregistered instrument against the party making the same. Therefore, the transfer executed by the respondent was operative to transfer . . . whatever estate, either at law or in equity, he was in possession of.

Mr. Justice Ritchie then said:

> It is, therefore, apparent that the deed here in question operated as an alienation of the interest of Mrs. Stonehouse, and the very fact of her interest being transferred to a stranger of itself destroyed the unity of title without which a joint tenancy cannot exist at common law.[12]

There is no question as to the correctness of the finding of severance at common law. However, the Torrens-law insistance on registration caused the court some concern: "Under the provisions

[6] R.S.B.C., 1948, c. 365.
[7] *Supra*, footnote 1, at p. 65 (W.W.R.).
[8] *Supra*, footnote 2. Italics are those of the court (at p. 65 (W.W.R.)).
[9] (1949), 78 Comm. L.R. 313. [10] Real Property Act of Tasmania, 1862.
[11] [1946] S.C.R. 115, at p. 119, [1946] 2 D.L.R. 289.
[12] *Supra*, footnote 1, at p. 66 (W.W.R.).

of s. 35 an unregistered deed could not be operative 'to pass any estate either at law or in equity' other than that of the grantor, but the effect of the . . . deed was not '*to pass*' any such estate or interest of Mrs. Stonehouse but rather to change its character from that of a joint tenancy to that of a tenancy in common and thus to extinguish his right to claim title by survivorship . . . . [On] the execution and delivery of the transfer by Mrs. Stonehouse, she divested herself of her interest in the land in question. At the time of her death, therefore, there was no interest in the land remaining in her which could pass to her husband by right of survivorship."[13] This being so, there could be no question of negligence on the part of the registrar, in failing to make inquiries as to whether Mrs. Stonehouse was dead or alive, and the assurance fund was, therefore, not liable.[14]

The phrase "except as against the person making the same" seems first to have appeared in the original Saskatchewan Land Titles Act,[15]

> After a certificate of title has been granted for any land no instrument until registered under this Act shall be effectual to pass any estate or interest in any land except a leasehold interest not exceeding three years or render such land liable as security for the payment of money except as against the person making the same.

and also in the comparable section of each succeeding Act. Today, the intention and meaning of this section seems perfectly clear to me. It is to insure that the maker of an instrument cannot avoid the effect of his own instrument on the ground that it has not, or cannot be, registered. For example, A executes a mortgage of his land to B and later a transfer to C, both for good consideration, and because of formal defects neither can be registered. A then sets up the Torrens system as a complete bar to either B or C obtaining their rights under his own instruments. The intention of the words "except as against the person making the same" is to insure that he will fail. B and C will both need to go to court to enforce their rights, but once in court the necessary orders will be

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[13] *Ibid.*, at p. 67. It is submitted that the result of the case shows this distinction to be without merit. She did not divest herself, she divested Mr. Stonehouse.

[14] This situation is not likely to arise in Saskatchewan where, in the case of transfers more than three months old a "dead or alive" affidavit is required (*supra*, footnote 3, s. 209 (2)) as a prerequisite to registration. It is true that this requirement is sometimes honoured in the breach rather than in the observance. In any case no Saskatchewan registrar will accept a transfer signed by a single joint tenant. Clearly the British Columbia procedure is the other way.

[15] S.S., 1906, c. 24, s. 73.

made. It was surely never the intention that B and C should be allowed to succeed against a *bona fide* third party who has got on the register for value, and yet that is exactly the result of various cases now to be considered. Curiously, I have not been able to find a case in Saskatchewan where these words have been subject to judicial ruling. In *Balzer* v. *The Registrar*,[16] Cartwright J. in the Supreme Court of Canada, held that "these words have no reference to the effect of an instrument when registered, but rather to its effect as against a party making same apart from registration". Anyway they had no effect on the result of the *Balzer* case.

A short history of the British Columbia fortunes of the phrase is in order. In *Entwistle* v. *Lenz*[17] the British Columbia Court of Appeal followed, without mentioning it, *Jellet* v. *Wilkie*[18] in ruling that a registered execution creditor could only take subject to unregistered equities against the execution debtor. *Bank of Hamilton* v. *Hartery*,[19] where the Supreme Court held that a registered execution took priority over a mortgage executed before but registered after the date of registration of the execution, was generally considered[20] to have overruled *Jellet* v. *Wilkie*. However, when *Gregg* v. *Palmer*[21]—where the question was the priority between a registered judgment debtor and an unregistered mortgagee—came before the British Columbia Court of Appeal the majority of the court seized, *inter alia*, on the phrase "except as against the person making the same" in section 34 of the Land Registry Act[22] which had been added to the British Columbia Act by the consolidation of 1921. In the words of Macdonald J.A.:

> It means that as against the maker . . . some estate right or interest in law or in equity passes to the holder of an unregistered instrument . . . . It is . . . clear that whatever interest passed . . . cannot also pass to someone else . . . . I think the Legislature intended to restore the law as it stood before the decision in *Bank of Hamilton* v. *Hartery*.[23]

In *L & C Lumber Co.* v. *Lundgren*[24]—where the question was the right of an unregistered assignee of an unregistered sale of standing timber to enter and cut—the defence was based on section 34 of the Land Registry Act.[25] O'Halloran J.A. for the majority stated: ". . . the exceptive clause which the statute has

[16] [1955] S.C.R. 82, [1955] 1 D.L.R. 657, at p. 665.
[17] (1908), 14 B.C.R. 51, (1908), 9 W.L.R. 317.
[18] (1896), 26 S.C.R. 282. [19] (1917), 58 S.C.R. 338.
[20] See *Union Bank* v. *Turner*, [1922] 3 W.W.R. 1138 (Man. C.A.).
[21] [1932] 2 W.W.R. 241, [1932] 3 D.L.R. 640.
[22] R.S.B.C., 1924, c. 127, now s. 35, see *supra*, footnote 2.
[23] *Supra*, footnote 21, at p. 254 (W.W.R.).
[24] [1942] 3 W.W.R., at p. 557, [1942] 4 D.L.R. 67.
[25] R.S.B.C., 1936, c. 140, now s. 35, see *supra*, footnote 2.

contained since 1921 presents itself as a statutory restatement of the exception our courts have found inherent in the section . . . ."[26] This interpretation found its ultimate blessing in *Davidson* v. *Davidson*[27] (involving a question of priority between a registered judgment and a prior unregistered transfer), especially in the words of Estey J. quoted and approved by Ritchie J. in the instant case.[28] In almost every case the words "except as against the person making the same no instrument until registered shall pass any interest" have been construed to have this effect: "As against a third party an unregistered instrument shall be effectual to pass all the estate or interest therein contained." The exception is the *Lundgren* case[29] which, it is submitted, involves exactly the situation the exception was designed to cover. The maker of an instrument should not himself be allowed to hide behind its lack of registration. However, following the logic of the other cases, the unregistered sale of standing timber would have been good as against a *bona fide* transferee for value from the vendor.

Is not the result of the *Stonehouse* case a perfect example of "the ghostly hand of the 'unknown claimant' . . . able to stretch out and fasten upon real property as distinguished from personality"?[30] Mrs. Stonehouse executes a transfer to her daughter and informs her thereof. Neither Mr. Stonehouse or anyone else knows of this instrument. Mr. Stonehouse dies and his wife becomes registered owner of the entire fee by right of survivorship. But when Mrs. Stonehouse dies first the transfer is produced, and the right of survivorship is entirely defeated. Doubtless Sir Robert Torrens "never dreamed"[31] that such a result could have been achieved under his system.

Oddly enough the court could have rigorously applied Torrens law and have arrived at the same result. It could have, it is submitted, said: "At the date of Mrs. Stonehouse's death we had two conflicting rights; that of the transferee to become registered owner of her mother's interest and the right of Mr. Stonehouse to become registered owner of the entire fee under the *jus accrescendi*. Both these interests were off the register and the transferee first got her interest on the register and therefore remains the winner." Or the court could have adopted a line of reasoning which it had approved previously in *Morrow* v. *Eahin*[32] and said that prior to

[26] *Supra*, footnote 24, at p. 565. [27] *Supra*, footnote 11.
[28] See, *supra*, footnote 1. [29] *Supra*, footnote 24.
[30] *Peters* v. *City of Duluth* (1912), 119 Minn. 96, at p. 99, 13 N.W. 390, and 54 Cent. L.J. 285.
[31] *Ibid.*
[32] (1953), 8 W.W.R. (N.S.) 548. See also *Power* v. *Grace*, [1932] O.R.

the registration of the transfer no essential step had been taken toward the severance of the joint tenancy and, had the survivorship application preceded registration of the transfer, Mr. Stonehouse would have prevailed, but so soon as an application to register the transfer had been made, the necessary step toward severance had been taken and the *jus accrescendi* disappeared.

There are rumors of possible amendments to prevent a repetition of the *Stonehouse* case on its own set of facts. However, in conclusion, it is suggested that the legislatures of Saskatchewan and British Columbia might go further and, having regard to the peculiar meaning given by the courts to the phrase, delete the word "except as against the person making the same" from their Acts altogether. All other Torrens Acts are adequate without the exception and in none of these, it is submitted, will an owner of an interest in land be able to defeat the consequences *of his own instrument* because of the fact that it is not registered.[33]

HUGH R. RANEY*

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MINES AND MINERALS—OIL AND GAS DEVELOPMENT AGREEMENT—DUTY TO PREVENT DRAINAGE FROM ADJACENT LANDS—OFFSET DRILLING OBLIGATION.—While the recent case of *Farmers Mutual Petroleums Ltd.* v. *United States Smelting, Refining and Mining Company and Agawam Oil Co. Ltd.*[1] was decided on the terms of the particular agreement before the court, it provides another example of the difficulties besetting a grantor or lessor of oil and gas rights trying, by contract, to prescribe the conditions under which so-called "offset" wells should be drilled to minimize drainage of oil or gas toward a producing well on adjoining property. Some idea of the difficulty of trying actions for the failure to drill wells of this kind can be gathered from the fact that approximately six weeks were required to try this case in the Court of Queen's Bench Division in Saskatchewan.

Farmers Mutual Petroleums Ltd. entered into a "development agreement" with the defendant, The United States Smelting,

357 (C.A.); *Re: Craig* (1928), 63 O.L.R. 192 (App. D.); *In Re Penn* (1951), 4 W.W.R. (N.S.) 452 (B.C.C.A.) and *Re Brooklands Lumber Co.* v. *Simcoe* (1956), 18 W.W.R. 328 (Man. Q.B.).

[33] Nor, as the recent Manitoba case of *Dominion Lumber* v. *Wpg. District Registrar* (1963), 41 W.W.R. 343 (C.A.) shows, is the lack of the phrase effective in laying the ghost of *Jellet* v. *Wilkie*, *supra*, footnote 18.

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[1] (1962), 39 W.W.R. 682 (Sask.).

Refining and Mining Company, whereby on the performance of certain obligations, the latter company was granted the right to remove oil and gas, for a period of thirty years, from several tracts of land containing in all some 751,277 acres. The defendant was given the right to surrender individual tracts at any time it felt a tract was uneconomic to maintain. The contract was subsequently assigned by the United States Smelting and Refining and Mining Company to Agawam Oil Co. Ltd.

Paragraph five of the "development agreement" provided as follows:

> The Company agrees to use reasonable efforts to cause the orderly development and operation of the several tracts covered by this agreement for oil, gas and other mineral purposes, but in this connection the Company's efforts in that respect shall be governed by the Company's judgment.

Paragraph seven reads:

> The Company *shall use reasonable diligence to protect any tract covered hereby from drainage by reason of commercial wells producing on land not included in the tracts set out in Exhibit "A"*[2] hereto attached, and in meeting the provisions of this covenant shall and may be governed by good oilfield practices and by the requirements of the Statutes, Orders in Council, rules, regulations and orders, in fact made by the Dominion of Canada, the Province of Saskatchewan or any agency, Board, commission or committee.

The plaintiff contended that if there was land which was being drained by commercial offsets, that is, wells producing in commercial quantities on adjacent land, not included in the contract, there was an absolute requirement on the part of the defendant to drill a well, irrespective of whether or not such a well would be economic. The defendant on the other hand contended that paragraph seven merely expressed what would have been implied in any event namely that it was required to use reasonable diligence to protect the lessor's lands against drainage.

Chief Justice Bence came to the conclusion that paragraph seven of the contract placed no obligation on the defendant to drill a well unless by so doing there was a reasonable possibility of thereby obtaining oil in commercial quantities.

While the report of the case does not show how the parties defined a "commercial" well, a typical definition is that given in Lewis and Thompson's *Canadian Oil and Gas*.[3]

> *Commercial Production* shall mean the output from a well of such quantity of the leased substances or any of them as considering the

[2] Italics mine.
[3] (1963), Vol. 1, Form A.1(b), 1(a).

> cost of drilling and production operations and price and quality of the leased substances, after a production test of thirty (30) consecutive days would commercially and economically warrant the drilling of a like well in the vicinity thereof.

Most industry agreements of this kind contain a positive covenant to drill an oil well, usually within a specified time after an offset well begins production in defined quantities.[4] The learned authors point out that:[5]

> This clause enures to the lessor's benefit, but with modern conservation legislation restraining production, it has not the crucial importance it merited in the United States in the earlier years of the industry when unrestrained production might have drained a reservoir in a relatively short period of time. However, the clause does enable a lessor, burdened with a lessee who is reluctant to drill, to terminate the lease and find a lessee who will drill.

Notwithstanding the specific clause used in Canadian practice, difficult problems are presented. In the first place, it is not at all clear what production would "commercially and economically warrant the drilling of a like well in the vicinity of the offsetting well". It is far from clear, too, whether or not drainage actually takes place and in what quantities.

As Egbert J. said in *Hudson Bay Oil & Gas Co. Ltd.* v. *Dynamic Petroleums Ltd.*:[6]

> I think it is common knowledge, and something of which I can take judicial notice that in this province lands situate within half a mile of a valuable producing well may be completely valueless. Accordingly evidence of what land situate 6 miles west or 12 miles south, or a number of miles in some other direction of a particular parcel of land, is worth is hardly evidence of the value of that particular parcel.

To obviate the difficulty of determining damages of this kind, oil and gas leases now frequently contain what is known as a "compensatory royalty" clause that requires the lessee, in lieu of drilling an offset well, to pay royalty based on the production from the well on the adjoining property. This royalty, presumably, is a form of liquidated damages based on the assumption that the amount received by the lessor in royalties is equal to what he would have received if the offset well had been drilled and produced. Because, to use the words of Nelson Jones,[7] "the uncertainties

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[4] *Ibid.*, Form A.1(b), para. 8, for a standard clause of this kind and for a later form, see Form A.1(d) 7.

[5] *Ibid.*, para. 116.

[6] (1958), 26 W.W.R. 504, at p. 512.

[7] Rights and Remedies for Non-Development and Failure to Offset (Legal Aspects), 4th Annual Institute on Oil and Gas Law and Taxation of the Southwestern Legal Foundation (1953), p. 57.

inherent in the enterprise make it impossible for the parties to agree in advance upon the specific plan of development", the United States courts have implied a covenant "to protect the premises against drainage". This concept is fully developed by Professor Merrill in *Covenants Implied in Oil and Gas Leases*[8] where he concludes that, generally speaking, specific clauses such as the ones used in the standard Canadian forms do not add anything to the lessee's obligations under the implied covenant.[9] The standard ordinarily employed to measure the lessee's duties under the implied covenant for protection is that of the reasonably prudent operator.[10]

Chief Justice Bence, in deciding the case under review, relied largely on United States authority, particularly *Texas Pacific Coal and Oil Company* v. *Barker*[11] and *Gregg* v. *Harper Turner Oil Company*.[12]

In the fairly recent case of *Renner* v. *Monsanto Chemical Company*,[13] Fatzer J. agreed that the standard by which both (lessor and lessee) are bound is by what an experienced operator of ordinary prudence would do in the same or similar circumstances having due regard for the interests of both.

In the comment on the case of *Gregg* v. *Harper Turner Oil Company*, the author, in dealing with the implied covenant to develop the lease tract with reasonable diligence, says:[14]

> Originally in order to prove a breach the lessor had the burden of showing that the additional wells would probably produce a reasonable profit. *Ramsay Petroleum Corporation* v. *Davis* (184 Okla. 155, 85 P. 2d 427 (1938)). However, in *Doss Oil Royalty Co.* v. *Texas Co.* (192 Okla. 359, 137 P. 2d 934 (1943)), the court modified this doctrine to the extent that if the lessee unreasonably delays in drilling additional wells, the lessor is not required to prove that additional wells would have been profitable. The court held 14 years to be an unreasonable delay and therefore decreed conditional cancellation.
>
> In determining whether the delay is unreasonable, the time elapsing since the drilling of the last well is merely one factor to be weighed

[8] (2nd ed., 1940), ch. 5, p. 235. See also Lease Clauses Affecting Implied Covenants, 2nd Annual Institute on Oil and Gas Law and Taxation of the Southwestern Legal Foundation (1951), p. 141.

[9] 2nd Annual Institute Southwestern on Oil and Gas Law and Taxation Legal Foundation (1951), p. 171.

[10] *Ibid.*

[11] (1928), 117 Tex. 418, 6 S.W. 2d 1031, 60 A.L.R. 936. The case is discussed in (1929), 7 Texas L. Rev. 438. Annotations on the measure of damages for breach of the obligation to drill "protection" or "offset" wells appear in 60 A.L.R. 957, and in 19 A.L.R. 450.

[12] (1952), 199 Fed. 2d 1. The case is discussed by Dewey J. Gonsoulin, in a comment appearing in (1953), 32 Texas L. Rev. 133.

[13] (1960), 187 Kan. 158, 354 P. 2d 326.

[14] *Supra*, footnote 12, at p. 133.

with other circumstances of the case. *Skelly Oil Co.* v. *Boles* (193 Okla. 308, 142 P. 2d 969 (1943)). The courts will also consider the attitude of the lessee with respect to future development of the premises, whether or not he was then engaged in drilling or had contributed towards the drilling of a well to test deeper sands in the vicinity, the amount already expended on exploratory operations, whether there were producing wells on surrounding tracts at a different depth from those on the leasehold, and whether there was any drainage from such wells.

While the reference, in this comment, is to the implied covenant to "develop the lease tract with reasonable diligence", these same principles would seem to be applicable to the covenant to protect the leased property from drainage. The author states:[15]

No Texas court has applied the unreasonable delay rule announced in the *Doss* case, although the Texas courts do adhere to the reasonably prudent operators standards in determining whether there has been a breach of the implied covenant to develop and explore. *Texas Pacific Coal & Oil Company* v. *Barker* (117 Tex. 418, 6 S.W. 2d 1031 (1928)).

In the present case, Farmers Mutual Petroleums Ltd. had contended that Agawam Oil Co. Ltd. had unreasonably delayed the development of the property. The court did not, however, accept this argument to the extent, at least, of finding that the defendant was obligated to drill a well.

Chief Justice Bence calculated damages on the basis that there was no absolute liability to drill a well in the circumstances and also on the basis that an absolute liability to drill existed. The report of the case does not indicate the quantum allowed.[16]

The case of *Albrecht* v. *Imperial Oil Limited*[17] appears to be the only Canadian case involving the measure of damage for breach of the obligation to drill an offset well.[18] In this case, a well drilled on land adjoining that of the plaintiff encountered commercial production of gas under such conditions as to require the defendant lessee to drill a well within six months from the date the offsetting well encountered production. However, the well giving rise to the obligation was abandoned and the defendant did not feel that it was worthwhile to drill. Riley J.[19] adopted Professor Summers' statement that:[20]

[15] *Ibid.*, at p. 135.

[16] *Supra*, footnote 1, at p. 690.

[17] (1957), 21 W.W.R. 560.

[18] *Cotter* v. *General Petroleums Ltd. and Superior Oils Ltd.*, [1951] S.C.R. 154 and *Prudential Trust Co. and Wagner* v. *Wagner Oils Ltd.* (1954), 11 W.W.R. 371, are cases dealing with failure to drill a "test" well to which, it is submitted, different principles are applicable. See Johnston Rowe, The Measure of Damages for Breach of Contract to Drill a Test Well (1943-44), 22 Texas L. Rev. 481. See also 122 A.L.R. 458 and comments in (1939), 25 Wash. U.L.Q. 117 and in (1930), 39 Yale L.J. 431.

[19] *Supra*, footnote 17, at p. 567.

[20] The Law of Oil and Gas (1938-1955), Vol. 2, p. 413.

> Amongst the tests to be adopted in awarding compensatory damages are the following:
> (a) the value of the rents and royalties which would have been received by the plaintiff if the well had been drilled.
> (b) the loss of the market value of a lease for oil and gas on the plaintiff's land resulting from their failure to drill.

While the principles enunciated above have been generally accepted, their application has already been the subject of criticism in Canada.[21]

Riley J. found that the measure of damages under head (a) was eleven dollars and fifty cents. By way of damages under head (b) the learned trial judge concluded,[22]

> The fact is that through the failure of the defendant to fulfill its obligation to drill an offset, the plaintiffs have been deprived of their opportunity to sell either the whole or a portion of their points [royalty points] at an attractive price.

and awarded an additional $6,000.00 damages to the plaintiff. Mr. Ballem[23] points out that it was not the failure of the defendant to drill the offset well which abated the interest of possible purchasers but the production characteristics of the nearby well that had given rise to the offset obligation. He says:

> The plaintiff did not accept any of the offers which he had received and this can only mean that he elected to retain his entire interest and run the risk that gas in commercial quantities would be discovered beneath his land. This is purely a matter of individual business judgment and one over which the defendant had no control.

In the *Albrecht* case,[24] it is almost certain that if the offset well had been drilled it would have been a dry hole.

In an article in the *Texas Law Review* entitled "The Measure of Damages for Breach of Contract to Drill a Test Well",[25] Mr. Rowe refers to the Texas case of *Whiteside* v. *Trentman*.[26] In this case, the defendant had refused to drill a second well after drilling a dry hole; the jury concluded that the second well would have also been a dry hole. It was also found that the market value of the leases retained would have risen $1,440.20 during the time the well was being drilled, but no issue was submitted to the jury on the question of whether the plaintiff would have sold his interest while the drilling of the second well was under way and the case was reversed for that reason. The court held that the proper measure of damages is the profit which would have been made

[21] J. B. Ballem (1957), 35 Can. Bar Rev. 971.
[22] *Supra*, footnote 17, at p. 566.
[23] *Supra*, footnote 21, at p. 978.
[24] *Supra*, footnote 17.
[25] *Supra*, footnote 18.
[26] (1943), 170 S.W. 2d 195.

from the sale of retained leases which must be shown with a "reasonable degree of certainty". Mr. Rowe states that the *Whiteside* case reaffirms the holding of *Riddle* v. *Lanier*[27] and *National Bank of Cleburne* v. *M.M. Pittman Roller Mill*,[28]

> . . . that it is not sufficient to show merely that a profit might have been made. The plaintiff must also prove he would have sold and made the profit otherwise he can show no harm resulting from the defendants breach.[29]

The question of the quantum of damages for failure to drill an oil well which has been so well treated in the legal literature of the United States[30] is one that requires to be more fully explored in Canadian law. It is submitted that the cost of drilling a well is not, in any event, the proper basis for damages. Damages should be awarded in an attempt to place the defendant in the same position, so far as it can be done by money, that he would have been in had the contract been performed.[31]

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[27] (1941), 136 Tex. 130, 145 S.W. 2d 1094.

[28] (1924), 265 S.W. 1024.

[29] *Op. cit.*, *supra*, footnote 18, note at p. 483.

[30] See, for instance, Hart, Damages and other Relief for Breach of Express and Implied Covenants in Oil and Gas Leases and Drilling Agreements, 7th Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation (1956), p. 47; Nelson Jones, *op. cit.*, footnote 7; Merrill, *op. cit.*, footnote 8; W. L. Summers, Equitable Relief from Termination of Oil and Gas Leases for Failure of the Lessee to Meet the Requirements of the Drilling and Delay Rental Clauses, 5th Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation (1954), p. 1; Merrill, Permitted Drainage—The Sellers Case and Local Law (1951), 4 Okla. L. Rev. 58; Brown, The Law of Oil and Gas Leases (1958), ch. 16.

[31] See Cartwright J. in *Cotter* v. *General Petroleums Ltd. and Superior Oils Ltd.*, *supra*, footnote 18, at p. 174, citing *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, at p. 307. See also *Wigsell* v. *School for Indigent Blind* (1882), 8 Q.B.D. 357. It was there held that damages for breach of a covenant to build a wall around the plaintiff's property were to be measured by the difference between the value of the property to the plaintiffs after the breach and what it would have been if the contract had been performed. In the circumstances, the cost of building the wall was not the correct measure of damages. See also *Joiner* v. *Weekes*, [1891] 2 Q.B. 31; *James* v. *Hutton and J. Cooke & Sons*, [1951] K.B. 9; *Smiley* v. *Townshend*, [1952] Q.B. 311.

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