CASE AND COMMENT

COMPANY LAW — SHARES—SUBSCRIPTION BY INCORPORATORS.—A decision which should not be overlooked by Solicitors when incorporating a company or by anybody who becomes an incorporator of a company, was recently given by Mr. Justice Fisher in bankruptcy, in the matter of *Re T. E. O'Reilly Limited.*[1] The decision in this case was that the incorporators were liable for five shares subscribed for by them notwithstanding the fact that the vendor of the company had directed that out of the shares to be issued to him for his business of the par value of $10,000, five shares "should be in satisfaction of the subscriptions of the incorporators." This brief foreword requires some elaboration and analysis but generally speaking the method adopted in this case of paying up the shares of the original incorporators by the transfer of assets to a company has been followed by solicitors for many years. Consequently in any cases coming within the exact facts it will be necessary to adopt some other method, as the decision in question is binding on all Judges of first instance, but it is suggested that it would well repay a study by those interested as the facts seem peculiarly limited and possibly not of general application.

The facts as taken from the report show that one T. E. O'Reilly had carried on the business of a broker and dealer in chemicals and drugs in Toronto, and that he with four others became incorporated under the Ontario Companies Act as T. E. O'Reilly Ltd. for the purpose of taking over the business of T. E. O'Reilly. T. E. O'Reilly himself and four others applied for a charter and subscribed for one share each of the par value of $100. The authorized capital was $40,000 divided into 400 shares of $100 each. The judgment goes on to state that of these "323 shares ($32,300) were subscribed for and issued; 110 as preferred and 213 as common; and, in addition to these shares, there were the 5 shares subscribed for by the five incorporators, which were never allotted nor issued. One hundred shares issued to T. E. O'Reilly and his nominees, in consideration of the transfer of the assets of the company, were included in the 323 shares subscribed for." The statement as to non-allotment of the incorporators' 5 shares is important because the judgment is based on the assumption that in Ontario it is not necessary to allot shares

[1] (1927) 32 O.W.N. 288.

subscribed for by original incorporators, and this point will be discussed later on in this annotation.

In analyzing the judgment one fact to be noted is that the judgment states that 323 shares were subscribed for. It is obvious, of course, that if shares are subscribed for and the subscription accepted and shares allotted they must be paid for in money or money's worth. Briefly then we have the situation here that 323 shares were subscribed for and accepted and allotted and in addition 5 other shares were subscribed for by the original incorporators which were not allotted, and if there is no need to allot these 5 shares then there were 5 shares in existence in addition to those to which O'Reilly was entitled and to the other shares which had been subscribed by others. It would be interesting to know, however, whether the 100 shares issued to T. E. O'Reilly were actually subscribed for by T. E. O'Reilly in writing as the term implies and were then issued as fully paid in consideration of the agreement taking over the business, or whether, which would be the more common practice, the company merely agreed to issue as fully paid to T. E. O'Reilly or his nominees 100 shares in consideration of the transfer of the assets, but one can only assume the report is correct in stating that they were subscribed for.

According to the report the terms of the agreement made with T. E. O'Reilly, which had been duly approved by the shareholders, were "to purchase from him, the assets, undertaking, and goodwill of the business, for $10,000 to be paid for by the issue to O'Reilly or his nominees of 100 paid-up shares of the par value of $10,000." This statement does not show that these shares were subscribed for although elsewhere in the report it is so stated. Moreover it says nothing about the wording of the agreement as to the shares of the original incorporators, if it contained any reference thereto. One presumes it did, however, as the report states that a resolution was passed "that the stock of the company be allotted in accordance with O'Reilly's request, and that one of the shares allotted to him and the four shares allotted to his nominees should be in satisfaction of the subscriptions of the incorporators." Now this merely speaks of O'Reilly's request, which may or may not have been actually in the form of a subscription for shares, or may have been contained in the agreement. If it were only a request in the agreement then it was not, strictly speaking, a subscription which could be accepted and so form the basis for an allotment, but merely an agreement of the purchase of certain assets for certain shares coupled with a "request" as to the shares subscribed for by the original incorpora-

tors. If, therefore the agreement were the same as the resolution and contained merely the aforementioned "request" then there is a sound basis for the judgment as the words of the agreement if so restricted would not in the writer's opinion be sufficient to pay up the outstanding liability on the original subscriber's shares as the consideration for the transfer of the business was 100 shares which would have to be issued for that consideration and so could not pay up the liability of the original subscribers. If, however, the agreement had been that he was entitled only to shares for himself or his nominees to the par value of $9,500 and the 5 shares of the original incorporators should be considered paid up in order to make up the full consideration of $10,000 and this is a usual way of issuing shares to a vendor who intends to pay up the shares of the original incorporators, the situation would be different. On reading the facts as stated in the report one is forced to assume that the full issue of 100 shares of par value of $10,000 was made as the consideration for the transfer of assets and that five of these shares were transferred or issued direct to the five incorporators as fully paid on the erroneous supposition that this would pay up the 5 additional shares which had been subscribed for on incorporation. The obvious point is that although the vendor is entitled to a certain number of fully paid shares and instructs the company to issue 5 less to him than the number to which he is entitled, with a request to pay up the shares of the five original incorporators, nevertheless this is not in plain terms payment of the obligation of the five original incorporators but only an issue of five other fully paid shares to them.

If this analysis of the situation be correct then the judgment turns on the two points stated therein, namely, that the 100 shares of the par value of $10,000 were actually subscribed for by T. E. O'Reilly, and that he was entitled to 100 shares to him or his nominees for the transfer of assets. Of course, if they were only to be issued to him as fully paid by agreement and were not subscribed for it might be argued that the "request" did not justify an allotment of the whole 100 shares but that only 95 should have been issued to O'Reilly, and that the 5 shares of the original incorporators really were paid up, but the writer agrees with the opinion of the learned Judge that in view of the terms of the agreement as apparently reflected in the resolution above mentioned this was not sufficient to pay up the shares of the original incorporators even if the 100 shares were not actually subscribed for as the report states.

Before considering how the 5 shares of the original incorporators

might have been paid up by the transfer of assets, for the writer considers this quite possible, it will perhaps be of interest to pursue the point as to whether in law there need be any allotment of the original 5 shares. The report states that persons signing a memorandum of association of a company to be incorporated are contributories although no shares have been allotted and references are made to English cases. In this connection reference might usefully have been made to some Canadian cases, namely: *Modern Bedstead Co.* v. *Tobin*;[2] *Canadian Druggists' Syndicate Limited* v. *Thompson*;[3] and *In re Nipissing Planing Mills Ltd., Rankin's Case*,[4] in all of which cases it was apparently taken for granted and expressed in *obiter dicta* that there was no need for allotment of shares subscribed for by original incorporators, and that they became liable to pay up the amount subscribed for immediately on incorporation of the company. Of course, the ordinary principle is that application for shares requires acceptance and an actual allotment and a reference to the English cases cited shows this, and that those cases were decided solely on Statutory authority (section 23 of the Companies Act of 1862), now found in somewhat similar wording in the Companies Consolidated Act, 1908 as section 24. Section 23 was as follows:—

> The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned, etc.

So the English cases do not help to decide the point, and we must look elsewhere for a basis for the decision on this aspect of the *O'Reilly* case, and no other authority is given or suggested.

In Ontario there is no similar statutory provision. However, section 3 of the Ontario Companies Act, 2 George V., Chapter 31 is the one which has been relied on. It reads as follows:—

> The Lieutenant-Governor may, by Letters Patent, grant a charter to any number of persons, not less than five, of the age of 21 years, who petition therefor, constituting such persons and any others who have become subscribers to the memorandum of agreement hereinafter mentoned and persons who thereafter become shareholders or members in the corporation thereby created, a corporation for any of the purposes, etc.

This section it will be seen is not as explicit as that of the English

[2] (1908) 12 O.W.R. p. 22.
[3] (1911) 24 O.L.R. p. 108.
[4] (1909) 18 O.L.R. p. 80.

Act. It simply states in effect that the petitioners and others who have become subscribers to the memorandum of agreement and persons who thereafter become shareholders shall be a corporation. There is an implication, of course that the petitioners and the subscribers to the memorandum of agreement had become shareholders, but it is not as clear as it might be. Of course, if they are shareholders then under section 74 every shareholder is liable for any amount unpaid on his stock. It has, however, been recognized in the above mentioned Ontario cases that the original subscribers are liable without allotments, but there is no decision in Ontario actually so holding, although *Modern Bedstead Co.* v. *Tobin* (*supra*) might be held to have gone that far as in that case subscribers to the memorandum of agreement who were not even original incorporators were nevertheless on incorporation held to be shareholders by virtue of the quoted section. It would no doubt be held by our Courts, in the writer's opinion, that the original subscribers are liable without any allotment and it has been the general practice to so consider them.

That point having been discussed the question of practical importance is whether the vendor of assets to a company can, as part of the consideration for such transfer, have the shares of the original incorporators paid up. The writer thinks he can. It was the undoubted intention to do so in the *O'Reilly* case, but as stated above, does not seem to have been done if the case be correctly reported. What really should have been done was that instead of giving O'Reilly shares of the par value of $10,000 he should have agreed to accept shares of the par value of $9,500, and that the $500 owing on the shares of the original incorporators should be fully paid by the transfer of assets by him. In order to carry out this there was no necessity that the issue of the shares to these four persons from O'Reilly's shares should, as the judgment states, "operate as a surrender and forfeiture of the original shares." There can be no surrender by a shareholder of his shares to the company, and forfeiture can only be effected in the manner described in the Companies Act on failure to pay a call thereon. There was, however, no reason why the amount owing by the original incorporators should not have been credited to them by the company as part of the amount that it was bound to pay to O'Reilly, and it was very unfortunate that the 100 shares to O'Reilly were subscribed and that the words of the agreement were not so expressed as to make clear that part of the consideration given by the company to O'Reilly was payment of the liability of the original incorporators.

On the whole it would seem desirable in future that wherever possible the actual amount of the par value of the shares subscribed for by the original incorporators should be paid into the coffers of the company in cash and then the company, if it sees fit, can pay out that money and in addition issue any number of shares for the transfer to it by the vendor of any assets or rights. There would in such a case, it is submitted, be no doubt that the shares of the original incorporators were fully paid up, provided the transaction with the vendor were not open to attack, of which there is very little likelihood as the Court will not inquire into the adequacy of the consideration. Many solicitors have been following this method for some time, but where it is inconvenient to actually pay over the money the method attempted by O'Reilly has been followed but it will be necessary now either to pay cash or to very carefully formulate the agreement so as to make clear that the payment of the amount outstanding on the five shares applied for by incorporators, is part of the consideration moving to the vendor.

One other point discussed in the report might be worth considering. It was proved that a transfer of one share each had been made by the original incorporators at such a time before bankruptcy as would have absolved them from any liability. The judgment, however, holds that: "The shares transferred by the alleged contributories were the shares allocated by O'Reilly and transferred by the company to them." Ordinarily, of course, a transfer of one share by a holder of two or more affords no basis for saying it is a transfer of a share acquired in any particular way or indeed of any particular share. Possibly the share in this case was actually transferred by a form of transfer on the back of the certificate for the one share each which had been issued to them on the nomination of O'Reilly, but even this would not seem necessarily to earmark the shares unless such transfer referred to the particular share evidenced by that very certificate. Furthermore the transfer may have purported to be a transfer of a fully paid up share, and if that were so then as the contributories only had one fully paid up share, namely that one which they got from O'Reilly, the transfer of a fully paid share would not be the transfer of the share for which they had originally subscribed and which was still unpaid. If no distinction were made in the transfer then the only conclusion is that the Court assumed it to be a transfer of the share referred to on the face of the certificate. One reason in support of this assumption would be the fact that shares that are not paid for may not be transferred without the con-

sent of the directors, and there is no mention in the report of the case of this having been obtained. In any event the question of transfer while useful to the contributories would still have left the transferee liable if they had not in fact been paid up by the agreement with O'Reilly, and so we are back at the question which inspired this dissertation.

In conclusion it seems clear that if the company were obliged to allot 100 shares in pursuance of the agreement with the vendor then those shares existed in addition to the shares subscribed for originally on incorporation, and the reasoning of the decision would seem to be correct, and the company would have no right to issue as fully paid up the shares subscribed by the original incorporators out of the 100 shares it was bound to issue to O'Reilly for his business, although it might have been made part of the consideration to the vendor by an agreement providing that in addition to the issue of a certain number of shares to him the shares of the original incorporators should be fully paid. Apparently the agreement in this case, although the intention was obvious, was not explicit enough on this point, if indeed it contained any reference to the shares of the original incorporators, which is not shown, as all the report speaks of is the resolution of the company attempting to pay up the shares of the original incorporation and, of course, the reference to the "request" in whatever form that might have been made. To repeat, the agreement with the vendor should have shown that the payment of the liability of the original incorporators was a consideration moving from the company to the vendor O'Reilly, and one must conclude on the report that this was not shewn to have been done, and so the decision is not only what was inevitable but affords a warning to those engaged in company incorporation.

ANGUS C. HEIGHINGTON.

* * *

RAILWAY—PASSENGER'S BAGGAGE—LOSS—LIABILITY OF COMPANY. —If you are about to travel by train and hand your suitcase to a "red cap" who carries it into a parlour car with you, who is responsible if the suitcase is stolen during your journey? Or if the parlour car porter has taken it at the car door and placed it by the chair you occupy? Or, if the red cap loses you in the crowd at the station, and the suitcase never gets to the train at all? Or if your car to which he carries it and from which it vanishes be an ordinary day coach without a porter in charge? Or if, being of a

frugal mind (like the late Mrs. Gilpin) you have disregarded the importunities of the red cap and the luxuries of the parlour car and carried the fated suitcase to the day coach yourself?

A red cap in this country is not quite in the position of a railway porter in England. As a rule, he is not a railway employee but is merely permitted to ply his avocation about the railway permises. In which case, your red cap (if you make use of him) is your agent, and not the Company's, and if by his negligence or dishonesty the suitcase disappears you may have no redress. Further, the ordinary course of business as to receipt of hand-baggage is not quite the same here as across the water. There it is common practice for the company to receive your hand-baggage at the entrance to the station at starting point and deliver it from the station to your carriage at destination. (Per Lord Watson in *G. W. Ry. Co.* v. *Bunch.*[1]) But these variations merely affect the question of fact as to the point of time at which the Company's obligation as a common carrier (whatever they may be) begin, that is to say, the point at which, if at all, the company receives your hand baggage for immediate transit.

Vosper v. *Great Western Railway Company*[2] reiterates the doctrine (obiter) of *G. W. Ry. Co.* v. *Bunch,* that railway companies are common carriers of hand-baggage taken by the passenger into the coach, as well as of baggage in the baggage car, with the modification that they are not liable as to the former if the negligence of the passenger causes or contributes to its loss.

In the *Vosper* case, the porter said that the baggage was placed in a first class compartment by direction and in presence of the passenger, so that at starting it was in the passenger's immediate control. The passenger denied this and said that he saw the porter place the suitcase in a luggage van; but the porter's story was accepted. The passenger in fact held a third class ticket and saw that after placing his case and other articles in a third class compartment, he spent the time of the journey partly in the restaurant car and partly with some friends who were travelling in another coach. At destination, the suitcase could not be found and the Divisional Court held the Company liable on the ground that it had not shown negligence of the passenger, causing or contributing to the loss. The passenger, it said, was invited by the Company to dine in the restaurant car; it was an ordinary incident of travel for him to do so or to spend the time with friends in another

[1] (1888) 13 A.C. 31, 44).
[2] (Weekly Notes, July 30, 1927).

carriage. Nor was a third class passenger an outlaw because he travelled in a first class compartment.

The case goes farther than the actual decision in the *Bunch* case, because in this latter the railway company was found guilty expressly of negligence; and also goes farther, as to relieving the passenger of the obligation to take care of his hand baggage, than *Talley* v. *G. W. R. Co.*,[3] in which the plaintiff failed because he had left his portmanteau in a carriage unprotected by his presence. It will be interesting to see whether the railway company will accept the decision. J. D. S.

* * *

MOTOR CAR—INSURANCE—ACCIDENT WHEN DRIVER DRUNK—RECOVERY PUBLIC POLICY.—An important case, *James* v. *British General Insurance Company, Limited*,[1] has recently been decided in England by Roche, J. It should be of especial interest to the readers of the *Review* for in *O'Hearn* v. *Yorkshire Insurance Co.*[2] the Appellate Division of the Supreme Court of Ontario reached an opposite result.

In the English case the plaintiff, an owner of a motor car, was insured with the defendant company against third-party risks, including accidental bodily injury to any person. The plaintiff, driving his motor car while intoxicated, collided with a motor bicycle and one of the occupants of the bicycle was killed and another injured. The plaintiff, in the present action, was subsequently sued by the survivor of the accident and a judgment for damages was recovered therein against him. Subsequently, the plaintiff was convicted of manslaughter. In this action, on the policy, the defendant company raised the defence that inasmuch as the plaintiff was guilty of a crime, it was against public policy that he should be indemnified. Judgment, however, was given for the plaintiff.

In the Ontario case, the facts were almost identical, except that the plaintiff had been convicted under sec. 285 of the Criminal Code;[3] yet the Insurance Company succeeded in their defence on the ground of public policy.

In both cases the drunkenness of the plaintiffs was only pertinent to the criminal prosecution and in establishing negligence.

[3] L.R., 6 C.P. 44.

[1] (1927), 43 T.L.R. 354. A brief note of this case is to be found *ante*, p. 439.

[2] (1921), 51 O.L.R. 130.

[3] 285. Everyone is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by doing negligently, or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person.

Because of its tendency to promote illegal acts, it is well settled that a contract to save the promisee harmless from the consequence of an act which is necessarily or manifestly unlawful, or which is done in circumstances in which he knew to be unlawful, is invalid.[4] However, in the two cases under consideration the contracts of insurance were so worded as to indemnify the insured against accidental bodily injury to any person. In the English case the Court held that the act, which brought about the criminal liability, was a negligent one and not a wilful doing of the act by which the doer injured or killed the other persons. In the Ontario case, it would appear that the majority, at least, of the Court might have found that there was an intentional act on the part of the plaintiff, if such had been necessary to decide in favour of the defendant company.

The English case followed a judgment of Bailhache, J., in *Tinline* v. *White Cross Insurance Co.*[5] where the insured had been convicted of manslaughter, yet he recovered against the insurance company which insured him against his liability to third parties. The majority of the Court in the Ontario case distinguished this case on the ground that there was no legislation similar to sec. 258 of the Criminal Code in England and therefore the negligence of the plaintiff in the *Tinline* case did not constitute a crime, although in its result it was a criminal offence—manslaughter—which was committed. However, under sec. 258 grievous bodily injury to some other person must result before the negligence involves an infringement thereof. It is difficult to observe the distinction.

It appears as a general principle in cases unconnected with motor insurance that no one can take advantage of his own wrong.[6] However, it is significant that the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.[7]

The problem in short is: Should the general rule, founded upon

[4] See Kennedy, J., in *Burrows* v. *Rhodes* (1899), 1 Q.B. 816 at p. 828; Lord Wrenbury in *Weld-Blundell* v. *Stephens* (1920), A.C. 956, at p. 998.

[5] (1921), 37 T.L.R. 732. See also *MacLure* v. *General Accident Ins. Co. of Canada* [1925], 3 D.L.R. 133.

[6] See *Amicable Society* v. *Bolland* (1830), 4 Bligh. N.R. 194, at pp. 211-2; *Cleaver* v. *Mutual Reserve Fund Life Association* (1892), 1 Q.B. 147, (case where a wife had murdered her husband and an action upon an insurance policy taken out for the benefit of the wife; the Court laid no stress upon the fact that the crime was premeditated); *Lundy* v. *Lundy* (1895), 24 Can. S.C.R. 650, (a case where a man killed his wife and was found guilty of manslaughter, held that he could not claim as a devisee of his wife.)

[7] *Adamson* v. *Jarvis* (1827), 4 Bing. 66, at p. 73; *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (1894), A.C. 318, at p. 324.

public policy, be extended so as to afford a defence to insurance companies which issue such policies? Is not the interest of the public safeguarded sufficiently, if relief is refused to a plaintiff who intentionally injures third parties by the operation of his motor car? It is submitted that it is and that the individual interest in freedom of contract should be maintained. The exception to the general rule, if it need be called such, can now be made to cover the new danger created by the rapid-running juggernauts on our roads. It is in the interest of the injured party or the dependents of the deceased, in many cases, that recovery should be had against the insurance companies, for the motor car owner may have only the car and that will be subject to a mortgage or lien. Furthermore, if the Ontario case is rightly decided, a large percentage of these insurance policies are not worth the paper they are printed upon, for any person driving to the public danger and inflicting grievous bodily harm will be unable to recover on his policy, even in the absence of an intention to commit the tort. Why coddle the indemnity company?[8]

S. E. S.

* * *

FIXTURES—VENDOR AND PURCHASER—HOUSE UNDER CONSTRUCTION.—In a case of *Bendig* v. *Schnarr*, which came before the Second Appellate Division of the Supreme Court of Ontario on Monday, 16th May, 1927, an interesting point was dealt with. The case arose out of a real property contract, the plaintiff suing for a return of his deposit of $200 upon the ground that the house, which at the time of purchase was in the course of construction, was not completed at the time of closing. The Trial Judge at Kitchener had dismissed the action on another ground which the Appellate Division was not prepared to adopt. The Appellate Division did not give a written judgment, but dismissed the appeal upon a different ground. The plaintiff had refused to take the house because he said it was not completely finished in that, *inter alia*, the electric fixtures were to be put in. For the defendant it was admitted that these fixtures were not in, and it was contended that the contract of sale in question did not require the defendant to put them in. The written contract between the parties contained the following words:—

> The party of the first part agrees to sell and the party of the second part agrees to purchase house number 417 on the east side of Wellington Street

[8] See article, 61 Amer. L. Rev. 77.

between Lancaster and Mayor Streets, being the second house facing Wellington Street from Lancaster Street at present under construction and to be completed as follows, it is to be completed and finished the same as the house on corner of Wellington and Lancaster Streets and to be completed by January 1, 1926.

The house on the corner of Wellington and Lancaster Streets had been built by the same contractor and in that house were electric light fixtures *which had been installed by him*, and that house had been seen by the purchaser. At the time of the making of the contract nothing was said about electric light fixtures and the question was whether a contract to reproduce a house which was inspected by the purchaser with a view to entering into the contract, obligated the vendor to reproduce it as it then was, including the fixtures which he had put in it at that time.

It was argued that a house to be completed and finished the same as another must be actually completed including fixtures, if any, the argument being based upon the judgment in *Stack* v. *Eaton*,[1] The Court held, however, that in that case the fixtures were already there and of necessity went with the property, but in the case at Bar the fixtures were not in the house agreed to be sold at the time of the contract, and that here the contract meant, although it did not say, that the house *minus the fixtures* was to be completed and finished similar to the house on the corner of Wellington and Lancaster Streets.

Some questions which naturally occur to one in reference to this decision are:—(1) Given that *prima facie* the building includes the fixtures, if any, *Stack* v. *Eaton* (*supra*), should or should not a contract to reproduce the building be taken to mean reproducing the fixtures which are a part of the building? (2) Was there anything in the facts present in this case to displace the *prima facie* meaning, or on the other hand, would or would not the fact that the contractor had himself installed the fixtures in the building to be reproduced rather support the *prima facie* meaning? (3) Apart altogether from case law, of which the parties themselves are usually ignorant when they contract, though sometimes made painfully wise afterwards, would or would not the purchaser, looking at the completed house as the model, reasonably expect the new house to be completed in the same way as the model had been completed by the same contractor? (4) If so, would or would not the contractor be well aware of it? (5) And again if so, would or would not there be any duty upon the contractor if he did not intend to reproduce the

[1] 4 O.L.R. 335.

fixtures to so stipulate in the contract? (6) Granted again that *Stack* v. *Eaton* (*supra*) was properly decided, would or would not the purchaser in this case have had as good reason for expressly mentioning the shingles, the door-knobs and the eave-troughing as the fixtures in question?

It will be noted that I do not presume to say that the recent decision is wrong. I merely ask a few questions which, in its logical result, it prompts in my mind. But if similar questions are induced in the mind of the average practitioner by the decision under discussion, I ask again if he will or will not feel compelled to regard what to him are the wrong answers as judicially established, if he is to avoid similar perils in draftsmanship to those which befell the draftsman in this case?

But lest I break the record of Mark Anthony, who no longer may compete, I forbear to ask any more questions.

ARTHUR A. MACDONALD.

* * *

PURCHASE OF MOTOR CAR DESCRIBED AS "NEW"—DISCOVERY AFTER USING CAR FOR LONG PERIOD THAT IT WAS NOT NEW WHEN SOLD—RIGHT TO RESCIND CONTRACT AND RETURN CAR.—In these days of motor cars, the judgment of Mr. Justice Kelly, of the Supreme Court of Ontario, in *Rourke* v. *Gilmore*,[1] following the decision in *Addison* v. *Ottawa Auto & Taxi Company*,[2] is interesting. The facts are almost on all fours with the *Addison* case. Plaintiff had purchased a motor car from the defendant, "trading in" his old car in the process, paying certain cash and giving a note for the balance. The written memorandum of the transaction described the car as being new, but after driving it over 7,000 miles, the purchaser learned that it had not been new when he bought it, and repudiated the contract, suing for payment back of his purchase money, the value of his old car and delivery up for cancellation of the promissory note.

The *Addison* case was practically identical with this. Mrs. Addison had purchased a car, which was sold to her as a new car, and which, on the evidence, was if anything a little better than new, as it had been driven just enough to "tune it up," so that any deficiencies would have been revealed if any had existed. In point of fact, however, it was not a new car, but Mrs. Addison did not discover this until she had driven it a very considerable distance under unfor-

[1] 32 O.W.N. 362.
[2] (1913-14) 30 O.L.R. 51.

tunate weather conditions, so that it certainly was then no longer new. Like the plaintiff in the *Rourke* case, she repudiated the contract to purchase on making the discovery, and brought action to recover back the purchase money, she having paid for the car in full when buying it. It was held that the car was not in fact the article intended to be dealt with, and Mrs. Addison recovered.

The *Rourke* case is not to appear in the Ontario Law Reports and the danger of its being lost in the Weekly Notes is a further excuse for calling attention to it. G. F. H.

* * *

AUTOMOBILE INSURANCE—REQUIREMENTS OF THE ONTARIO INSURANCE ACT, 1924—PROMPT NOTICE—ACCIDENT.—The case of *Duchene* v. *General Accident Assurance Company*,[1] deals with the requirements of section 168 of The Ontario Insurance Act, 1924, and the notice required to be given under that section by the insured to the insurance company in the event of an accident causing bodily injuries.

The plaintiffs carried on a grocery business, and were owners of a delivery truck. This truck while being driven by one of their servants, struck and injured D. The plaintiffs, believing the injuries to D. were very slight, did not notify the insurance company of the accident until some four or five weeks thereafter. D. brought an action, and recovered $2,000 damages, against the plaintiffs.

The insurance company disclaimed any liability and set up that they had not received "prompt" notice of the accident as required by the Act. The Court decided that the plaintiffs had not exercised ordinary diligence and that their notice to the company was neither immediate nor prompt; that they were aware of the accident a short time after it occurred, and should have reported it to the company within twenty-four hours; and that by reason of the plaintiff's failure to promptly notify the company it was not liable under the policy, as it did nothing that could be construed as a waiver or admission of liability. "Prompt" is a relative term dependent upon the circumstances of each case, and the learned Judge considered that the law as it now stands is not as rigid as when the cases of *The Accident Insurance Co. of North America* v. *Young*,[2] and *Johnston* v. *Dominion of Canada Guarantee and Accident Insurance Co.*[3] were decided because "immediate" notice was then required.

B. B. J.

[1] (1926-27) 31 O.W.N. p. 59.
[2] (1892) 20 S.C.R. 280.
[3] (1908) 17 O.L.R. 462.

TRADE-MARK—DISTINCTION BETWEEN RIGHT TO PARTICULARS IN PASSING-OFF ACTIONS AND THOSE FOR INFRINGEMENT OF REGISTERED TRADE-MARK.—In the case of *La Radiotechnique* v. *Winbaum*[1] Clauson, J., in the Chancery Division of the High Court of Justice in England decided an interesting point of practice. In that case the plaintiffs were carrying on business as manufacturers of goods for wireless valves, and they claimed an injunction to restrain the defendants from using, in advertisements of wireless valves not of the plaintiffs' manufacture, the words "Radio Micro," and from using cartons in fraudulent imitation of those of the plaintiffs, and otherwise to restrain the defendants from passing off their goods as and for the plaintiff's goods. The words "Radio Micro" had not been registered as a trade-mark or any part of a trade-mark by the plaintiffs, but they alleged in their statement of claim that they had been accustomed to sell certain of their valves under the name of "Radio Micro," and that such name had become recognized as indicating goods manufactured by them. They further alleged that they had long been accustomed to put up their valves in cartons of a distinctive appearance which bore the words "Radio Micro," and that such cartons were well-known to the trade as containing goods manufactured by the plaintiffs. The defendants by paragraph 3 of their statement of defence simply denied all these allegations. Thereupon the plaintiffs applied to the Court for an order that paragraph 3 of the defence might be struck out, or that in the alternative, particulars should be ordered as follows:—"(a) If it were contended that the words 'Radio Micro' were in use by others than the plaintiffs, particulars of such user, stating the name of the person or firm, and the earliest date of such user; (b) if it were contended that the plaintiff's cartons were not distinctive, particulars of cartons, if any, in use by other firms and relied on by the defendants and of the features alleged to be common to the trade, and by whom and when used." Clauson, J., in delivering judgment on the application, observed that the way in which the allegations had been stated was interesting in view of the possible difficulty that the plaintiffs might have in their action, if their claim really depended upon the use by the defendants of their words "Radio Micro," since those words were not a registered trade-mark, and under the Trade-Marks Act, 1905, no action would lie for the infringement of an unregistered mark. The defendants had simply traversed the plaintiffs' allegations, setting up no affirmative case but challenging the plaintiffs to prove their case. The contention of the plaintiffs was that the denial by

[1] [1927] W.N. 211.

the defendants was a pregnant denial involving an affirmative allegation that other persons than the plaintiffs had applied the words "Radio Micro" to their goods and that therefore they, the plaintiffs, were entitled to have the particulars which they claimed. He held that there was no jurisdiction under Order XIX., rr 6 and 7, to order the particulars so claimed. The power to order particulars of "any matter stated in any pleading" in rule 7 meant any matter stated expressly or by reasonable or necessary implication. The defendants' denial did not involve any allegation on their part. No practice, in the opinion of the learned Judge, had been established in passing off cases which bound the Court to order a defendant to give particulars of his simple denial. In cases where the claim was based upon infringement of a registered trade-mark the defendant must define his line of opposition; in such cases no onus was on the plaintiff except to prove that his mark was registered, and if defendant alleged that the mark was improperly on the register on the ground, for instance, that it was a mark common to the trade and not distinctive, he would be ordered to give particulars of such an allegation which he would have to prove. C.M.

* * *

ADMIRALTY LAW—COLLISION—GOOD SEAMANSHIP—EVIDENCE.—In the case of *The Backworth*[1] Hill, J., in the Probate, Divorce and Admiralty Division of the High Court of Justice in England, had to apply to the facts there, By-Law No. 36 of the Port of London River By-Laws, 1914-1926. This by-law provides:—"Every steam vessel navigating against the tide shall on approaching points or sharp bends in the river ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her." The learned Judge held that the by-law imposes on the vessel navigating against the tide two duties, (a) to ease her speed, and (b) if necessary, to stop her engines and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her. We are not surprised to find the learned Judge reaching the conclusion that in the last analysis the question whether it was necessary for the vessel in such circumstances to stop and wait was one of seamanship. He referred to the case of *The Hontestroom*[2] in which the House of Lords considered the same by-law as that in question before him. In that case Lord Sumner delivered a most able and incisive judg-

[1] (1927) 43 T.L.R. 644.
[2] [1927] A.C. 37.

ment, touching, *inter alia,* on the question of seamanship as falling to be determined upon contradictory evidence. Lord Sumner there expressed the view that such question as that of seamanship "must always be very difficult, when the data can only be ascertained from evidence tainted by the frailty and fallibility of human nature." Speaking of such evidence as it should be viewed by a Court of Appeal he says:—"At least we should not make further difficulties for ourselves by assuming that the trial judge has not understood the case, if his views do not agree with our own, or by overruling his estimate of the witnesses on a paper review of their words, stripped of the material colour, which hesitation or promptitude, shiftiness or candour may well have given them. It is, of course, true that the trial judge may have been imposed upon, but I think it is more useful that we should be on our guard against imposing on ourselves."

It may be mentioned that in the Canadian case of *Bryce* v. *Canadian Pacific Railway Company* decided by the Judicial Committee of the Privy Council on the 30th July, 1909,[3] their Lordships' decision, delivered by Lord Gorrell, contains an interesting discussion of what must be held to be "in the circumstances . . . . a matter of good seamanship." C. M.

* * *

Diplomatic Privilege—Action Against Foreigner for Rent—Affidavits—Cross-Examination.—*Mussmann* v. *Engelke*[1] is an interesting case to those who are alarmed at the present advancement of what is known as 'Administrative Law' in England. The defendant appears to have been a member of the staff of the German Embassy in London and he was sued by the plaintiff for arrears of rent due. He filed an affidavit to that effect in the action and obtained a similar affidavit from one of the Embassy secretaries. He also produced a certificate from the Foreign Office that his name was in the list of persons recognized as belonging to the German Embassy, and he claimed that he was entitled to diplomatic privilege and so immune from action in a British Court. Shearman, J., had made an order in chambers that the plaintiff was entitled to cross-examine the deponents on their affidavits. The defendant appealed, contending that the members of the staff of a foreign Embassy could not be required to submit to cross-examination on their affidavits; and that in any event the certificate of the Foreign Office

[3] Noted in (1909) 13 Ex. C.R. 394.
[1] (1927) 64 L.J.N.S. 33.

was conclusive and established the defendant's immunity. The case on appeal was heard by Lord Hanworth, M.R., Scrutton, L.J., and Sargant, L.J., the appeal being dismissed. Lord Hanworth delivered a dissentient opinion, holding that so long as the recognition of the defendant by the Foreign Office existed, international comity required that effect should be given to his diplomatic status. Scrutton, L.J., with whom Sargant, L.J., concurred, was of opinion that a British subject, suing on a British contract, was not to be deprived of his right to go into a British Court because a Government department, holding an inquiry, not on oath, at which the plaintiff was not represented, had arrived at the conclusion that the defendant was immune or exempt from process. The learned Judge thought that the fact that the Attorney-General essayed to inform the Court of the conclusion to which the Government department had come, without giving the plaintiff an opportunity to ascertain the facts for himself, was a most unsatisfactory position to be taken in the premises, and was one not warranted by authority. The question was one to be determined by ascertaining the facts, and the Court ought not to interfere with the discretion exercised by Shearman, J., in ordering the cross-examination of the deponents.

With deference it might be said that the views of the majority of the Court in this case will commend themselves as sound to any one who has examined the authorities on the question of diplomatic privilege. The exact status of any person claiming the privilege ought to be established before the Court. For instance, if it turned out that the defendant really occupied an inferior position, such as a consular secretary, as it appears the plaintiff contended in this case, then on the authority of *Heathfield* v. *Chilton*[2] he would have no immunity from actions at law within the jurisdiction. Lord Mansfield said in the case cited: "The law of nations does not take in consuls or agents of commerce; though received as such by the Courts to which they are employed." A fuller statement of the reason of the distinction between consular and diplomatic agents in this behalf is to be found in the judgment of Mr. Justice Story in the case of *The Anne*.[3] The learned Judge there says: "A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to repre-

[2] 4 Burr. 2016.
[3] (1818) 3 Wheat. 435, at p. 445.

sent him in his negotiations with foreign States, or to vindicate his prerogatives." It would seem, therefore, that a claim for diplomatic immunity should be substantiated by evidence before the Court in the same manner as any other fact.

C. M.

* * *

TRADE-MARK—MOTION TO EXPUNGE—DISTINCTIVENESS. — The Court of Appeal in England has held that a trade-mark might be validly registered in Part B of the Register under sec. 2 of The Trade Marks Act 1919, notwithstanding that, taken in its primary meaning, the word constituting the mark was purely distinctive of the goods in general to which it was applied. In the opinion of the Court it is not necessary to prove that the mark in question had actually become distinctive of the goods of the person registering it, but that it is sufficient to satisfy the Registrar that it is "not incapable of becoming distinctive." *Re F. J. Davis's Trade Mark; Davis* v. *Sussex Rubber Co. Ltd.*[1]

The Canadian Courts have not, we believe, gone as far as this in extending the right to register as a mark a word of a generally distinctive signification, and in considering the applicability of recent English decisions to Canadian cases differences in the legislation of the two countries must be given due weight. *Re Fruitatives Limited* v. *Compagnie Pharmaceutique de La Croix Rouge, Limitée.*[2]

C. M.

* * *

ADMIRALTY LAW—ACTION IN REM FOR BREACH OF CHARTER-PARTY—JURISDICTION OF EXCHEQUER COURT.—In the cases of *Snia Viscoha Societa Nazionale Industria Applicazioni Viscosa* v. *The Ship "Yuri Maru"* and *The Canadian American Shipping Company, Limited* v. *The Steamship "Woron,"* the Judicial Committee of the Privy Council, on appeal from the judgment of the Honourable Mr. Justice Audette sitting in the Exchequer Court of Canada, has decided an important point relating to the jurisdiction of the Exchequer Court of Canada on its Admiralty side. These cases were originally heard before the Honourable Mr. Justice Martin, Local Judge in Admiralty for the British Columbia Admiralty District, who decided that the Exchequer Court of Canada had jurisdiction to entertain an action *in rem*, under Imperial legislation, against a ship for breach of a charter-party. An appeal to the Exchequer Court was taken by the owners of the ships against the judgment at first instance and

[1] (1927) 64 L.T. 24.
[2] (1912) 14 Ex. C.R. 30, at p. 33.

Mr. Justice Audette allowed the appeal, holding that the Court had no jurisdiction in the premises under the Colonial Courts of Admiralty Act, 1890 (Imp.) and the Admiralty Act of 1891 (Can.).[1]

The following is the judgment of their Lordships of the Judicial Committee (Viscount Haldane, Viscount Sumner, Lord Shaw, Lord Merrivale and Lord Warrington of Clyffe), delivered by Lord Merrivale on the 5th July, 1927:—

"These appeals are brought against judgments of the Exchequer Court of Canada in Admiralty by plaintiffs who had sued out in the District Court of British Columbia writs *in rem* and warrants of arrest with a view to the trial at Victoria of claims for damages under charter parties made and alleged to have been broken outside the local area of jurisdiction by parties not resident within that area.

In the case of the s.s. *Woron* the arrest was in respect of damages stated at about 18,000 dollars. The plaintiffs are a Canadian company. The owners of the ship appear to be a joint stock company registered in England. The *Woron* was said to have been chartered for a voyage from ports in British Columbia to Yokohoma and it was alleged that her master had wrongfully deviated upon the agreed voyage and thereby caused loss to the plaintiffs.

In the case of the ss. *Yuri Maru* the plaintiffs are an Italian corporation. The vessel is Japanese, registered at Kobe, the property of owners domiciled in Japan, who have alleged *inter alia* that they became owners since the accrual of the alleged cause of action of the plaintiffs and that judgment in respect thereof had already been recovered by the plaintiffs against their predecessors in title. The claim of the plaintiffs in respect of which the arrest was made was 290,000 dollars for damages for breaches of a charter party for nine months made in December, 1919.

In each case the owners of the arrested ship moved to set aside the writ and warrant of arrest for want of jurisdiction. These motions respectively were dismissed by Martin, J., in the District Court, but upon appeal were allowed in the Exchequer Court of Canada.

In view of the fact that the substantial question for argument was the same in each case of the appeals, counsel for both appellants and both respondents were heard by their Lordships in the course of one hearing. The question which is immediately raised in both cases is whether, irrespective of residence of the defendant or place of origin of the alleged cause of action, a Court of Admiralty in the Dominion may by arrest of a vessel within its area be called upon to adjudicate upon all claims of plaintiffs suing under any charter party made in respect of the vessel.

Incidentally, the further question arises whether, throughout the Empire, there is a like right of litigants in Courts of Admiralty jurisdiction of proceeding, by process *in rem*, in respect of like claims, under like circumstances of absence of local residence of parties impleaded and non-existence of any cause of suit arising within the local jurisdiction.

The claim of the appellants is that by virtue of the Colonial Courts of Admiralty Act, 1890, which provides for the establishment in British posses-

[1] Reported in [1926] Ex. C.R. 80. The judgment of Martin, J., will also be found there.

sions overseas of Courts of Admiralty jurisdiction in lieu of the Vice-Admiralty Courts theretofore existing; and the Canadian statutes which have brought that Act into operation in the Dominion and invested with Admiralty jurisdiction thereunder the Exchequer Court of Canada; whatever jurisdiction in Admiralty is from time to time exercisable in the High Court of Justice in England is exercisable in Canada in the Exchequer Court. The jurisdiction of the Exchequer Court of Canada in Admiralty is exercised in the maritime provinces of Canada by district Judges, of whom the Judge sitting in British Columbia is one.

By the Act of 1890 every Court of Law in a British possession which (*a*) is declared by the local legislature to be a Court of Admiralty or (*b*) has unlimited civil jurisdiction, is constituted a Court of Admiralty, with the jurisdiction defined in the Act in terms the meaning of which is now in question. The Act provides further (section 17) for the abolition, on the 'commencement' of the Act in any British possession, of every Vice-Admiralty Court in the possession which theretofore had exercised Admiralty jurisdiction.

The due investment of the Exchequer Court of Canada in Admiralty with the jurisdiction defined in the Act of 1890 and the competence of the District Judge in British Columbia to exercise that jurisdiction are not in dispute.

The jurisdiction in Admiralty of the High Court of Justice in England did not extend to claims upon charter parties at the time when the Colonial Courts of Admiralty Act, 1890, became law. Jurisdiction over such claims was given in the first instance by the Administration of Justice Act, 1920, section 5, in terms which have no apparent reference to courts out of England, since a proviso in the section limits the costs of actions recoverable thereunder in certain events by the amount of the costs which "might have been recovered if the proceedings had been brought in a County Court." The Act of 1920 was among the numerous jurisdictional statutes extending in date from 1873 onward which are consolidated in the Judicature (Consolidation) Act, 1925. The jurisdiction so conferred on the High Court in England is that on which the appellants rely.

In the statutes of 1920 and 1925 there are no words indicative of any express intention on the part of the legislature of conferring any extended jurisdiction on Admiralty Courts overseas.

The words for construction in the Act of 1890 are these—"The jurisdiction of a Colonial Court of Admiralty shall . . . be over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court of England whether existing by virtue of any statute or otherwise." The appellants claim that these words can only be understood as applying to conditions which are to come into being upon and after the passing of the Act. They offer, in effect, to make the meaning clear by reading into the sentence before the word "existing" the words "from time to time." The respondents on the other hand contend that the jurisdiction defined by the section is sufficiently and indeed unmistakably described as the jurisdiction of the High Court of Admiralty "existing" at the point of time when the Colonial Courts of Admiralty Act, 1890, became law.

Inasmuch as the use of words in the English tongue is not so rigidly governed by rule as to render impossible either of the alternative constructions of the parties, Counsel on both sides properly discussed the subject matter, origin and scope and apparent policy of the Act of 1890, with a view to demonstrate the true intent of the language used.

The establishment, in the overseas dominions of the Crown, of Courts of Admiralty jurisdiction under one common system, in place of the pre-existent Vice-Admiralty Courts called into being as occasion dictated in course of two or three centuries at the discretion of the Home authorities, is the most prominent of the facts in question. In a material passage in the judgment of Martin, J., in favour of the appellants, the view taken by the learned judge as to the nature and scope and apparent intention of this tranasction is thus stated:—

'The Vice-Admiralty Courts in Canada were abolished upon the coming into force of this court as established under the Canadian Act of 1891, but if those former courts were still in existence and exercising locally the jurisdiction of the High Court of Admiralty, it would, I apprehend, be clear that their jurisdiction would march with that of the said High Court and increase or decrease as the case might be in accordance with Imperial legislation affecting that Imperial Court. Such being the case, it follows, to my mind, that the present Admiralty Court of Canada . . . likewise marches in the same jurisdiction, and it would require clear language to the contrary to deprive it of the same continuous jurisdiction as is cumulatively possessed by the Imperial Court for the local exercise of whose jurisdiction it is in reality the local machinery and nothing more.'

To appreciate the extent to which the jurisdiction of the old Vice-Admiralty Courts was subject to automatic enlargement in harmony with an expanding jurisdiction in the High Court of Admiralty in England it is necessary to bear in mind the relation of the Vice-Admiralty Courts to the High Court during their period of development, the circumstances under which the ambit of the authority of the High Court and of the overseas Courts has been enlarged, and the mode in which as to each the process of expansion has gone on.

The extension of the powers of the High Admiral and his lieutenants or deputies in order to meet the needs which resulted from the growth of the Empire does not need to be described with particularity. (See Marsden, *Law and Custom of the Sea*, Vol. I. xiii.) Selden gives the early form of the commission of the High Admiral, when the jurisdiction had been centred in one officer of state under that title. (*Mare Clausum*, p. 196.) Marsden sets out the first commission which—in 1643—extended beyond "England, Ireland and Wales and the Dominions and Isles of the same." It included "all the islands and English plantations within the bounds and upon the coasts of America." (Marsden, p. 531.)

The creation of Vice-Admiralty Courts overseas is also dealt with by Marsden (Marsden, *Law and Custom of the Sea*, Vol. II, pp.. xiv, xv); and Brown's *Civil Law and Admiralty*, published in 1802, presents from the standpoint of a learned civilian a broad view of the then existing system of Vice-Admiralty Courts constituted under commission of the High Admiral or the Lords Commissioners of the Admiralty. The substance of the matter as things stood before 1890, is concisely presented by an experienced public servant, Sir Henry Jenkyns, in these terms (Jenkyns: *British Rule and Jurisdiction Beyond the Seas*, p. 33):—

'In civil matters, the most important branch of extra-territorial jurisdiction, that of the Admiralty Court, was, until 1890, mainly exercised by Vice-Admiralty Courts established by an instrument under the seal of the office of

Admiralty, issued in pursuance of authority given to the Commissioners of the Admiralty in England by a commission under the Great Seal of the United Kingdom. In practice, a judge of the Superior Court of the possession was always made judge of the Vice-Admiralty Court, but he held that office by virtue of an appointment from the British Admiralty, and not by virtue of his position as judge of the possession. His jurisdiction was vested in him personally, and not in the colonial court.'

The jurisdiction exercised by the Vice-Admiralty Courts was commonly that of the High Court of Admiralty. The area of the exercise of the jurisdiction was enlarged as the Empire grew. Its juristic extent was not. For centuries that had been stabilised and strictly limited so far as the High Court of Admiralty was concerned by the vigilant supervision of the Court of King's Bench. The High Court of Admiralty never shared the inherent capacity for development which marked the English Courts of law and equity.

Great extensions of the Admiralty jurisdiction in England were made during the nineteenth century, before the passing of the Colonial Courts of Admiralty Act, 1890. Notable extensions had also been made during the same period by Acts of the Imperial Parliament in the jurisdiction of the Vice-Admiralty Courts. It would be wholly incorrect, however, to suppose that these were extensions of jurisdiction granted to the High Court of Admiralty here and thereupon automatically operative in the Courts overseas. Parliament made its separate grants to the High Court of Admiralty as an English Court. Dr. Lushington, as Judge of the Court, pointed out as early as 1859 that the extensions so made had no effect in the Vice-Admiralty Courts (See *Rajah of Cochin*, Swabey, 473.) At this Board in the same year the same conclusion was stated (*The Australian*, 13 Moore, at p. 160). Parliament in fact legislated for the High Court and the overseas Courts by numerous unconnected statutes.

The Admiralty Court Acts of 1840 and 1861 conferred specific powers, carefully identified and limited, upon the High Court in England. The Vice-Admiralty Courts Acts of 1863 and 1867 (26 Vict. c. 24; 30 & 31 Vict. c. 45) extended the powers of the Admiralty Courts overseas, not by reference to the powers of the High Court in England, but by scheduled statement of the causes of action in respect of which jurisdiction was newly conferred and specification of other amendments.

So far as the appellants' case rests upon a theory that without statutory action there was before 1890 a historic and progressive growth of Admiralty jurisdiction which was common to the High Court and the Vice-Admiralty Courts, or upon a supposition that any statutory enlargement of the jurisdiction of the High Court in England operated automatically to enlarge the jurisdiction of the Vice-Admiralty Courts, it cannot be sustained.

How then did Parliament, by the Colonial Courts of Admiralty Act 1890, deal with the condition of affairs which had grown up under the old law?

The Act has three outstanding characteristics. So far as the "instance" jurisdiction is concerned, its plain intent is the establishment as part of the machinery of self-government within each autonomous area of courts locally constituted, wherein judges locally nominated should exercise such a measure of jurisdiction in Admiralty within prescribed limits as the government on the spot might think convenient. Subject to specific reservations the statute applied to the Empire, and it provided that on the commencement of the Act

in any British possession, and subject to its provisions, every Vice-Admiralty Court in the possession should be abolished.

By Section 2(1), and Section 3, the legislature of an overseas possession is enabled, at its will, to declare a court of unlimited civil jurisdiction within its area to be a Court of Admiralty; to limit territorially or otherwise the extent of the jurisdiction in Admiralty to be exercised in such Courts; and to confer partial or limited jurisdiction in Admiralty upon subordinate or inferior courts. In the absence of local legislative action, a court of "original unlimited civil jurisdiction" in any possession is constituted a Court of Admiralty. And by Section 2(1) "where in a British possession the governor is the sole judicial authority, the expression 'Court of law' includes such Governor."

Incidentally to the fact that the Act of 1890 empowers self-governing communities to decide for themselves within defined limits what shall be the ambit of the jurisdiction to be exercised by their courts by means of process *in rem*, it is necessary to bear in mind that, even in England, conflict of opinion long existed as to the advantage of extending the availability of this process, and that the right of trial within a local jurisdiction of actions arising elsewhere is not always an unmixed benefit. Opinion may well differ between State and State as to whether, *e.g.*, a port which is chiefly a port of call will be benefited by the existence of a power in all and sundry to arrest vessels found within its limits in order that strangers may litigate in the local court questions which have arisen elsewhere.

The Act of 1890 empowers the legislature in any of the dominions to determine by its own statute, subject to the Royal Assent on the prescribed special reservation, what shall be the extent of the Admiralty jurisdiction of the Courts for which the local legislation provides Yet, if the contention of the appellants in this case is sound, an Act of the Imperial Parliament, purporting on the face of it to apply to England and the High Court in London, has without any choice of the self-governing states in the Empire peremptorily enlarged the jurisdiction of their Courts in Admiralty, subject only to a power in them under Section 3 of the Act of 1890 to limit such jurisdiction anew by a new local law, after compliance with the conditions of Section 4 whereby such a law unless previously approved by a Secretary of State, must be 'reserved for the signification of His Majesty's pleasure therein or contain a suspending clause.'

The present cases arises upon an enlargement by the Imperial Parliament of the Admiralty jurisdiction of the High Court of England. But the fact cannot be overlooked that during the last half-century the distribution of business in the High Court in England has been the subject of very numerous enactments, and there is involved in the question now presented for determination the further question whether the withdrawal of any cause of action from Admiralty process in England would *ipso facto* operate a corresponding diminution in Admiralty jurisdiction in the Courts overseas. A construction of the statute of 1890, which would have the singular effect of introducing by an automatic process unasked changes in the jurisdiction and procedure of the Courts of self-governing dominions, with possible power in the local legislature by a cumbrous process to revoke an extension of jurisdiction *in rem*, but no power to undo an unwelcome abatement, manifestly

could not be adopted unless the words of the statute should be found to leave no alternative.

Neither the early history of the overseas Courts, the course of modern legislation, continuity of policy, nor practical convenience appear to their Lordships to require that the jurisdiction defined in the Act shall be declared to be that "from time to time existing" in the High Court in England.

On the whole, the true intent of the Act appears to their Lordships to have been to define as a maximum of jurisdictional authority for the Courts to be set up thereunder, the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act passed. What shall from time to time be added or excluded is left for independent legislative determination.

Their Lordships will humbly advise His Majesty that in their opinion these appeals fail. The costs of the respondents must be paid by the appellants.

EDITOR'S NOTE.—See an interesting article by Professor H. A. Smith of McGill University Law School on "Admiralty Jurisdiction in the Dominions," published in 41 *L.Q. Rev.*, p. 423. Speaking of the doubts surrounding the Admiralty jurisdiction of the Exchequer Court of Canada under existing legislation, Professor Smith says:—"The example of the Copyright Act of 1911 should be followed, and the Dominions should be given a general power under their respective Constitutions to deal with all questions of Admiralty and maritime law in any manner they may think fit. If uniformity is desired it can only be obtained by free consultation and voluntary co-operation between the various Governments concerned. The present system does not even secure uniformity, while at the same time it violates every sound principle of autonomy, convenience, and common sense."

Professor Berriedale Keith offers some observations on Professor Smith's views in *The Journal of Comparative Legislation and International Law*, Volume 9, Part I, p. 123.