CASE AND COMMENT

WIFE CARRYING ON BUSINESS SEPARATELY FROM HER HUSBAND.—A remarkable instance of the application of a rule of Roman Law to solve a problem from a Common Law province (Manitoba) is furnished by the recent case of *La Banque Canadienne Nationale* v. *Tencha*, which lately came before the Supreme Court of Canada, respecting an interpleader issue, a report of which hearing has not, up to the time of writing, appeared. The question to be determined was, whether grain, grown upon land of which the wife was registered owner, and claimed by her as her own, was liable to seizure and sale under a writ of *fieri facias* issued by the plaintiff against the husband. Briefly, the facts were as follows. The husband was sued as a guarantor of a promissory note, and judgment was signed against him. In November 1922, shortly after the note was made, the husband was apparently in financial difficulties; and in consideration of natural love and affection and the sum of One dollar he executed in favour of his wife a quit-claim deed of all his interest in the farm, which consisted of half a section of land which he was purchasing from one Johnstone, the then registered owner, and upon which he, his wife, and adopted children were then living, and had so lived and farmed for some years then past. At the same time, and for a like consideration, the husband gave his wife, the claimant of the grain, a bill of sale of all his stock and farming implements. Subsequently, the claimant acquired from Johnstone, for valuable consideration, which she furnished out of her own separate estate, a transfer of his legal estate to the farm, subject to a mortgage to an assurance company; and in April, 1924, the title to the property became registered under the Real Property Act, R.S.M. 1913, c. 171, in the name of the wife, subject to the mortgage to the assurance company. After this, the husband and wife and their adopted children continued farming operations, the wife "doing a man's work on the place, as she had been accustomed to do." The evidence showed (see Appeal Book, pp. 53 and 143) that the seed for the 1923 crop was purchased out of her own moneys, and that this seed was the origin of the 1923, 1924 and 1925 crops; and in the fall of 1925, after the crop for that year had been cut, it was placed in railway cars and consigned to the Manitoba Wheat Pool, of which

the wife was a member. The cars containing the grain were placed on a siding, where they were seized by the sheriff under the writ of *fieri facias* mentioned above. The wife claimed the grain as her own, and an interpleader was directed between the bank and the wife, the bank being the plaintiff in the issue.

Before we consider this case any further, it will be well to state a few of the principles laid down by decisions in regard to transfers which have been attacked as a fraud upon creditors. In transactions between relatives having the effect of defeating the claims of creditors, if the circumstances be suspicious, the onus is upon the purchaser to establish the *bonâ fides* of the transaction.[1] But in such transactions, even if it can be inferred that the transferee had full knowledge of the transferor's position and intentions, such knowledge will not, of itself, suffice to render the transaction void: *Wagner* v. *Hartows* (*supra*) and *Langley* v. *Beardsley* (*supra*) in which latter case Anglin, J., upheld a sale of a business by an insolvent debtor to his wife (who was one of the husband's creditors and actually raised the money to make the purchase) although the wife was aware that the husband was insolvent and that he intended to prefer certain of his creditors to others by payment out of the purchase money.

Where an insolvent person transfers property to a relative and the circumstances surrounding the transfer are suspicious, the evidence of the parties as to the *bona fides* of the transaction should be corroborated.[2] But the rule relating to the evidence of an accomplice does not apply to civil cases, and a judge may believe the evidence of the interested parties without any corroboration, if he thinks fit.[3] A finding that a transfer of land is fraudulent as against

[1] *Langley* v. *Beardsley*, (1909, Anglin, J.) 18 O.L.R. 67, at 72; *Kilgour* v. *Zaslavsky*, (1914, Mathers, C.J.K.B.) 25 M.R. 14, 7 W.W.R. 446, 30 W.L.R. 303; *Union Bank* v. *Murdock*, (1917, C.A.) 28 M.R. 229; *Koop* v. *Smith*, (1915) 51 S.C.R. 554; *Wagner* v. *Hartows*, (C.A. Alta.) (1922) 3 W.W.R. 1050; *Burr* v. *Cassady*, (1919) 13 Sask. L.R. 130 (Embury, J.); *In re Ready & Cass*, (1924, Murphy, J.) 33 B.C.R. 371; *Enfield Realty Co.* v. *Peterson*, (1926) 2 D.L.R. 1005.

[2] *The Merchants Bank of Canada* v. *Clarke*, (1871, Mowat, V.C.) 18 Gr. 594; *Harris* v. *Rankin*, (1887, App.) 4 M.R. 115; *Osborne* v. *Carey*, (1888, App.) 5 M.R. 237; *Ady.* v. *Harris*, (1893, Killam, J.) 9 M.R. 127; *Goggin* v. *Kidd*, (1895, App.) 10 M.R. 448; *Rice* v. *Rice*, (1899, App.) 31 O.R. 59; *Langley* v. *Beardsley*, (*supra*); *Kilgour* v. *Zaslavsky*, (*supra*); *Koop* v. *Smith*, (1915) 51 S.C.R. 554; *Union Bank v. Murdock*, (*supra*); Martin, J.A., in *Wagner* v. *Hartows*, (*supra*) at 1058; *Imperial Bank of Canada* v. *Esakin*, (1924) 2 W.W.R. 33, 18 Sask. L.R. 561; *Lundquist* v. *Puls*, (1925) 3 D.L.R. 84, (1925) 1 W.W.R. 834; *Burr* v. *Cassady*, (*supra*).

[3] *Graham* v. *The British Canadian Loan and Investment Company*, (1898, App.) 12 M.R. 244, at 263; *Koop* v. *Smith*, (*supra*); *Hawley* v. *Hand*, (1921, App.) 50 O.L.R. 444; *Anderson* v. *Bradley*, (1921, Orde, J.) 20 O.W.N. 13.

an execution creditor of the transferor is not conclusive as to the ownership of the crops grown on the land, and does not determine the right of such creditor to have such crops taken under his execution.[4] In *Osborne* v. *Carey* (*supra*), it was said by Taylor, C.J., that those who seek to support a voluntary conveyance which is attacked by the creditors of the grantor must bear and satisfy the onus of showing the existence of other property sufficient to pay the grantor's debts. But this case was decided before the passing of the Married Women's Property Act in 1900, and the rule thus stated does not appear generally to have been followed. But see *Davies* v. *Dandy*.[5] The onus of proof that payments by a woman to her husband are loans and not gifts has been held to rest with the wife: *Rice* v. *Rice* (*supra*).

The question whether or no a conveyance be fraudulent, or whether or no a woman carries on an occupation separately from her husband within the meaning of the Married Women's Property Act, is a question of fact.[6] "Where the occupation is *bonâ fide* carried on as the business of the wife and without her husband having any proprietary interest in it or any right of interference in or control over it—when he takes no part in it other than as his wife's employee—the facts that he resides with and aids her in carrying it on, do not prevent its being, for the purposes of the Married Women's Property Act, her business and an occupation carried on separately from her husband": dictum of Anglin, C.J.[7] If, however, the occupation or trade be such that the wife

[4] *Kilbride* v. *Cameron*, (1867, C.A.) 17 U.C.C.P. 373; *Massey-Harris* v. *Moore*, (1905) 6 Terr. L.R. 75; *Cotton* v. *Boyd*, (1915, C.A.) 8 Sask. L.R. 229. See also *Banque Can. Nat.* v. *Tencha*, (Man. C.A.) (1926) 3 W.W.R. 532; *Leippi* v. *Frey*, (1921) 2 W.W.R. 326.

[5] (C.A. 1920) 30 M.R. 306.

[6] *Merchants Bank* v. *Carley*, (1892) 8 M.R. 258; *Doll* v. *Conboy*, (1893) 9 M.R. 185; *Stewart* v. *Bank of Ottawa*, (1897) 3 Terr. L.R. 447; *Walker* v. *Brown*, (1916, Kelly, J.) 36 O.L.R. 287; *Standard Trusts Co.* v. *Briggs*, (C.A. Alta.) (1926) 1 W.W.R. 832, 22 Alta. L.R. 113, (leave to appeal refused (1926) S.C.R. 602).

[7] *Banque Candienne Nationale* v. *Tencha*, (*supra*); supported by *Ingram* v. *Taylor*, (1881) 46 U.C.Q.B. 52, affirmed (1882) 7 O.A.R. 216; *Murray* v. *McCallum*, (1883) 8 O.A.R. 277; *The Dominion Loan and Investment Co.* v. *Kilroy*, (1877) 14 O.R. 468, affirmed (1888) 15 O.A.R. 487; *Baby* v. *Ross*, (1892) 14 Ont. Pr. R. 440; *Doll* v. *Conboy*, (*supra*); *Cooney* v. *Sheppard*, (1895) 23 O.A.R. 4; *Lindsay* v. *Morrow*, (1908, Lamont, J.) 1 Sask. L.R. 516, 9 W.L.R. 619; *Harvey* v. *Silzer*, (1905, Newlands, J.) 1 W.L.R. 360; *Douglas* v. *Fraser*, (1908, C.A.) 17 M.R. 439, 7 W.L.R. 584, affirmed 40 S.C.R. 384; *In re Ida Simon*, (1909) 1 K.B. 201, 78 L.J.K.B. 393; *Moose Mountain Lumber Co.* v. *Hunter*, (1910, Lamont, J.) 3 Sask. L.R. 89, 13 W.L.R. 561; *Karst* v. *Cook*, (1910, Wetmore, C.J.) 3 Sask. L.R. 406, 15 W.L.R. 679; *Walker* v. *Brown*, (*supra*); *Johnstone Lumber Co. Ltd.* v. *Hager*, C.A. (1924) 1 W.W.R. 389, 20 Alta. L.R. 286; *Standard Trusts Co.* v. *Briggs*, (*supra*).

cannot carry it on without the husband's active co-operation or agency, or there be any interference by the husband in the conduct of the business with the wife's concurrence, it appears that the effect will be to deprive the business of its separate character. In *Harrison* v. *Douglas*[8] it was decided that hay, being the natural product of the land of which the wife was the tenant came under the description of "issues and profits of her separate estate", referred to in sec. 5 of the Married Women's Act, R.S.M. 1892, c. 95, and that the wife (the plaintiff) was entitled to it as against the judgment creditor of her husband. In *Moose Mountain Lumber etc., Co.* v. *Hunter* (*supra*),[9] Lamont, J., lays down the following rule: "When the crop is grown on land owned by a married woman, and both herself and her husband reside upon that land, the crop, being the product of her land, *prima facie* belongs to her, and it can only be held to be the husband's when it is shown that he carried on the farming operations as the head of the family or as tenant of the land[10]. Where a claimant is the registered owner of the land upon which a crop is grown, and such crop at the time it is seized is not in the possession of the execution debtor, the execution creditor must prove affirmatively the property of the execution debtor in such crop: *Re Bank of Montreal* v. *Tammas*. *Tammas* v. *Bank of Montreal*,[11] and cases there cited. Certain cases are cited as authority for the general proposition that where a man resides with his wife on a farm and assists her in raising crops, then although the farm belong to the wife and she conduct it on her own account, employing the husband to aid in the work, the crop is seizable under an execution against the husband—see comment of Anglin, C.J., on such cases in *Banque Can. Nat.* v. *Tencha* (*supra*) —unless she satisfy the onus, which these cases state to be on her, of showing that the husband is really her servant and the farming business hers.[12] But all of these cases were decided under the old statutes relating to Married Women's Property and before the passing of the Married Women's Property Act, under which the *Tencha* case was decided. See *infra*.

[8] 40 U.C.Q.B. 410, Harrison, C.J., at 415. See also *Murray* v. *McCallum*, (*supra*); *Campbell* v. *Shorey*, (1914, C.A.) 14 E.L.R. 259; *Reid* v. *Morwick*, (1918, C.A.) 42 O.L.R. 224; *Slingerland* v. *Massey Manufacturing Co.*, (1894) 10 M.R. 21.

[9] 3 Sask. L.R. at 91 and 13 W.L.R. at 563.

[10] Followed in *Karst* v. *Cook*, (*supra*); *Pierce* v. *Thompson*, (1921) 14 Sask. L.R. 503, (1921) 3 W.W.R. 573.

[11] (C.A. Sask.) (1925) 3 D.L.R. 1079.

[12] See *Parenteau* v. *Harris*, (1884) 3 M.R. 329; *Ady* v. *Harris*, (1893) 9 M.R. 133; *Streimer* v. *Merchants Bank*, (1894) 9 M.R. 546; *Slingerland* v. *Massey Mftg. Co.*, (1894) 10 M.R. 21; *Goggin* v. *Kidd*, (1895) 10 M.R. 448.

By the Married Women's Property Act (R.S.M. 1913, c. 123, s. 5) it is enacted, that

> all property which . . . shall be standing in, or allotted to, or placed, registered, transferred in or into or made to stand in, the sole name of a married woman, shall be deemed, *unless and until the contrary be shown,* to be her property . . . ; and she alone shall be entitled to deal therewith and to receive the rents, issues, dividends, interests and profits thereof.

Section 2 (b) defines "property" as

> any real or personal property of every kind and description of a married woman and the rents, issues, and profits of any such real or personal estate and .. .. all wages, earnings, money and property gained or acquired by a married woman in any employment, trade, or occupation in which she is engaged or which she carries on separately from her husband, and in which her husband has no proprietary interest .. ..

Sec. 79 of the Real Property Act (*supra*), provides that every certificate of title issued under that Act will be conclusive evidence at law and in equity as against H.M. and all persons whomsoever that the person named in such certificate is entitled to the land described therein, subject to the right of any person to show fraud in which the registered owner has participated or colluded, but the onus of proving such fraud is upon the person alleging it. At the trial the learned judge relied on *Ady* v. *Harris* (*supra*), *Slingerland* v. *Massey Mfg. Co.* (*supra*), *Streimer* v. *Merchants Bank* (*supra*), *Goggin* v. *Kidd,* and certain other similar cases, and found (see (1926) 1 W.W.R. at 872) for the plaintiff on two grounds, namely,—

1. That the transfer to the wife was a fraudulent transaction, executed for the purpose of defrauding creditors of the husband by preventing the recovery of their claims against him, and that although the land is registered in the name of the wife it is not hers, and the crops grown thereon are his.
2. That even if the farm were the property of the wife, she was not carrying on the farming business separate and apart from her husband within the meaning of the statute.

Mrs. Tencha appealed, and the Court of Appeal for Manitoba [(1926) 3 W.W.R. 532] by a majority (Perdue, C.J.M., Denistoun and Trueman, JJ.A.) reversed the judgment of the trial judge. Fullerton, J.A. (dissenting), after reviewing the evidence and cases upon the matters in issue, agreed with the learned trial judge, that the claimant "was not carrying on the farming business separate and apart from her husband within the meaning of the statute;" and Prendegast, J.A., concurred in the judgment of Fullerton, J.A. The learned judges who constituted the majority of the Court of Appeal, reviewed many of the cases cited above, and expressed the view, that after November 1922 the farming operations on the farm were actually and *bonâ fide* carried on by Mrs. Tencha on her own

account and without her husband having any "proprietary interest" therein or any control thereof; that even if the transfer of the land to Mrs. Tencha were deemed a fraudulent transaction as against the creditors of the husband, it did not follow that he had an interest in the crops which would make them exigible under an execution against the husband, inasmuch as the transfer was *inter pares* intended to be effective and was not a mere sham and the farming operations had been carried on by Mrs. Tencha as proprietor and without her husband having any interest in or control over them; that the grain in question was "property acquired" by Mrs. Tencha in "an occupation in which she is engaged or which she carries on separately from her husband and in which her husband has no proprietary interest", within the meaning of clause (b) of s. 2 of the Married Women's Property Act, supra; and that the grain seized was her exclusive property and was not exigible under the plaintiff's execution against her husband.

The bank appealed; and the Supreme Court of Canada, by a majority (Duff, Rinfret and Newcombe, JJ.; Anglin, C.J. and Mignault, J. dissenting), allowed the appeal, except as to that part of the crop which was agreed by such majority of the court to represent the crop grown upon land which was exempt from seizure under the Executions Act, R.S.M. 1913, c. 66, secs. 29 and 34. In delivering the judgment of himself and Mignault, J., Anglin, C.J. (after reviewing the facts, the findings of the learned trial judge, and the judgments of the Manitoba Court of Appeal) approved of the decisions in *Kilbride* v. *Cameron, Standard Trusts Company* v. *Briggs, Murray* v. *McCallum* and *Baby* v. *Ross,* (see above), considered the effect of the Married Women's Property Act, *supra,* and agreed with the views of the learned judges who constituted the majority in the Manitoba Court of Appeal as outlined above, and decided that as the title to the farm was not in issue they would determine nothing in regard to such title, and they were of the opinion that the judgment *a quo* was right, and should be affirmed. At the trial, counsel for the wife had objected to the question of the transfer to the wife being gone into, as there was no issue on the record that such transfer was fraudulent against the creditors of the husband, and the matter could only be gone into if the question were raised specifically on the record: *Donohoe* v. *Hull Bros. & Co.*[13]. This contention was not sustained by the judges who constituted the majority in the Court of Appeal but effect was given to it by Anglin, C.J., and Mignault, J., in the Supreme Court. Dealing with this point, Newcombe,

[13] (1895) 24 S.C.R. 683.

J., who delivered the judgment of the learned judges who constituted the majority in the Supreme Court hearing, held that it was not necessary in proceedings such as these to invoke the jurisdiction of the court specifically to declare void or to set aside a conveyance alleged to be fraudulent against creditors; and further, that although the transfer of the farm by the husband to the wife might be good as between the parties, it was nevertheless fraudulent as against the husband's creditors; and their conclusion was, that the husband was the (real) owner of the land, and, therefore, was also the owner of the grain in question. To arrive at this conclusion the learned judges applied a rule of Roman Law, namely, that the owner of the principal thing (in this case, the farm) was also the owner of any accession to it; and that as crops grown upon the farm were in the nature of an accession, the owner of the farm (whom they held to be the husband) was also the owner of the grain, which, therefore, became exigible for the purpose of the execution issued against the husband, except as to a portion which might be taken to represent the exemption mentioned above. As regards this exemption, it has been held that where a judgment debtor has, with intent to delay defeat or hinder his creditors, fraudulently conveyed away land which ordinarily would be exempt from execution, and such conveyance was binding on the grantor, even though set aside as regards his creditors, such exemption will be lost and the land become exigible to a creditor of the debtor.[14] In his judgment, however, his lordship, Newcombe, J., does not deal with any of the last mentioned cases. He regarded the case of *Kilbride* v. *Cameron* as indecisive and not applicable to the case under consideration.

E. A. Whittuck ("Gai. Institutiones", 4th edn.; at p. 164) states the rule in Roman Law referred to above to be as follows: "Fructus or produce of a thing, when they become distinct entities, belong to the owner of the principal thing, unless specially acquired from him by some one else."

Their Lordships base their authority for applying this rule of Roman Law upon the passage in Blackstone (Vol. 2, p. 404), of which the following are the material parts:—

[14] *Brimstone* v. *Smith* (1884) 1 M.R. 302; *Massey-Harris Co.* v. *Warrener*, (unreported) but referred to in *Roberts* v. *Hartley*, *(supra)*; *In re McCuaig and Bray*, (1924) 4 C.B.R. 660, (1924) 2 W.W.R. 373—also *Logan* v. *Rea*, (1903) 14 M.R. 543. But see the judgment of Denistoun, J.A., in *Davies* v. *Dandy*, *(supra)*, at p. 315, citing *Fredericks* v. *Northwest Thresher Co.*, 3 Sask. L.R. 280, 15 W.L.R. 66, 44 S.C.R. 318, and *Hart* v. *Rye*, 5 W.W.R. 1280, 27 W.L.R. 9.

> The doctrine of property arising from accession is also grounded on the right of occupancy. By the Roman Law, if any given corporeal substance received afterwards an accession by natural means, as by the growth of vegetables . . . , the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement; . . . . . And these doctrines are implicitly copied and adopted by our Bracton, in the reign of Henry III.; and have since been confirmed by many resolutions of the courts.

Newcombe, J., in his judgment, says, that

> this passage is reproduced in Stephen's Commentaries, 17th ed., Vol. II, p. 525, including the statement that even when the offspring or produce is separated from the principal corporeal object it still belongs to the owner of the latter.

and his Lordship adds, that, since the judgment debtor's conveyance of the land was void when brought into competition with the claims of his creditors, it should, for the purpose of adjudicating their rights, be treated as frustrate and not existing, that the husband had the equitable or beneficial title, to which the possession and right to the crops was incident, while his wife, after she had obtained the legal title from Johnstone, the former registered owner, had the rights Johnstone would have had if he had not conveyed to her.

The passage quoted above from Blackstone is based, as to accession by growth of vegetables, upon Inst. 2, i: 25, 26, 31; as to the Roman doctrines being adopted by Bracton, upon Bracton's *De Legibus Angliae,* L. 2, cc. 2 and 3; and as to confirmation by the courts, on Bro. Abr. tit. propertie, 23, Moore 20, and Popham 38. As Inst. 2, i, No. 25 deals with things made through human operation only, it does not concern our present enquiry. The same may be said concerning No. 26; but No. 31 is copied almost verbatim by Bracton in his *De Leg. Ang.* cap. 2, to which we refer infra. Bro. Abr. tit. propertie, 23, appears to deal with accession through the breeding of animals. Moore 20 (1560), 72 E.R. 412, is a case of trespass, where a person tortiously entered upon the defendant's leasehold land, felled trees and cut them into timber, which he gave to the plaintiff, upon whose land the defendant entered, recovered the timber and carried it away. The plaintiff sued out a writ of trespass against the defendant and the court laid down the rule, that where a thing is taken tortiously and altered in form, if what remains is the principal part of the substance the owner is entitled to it; and if a man take certain trees and make boards from them, the owner of the trees may still recover them, because the principal part still remains. *"Mais si les arbres sont fixes sur le terre, ou si un meason soit fait del timber, autermt, est."* The last sentence is merely the substance of the case of Titius and Menius, infra. Poph. 37, at p. 38, (1594) *Stock* v. *Stock,* deals partly with the right of an

official who is not an ecclesiastic to grant letters of administration, and partly with the position of the plaintiff who wilfully mixed his own hay with that of the defendant, who, acting in good faith, carried away the mixed hay, the court holding that the plaintiff having wilfully caused the confusion, the defendant was not liable for taking away any part of the hay.

As to Bracton; L. 2, c. 2, is the one with which we are concerned. That portion of it which relates to the matter in question is based upon and is copied almost word for word from Inst. II. i, No. 31, and also contains the substance of Inst. II. i, No. 32. The side-note confirms this. The former deals with the classic hypothetical case of Titius setting another person's plant in his own land, and the plant thereby becoming the property of Titius, and, vice versa, Titius setting his own plant in the land of Menius, and the latter becoming the owner of the plant, provided in each case that the plant has struck root. Then follows the substance of Inst. II. i, No. 32:—

Qua autem ratione plantae solo cedunt, cum radices egerint, et aedificia immobilia, eadem ratione cedunt frumenta, cum sata fuerint et solo coaluerint, sive fortuito casu ceciderint in terram, sive non.

When this was written by Bracton (who was not only a justice but an ecclesiastic, steeped in the civil and canon law), he obviously had in mind the parallel case set out in Inst. II. i No. 30, the effect of which is, that where a person in *bonâ fide* possession of land erects a building upon the land with his own materials the owner must compensate him for the additional value the builder has thus given to the land. (See as to this, for example, Thomas Collett Sandars, "The Institutes of Justinian", 11th ed., pp. 106, 107). And No. 32, referring to this, provides,

ita ejusdem exceptionis auxilio tutus esse potest is, qui alienum fundum sua impensa bona fide consevit.

His Lordship, Newcombe, J., doubtless had this in mind, when he states in his judgment:

I prefer to apply the rule derived from the Roman Law, by which, at least as against a purchaser *other than a bonâ fide possessor*, the owner of the principal thing becomes the owner also of the fruits.

This being so, let us consider the position of Mrs. Tencha under this companion rule, which, we most respectfully submit, is applicable to this case. Their Lordships who rendered the majority judgment in the Supreme Court held, that the husband was the real owner. His wife was the registered owner, undoubtedly in

possession of the land, and actively engaged in farming it with the help of her husband and their adopted children. The evidence shows that the seed from which the 1925 crop was grown was hers. *Bonâ fide* possessor within the meaning of the Roman law rule cited above means a person *bonâ fide* in possession *as between the owner and such possessor.* It would have been impossible for the husband in this case to deny the title or possession of his wife, and, had she thought fit, she could have ejected him from the land. The fact that Mrs. Tencha was also a purchaser of the land would not make her any the less a *bonâ fide* possessor. Would not Mrs. Tencha, therefore, be entitled to the crops under this rule?

The writer has not at hand the seventeenth edition of Stephen's Commentaries from which Newcombe, J., quotes, but in the sixteenth edition (1914) vol. 2, at pp. 22, 23, in considering the decisions of the English courts respecting accession, the commentator cites merely cases dealing with accession from the breeding of animals and swans; so from this source we do not appear to get very much help.

There is neither the time nor the space to deal with many other important points raised by this remarkably interesting decision, such as onus of proof, the effect of the Dower Act, and the statutory changes in the law relating to the property of married women, the avoiding of conveyances on the ground of fraud when that issue is not specifically on the record; but there is one point which the writer would like to refer to. It is this. In his judgment Newcombe, J., points out that Johnstone, the former registered owner who transferred the land to Mrs. Tencha, while he retained the legal title, "received the crops of grain which were grown upon the land, and that the proceeds, in considerable part at least, went in reduction of the purchase price, of which the amount due upon the mortgage formed part." Further on, His Lordship says, that Mrs. Tencha, "after she had obtained the legal title from Johnstone" (i.e. April 1924), "had the rights that the latter would have had if he had not conveyed to her." On this holding, then, might it not be respectfully suggested that Mrs. Tencha would be entitled to the crops.

F. READ.

* * *

PRIORITIES—REGISTRY ACT.—Can a purchaser of land, who has not yet received a conveyance from the vendor, give to a third party a mortgage which, by the magic of The Registry Act, will

take priority over a subsequently registered mortgage from the purchaser to the vendor? This question, formerly answered in the negative by *Nevitt* v. *McMurray*[1] and *McMillan* v. *Munro*,[2] is raised again by *Thomson* v. *Harrison*.[3] On April 12, 1924, Thomson said that he would sell his house to Harrison and on the same day Thomson gave to Harrison a deed of conveyance and Harrison gave to Thomson a mortgage, of the land in question, for a balance of the purchase price. Harrison executed a mortgage of this land, bearing the date, April 10, 1924, in favour of Stewart. The learned judge, who tried the action, seemed to lean towards a finding that the last mentioned mortgage was executed on that day. However, he observed: "I do not think that anything really turns upon the date of the execution." The deed, Thomson to Harrison, then the mortgage, Harrison to Stewart, and subsequently the mortgage, Harrison to Thomson, were registered.

Apart from the Registry Act[4] Thomson could claim priority for his mortgage over the mortgage given to Stewart.[5] The learned judge held that, as Stewart at the time of registration of her mortgage had no actual notice of the mortgage given to Thomson, Stewart obtained priority for her mortgage by virtue of section 72 of The Registry Act.[6]

In view of the decisions of The Court of Appeal in *Nevitt* v. *McMurray* and *McMillan* v. *Munro*, it seems difficult to admit the correctness of this holding. Assuming that the Stewart mortgage was the earlier by two days (and the learned judge held that the date of execution of it was immaterial) the case under consideration appears to be on all fours with the latter case, where an opposite result was reached. The object of The Registry Act is the protection of *subsequent purchasers*.[7] From the very terms of section 72, it can be readily gleaned that there is only contemplated a situation where there is a subsequent instrument and a prior registration of it, with-

[1] (1886), 14 A.R. 126.
[2] (1898), 25 A.R. 288.
[3] [1927], 3 D.L.R. 526, 60 O.L.R. 484.
[4] R.S.O. 1914, c. 124.
[5] Assuming that the mortgage to Stewart preceded the instruments which passed between Thomson and Harrison, see the reasons given in *Nevitt* v. *McMurray*, (1886) 14 A.R. 126; *McMillan* v. *Munro*, (1898) 25 A.R. 288. See also *Eyre* v. *Burmester*, (1862) 10 H.L. Cas. 90; Falconbridge: Law of Mortgages, p. 126.
[6] Priority of registration shall prevail unless before the prior registration there had been actual notice of the prior instrument by the person claiming under the prior registration.
[7] See *McMillan* v. *Munro, supra*, particularly the judgment of Moss, J.A., 25 A.R. at pp. 300 and 301; *Waters* v. *Shade*, (1851) 2 Gr. at pp. 482-3; *Kingston Building Society* v. *Rainsford*, (1853) 10 U.C.R. 236.

out actual notice of a prior instrument. If the mortgage to Stewart was prior to the Thomson instruments, it is submitted that prior registration of it in no case would, as regards the latter, involve an application of section 72.

The learned judge further held that Thomson had an unpaid vendor's lien, but as Stewart had registered her mortgage without actual notice of Thomson's claim, she had, by virtue of section 73[8] of The Registry Act, priority. True, section 73 does not in terms provide only for a case where an instrument is given by a person against whom an equitable lien could be asserted, *after* such equitable lien has arisen. However, having regard to the policy and the object of The Registry Act, it is submitted that the section should not be so construed as to apply to a case where a registered instrument would afford protection to the grantee, when the grantor at the time of the execution of the instrument had no interest whatever in the land in question.

Otherwise, a tenant in fee simple, for example, in disposing of his land must, in order to be secure, ascertain if he has been cut out by some instrument executed by his purchaser weeks, months or years before the latter has acquired any estate or interest in the land. S. E. S.

* * *

DISCHARGE OF MORTGAGE (*a*) BY ONE OF TWO EXECUTORS OF THE MORTGAGEE; (*b*) BY THE SURVIVOR OF TWO MORTGAGEES.—In *Re A. and B.*[1] it was held by Middleton, J.A., that a discharge of mortgage executed by one of two living executors of a deceased mortgagee will, when registered, operate under the Registry Act as a reconveyance of the mortgaged land. The decision may be right; but it is submitted with respect that *Re Stair and Yolles*[2] cited as "a satisfactory decision upholding the validity of the discharge", is not quite conclusive, and that the objection taken to the sufficiency of the discharge (which was registered in 1917) may be of more substance than the learned Judge was willing to concede. *Re Stair and Yolles* (*supra*) was merely a decision that under a former provision of the Mortgages Act[3] which was omitted from the Act in 1910,[4] the

[8] No equitable lien, charge or interest affecting land shall be valid, as against a registered instrument executed by the same person, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act.

[1] [1927] 3 D.L.R. 1070; (1927) 60 O.L.R. 647, 61 O.L.R. 4.

[2] [1925] 3 D.L.R. 1201; (1925) 57 O.L.R. 338.

[3] R.S.O. 1887, c. 102, s. 13, originally enacted in 1868 by 31 Vic. c. 20, s. 62, and subsequently re-enacted as R.S.O. 1897, c. 136, s. 12.

[4] 10 Edw. VII, c. 51.

discharge there in question (registered in 1889) was valid; and no more general answer was given by Riddell, J., to the doubt expressed by Meredith, C.J., C.P., in *Re Spellman and Litovitz*,[5] as to the present law on the subject.

After the reference to *Re Stair and Yolles* (*supra*) the reasoning of the judgment in *Re A. and B.* proceeds in substance as follows, that (1) whereas under decisions going back beyond the time of Lord Hardwicke one of several executors might give a valid receipt, binding on the others, and (2) whereas the effect of Ontario legislation is to give to the receipt and discharge of one who can release the debt the full effect of reconveying the land, therefore the discharge in question when registered was valid as a reconveyance of the land. Again, the result may be right; but, it is submitted, the second part of the premise must be read with caution as applied to discharges registered between 1911 and 1927. The authority cited is *Dilke* v. *Douglas*.[6] This case, it should be noted, relates to another question, namely, whether the survivor of two mortgagees can give a discharge which, when registered, will operate as a reconveyance, without the necessity of any discharge being executed by the personal representatives of the deceased mortgagee. *Dilke* v. *Douglas* (*supra*) was right in 1880 in answering this question in the affirmative, but, it is submitted, ceased to be right as applied to s. 67 of the Registry Act, as enacted in 1911,[7] and as incorporated in R.S.O. 1914, c. 124, and has become right again by virtue of the amendment of s. 67 made by the statutes of 1927, c. 38, s. 9. The difficulty created by the change made in 1911 seems to have been overlooked by Middleton, J.A., in *Re Alderson and Hillyard Mortgage*,[8] and in *Re Pountney and McBirney*,[9] but the fact that the difficulty has been removed, as to discharges registered on or after the 5th of April, 1927, by the amendment of 1927, seems to have been recognized by Kelly, J., in *Booth* v. *Colonial Mfg. Co. Ltd.*[10].

J. D. F.

* * *

CRIMINAL LAW—CORONER'S INQUEST—CORONER PRESENT WHEN JURY CONSIDERING THEIR VERDICT.—In the case of *Rex* v. *Wood; Ex party Anderson*,[1] the King's Bench Division in England had to

[5] (1918) 44 O.L.R. 30.
[6] (1880) 5 O.A.R. 63.
[7] 1 Geo. V, c. 17, s. 31, adding the section to 10 Edw. VII, c. 60, as s. 66a.
[8] (1924) 26 O.W.N. 277.
[9] (1927) 33 O.W.N. 84.
[10] (1927) 32 O.W.N. 139.
[1] (1927) W.N. 258.

deal with an application to make absolute a rule *nisi* for *certiorari* to quash a coroner's inquisition. On the facts it appeared that one T. was killed by a motor car driven by the applicant A. An inquest was held by a coroner, and the coroner's jury returned a verdict of accidental death but added in a rider that they thought that there had been negligence on the part of the applicant and decided to censure him severely. The applicant obtained a rule upon the grounds (1) that the coroner was in the jury's retiring room while they were considering their verdict, and that he took the verdict in private; and (2) that the verdict and rider were contradictory and bad on the face of them. The first ground only was dealt with. It appeared from affidavits that the coroner had gone into the jury's room at the request of the jury, and had remained with them for a quarter of an hour. It was not suggested, however, that the coroner was doing more than helping the jury in the discharge of their duty. The Court (Lord Hewart, C.J., Avory and Salter, JJ.), made the rule absolute.

Lord Hewart, C.J., said that the judgment was confined solely to the first ground dealing with the presence of the coroner in the jury room. It was clearly contrary to public policy that the coroner should go into the jury room after the jury had retired, even though it was only to answer questions asked of him by the jury in the discharge of their duty. The principle was clearly laid down in the Irish case of *Reg.* v. *Bourchier*.[2] May, C.J., said:—"As to [the coroner] not interfering in the discussion when the jury were deliberating, this is no excuse, he has violated the principle to be observed in such cases; the jury should have been segregated from all the rest of the public. This is the proper practice, and it is no answer to the complaint to say that the coroner read the evidence to the jurors when they returned to the room." And in another Irish case, *In re the Mitchelstown Inquisition*,[3] the inquisition was quashed on the ground of irregularity and misconduct. Those cases seemed to apply clearly to the present case. The inquisition must be quashed and a new inquisition held before the coroner of the Pickering Division of Yorkshire.

NOTE.—While we have not found any Canadian decision dealing precisely with the point in question in the above case, it may be useful here to quote the following paragraph from Judge Boys' book on the Duties of Coroners in Canada, 4th ed., p. 383:—

[2] (1882) 17 Ir. L.T. 34, 36.
[3] (1885) 22 L.R. (Ir) 279.

"The coroner should not go into the room where the jurymen are and take their verdict there, but should let the jury return, with the constable in charge of them, into the open court, and there receive their verdict. In the case of *In re Mitchelstown Inquisition* (*supra*), it was held that for the coroner to go into the jury room to receive the verdict was misconduct for which the inquisition would be quashed." C.M.

* * *

MOTOR CAR—RECKLESS DRIVING—MANSLAUGHTER. In the case of *Rex* v. *Dabbs,* tried before Mr. Justice Riddell in Toronto on the 28th ultimo, the prisoner was found guilty of manslaughter for killing a child while driving his automobile in a reckless manner on a public highway. The jury added a strong recommendation to mercy to their verdict of guilty. Dabbs was sentenced to three years' imprisonment.

The facts disclosed that a child of three years of age was struck and killed on a public highway by an automobile driven by Dabbs at an excessive rate of speed. In passing sentence upon the prisoner, Mr. Justice Riddell said:—

> You have been convicted by a jury of your countrymen of the crime of manslaughter in crushing out, with your automobile, the life of a little lad on Eastern avenue in this city.
>
> The law is exceedingly careful in a charge of this kind—so long as a single juryman is not convinced beyond any reasonable doubt that the accused was guilty of gross, culpable, wicked negligence—a reckless disregard of the rights of others—no conviction can be made.
>
> A very intelligent jury after an exhaustive description under oath of the facts of the case, after everything possible in your defense was done and said by your able counsel, and after long and careful consideration, were all convinced of your guilt—and I agree with them.
>
> You, then, ran your car at an excessive rate of speed, not less than 40 miles an hour, along a public street in the city of Toronto—and that with such gross negligence as to evince a reckless disregard for others who might be on the street.
>
> You are a former taxi-driver, an experienced chauffeur, you are perfectly familiar with the operation of a motor vehicle—you knew well the likelihood of others being on the street whose rights you were bound to respect—and yet by your wicked negligence you slew this child.
>
> The law enables me to sentence you for life. Certain considerations induce me not to impose the extreme penalty.
>
> The shocking number of those slain by automobiles on our highways has become notorious; even excluding the no small number due to the negli-

[4] 22 L.R. Ir. 279.

gence of the victim, the number is still appalling. Everything that can legitimately be done to reduce the number of fatalities should be done—the great and insistent lesson must be taught and taught again, until it is thoroughly understood and heeded by all, that the whole right an automobile driver has on the highway is the right to pass over it carefully and with due regard to the rights of others.

This, I think, you knew and would have acted accordingly, but that you had obscured your mind and judgment by drinking alcoholic liquor. No doubt you thought you were sober—that is a matter of definition—the fact remains that you were not—and very few having recently taken even a little liquor are fit to drive a car.

I am, however, impressed with the extremely strong recommendation to mercy of the jury—they saw you for many hours, heard your story and that of other witnesses—and their recommendation showed the estimate of your conduct by twelve intelligent and honest men, men who were anxious that their country's laws should be obeyed.

The report of a medical man as to your health is disquieting, indicating that close confinement even for a short time might spell disaster—that will be brought to the attention of the authorities.

Considering all the circumstances, your repentance and the recommendation to mercy by the jury, I think the ends of justice will be met and a sufficient public warning given by my imposing imprisonment for three years.

If this warning proves ineffective, those who in future commit a similar crime need not expect similar clemency.

C.M.

* * *

ATTEMPT TO PROCURE ABORTION—MISDIRECTION — CRIMINAL CODE SECTION 1014—NEW TRIAL.—In the case of *Brooks (Appellant)* v. *The King*, the Supreme Court of Canada (Anglin, C.J., Duff, Newcombe, Lamont and Smith, JJ.), on the 2nd November, by a decision of the majority of the Court, reversed the judgment of the majority of the Appellate Division of the Supreme Court of Ontario (Mulock, C.J.O., Magee, J.A., and Grant, J.—Masten and Ferguson, JJ.A., dissenting)[1] which affirmed the conviction of the appellant at the trial before Logie, J., and a jury for an attempt to procure abortion under sec. 303 of the Criminal Code.

The appellant, along with one W., was indicted on two counts: (1) for manslaughter, and (2) "for that they did, with intent to procure the miscarriage of a woman, unlawfully use on her an instrument or other unknown means contrary to sec. 303 of the Criminal Code." The defendants were tried together on the two counts, being acquitted on the first and found guilty on the second. After conviction and sentence the defendant *Brooks* appealed to

[1] (1927) 61 O.L.R. 147.

the Appellate Division of the Supreme Court of Ontario. Among other grounds relied on by the appellant in that Court was that of misdirection by the trial Judge in respect of the principal ground of the appellant's defence. This ground is stated at length in the following opinion of the majority of the Supreme Court of Canada:—

By the Court:

A majority of the Court is of the opinion that in view of the unfortunate failure of the learned trial Judge to present to the jury the principal ground of defence put forward by the appellant his conviction cannot be sustained. As there is to be a new trial it is inadvisable to discuss the evidence in detail or to do more than indicate what is regarded as the fatal defect in the charge.

The appellant is shewn by the evidence to have been more or less connected with two occasions on which the girl, Ruth Dembner, was "treated" by Dr. Withrow. He accompanied her to the doctor's residence on the evening of Tuesday the 8th of February, 1927, when the doctor states that he made a physical examination using a "dilator." The appellant also brought the girl to the Strathcona Hospital on the night of Friday, the 11th of February, and she was admittedly operated on by Dr. Withrow on the following (Saturday) morning.

That Ruth Dembner was in fact pregnant from some time in January is clearly established; and that she was in fact operated on by Dr. Withrow with intent to bring about an abortion is not open to question here.

The defence of the appellant is that he was never aware of Ruth Dembner's pregnancy. There is no direct testimony that he ever learned that fact, circumstantial evidence being relied upon by the Crown to justify an inference of such knowledge. The appellant, on the other hand, points to his knowledge that the girl had menstruated on the 28th of January (deposed to by his father) as imputing ignorance by him of the vital fact that she had conceived. The fact of her menstruation is established by the uncontradicted testimony of her mother and sister, called as Crown witnesses, and whose credibility is unimpeached. The medical testimony is that menstruation during pregnancy is not uncommon.

The fair inference from these facts, it is argued for the appellant, is that both he and the girl did not believe that she was pregnant when she first visited Dr. Withrow on the evening of the 8th of February. At all events, the fact of the menstruation and

the significance attached to it by the appellant should have been placed before the jury by the learned trial Judge in his charge at least as fairly and as clearly as were the circumstances relied on by the Crown as implying guilty knowledge and intent. Yet, while some emphasis was laid in the charge on the facts that Ruth Dembner had passed over her family physician and had gone to Dr. Withrow, an utter stranger, to be treated, as the defence claims, for dysmenorrhoea, and that she had given her name to Dr. Withrow as "Mrs. Brooks," nothing was said of the suggested explanation offered for the appellant that she probably wished to conceal the loss of her virginity from the family physician and that, as that fact would be apparent to Dr. Withrow, she might have thought it would be more convenient for her to give the name of a married woman.

The learned Judge instead of telling the jury, as the evidence clearly warranted, that they should accept as undisputed the girl's menstruation in the end of January, cast doubt upon that fact, saying: "The evidence, if any, was of menstruation," and then, suggesting the possibility of the issue of blood on the 28th of January having been due to some earlier unlawful operation (of which there is not a scintilla of evidence), he added:—

> The weight of that evidence (as to menstruation); the credibility of it is for you; you are the judges of that.

After the jury had retired, counsel for the appellant objected to the charge in these terms:—

> In charging the jury as to the evidence of menstruation I was struck by the fact that you brushed it aside; you covered it in such a way that you in effect used this expression in regard to that; you must consider the weight of the evidence. You did not perhaps have present in your mind at that time that the evidence consisted of the mother's testimony and the sister's testimony.

Instead of recalling the jury and specifically directing their attention to this matter as requested, the learned Judge said:—

> But that was impressed upon the jury again and again by you and Mr. Roebuck. Of course there was evidence that blood had been seen on a pad, but all the girl said to her mother was—"It is the usual".
>
> MR. GREER: I have it down that the mother actually saw it.
>
> HIS LORDSHIP: It may be so but I do not think any miscarriage will occur from that, because Counsel reiterated that only this morning to the jury.
>
> MR. GREER: Well you charged very carefully and it struck me that perhaps a proper sense of proportion. . . .
>
> HIS LORDSHIP: Any objection, Mr. Roebuck?
>
> MR. ROEBUCK: I intend to make none.

And yet the learned Judge had, early in his charge to the jury, said:—

> It is my duty, gentlemen, to lay the defence fairly and completely before the jury, and I will do that a little later. . .

To avoid any possible misapprehension, it should be stated that, in the opinion of the Court, but for the defects in the charge the appellant could not have successfully attacked his conviction. There was quite enough evidence to warrant the jury upon an adequate charge, had they seen fit to do so, in drawing the inference of guilty knowledge and intention on his part. But it is impossible to guage the effect on the jury's mind of casting doubt upon the fact of the girl's menstruation and of failing to direct their attention to its possible significance and also to the motives, consistent with innocence, which might have actuated the girl in consulting Dr. Withrow rather than the family physician and in presenting herself to him as "Mrs. Brooks." If the jury, properly instructed as to these points, regarded the first visit to Dr. Withrow on the 8th of February as made for an innocent purpose and in ignorance by the girl and the appellant of her pregnancy, as the Deputy Attorney-General admitted they might, they would be obliged to infer from what subsequently occurred that the appellant's state of mind and his intention changed, and that when he brought the girl to the hospital on the Friday evening (February 11th) he did so with the object of furthering a design on her part to undergo an operation to procure an abortion. That it may seem probable to an appellate court perusing the record that the jury would have reached that conclusion, does not warrant affirming the conviction. That would, in effect, be to substitute the verdict of the court for that of a jury properly instructed, to which the appellant was entitled. Misdirection in a material matter having been shewn, the onus was upon the Crown to satisfy the court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty.[2] That burden the Crown, in the view of the majority of the Court, has not discharged. There was nondirection by the learned trial Judge in a vital matter, tantamount in the circumstances of this case to misdirection, and constituting a miscarriage of justice within sub-section 1(c) of sec. 1014 of the Criminal Code. Upon the whole case and taking into consideration the entire charge, the majority of the Court, with respect, finds itself unable to accept the

[2] *Gouin* v. *The King*, (1926) Can. S.C.R., 539, 543; *Allen* v. *The King*, (1911), 44 Can. S.C.R., 331, 339; *Makin* v. *A. G. for N.S.W.*, [1894] A.C. 57, 70.

view expressed by the learned Judge who delivered the majority judgment in the Appellate Division that "no substantial wrong or miscarriage of justice can have occurred" at the trial. (Criminal Code, sec. 1014(2).

Appeal allowed and new trial ordered.

C.M.

* * *

CONTEMPT OF COURT—CONSENT ORDER—BREACH.—In *Dashwood* v. *Dashwood* (reported in [1927] W.N. 276) a point arose concerning which Tomlin, J., said there was no direct authority. The question was whether, when an order was made by consent staying an action on terms set out in a schedule to the order, and one of the parties failed to comply with the terms, the remedy of the injured party was for contempt by way of a motion for attachment or committal, or whether his proper course was first to take proceedings either independently or in the action to enforce the terms by obtaining against the offending party an order for specific performance or an injunction restraining him from breaking the terms. In the opinion of the learned Judge the Court was staying the action on terms which the parties had agreed, and only keeping it alive to the extent necessary to enable any party thereafter to enforce the terms. It seemed to follow that the terms in the schedule were not an order of the Court which ought directly to be enforced by proceedings for contempt. The proper course was to apply for specific performance or an injunction, and then to base proceedings for contempt on any subsequent breach. The application therefore failed, and must be dismissed with costs. C.M.