CASE AND COMMENT

CONTRACT—PRICE MAINTENANCE—CONSIDERATION—RESTRAINT OF TRADE.—The case of *Palmolive Company (of England), Limited* v. *Freedman*[1] marks a new stage in the development of the law respecting price maintenance agreements. In *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.*,[2] it was established that a contract entered into between a wholesaler and a retailer whereby the latter, in consideration of the sale of certain commodities, undertook not to sell them at less than a stated price, could not be enforced by the manufacturer of the articles. This holding was made in the face of a contract between the manufacturer and the wholesaler which provided, *inter alia*, that the latter would exact, as agent for the manufacturer, the undertaking as to the price from any retailer to whom he sold the manufacturer's products.

The *ratio decidendi* was, in short, that only a person who is a party to a contract can sue upon it. The manufacturer in the case of *Taddy & Co.* v. *Sterious & Co.*[3] purported to be more astute in that he provided in his contract with the wholesale dealer that his products should not be sold by any one below certain prices and that "in the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be deemed to be the agent" of the manufacturer for establishing privity of contract between the manufacturer and the retailer. The defendant, a retail dealer, who bought the manufacturer's products, with notice of the condition as to a minimum price, from a wholesale dealer, sold them below the stipu-

[1] [1928] Ch. 264.
[2] [1915] A.C. 847.
[3] [1904] 1 Ch. 354. Although it is not particularly germane to the topic discussed in this note, one cannot avoid asking the question: What would the Courts have decided in these cases, if counsel for the manufacturer had argued that the wholesaler had contracted with the retailer as trustee for the manufacturer? It is well settled that where a contract is made with a promisee as trustee for a third party, such third party, as cestui que trust, may enforce the contract against the promisor. See *Tomlinson* v. *Gill* (1756), Amb. 330; *Gregory* v. *Williams* (1817), 3 Mer. 582; *Fletcher* v. *Fletcher* (1844), 4 Hare 67; *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290; *In re Empress Engineering Co.* (1880), 16 Ch. D. 125; *Les Affréteurs* v. *Walford*, [1919] A.C. 801; *Toronto General Trust Corp.* v. *Keyes* (1907), 15 O.L.R. 30; *Kendrick* v. *Barkey* (1907), 9 O.W.R. 356; *The Canadian Moline Plow Co.* v. *Trca* (1918), 13 Alta. L.R. 354; 39 D.L.R. 581; *Beatty* v. *Best and Ash* (1921), 61 Can. S.C.R. 576; 58 D.L.R. 552; *Faulkner* v. *Faulkner* (1893), 23 O.R. 252.

lated price. The Court decided that, as the wholesaler bought out and out from the manufacturer, consideration for the retail dealer's promise only moved from the wholesaler and not from the manufacturer. It was laid down in the *Dunlop* case (*supra*) that a principal not named in a contract may sue upon it if the promisee really contracted as his agent. But in order to entitle him so to sue, he must have given consideration personally or through the promisee, acting as his agent in giving it. The Court in the *Sterious* case (*supra*) held that the wholesaler selling for his own profit was in no sense, whatever, an agent for the manufacturer. Mere calling a person an agent does not make him one. It should however be noted that the Court contemplated the possibility of a wholesaler entering into a collateral contract with a retailer, as to the subsequent dealing with the goods, as agent of the manufacturer. No such collateral contract was here entered into. Furthermore, the counsel for the manufacturer in the *Sterious* case (*supra*) argued that restrictive conditions run with goods as they do with land under the doctrine of *Tulk* v. *Moxhay*.[4] This contention was refuted by the Court.[5] On the other hand, in the case of patented articles, the patentee, but not his assignee, may enforce restrictive conditions in respect of his patented articles against purchasers of them unless they are subsequent assignees for value in good faith and without notice.[6]

In the *Palmolive* case (*supra*) another attack was made upon a contract to uphold prices on the ground that it was invalid as being in restraint of trade. In consideration of being allowed by the plaintiffs the wholesale discount, the defendants agreed, *inter alia*, not to sell Palmolive soap "howsoever acquired" under sixpence a tablet. The defendant obtained Palmolive soap from a French source and sold it below the agreed price. This appears to be the first case in the English Courts dealing with a contract for price maintenance in respect to goods not sold by one of the contracting parties.[7] The Court applied the test as to restraint of trade laid down in the *Nor-*

[4] (1848), 2 Ph. 777.

[5] Compare *Lord Strathcona Steamship Co., Ltd.* v. *Dominion Coal Co., Ltd.*, [1926] A.C. 108. See also article: Equitable Servitudes on Chattels, (1928), 41 Harv. L. Rev. 945; article: Tulk v. Moxhay and Chattels, (1912), 28 Law Q. Rev. 73; article: The Origin of the Doctrine in Tulk v. Moxhay, (1928), 166 L.T. Jour. 195, 206.

[6] *National Phonograph Co. of Australia, Ltd.* v. *Menck*, [1911] A.C. 336; *McGruther* v. *Pitcher*, [1904] 2 Ch. 306.

[7] Compare *Elliman, Sons & Co* v. *Carrington & Son, Ltd.*, [1901] 2 Ch. 275.

denfelt case:[8] is the provision in question reasonable as to the public and as between the parties? Lord Hanworth, M.R., and Lawrence, L.J., decided that the agreement was enforceable. Sargant, L.J., dissented. The Master of the Rolls said:[9] "So far as the public is concerned, slight evidence—if any—is needed to justify an agreement for the maintenance of prices; and the Court 'regards the parties as the best judges of what is reasonable as between themselves': see per Lord Haldane in the *North Western Salt* case."[10]

The majority of the Court held that the agreement was not a general restraint for it only applied to a few of the articles dealt in by the defendant. In this way the *Palmolive* case (*supra*) differs from that of *Joseph Evans & Co.* v. *Heathcote*,[11] which concerned the whole output of the factory of one of the parties to the agreement. Furthermore, the trader in the *Palmolive* case (*supra*) was left free to sell the same or other kinds of articles produced by other manufacturers. A distinction was also made between the subject-matter of the contract in question and that of a contract as to services between employer and servant. A servant seeking employment has less economic freedom than a retailer has in entering into a contract for the purchase of articles for his business, and consequently greater safeguards should be afforded him. Sargant, L.J., who dissented, held that the agreement in question was reasonable as to the interests of the public and was unreasonable as between the parties inasmuch as the agreement was one-sided and lacked reciprocity. However, as against this view there is the statement of the Master of the Rolls: "If they (the parties to the contract) are of a standing not unequal in relation to each other, there is no question of one overreaching the other."[12]

It should be remembered that in Canada a price maintenance agreement valid at common law may, nevertheless, be held unenforceable because it infringes the provisions of the Criminal Code concerning offences connected with trade.[13]

S. E. S.

[8] [1894] A.C. 535.

[9] [1928] Ch. 264 at p. 271.

[10] [1914] A.C. 461 at p. 471.

[11] [1918] 1 K.B. 418.

[12] [1928] Ch. 264 at p. 274.

[13] See R.S.C. 1927, c. 36, s. 498. See also *R. v. Elliott* (1905), 9 O.L.R. 648; *Wampole & Co.* v. *F. E. Karn Co., Ltd.* (1906), 11 O.L.R. 619; *Weidman* v. *Shragge* (1911), 46 Can. S.C.R. 1; *Stearns* v. *Avery* (1915), 33 O.L.R. 251; *Dominion Supply Co.* v. *T. L. Robertson Mfg. Co., Ltd.* (1917), 39 O.L.R. 495; *Saskatchewan Co-op. Wheat Producers* v. *Zurowski*, [1926] 3 D.L.R. 810.

DONATIO MORTIS CAUSA—DONOR'S CHEQUE—DELIVERY.—It is familiar law that three essentials must be present in order that there may be a valid *donatio mortis causâ*. First, the gift must be made with a view to the donor's death; second, it must be conditioned to take effect only on his death from the existing disorder;[1] third, there must be a delivery of the subject of the donation by the donor, or by his direction, to the donee, or to some one for the donee's use.[2] The third element has been most productive of litigation. The Court in *In re While, Wilford* v. *While*[3] was faced with the question: is the delivery of a cheque drawn by the donor sufficient to support a *donatio mortis causâ* of the funds in the bank available for the payment thereof?

In the leading case of *Ward* v. *Turner*[4] Lord Hardwicke laid down the rule, with reference to delivery, which has, almost invariably ever since, formed the basis of decisions concerning the validity of donations *mortis causâ*. After showing that the recognition of donations *mortis causâ* by the common law was derived from the civil law, he said:

> It is argued that though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way of *symbol* is sufficient; but I cannot agree to that . . . So in all cases in this Court, delivery of the thing given is relied on and not in the name of the thing . . . Yet notwithstanding, delivery of the key of bulky goods, where wines, etc., are [concerned], has been allowed as delivery of the possession, *because it is the way of coming at the possession, or to make use of the thing.*"

In line with this statement, it has been decided that as physical delivery is impossible in the case of a chose in action, delivery of a document essential to its recovery may suffice.[5] A cheque is not an assignment of money in the hands of a banker.[6] It is nothing more than an order to obtain a certain sum of money, and if the order is not acted upon in the lifetime of the person who drew it, it is worth nothing.[7] Bearing this in mind and applying Lord Hardwicke's rule, it follows that the mere delivery by the donor of his

[1] As to this requirement, see *Kendrick* v. *Dominion Bank and Bownas*, 58 D.L.R. 309; (1920), 48 O.L.R. 539.

[2] See Mills, J., in *McDonald* v. *McDonald* (1903), 33 Can. S.C.R. 145 at p. 161.

[3] (1928) W.N. 182.

[4] (1752), 2 Ves. Sr. 431; White and Tudor, L.C., 9th ed., vol. 1, p. 341.

[5] See Halsbury's Laws of England, vol. xv., p. 432 *et seq.* for authorities.

[6] *Hopkinson* v. *Forster* (1874), L.R. 19 Eq. 74 at p. 76; *Boyd* v. *Nasmith* (1888), 17 O.R. 40 at p. 45.

[7] See Lord Romilly in *Hewitt* v. *Kaye* (1868) L.R. 6 Eq. 198 at p. 200; the Bills of Exchange Act, R.S.C. 1927, c. 16, s. 167. Cf. Lord Lindley in *In re Dillon, Dillon* v. *Dillon* (1890), 44 Ch. D. 76 at p. 83.

own cheque is not sufficient to support a *donatio mortis causâ* of the fund to his credit at the bank. On the death of the donor, his cheque is not "the way of coming at the possession or to make use of the thing."[8] On the other hand, there may be a valid delivery by the donor of a cheque drawn by a third person.[9]

To one who is maintaining that the delivery of the donor's cheque is sufficient for a *donatio mortis causâ*, succour may be afforded by the words of Buckley, J., in *In re Beaumont, Beaumont* v. *Ewbank*:[10]

> Even without actual payment of the cheque [in the lifetime of the donor] there may be a good gift — for instance, if there is an undertaking by the banker to the donee to hold the amount of the cheque for the latter, that may be enough. Unless there is that, or something equivalent to it, there is no delivery of property, but only a delivery of that which if acted on will procure the delivery of property.[11]

In *In re While, Wilford* v. *While* (*supra*) the donor, being in expectation of death, told his wife that he wished her to have all the money standing to his credit at the Kilburn branch of Barclays Bank and also a further sum which he wished debited against his account at the Sheffield branch of Barclays Bank. In pursuance of this desire, the donor gave his wife two cheques, one on the Kilburn branch for the balance in favour of the donor and another on the Sheffield branch for £200. The sub-manager of the Kilburn branch, who had been sent for, then arrived at the donor's house. The cheques were given to him with instructions to open an account at the Kilburn branch, for the amount of the two cheques, in the wife's name. The sub-manager then returned to his branch which was only a few minutes' walk away. The donor died about an hour later. The cheque on the Sheffield branch was subsequently returned because it, in error, had been postdated one month. The amount of this cheque had been paid into the account of the wife at the Kilburn branch but, apparently, it had not been honoured by the Sheffield branch. Tomlin, J., held that the sub-manager received the cheque drawn on the Kilburn branch, at the donor's place of residence, in the exercise of his authority as a bank official and that the matter was complete at that moment. Undoubtedly the wife, on the death of the donor, had the "way of coming at the possession or to make use" of the fund at the Kilburn branch. There was an adequate

[8] See also *McLellan* v. *McLellan* (1911), 25 O.L.R. 214; *Re Bernard* (1911), 2 O.W.N. 716.

[9] *Clement* v. *Cheesman* (1884), 27 Ch. D. 631.

[10] [1902] 1 Ch. 889 at p. 895.

[11] See also *In re Swinburne, Sutton* v. *Featherley*, [1926] Ch. 38.

traditio. As to the cheque on the Sheffield branch the learned judge held that there had not been a valid delivery. No reasons to support this conclusion are given in the report. Invoking the words of Buckley, J., quoted above, may it not be said that the sub-manager acting for Barclays Bank undertook "to hold the amount of the cheque for" the wife? The answer to this question must be found in banking law. Branches of a bank are for some purposes regarded as separate and distinct bodies. A bank is not obliged to pay a cheque presented at any branch other than the one upon which it is drawn and at which the drawer has his account.[12] Furthermore a customer is not entitled to require payment at one branch of money at his credit at another branch, at least in the absence of sufficient previous notice to the latter branch requiring it to transfer or remit the money to the former.[13] The cheque on the Sheffield branch was an order concerning funds at that branch, and it may conclusively be argued that the sub-manager of the Kilburn branch, in receiving this cheque, was not undertaking to hold the amount of it for the wife. Such an undertaking could only properly come from some official of the Sheffield branch.

S. E. S.

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MUTUAL WILLS—AGREEMENT GIVING RISE TO EQUITIES.—For the first time the Judicial Committee of the Privy Council has been called upon to determine a point arising out of the execution of mutual wills and resulting equities. It has long been settled that where two persons enter into an agreement for the disposition of their respective property and, in pursuance thereof, make mutual wills, the survivor, if it can be shown that no change of the arrangement has taken place and that the other party has died relying upon it, becomes a trustee for the performance of his undertaking and transmits that trust to those who claim under him.[1] Equity interferes to prevent the injustice of having the survivor receive and enjoy property left to him solely because of his promise and then successfully violate on his part the agreement under which he, as the survivor, was bound to let his will stand unrevoked. Equity does not compel the probate of the revoked will but decrees that the

[12] *Woodland* v. *Fear* (1857), 7 E. & B. 519; *Prince* v. *Oriental Bank Corporation* (1878), 3 A.C. 325.

[13] *Clare* v. *Dresdner Bank,* [1915] 2 K.B. 576. See also Falconbridge: Banking and Bills of Exchange, 4th ed., p. 166.

[1] *Dufour* v. *Pereira* (1769), 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.

property shall be held for those who would have taken if the will had not been revoked. The problem presented to the Judicial Committee in the case of *Gray* v. *Perpetual Trustee Company, Limited*[2] was: does the mere fact that the two wills have been made simultaneously by husband and wife in identical terms sufficiently imply an agreement that they shall not alter or revoke their respective wills? If there is not such an agreement, it will be impossible to spell out that reliance by one person upon the undertaking of another and that failure to justify such reliance on the part of the latter which is so characteristic of equity's beneficent remedial device, constructive trust.[3] It was held in the case under review that, without more than the simultaneity of the wills and the similarity of their terms, it was impossible to come to the conclusion that an agreement to constitute equitable interests had been made. The Judicial Committee approved and followed the case of *In re Oldham, Hadwen* v. *Miles*,[4] in which Astbury, J., said: "I cannot build up a trust on conjecture, and there are many reasons which may have operated on the minds of these mutual will makers. Each may have thought it quite safe to trust the other."[5] It is primarily a question of fact for the courts, yet it appears that it would be comparatively a ready inference of fact from the circumstance of the spouses making identical wills, simultaneously, that there was some agreement as to the permanency of their respective acts. In the Ontario case of *Re Hackett*[6] the spouses made a joint will and Rose, J., held that this fact was evidence of a contract between them that any property remaining at the death of the survivor should go to a beneficiary designated in the will.

S. E. S.

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WILL—STANDARDS OF INTERPRETATION—ADOPTED CHILD—Only occasionally do the law reports offer a decision on the interpretation and construction of wills which may have an effect beyond the particular situation dealt with. The number of applications for construction by the court must be, however, unlimited, and frequently a reported decision throws into relief the nature of the problem and the method of solution, common to all. Needless to say the result obtained in each case must depend on the judicial

[2] [1928] A.C. 391; 44 T.L.R. 654.
[3] See *In re Falkiner, Mead* v. *Smith*, [1924] 1 Ch. 88.
[4] [1925] Ch. 75.
[5] [1925] Ch. 75 at p. 88.
[6] (1927), 32 O.W.N. 331.

attitude to these questions. As an illustration, the case of *Re Donald*[1] may afford a basis for discussion. There a testator, domiciled in Saskatchewan, by his last will, in effect left a certain portion of his estate to X., with a clause providing that if X. predeceased him, the share which he would have received had he survived the testator, should go to the children of X. X. did predecease the testator but left surviving an adopted child, on whose behalf application was made for the legacy. A further and, as the Court found, complicating element, was the fact that X. was domiciled in the State of Washington, U.S.A., where the claimant child had been legally adopted under the laws of that state, which had the effect of entitling such child to all the rights and privileges, including inheritance, of a child born in lawful wedlock. At the death of the testator, there was in Saskatchewan, no statutory provision varying the common law in respect to adopted children, and hence no rights of inheritance.

In this state of affairs, the Court felt bound by a decision of its own Court of Appeal in *Burnfiel* v. *Burnfiel,*[2] and declared although not without some doubt, that the claimant must fail. In arriving at this conclusion, the Court considered the problem to centre around the answer to "the only question to be considered," namely, whether the claimant, "an adopted child, is a child under the will."[3] The query at once arises,—a child in whose eyes? The testator's, the law's or the claimant's family? It is submitted that the answer to this question, while perhaps of little weight in a number of cases in which that answer would be identical in any case, is of extreme importance in others, both in actual result and as furnishing the underlying principle of interpretation of testamentary instruments. In the present case the Court apparently took the second view: the adopted child was *not* a child in the eyes of the law of Saskatchewan, for Bigelow, J.,[4] states the proposition as follows: "Under the will in question, 'an adopted child' must be held to be a 'child' *under our law*[5] to entitle him to anything." Stating the problem in that way the result reached was, it is submitted, inevitable under the previous decision of *Burnfiel* v. *Burnfiel* (*supra*). But there appears to be an important and basic distinction between the two situations, which although presented to the Court in *Re Donald,* was rather summarily dismissed. In the

[1] [1928] 4 D.L.R. 181 (Sask.).
[2] (1926), 20 Sask. L.R. 407; [1926] 2 D.L.R. 129.
[3] Bigelow, J., at p. 182.
[4] At pp. 182-3.
[5] Writer's italics.

Burnfiel case, the facts before the Court involved a determination of the question whether a child, adopted by A., domiciled at the time in a jurisdiction giving such child all the privileges of a child born in lawful wedlock, could, on the death of A. intestate and domiciled in a jurisdiction not recognizing the rights of adopted children, share on a distribution of the intestate's estate in the latter jurisdiction. In such case the right to succession depends upon the "statutory will" of the latter jurisdiction, found usually in a modern form of the Statute of Distribution: that is to say, it is the "will of the law" and rights given thereunder to children will truly be to children viewed as such in the eyes of the law—the maker of such will. But if a testator makes his own testamentary dispositions, is there any reason why *his* intentions should not be given effect so long as no substantive rule of law is thereby infringed? It cannot be disputed that a testator *could* make a perfectly valid disposition in favour of his or another's adopted child: the sole question is, has he done so by the language he has used? It cannot be denied that in the present case "child" had a definite legal meaning on the statute books of Saskatchewan, but is the Court in every case to presume conclusively that a testator uses words in their exact legal connotation? It is submitted not.

Let us assume in the present case that the testator knew the claimant personally, and also knew that he was an adopted son of X. Could it be argued that evidence of these facts was inadmissible? It has long been settled that a "will is the language of the testator soliloquizing * * * and the Court in construing his language may properly take into account all that he knew at the time, in order to see in what sense the words were used."[6] In other words, in *every* case the words used by a testator are to be read in the light of all the surrounding circumstances, so as to enable the Court to read the will with the eyes of the testator, from "the arm chair of the testator."[7] Cases where a testator has made a gift in terms of relationship afford one of the most outstanding examples in which this elementary principle often appears to be lost sight of. It is here, despite the fact that the old notion of the sense of words being fixed by law[8] has given way, we find a modification of that

[6] Blackburn, J., in *Grant* v. *Grant* (1870), L.R. 5 C.P. 727, 728.

[7] James, L.J., in 14 Ch. D. at p. 46.

[8] Brook, J., in *Throckmerton* v. *Tracy* (1554), Plowd. 160: "The party ought to direct his meaning according to the law, and not the law according to his meaning * * * for if a man was assured that whatever words he made use of, his meaning only should be considered, he would be very careless about the choice of his words, and it would be the source of infinite confusion and uncertainty to explain what was his meaning."

doctrine in what has been called "the rule against disturbing a plain meaning,"[9] which shortly put, may be stated to mean that where the words in a will are clear, plain and unambiguous, the Courts will not disturb that meaning, nor receive any evidence to control it. It has probably been most frequently invoked where a gift is left by will to beneficiaries under some term denoting relationship, or by some proper name or title, definite enough in itself, but on the testator's death two claimants appear; the description accurately or "legally" fitting one person, and applying to the other only by taking a more liberal view of the language considered in the light of all the testator's knowledge and circumstances. Until the decision in the House of Lords in *National Society* v. *Scottish National Society*,[10] one might well have gathered from the cases[11] that "whenever a person is accurately named in a will, then the rigid rule descends which forbids under any circumstances any further inquiry or consideration in regard to the person who is to take the benefit," which was the argument advanced in that case. Lord Loreburn, however, refused to affirm such a statement, stating "the true ground" to be, that "the accurate use of a name in a will creates a strong presumption against any rival who is not the possessor of the name mentioned," but he does leave open the possibility of rebutting that presumption. That rebuttal must in the ordinary case be made by evidence of surrounding circumstances known to the testator, going to show indirectly, the sense in which the testator used the words. If such evidence is clear, the ordinary or plain meaning described by Dean Wigmore[12] as being often "simply the meaning of people who did not write the document," should not avail.

In the case of *Marks* v. *Marks*,[13] in the Supreme Court of Canada, the opinions of Idington and Maclennan, JJ., the latter dissenting, afford an excellent illustration of the difference in result that might be expected, according as the Court takes the more liberal view of interpreting *all* words in the light of the testator's knowledge and circumstances, or the older and more easily applied, "plain meaning" dogma. In that case the will before the Court contained a gift to the testator's "wife." Evidence was offered showing that the testator had married one woman (the plaintiff) whom he had deserted shortly afterwards. Later he went through a form of marriage with another woman (the defendant) without having first

[9] Wigmore, Evidence, sec. 2462.
[10] [1915] A.C. 207.
[11] Cf. *Re Ofner*, [1909] 1 Ch. 60.
[12] Evidence, sec. 2462.
[13] (1908), 40 Can. S.C.R. 210.

obtained a divorce. Both women claimed the legacy. Maclennan, J., taking the rigid logic of "plain meaning" was in favour of giving to the legal wife, on the grounds that "no evidence is admissible to shew that the expression 'my wife' * * * mean any other person than her who was then his legal wife." On the other hand, Idington, J., expressly discountenanced the notion that there could be but one person answering the description "wife" and that the legal wife, holding that he was bound to read the words "in light of all the circumstances that surrounded and were known to him when he used it and give effect to the intention it discloses when so read." It is submitted that on principle the latter is the correct mode of approach to any problem of interpretation. In every case, as Lord Loreburn suggests in the *National Society* case, the Courts will start with the ordinary, common, plain or "legal" meaning and only the strongest evidence from unimpeachable sources will impart a meaning to the words in the testator's will other than the ordinary one.

Returning to the case under discussion, it is impossible to say from the report what evidence, if any, was before the Court. If, however, this adopted child was shown to be known personally to the testator, if the testator was fond of him or even if the testator did not know he was adopted, it seems difficult to understand why the Court could not give effect to the testator's "expressed intentions," the question not being whether the word "child" as used in a Saskatchewan statute meant "adopted child," but whether such word in the testator's will, used with reference to the testator's own knowledge pointed towards this claimant as the object of the testator's bounty. From the reasoning of the Court, based on the *Burnfiel* case, it seems that even had such evidence been forthcoming the claimant would not have taken.

Another line of argument that might well have been advanced in *Re Donald* is to be found in those cases holding that a "bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law as recognized in this country, those children are legitimate whose legitimacy is established by the law of the father's domicile."[14] This rule has been extended to include gifts of realty[15] and there appears to be no reason for differentiation in this respect, between the situations of adopted and illegitimate children. Following this analogy the Courts might find that even though "child" as used by the testa-

[14] Kay, J., in *In re Andros, Andros* v. *Andros* (1883), 24 Ch. D. 637, 639.
[15] See cases cited in *Underhill and Strahan* on Wills and Settlements, 3rd ed., 1927, p. 59.

tor meant the equivalent of one born in wedlock, yet that was to be determined by the law of the claimant's family; the testator having used words of relationship may well be taken to have intended to benefit the person standing in that relationship by their own proper law.

Hence, in answer to the queries raised earlier in this note, the Court should, it is submitted, under the principles considered above, have sought the meaning of "child" either (a) in the eyes and mouth of the testator or (b) in the eyes of the country in which such child was domiciled and "legitimately adopted" (i.e., legally born), but that it should not have sought to impose the meaning given to "child" by the law of Saskatchewan unless, in the absence of evidence, this might be considered as in accordance with the testator's intention.

C. A. W.

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DAMAGES—LAW COSTS MAY NOT BE A DIRECT DAMAGE.—A bad collision occurred between the car of Mr. Foley and the car of Mr. Gibson. In Gibson's car rode one Mr. Hayward, and he was injured. Hayward sued Foley for his physical damage and lost completely. Foley was not at fault for the collision, whoever was. But Foley has been unable to recover his costs out of Hayward.

Fortunately Foley was insured, and his insurance company promptly paid his car damage ($1,670) and the costs ($400) outlaid in defending the Hayward suit. Then the insurers started suit for negligence against, Gibson, the owner of the other colliding car: *London Guarantee and Accident Co.* v. *Gibson.*[1] The demand is for car damage, and for the $400 law costs. The court of appeal of Alberta has ordered that the latter claim be stricken out of the pleadings. That outlay was not directly due to Gibson's fault, if any, but to an independent cause, the self-seeking of Hayward, with which it must be presumed Gibson had nothing to do, and which he could not in law control.

Weld-Blundell v. *Stephens*[2] preferred to *Britannia Hygienic Laundry* v. *Thornycroft,*[3] which seemed to be considerably in point.

G. C. THOMSON.

[1] [1928] 2 W.W.R. 532.
[2] [1920] A.C. 956; 89 L.J.K.B. 705.
[3] (1925), 94 L.J.K.B. 858.

PRINCIPAL AND AGENT—ACTION BY AN UNDISCLOSED PRINCIPAL AGAINST THIRD PARTY—AGREEMENT UNDER SEAL.—The plaintiff's dilemma in the case of *Winnett* v. *Heard*[1] was one of some legal nicety. The plaintiff sued for the specific performance of a contract for the purchase of land which had been entered into on his behalf by his agent David H. Porter, at an auction sale of the land. The fact that Porter was acting as agent for the plaintiff was neither disclosed to the auctioneer nor to the vendor defendant.

The written document which the plaintiff sued upon was attached to the conditions of sale and read as follows:—

> I, David H. Porter, the purchaser of the lands herein described at the Auction Sale held April 9th, 1927, hereby agree and undertake to complete the purchase of the said lands according to the above terms,—price $7,200.00.
>
> Dated this 9th day of April, 1927.
>
> Witness,
>
> B. H. RAMSAY. C. D. PORTER (Seal).

Now, unfortunately, this agreement which Porter signed was under seal, although it was not necessary to its legal validity that it be so sealed, the mere memorandum in writing being sufficient to satisfy the Statute of Frauds. The law is certainly well settled that an action upon an agreement under seal can only be maintained by one who is a party to the deed (for an extreme application of this doctrine, see *Chesterfield* v. *Hawkins*).[2] In the case of *Porter* v. *Pelton*[3] the Supreme Court of Canada held that this doctrine was even applicable to a case where a seal was not necessary to the validity of the document sued upon, yet which had, in fact, a seal attached thereto. Hence, the decision in *Porter* v. *Pelton* (*supra*) was an effective answer to the undisclosed principal's attempt in the case under discussion, to maintain an action on a document under seal to which he was not a party.

The law seems to be unduly technical as to such actions on a document which does not have to be under seal and it is interesting to note that in a different, yet somewhat analogous situation, the common law has taken a less technically rigorous attitude. An authority given by a principal to an agent to execute sealed contracts was, and still is, invalid at common law, unless the authority is itself under seal: Joyce, J., in *In re Seymour*.[4] Yet, if an agent signs an agreement which is in fact under seal, but the legal validity of

[1] (1928), 62 O.L.R. 61.
[2] (1865), 3 H. & C. 677.
[3] (1903), 33 Can. S.C.R. 449.
[4] [1913] 1 Ch. 475 at p. 481.

which would not be affected by the absence of a seal, it is not necessary that the agent's authority be contained in a document under seal.[5]

This latter principle seems quite reasonable and it is somewhat unfortunate that the law is not consistent enough to permit an undisclosed principal to sue upon an agreement which, perhaps, by merest chance, happens to be under seal and which does not need to be so sealed in order to attain the desired legal result. However, for better or for worse, there are some things which are law, whether we like it or not—a truism, the thought of which must be disturbing to the exponents of the various philosophical Schools of Jurisprudence.

Moreover, in the case at hand, there was another bar to the undisclosed principal's claim. His agent Porter, was described in the sealed memorandum as "the purchaser" and to admit evidence to show that the plaintiff was the purchaser and that Porter was merely an agent would probably be to admit parol evidence to contradict a written document and hence, objectionable.[6]

J. J. ROBINETTE.

* * *

SALE OF GOODS—CONDITIONAL SALES ACT—PURCHASER ACTING IN GOOD FAITH AND FOR VALUE WITHOUT NOTICE.—The appellate Court of the Province of Ontario has delivered a judgment in the case of *National Discount Corporation* v. *Frech and Jackson*[1] which will be of special interest to those who sell chattels on the lien note system. A motor sales company sold a car to W. in 1923 taking a lien note in part payment. This note was not filed in accordance with the provisions of the Conditional Sales Act,[2] section 3, which require filing within ten days after execution of the contract to substantiate a claim of ownership in the seller against a subsequent purchaser or mortgagee claiming under the original purchaser without notice and in good faith and for valuable consideration. W. appears to

[5] See *Hunter* v. *Parker* (1840), 7 M. & W. 322; *National Trust Co.* v. *Nadon* (1915), 30 W.L.R. 588.

[6] See *Humble* v. *Hunter* (1848), 12 Q.B. 310; *Drughorn* v. *Rederiaktiebolaget*, [1919] A.C. 203; *Katzman* v. *Ownahome*, [1924] Can. S.C.R. 18; *Musson* v. *Head* (1925), 58 O.L.R. 210; cf. *Rederiaktiebolaget* v. *Hani*, [1918] 2 K.B. 247 at p. 249.

[1] (1928), 61 O.L.R. 659.

[2] R.S.O. 1914 c. 136; R.S.O. 1927 c. 165.

have transferred the car to J., who, in 1924, mortgaged the car and other goods to W. as security for money due, and this mortgage was duly registered.

In January, 1925, W. assigned this mortgage to F., who purchased it in good faith, and for valuable consideration without notice of any claim on the part of the motor company. This assignment was also registered. The mortgagor being in default, F. took possession of the mortgaged goods in 1926. But in August, 1925, the motor company had made a resale of the car to J., who gave a lien note containing a condition that the title remained in the motor company until the note was paid. The motor company, however, did not take the precaution of taking actual possession of the car before making the sale to J.

This note was assigned to the plaintiffs, who claimed ownership and set up a defect in the affidavit attached to the chattel mortgage to prove it ineffectual as against creditors of the mortgagor and subsequent purchasers or mortgagees in good faith for valuable consideration. The plaintiffs were not claiming as creditors, but as owners of the motor car; not as subsequent purchasers or mortgagees under either J. or W. but as holders of a prior and superior title which was not parted with, but retained throughout by the motor company and assigned to the plaintiffs. So far as the plaintiff's title was concerned, the Court decided that the chattel mortgage need not be registered or renewed. The Court next discussed the question whether F., as assignee of the chattel mortgage, was a purchaser or mortgagee within the meaning of section 3 of the Conditional Sales Act, and decided that F. was a purchaser in good faith for value and without notice who claimed "under the original conditional purchaser through J," and the plaintiffs' title was invalid as against him.

There is no distinction in the protection to be given under the statute as between *purchaser* and *mortgagee* which latter word was inserted for greater caution, the correct reading being "purchasers including mortgagees"

B. B. JORDAN.

* * *

SLANDER—WORDS IMPUTING A CRIME.—In *Dubord* v. *Lambert*[1] two strong judges were against each other, but the Chief Justice carried the balance of the court of appeal. It would allay some confusion to practitioners if the matter should be argued in a higher court; but the groundwork of the judgments is clear enough.

The plaintiff had a grievance. Defendant had been rude to him before witnesses. He had said: "You can go home now, Joe Dubord; there are no pigs to steal here." There were further harsh words, and they magnified the suggestion, but were not proved in indisputable terms. The trial judge gave judgment for the plaintiff, and allowed him $100 without proof of special damage. On appeal this was upset. The words, held the Chief Justice, were defamatory and reprehensible, but "not capable of a construction implying the commission of a crime." To charge a man with stealing pigs is a different thing from charging him with having the mind for stealing pigs if and when pigs were available.

Clarke, J.A., dissented. He found in evidence words that showed that some one had in that very conversation made a prior accusation against plaintiff of actual pig-stealing. These prior words were not libelled, but, said the learned judge, they were heard by the public and they showed the meaning of the hurtful phrase "there are no pigs to steal here." That cleared up the innuendo, and words that normally meant mere abuse became indicative of actual crime.

G. C. THOMSON.

[1] [1928] 2 W.W.R. 529.