CASE AND COMMENT

CONTRACT OF SALE—DEFAULT OR ABANDONMENT BY PURCHASER—RETENTION BY VENDOR OF PURCHASE MONEY.—Where a vendor has properly taken the position that he is discharged from any obligation to render further performance,[1] under the contract of sale, because of the default, repudiation or abandonment of the purchaser,[1] may the vendor retain any money paid to him by the purchaser? This question has been recurring recently in the Canadian Courts.[2] The solution of a question of this sort must primarily depend upon the terms of the particular contract.[3]

The general rule appears to be that the rights of the parties, under such circumstances, are to be adjusted upon the footing of a *restitutio ad integrum*.[4] The authorities establish or indicate that to this several exceptions have been engrafted.

First, it is definitely settled that where the money paid by the purchaser is in the nature of a deposit to secure his performance of the contract, and the contract goes off through his default or repudiation, the vendor is entitled to retain the amount of the deposit.[5]

[1] Some courts have spoken of the vendor "cancelling" or "rescinding" or "treating the contract at an end." This phrasing is misleading in so far as it suggests that the contract is discharged. The vendor may rightly assert that he is not bound to go on, but the contract may remain in existence for the purpose of the vendor suing the purchaser thereon for damages for breach of contract. See *Michael* v. *Hart*, [1902] 1 K.B. 482 at p. 490; *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460 at p. 467; Halsbury: Laws of England, vol. 25, p. 263, note (*i*).

[2] See *Cronholm* v. *Cole*, [1928] 3 D.L.R. 321; *Eng Chow* v. *Balfour*, [1928] 3 D.L.R. 608; *Stephenson* v. *Bromley*, [1928] 4 D.L.R 737; *Boericke* v. *Sinclair* (1928), 35 O.W.N. 147.

[3] *Mayson* v. *Clouet*, [1924] A.C. 980 at p. 986; *Harrison* v. *Holland*, [1922] 1 K.B 211

[4] See Mellor, J., in *Clough* v. *L. & N.W. Railway Co.* (1871), L.R. 7 Ex. 26 at p. 37.

[5] *Howe* v. *Smith* (1884), 27 Ch. D. 89; *Sprague* v. *Booth*, [1909] A.C. 576; *March* v. *Banton* (1911), 45 Can. S.C.R. 338; *Whiteley* v. *Richards* (1920), 48 O.L.R. 537; *Harrison* v. *Holland*, *supra*; *Sanderson* v. *Morton* (1923), 54 O.L.R. 479; *Douglas* v. *Arthur*, [1923] 3 D.L.R. 800. Cf. *Brickles* v. *Snell*, [1916] 2 A.C. 599. In *Cornwall* v. *Henson*, [1900] 2 Ch. 298 at p. 302. Webster, M.R., said: "I feel very great doubt whether the doctrine of *Howe* v. *Smith* would apply to a case in which the purchase-money was to be paid by instalments." See also *Labelle* v. *O'Connor* (1908), 15 O.L.R. 519 at p. 550. In *Shuttleworth* v. *Clews*, [1910] 1 Ch. 176, it was held that if the vendor sues the purchaser for a deficiency on a resale, he must give credit for the amount of the deposit.

Secondly, where the purchaser has *abandoned* or *repudiated* the contract of sale and purchase, the vendor may retain any money paid by the purchaser in respect of the contract.[6]

Thirdly, where a contract of sale and purchase is treated at an end by the vendor, in so far as his performance is concerned, for or on the purchaser's *default* (as distinguished from his abandonment or repudiation), the vendor may retain such purchase money as is, by the contract, made forfeitable in such an event.[7] However, this will not fully protect the vendor, because in the exercise of the jurisdiction to relieve against forfeiture, the court will not allow the terms of the contract to prevail[8] if the purchaser has been and is ready and willing to perform.[9]

Fourthly, where the vendor has suffered loss through the failure of the purchaser to complete, the amount of such loss will be first deducted from any money paid to the former.[10]

In *Cronholm* v. *Cole*,[11] the Supreme Court of Canada decreed that the vendor upon the default of the purchaser must return to the latter the amount paid to him on account of the purchase money. There was no question of this money being paid by way of deposit and the contract did not afford the vendor the right to retain it. The decision in the case of *Eng Chow* v. *Balfour*[12] is more difficult to understand. The defendant had agreed to lease to the plaintiff a building and the plaintiff paid $100 in cash, in advance, to be applied on the rental at the rate of $10 per month. Subsequently the plaintiff refused to go on with the lease and notified the defendant to this effect. Then the defendant rented the property to a third party at a lower rental. The plaintiff sued for a return of his $100. There was nothing to show that this money had been paid as a deposit, or under any other condition which would make it subject to

[6] See *Cornwall* v. *Henson*, [1899] 2 Ch. 710, and in the Court of Appeal, [1900] 2 Ch. 298; *Mackreth* v. *Marlar* (1786), 1 Cox Eq. 259; *Sanderson* v. *Morton, supra; Thagard* v. *Edmiston*, [1925] 4 D.L.R. 934; *R. C. Episcopal Corp. of Prince Albert* v. *Mahon*, [1926] 1 D.L.R. 411; *Walsh* v. *Willaughan* (1918), 42 O.L.R. 455 at p. 466. Cf. *Gibbons* v. *Couzens* (1898), 29 O.R. 356.

[7] See *Sanderson* v. *Morton, supra; Whiteley* v. *Richards, supra; Walsh* v. *Willaughan, supra; Brown* v. *Walsh* (1919), 45 O.L.R. 646.

[8] *Kilmer* v. *B. C. Orchard Lands Co. Ltd.*, [1913] A.C. 319; *In re Dagenham (Thames) Dock Co., Ex parte Hulse* (1873), L.R. 8 Ch. 1022 at p. 1025; *Brickles* v. *Snell, supra.*

[9] *Gray* v. *Abbott*, [1923] 2 W.W.R. 424; *Walsh* v. *Willaughan* (1918), 42 O.L.R. 455 at pp. 460-1.

[10] See *Brown* v. *Walsh* (1919), 45 O.L.R. 646 at p. 648; *Stephenson* v. *Bromley*, [1928] 4 D.L.R. 737 at p. 742; cf. *Lambert* v. *Slack*, [1926] 2 D.L.R. 166; *Hayes* v. *Mayne*, [1927] 4 D.L.R. 1070.

[11] *Supra.*

[12] *Supra.*

forfeiture. Because of this, the Court held that the defendant must return the money to the plaintiff less $60 damages as awarded to the defendant for the plaintiff's breach of contract. In the light of the authorities noted above,[13] one may well wonder how the Court could, in the face of the plaintiff's abandonment or repudiation, decide in his favour. The result in *Stephenson* v. *Bromley*[14] was substantially the same as that reached in the *Balfour* case, and is in line with the authorities, for the breach of the contract on the part of the purchaser arose out of mere default rather than a repudiation.

In *Boericke* v. *Sinclair*[15] the purchaser had not abandoned the contract, but had only committed an unintentional default. As time was of the essence, the Court did not decree specific performance, but held that the purchaser, who was willing to go on, was entitled to be relieved from a forfeiture of the payments he had made.

S. E. S.

* * *

DISCOVERY—PROPERTY OF ONE LITIGANT NOT TO BE TURNED OVER TO OTHER FOR EXPERIMENT.—*Nichols* v. *Toronto Transportation Commission*,[1] recently decided by the Second Divisional Court of the Appellate Division for Ontario, must be regarded as an important decision on the law of discovery.

The decision of McEvoy, J.,[2] appealed from, had ordered the defendants in a negligence action to submit their street car involved in the accident to nominees of the plaintiff for inspection and experiment as to the distances within which it could be stopped at varying speeds. It was conceded that in no reported case had the Court gone the length of ordering the property of one litigant to be turned over to his opponent in order that the latter might experiment with the same, but it was argued that Ontario Rules 266 and 370 were wide enough to justify such a practice.

The Rules in question are as follows:

266.—A party may apply for an order for the inspection by himself or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute. (See also Rule 370). C.R. 571.

[13] See footnote 6, *supra*.
[14] *Supra*.
[15] *Supra*.
[1] (1928), 62 O.L.R. 124; [1928] 2 D.L.R. 364.
[2] (1928), 61 O.L.R. 550; [1928] 1 D.L.R. 1101.

370.—(1) The Court may, upon the application of any party and upon such terms as may seem just, make any order for the detention or preservation of property, being the subject of the action, or for the inspection of any property, the inspection of which is necessary for the proper determination of the question in dispute; and for all or any of the purposes aforesaid may authorize any person or persons to enter upon or into any land or building in the possession of a party and may authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. (See also Rule 266). C.R. 1096.

The appellate Court held that the words "necessary for the proper determination of the questions in dispute" dominate the whole of Rule 370 and experiments are only authorized as ancillary to inspection which is found to be necessary. The Court pointed out that so far from the experiments as proposed being necessary, evidence of the same would be actually an inconvenience at a trial as tending to complicate the issues to be determined. In place of a simple adjudication on the facts of the case at the time of the accident there would be a controversy as to how far such facts were comparable with conditions at the time of the plaintiff's tests and as the defendant might in rebuttal submit tests made by his experts, there would be developed a litigation similar, as one American commentator put it, "to the great banyan tree of India which grows by its branches reaching the ground and constantly developing new roots."

The Court also pointed out that the order appealed from gave and could give no assurance to the defendants that in the course of the experiments their property would be entrusted to competent hands or safeguarded from injury or that they would be free from liability to the public during such tests. When one considers that the principle sought to be invoked would be equally applicable to the huge locomotives of our transcontinental railways or to the leviathans of our great steamship companies, one can hardly wonder that the Court thought an extension of the existing practice of most questionable expediency.

I. S. FAIRTY.

* * *

HABEAS CORPUS—RIGHT OF APPLICANT TO APPLY TO ALL JUDGES OF SAME COURT.—The Privy Council's recent decision in *Eshugbayi Eleko* v. *Government of Nigeria*[1] raises a number of interesting questions, some of which it clears up and some of which it does not.

[1] [1928] A.C. 459.

Whether or not one is convinced by the reasons given for holding that an applicant for a *habeas corpus ad subjiciendum* may canvass the judges of the same court one after another until he finds one favourable, one cannot but feel that the absence of any precedent in England of an applicant ever having gone from one judge to another of the same court is a fact not satisfactorily explained away. If applicants have for centuries always chosen to go from a judge to his court in banco or to another court, rather than to another judge of the first court, although they thereby cut down the mathematical chances of success, the natural inference would seem to be that applicants had no hope of help from any judge whose brother judge had refused relief. *Ex parte Partington,*[2] which was cited by the Lord Chancellor in the *Nigeria* case (*supra*), really throws no light upon the point at all. To go from a judge to his court in banco was really to appeal, not to invoke the aid of another co-ordinate jurisdiction.

It is doubtful whether the Habeas Corpus Act in imposing a penalty upon any judge who wrongfully refused to entertain an application for the writ really caused the difficulty the Lord Chancellor felt. It would surely be a strong thing to hold that a judge had wrongfully refused to hear an application by dismissing it on proof that a brother judge had already decided the point.

On the other hand, the colonial Courts overruled were faced with one difficulty to which none of them could find a satisfactory answer, viz., the question why, if the decision of one court did not conclude another court, the decision of one judge ought to conclude another judge? And why was it possible to go even from court to court? This is really the whole essence of the controversy and it cannot be said that even the Privy Council threw much light on the point.

In any ordinary civil or criminal cause, a court or a judge refuses to review the decision of another court or judge on the same subject-matter simply because the point is *res judicata.* Obviously at an early date the courts must have decided for some reason that the doctrine of *res judicata* did not apply to habeas corpus applications. What was that reason? The vague explanation, frequently offered, that this was an exception *in favorem libertatis,* is obviously unsatisfactory, because the exception was recognized long before the courts became very tender about personal liberty.

In *Harrington (Earl)* v. *Ramsay,*[3] Lord Campbell, C.J., said: "But there is no doubt that, at present, in prohibition and on habeas corpus, the decision of one Court refusing a rule, on which error can-

[2] (1845), 13 M. & W. 679.
[3] (1853), 2 E. & B. 669.

not be brought, is not binding on another Court, though only of co-ordinate jurisdiction", and Crompton, J., reiterates that:[4] ". . . in applications for writs of prohibition or habeas corpus, where error does not lie on the refusal of the writ, it has been usual for the parties to apply to one court after another on the same matter, in the same case; and the party may, in such case, ask for the judgment of the Court independent of, and without reference to, the decision of the other Court in the same case". Clearly, the key to the matter lay in the fact that a writ of error did not lie on the refusal of a *habeas corpus*. And no proceedings in error lay because the application was "summary" and not "plenary" (i.e., was heard on motion without formal pleadings).[5]

To see why the right to a writ of error was considered so significant, it is necessary to go back several centuries, and then we find distinct traces of a doctrine that no one was concluded by a decision which he could not have reviewed by writ of error. Thus Bramston, C.J., said of a summary order of sewer commissioners: "Where a man is not party to a judgment, there he cannot have a writ of error, but there he may falsify, so I conceive that he may in this case, because he cannot have a writ of error." *Commins* v. *Massam*.[6]

The idea that no person can be estopped by a decision on which no writ of error will lie, has long since been exploded. It was repudiated by Lord Holt, C.J., in *Groenvelt* v. *Burwell*,[7] and has ever since been recognized as fallacious, for it would have meant that every summary conviction or order could be questioned collaterally. But it has left its legacy in *habeas corpus* law, surviving in full vigour, in spite of the original foundation having long since been swept away.

Other traces of the same idea survived in a rather vague doctrine that only a positive decision was an adjudication (so as to make a subject-matter *res judicata*) and that the mere refusal of an order or the dismissal of a complaint, being negative, was not an adjudication, so that the disappointed party could try again: *Mayo* v. *Parsons*;[8] *Morse* v. *Apperley*;[9] *R.* v. *Brisby*.[10] This idea, which never had anything to recommend it, is gradually being repudiated.[11]

[4] S.c. at p. 675.
[5] *Dublin* v. *Dowgatt* (1717), 1 P. Wms. 348 and *sub nom. Dublin* v. *R.* (1724), 1 Bro. P.C. 73.
[6] (1643), March N.R. 196 at p. 201.
[7] (1699), 1 Ld. Raym. 454.
[8] (1721), 1 Str. 391.
[9] (1840), 6 M. & W. at 145 per Alderson, B.
[10] (1849), 2 C. & K. 962.
[11] Bower on Res Judicata, pp. 28, 29.

One feels tempted to examine the desirability of allowing prisoners to canvass judges in the way the Privy Council has decided they can do. It is all very well to say that liberty must be safeguarded, but society also needs protection. It is surely unsatisfactory that although a dozen judges think a criminal ought not to be at large, their decisions may be nullified by the wrong-headedness of a thirteenth judge. Other criminal appeals do not allow the canvassing of co-ordinate tribunals, and this exception is clearly anomalous. In some jurisdictions, e.g., Ontario, the practice has been stopped by statute, and the right to appeal from the refusal of a *habeas corpus* substituted. Common sense approves this as the proper solution.

D. M. GORDON.

* * *

SALE OF LAND—AGENT'S COMMISSION—LAND SOLD AT THE REQUEST OF THE VENDOR FOR LOWER PRICE THAN THAT NAMED IN THE AGREEMENT FOR COMMISSION.—The case of *Weaver* v. *Dixson*[1] has made it incumbent upon a real estate agent to have a new agreement for commission if the agreement signed by the vendor calls for payment of commission for the sale of the property at a sum stated, even although the vendor himself directs the agent to sell at a lesser price. D., a vendor, directed W., a real estate agent, to list and sell his property for the sum of $4,800 and agreed in writing to pay three per cent. commission for same. He subsequently directed his agent to sell for $4,500 but did not sign a new agreement for payment of commission. The agent found a purchaser acceptable to the vendor, and the vendor himself, accompanied by the purchaser and the agent, proceeded to the office of the vendor's solicitor and entered into an agreement of sale with the purchaser, the vendor receiving, at the time, the sum of $200 on the purchase price. The vendor did not at that time pay the commission but the agent agreed with the vendor that he would accept $90 *if paid immediately*, instead of $135 (the full amount).

The vendor subsequently relieved the purchaser of his bargain, retained the $200 deposit, and refused to pay any commission. The learned County Court Judge, before whom the action for the recovery of commission was tried, gave judgment for the plaintiff. The defendant appealed, setting up that there was no agreement in writing to satisfy the Statute of Frauds.[2] Their Lordships decided

[1] (1928), 62 O.L.R. 419; [1928] 4 D.L.R. 226.
[2] R.S.O. 1927, c. 131, s. 11.

that the plaintiff was employed to sell at a fixed price, $4,800, and by reason of the property having been sold to a purchaser for the sum of $4,500, the plaintiff could not recover a commission on the sale—notwithstanding that the vendor had authorized a sale and accepted a purchaser for the sum of $4,500—because there was no written agreement to sell for the lower price in accordance with the provisions of section 11 of the Statute of Frauds.

Their Lordships in their reasons for judgment referred to many cases, among them *Toulmin* v. *Millar*,[3] *Howard* v. *George*,[4] *Marten* v. *Whale*,[5] *Smith* v. *Barff*,[6] *Como* v. *Herron*.[7] There cannot, perhaps, be any doubt that the decision in this case is in accordance with the strict principles of the common law rule. But it has been held by Courts in England that under the Judicature Act the Court is vested with equity jurisdiction and has the power to prevent the setting up of the Statute of Frauds as a defence, when by so doing the defendant seeks to protect himself from the effect of an oral agreement varying a written agreement, when he has been a party to the oral variation. In such cases the use of the statute may operate as a fraud upon the statute itself, and it has been so held in the Courts in England. In *Morris* v. *Baron and Co.*,[8] Lord Haldane in discussing the distinction between rescission and variation of a contract, with reference to the Sale of Goods Act and the Statute of Frauds, said: "That rule (of evidence) is that where an agreement is validly entered into which has had to comply with the Statute of Frauds, and variations are afterwards sought to be introduced by parol or by a document which does not comply with the statute, these variations cannot be set up even by a defendant as an answer in proceedings to enforce the original agreement," and after considering the question of *rescission* as distinguished from *variation* with special reference to the case of *Noble* v. *Ward*,[9] he states that "what was therefore decided was merely that where parties enter into an invalid contract, which purports to vary, and only to that extent to supersede or rescind, an earlier written contract, the later one does not operate validly." His Lordship then referred to the establishment of the principle by the authorities in equity and said: "No doubt it is not to be found in the expressed words of the sections. But if

[3] (1887), 58 L.T. 96.
[4] (1913), 49 Can. S.C.R. 75.
[5] [1917] 1 K.B. 544, affirmed [1917] 2 K.B. 480.
[6] (1912), 27 O.L.R. 276.
[7] (1913), 49 Can. S.C.R. 1.
[8] [1918] A.C. 1 at pp. 16 and 18.
[9] (1866), L.R. 1 Ex. 117; L.R. 2 Ex. 135.

the construction placed by the Courts on such words is not accepted injustice will result. For it would then be in the power of a defendant to insist that the contract to be sued on by the plaintiff must be the entire new contract comprising the old one with the parol variations, and then to defeat the plaintiff by setting up the statute. The Courts, in order to avoid this result, have read the language as implying that the original formal contract is not, in any question of evidence in proceedings, to be treated as varied by a subsequent contract which is informal, and therefore of imperfect obligation."

But the case of *United States of America* v. *Motor Trucks, Limited,*[10] a Privy Council case, goes further and lays down the principle that since the Judicature Act of 1873 the Court in England has jurisdiction to rectify a contract and "the Court, which is to administer equity as well as law, is to grant, either absolutely or on such reasonable terms and conditions as it shall deem best, all such remedies as any of the parties may appear to be entitled to in respect of any and every legal and equitable claim properly brought forward by them in such cause or matter, so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings discouraged."[11] The decision in the *Weaver* case (*supra*), when compared with the decisions in other cases, gives a clear example of the wide difference of opinion permitted by the Judicature Act as at present framed and it would seem there is opportunity for some provision to be made therein that would definitely settle whether rules of law or of equity should prevail in cases where there is conflict between the two.

B. B. JORDAN.

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EXTRADITION—SAAR BASIN—APPLICATION BY FRANCE—NOT PROPER GOVERNMENT. — The case of *Re Incampe*[1] is one of interest to lawyer and layman alike. Incampe was arrested for the purpose of extradition by the police in Halifax, Nova Scotia, charged with "theft by an agent or embezzlement," and an application for an extradition order was refused by Carroll, J., who, in delivering his judgment, stated that the crime was committed in German territory, against German law; that the extradition application was made on behalf of the French Republic

[10] [1924] A.C. 196.
[11] [1924] A.C. 196 at p. 201.
[1] [1928] 3 D.L.R. 240.

under the extradition treaty between France and Great Britain, which did not provide for the extradition of German citizens for crimes committed on German territory; and that the Governing Commission of the Saar Territory, set up under the Treaty of Versailles, had not acquired any rights or privileges of extraditing fugitive offenders from Great Britain or Canada. He also stated that he could not accept as evidence under sec. 24 of the Canada Evidence Act,[2] copies of correspondence between the President of the Governing Commission and resolutions and decrees of the said Commission dealing with "the protection abroad of the inhabitants of the Territory" that had been forwarded by the Under-Secretary of State for External Affairs for Canada with his certificate attached. His Lordship therefore ordered the discharge of the prisoner from custody. Probably he was within the strict letter of the law in so doing, but there are a few observations that are in order. In the first place, the effect of it was to allow an embezzler to be set at liberty in our country. Secondly, the learned Judge, faced with a novel situation arising out of the Great War, arrived at a different result from that reached by other courts in dealing with somewhat similar problems.

In *Jacobus Christian* v. *Rex*[2a] the Full Bench of the Appellate Division of the Supreme Court of South Africa decided that Jacobus Christian, an inhabitant of South West Africa, was guilty of treason against His Majesty King George the Fifth, despite the fact that South West Africa was a former German colony and was held by the Union of South Africa under a mandate established by the Treaty of Versailles and the League of Nations, and that Christian was a former German subject.

In *Goralschwili and Another* v. *The Attorney-General for Palestine*,[3] before the Palestine Supreme Court, Goralschwili and Sabatat, residents of Jerusalem and charged with complicity in fraudulent bankruptcy, were trying to avoid extradition to Italy under the Anglo-Italian Treaty of 1873, on the grounds that they were either British subjects or Palestine nationals, and as such were exempt from extradition. (They were both resident in Palestine and it appears both ex-Ottoman subjects.) The Palestine Supreme Court stated "that to hold that the petitioners are British subjects would

[2] R.S.C. 1927, c. 59.

[2a] [1924] S. Af. L.R. 101; 1925, British Year Book of International Law, p. 211.

[3] London Times, February 25, 1925; American Journal of International Law, 1926, vol. 20, p. 768 *et seq.* This case went on appeal to the Judicial Committee of the Privy Council and special leave to appeal was allowed.

involve holding that the Crown ('which had enough sovereignty in German South West Africa to convict Christian of treason') has thereby acquired sovereignty a view for which no authority has been cited. As regards the alternative plea, it may be doubted whether a 'Palestinian citizen' has at present any existence. But it is unnecessary to consider that question, as I hold that in applying the Anglo-Italian Treaty to Palestine, article 3 of the Treaty is to be taken to exempt from extradition only British subjects, which the petitioners are not." Therefore, they were liable to extradition.

And so British courts in South Africa, in Palestine, in England and New Zealand have dealt with much the same kind of problem, as Carroll, J., had before him, and have decided them so as to produce a quite different result.

The decision in the *Incampe* case (*supra*) was largely based on the Saar being German territory. Now the Saar Territory was German territory—but so was German South West Africa—and so was Dantzig, and any number of other sections of the earth's surface. Canada, it is true, has no extradition treaty with the Saar, but Canada has treaties (or Great Britain has for her) with both France and Germany. Canada is a party to the Treaty of Versailles, a member of the League of Nations with a seat on the Council of the League, and a Canadian, Major George Washington Stephens, has only recently resigned from the position of President of the Governing Commission of the Saar. So Canada and the Canadian government is a party to all that has gone on, and responsible for her share in the situation. There is no doubt that the Treaty of Versailles did authorize the establishment of the Government of the Saar Territory, that the League of Nations did appoint the Governing Commission of the Saar, and that France was entrusted with the protection abroad of the interests of the inhabitants of that Territory. France has an extradition treaty with Canada, and France is the logical party, in fact the only party, to apply for extradition under present conditions. It is inaccurate to say that "the Saar is German territory". The Saar *was* German territory, and probably will be again, but in the meantime it is not, and will not become so until the plebiscite is taken in 1935 to decide whether it will remain as it is under the League, go to France, or return to Germany.

Changing conditions demand recognition and Mr. Justice Carroll does not seem to have given sufficient recognition to this fact. "Justice" is not a matter for the executive and legislature alone.

but for the judiciary as well. Judges may state, as they often do, that they are there to interpret the law, not to make it, but new situations sometimes demand judicial law-making if gaps in the law are to be filled, and *Re Incampe* seems to have been one of them.[4]

N. A. M. MacKenzie.

[4] In *Tagaloa* v. *Inspector of Police*, [1927] N.Z.L.R. 833; 44 Law Q. Rev. 419. Ostler, J., at page 900, said: "Even if there had been no Imperial Order in Council issued under the Foreign Jurisdiction Act, 1890, as was the case with the mandate over German South-West Africa which was given to the Union Government, I should have been content to follow the judgment of the Appellate Division of the Supreme Court of South Africa in *R.* v. *Christian* [1924] S. Af. L.R. 101. The progress of the Dominion along the path of nationhood has been rapid in recent years. The older conception of subordination to a central legislative authority has been superseded by the conception of a partnership of independent nations bound together by ties of loyalty to the same King, ties of kinship, ties of common interests, common beliefs, common faith in the future. If this was not clear before, it was made abundantly clear by the proceedings of the Imperial Conference of 1926. In my opinion the time has come for recognition of this fact by the Courts. It is not necessary to hold that our Constitution Act has fallen into desuetude, though a strong argument could be put forward to that effect founded on the maxim 'Cessante ratione legis, cessat ipsa lex.' 'The tooth of time will cut away ancient precedent, and gradually deprive it of all authority and validity. The law becomes animated by a different spirit and assumes a different course, and the older decisions become obsolete and inoperative': *per* Sir John Salmond in the *Law Quarterly Review*, xvi, p. 383. But whether the Constitution Act has thus become obsolete or not, so far as the mandate is concerned, in my opinion it is a matter entirely outside the scope of the Constitution Act. The Dominion had a representative at the negotiation of the Treaty of Peace, who signed the Treaty on behalf of New Zealand, which thus agreed as a separate nation to the Covenant of the League of Nations and became a member of the League. The mandate for Samoa was conferred by the Council of the League of Nations upon His Majesty the King for and on behalf of the Government of the Dominion of New Zealand. That means that it was conferred directly on the Dominion, and the Dominion is the Sovereign Power responsible to the League of Nations. . . . The authority is given by the League of Nations directly to the Dominion as a member of the League. This is a matter of my opinion it is ample authority for the legislation now attacked, and it history, of which, in my opinion, this Court must take judicial notice. In is entirely outside the purview of the Constitution Act. This is the view taken by the Appellate Division of the Supreme Court of South Africa in *R.* v. *Christian* (*supra*)."