CASE AND COMMENT

APPORTIONMENT — LIFE TENANT AND REMAINDERMAN — STOCK DIVIDEND—CASH DIVIDEND.

"Is this income or is it capital?" Frequently, in the management of a trust fund this question arises. The prudent trustee will first look at the trust instrument for a provision dealing with the matter. If he finds one, it of course prevails. If he finds none, what test may he apply? This was the quandary in which the executors in *In re Bates, Mountain* v. *Bates*[1] found themselves before they applied to the Court for advice. The directors of a company owning and operating steam trawlers sold some of their vessels and realized more than the values at which they stood in the balance sheet of the company. The proceeds were carried to a suspense account and afterwards were distributed as cash bonuses to the shareholders with a covering letter stating that such bonuses were capital payments not liable to income or supertax. A shareholder, now deceased, devised and bequeathed all his property to his executors upon trust for his wife for life, remainder to his children. Eve, J., held that the payments should be treated as income.

Lord Herschell in the leading case of *Bouch* v. *Sproule*[2] said:

> When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks *in a company which has the power either of distributing its profits as dividend or of converting them into capital,* and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital.[3]

The company is in law dominant on the question whether the money which has been distributed is to be considered as capital or income.[4]

[1] [1928] Ch. 682.
[2] (1887), 12 A.C. 385.
[3] (1887), 12 A.C. 385 at pp. 397-8, quoting and approving the statement of Fry, L.J., in the same case in the Court of Appeal, 29 Ch. D. 635 at p. 653.
[4] See Lord Haldane in *Inland Revenue Commissioners* v. *Blott*, [1921] 2 A.C. 171 at p. 188.

In *Bouch* v. *Sproule* (*supra*), the company proposed to distribute certain accumulated profits as a bonus dividend, to allot to each shareholder one new share in respect of every three shares he held and to apply the bonus dividend in part payment of the new share or shares. Facilities were afforded by the company for the sale of fractional parts of new shares, but the amount paid to a shareholder, who took advantage of these, would be proceeds of a sale of new capital stock rather than a cash dividend. Assuming, for it did not appear to be a fact, that the shareholder could refuse to take new shares and could ask for the cash dividend, Lord Herschell was of the opinion that the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly created shares.[5] No shareholder would ever ask for the cash dividend when he could obtain twice as much for his rights.[6]

In *In re Northage, Ellis* v. *Barfield*,[7] the declaration of the bonus and the issue of new shares were two different transactions. The distribution of the amount in the reserve fund was merely an extraordinary cash dividend. Then an offer was made to the shareholders to purchase newly created shares. Consequently, the Court held that the dividend was a cash dividend and not a stock dividend and should be treated as income.

In *Re Bicknell*,[8] the Court held that a stock dividend should be treated as income. The dividend was issued in lieu of the ordinary cash dividend on preference shares. As the facts given in the report are very meagre, it is difficult to ascertain what steps were taken by the company in declaring a stock dividend. Did the company capitalize profits or did they pay cash to the shareholder, leaving it a matter of pure choice, with regard to which the company expressed no desire at all, as to how it should be applied? To state that it was given in lieu of a cash dividend indicates the motive for the act, rather than supplies an answer to the question, how was it done?

It was decided in *In re Malam, Malam* v. *Hitchens* (*supra*) that the tenant for life was entitled to the whole of the dividend, half of

[5] Cf. Kekewich, J., in *In re Despard, Hancock* v. *Despard* (1901), 17 T.L.R. 478.

[6] For other cases where a stock dividend was held to be capital, see *In re Evans, Jones* v. *Evans*, [1913] 1 Ch. 23; *In re Hatton, Hockin* v. *Hatton*, [1917] 1 Ch. 357; *In re Ogilvie, Ogilvie* v. *Ogilvie* (1919), 88 L.J. Ch. 159.

[7] (1891), 60 L.J. Ch. 488. For other cases where the distribution of accumulated profits was treated as a cash dividend, see *In re Alsbury, Sugden* v. *Alsbury* (1890), 45 Ch. D. 237; *In re Malam, Malam* v. *Hitchens*, [1894] 3 Ch. 578; *In re Piercy, Whitwham* v. *Piercy*, [1907] 1 Ch. 289. See also *In re Sinclair, Clark* v. *Sinclair* (1901), 2 O.L.R. 349.

[8] (1919), 46 O.L.R. 416.

which was paid in cash and in respect of the balance an allotment of new shares was offered to the shareholders and such as did not accept received the remainder of the dividend in cash. The trustees treated the right to allotment as belonging to the tenant for life and renounced their right to new shares to her. Shares were accordingly allotted to her. However, Stirling, J., said:

> Those shares were not, however, in the first instance offered to her but to the trustees. The option of determining whether the offer of those shares should be accepted or not lay with the trustees and not with the tenant for life . . . If an offer were made to the trustees unconnected with the payment of any dividend, the option would have to be exercised on behalf of all the beneficiaries, and if the instrument creating the trust did not authorize the retention of the shares, it would be the duty of the trustees to sell them and deal with the proceeds of the sale as capital.[9]

Stirling, J., then concluded that on a sale of these new shares, taken up by the tenant for life, the proceeds should be applied in payment first of the dividend to the life tenant and the cash balance ought to be applied as capital.[10]

The doctrine of *Bouch* v. *Sproule* (*supra*) was not followed in *Re Anderson*,[11] where on liquidation of a company the surplus of trading profits, after the payment of all liabilities of the company and the payment of its paid-up capital, was distributed among the shareholders. The Court considered that the testator or settlor in leaving the shares on trust for a tenant for life, with a remainder over, intended, only, that the life tenant should have the income arising from the shares in the shape of dividends or bonuses declared during his life[12] and not to profits arising in other ways.

In the case of *In re Bates, Mountain* v. *Bates* (*supra*) the Court, in applying the test laid down in *Bouch* v. *Sproule* (*supra*), decided that there was no capitalization by the issue of new bonus shares of the payments made by the company to shareholders. True, the amount of these payments was not realized from the trading of the company but from a fortunate appreciation in value of its capital assets; yet this sum was available for distribution as a dividend inasmuch as no part of it was required to satisfy the claims of creditors or shareholders of the company.

Such a rule, as laid down in *Bouch* v. *Sproule* (*supra*), regulating

[9] [1894] 3 Ch. 578 at pp. 586-7.
[10] See also *In re Northage, Ellis* v. *Barfield, supra.*
[11] [1925] 4 D.L.R. 116.
[12] As to the operation of the Apportionment Act, see *In re Jowitt, Jowitt* v. *Keeling*, [1922] 2 Ch. 442.

the enjoyment of property between a life tenant and a remainderman is artificial, but every settlor or testator failing to give in the trust instrument some express direction as to apportionment, may well be presumed to have intended that the objects of bounty should share its benefits according to the rule.[13] Furthermore there appears to be a real ground for treating a bonus stock dividend as capital, because in a case where the share capital has been increased and the fixed assets of the company remain the same, the old shares will frequently, if not in the majority of cases, be reduced in value.[14]

S. E. S.

* * *

JUDICIAL SEPARATION AND CHANGE OF DOMICIL.—A learned correspondent contributes the following note:

In *Attorney-General of Alberta* v. *Cook*,[1] the Judicial Committee of the Privy Council decided that a wife who had obtained a decree of judicial separation in an Alberta Court could not thereafter, while the marriage relation continued, acquire a domicil distinct from that of her husband. After this case, and probably as a result of certain suggestions contained in it, the legislature of the province of Alberta, by a provision in its Domestic Relations Act[2] purported to confer upon a married woman who has obtained a judicial separation in the province, the capacity to acquire a new and separate domicil of her own. The effect of this attempted legislative change of the law as laid down in *Attorney-General* v. *Cook* (*supra*) is both interesting and important.

The Alberta statute referred to gives jurisdiction to the Courts mentioned in the Act to hear an action for judicial separation in substantially the same cases in which the High Court has jurisdiction in England, namely, in cases in which the parties are domiciled in the province at the commencement of the action or in which the parties had a "matrimonial home" in the province when cohabitation ceased or the matrimonial offence was committed or in which both parties were resident in the province at the commencement of the action.[3] After judgment of judicial separation has been given, the statute expressly provides that

[13] See Lord Herschell in *Bouch* v. *Sproule* (1887), 12 A.C. 385 at p. 392.
[14] See Lord Watson in *Bouch* v. *Sproule* (1887), 12 A.C. 385 at p. 407; *In re Evans, Jones* v. *Evans*, [1913] 1 Ch. 23.

[1] [1926] A.C. 444; [1926] 1 W.W.R. 742; [1926] 2 D.L.R. 762.
[2] 17 Geo. V., c. 5, s. 10 (b).
[3] 17 Geo. V., c. 5, s. 7.

the wife shall have the capacity to acquire a new domicil on her own account. This enlarged capacity is in no way dependent upon the innocence of the wife. It is not clear whether the capacity to acquire a new domicil on the part of the wife is intended to be limited to the case of the acquisition of an Alberta domicil. The power to legislate concerning "Property and Civil Rights in the Province" can hardly be treated as sufficient to authorize legislation by a province conferring a capacity on a married woman, merely resident in the province at the time of the judgment, to acquire a domicil in another province or in another country to which she subsequently removes while still living apart from her husband. It may be that the provision in question is intended to confer upon a married woman who already has an Alberta domicil the capacity to acquire a new domicil elsewhere which is distinct from that of her husband.

Notwithstanding the giving of a restricted meaning to the provisions of the statute, serious difficulties, which a suppositious case will illustrate, may arise. H and W (who each have an English domicil of origin) marry in England where they are domiciled at the time of the ceremony. Later H (the husband) comes to Alberta for the sake of his health, intending to return to England in a few years to reside there permanently. W accompanies him. While in Alberta, H is guilty of cruelty towards W and W gets a judicial separation from an Alberta Court on that ground. Subsequently, while still living apart from H, W (being still a resident of Alberta) determines to make her permanent home in that province. H has meanwhile returned to England with the intention of residing there indefinitely. Later H commits adultery in England and W obtains a divorce from him in Alberta on that ground, the Alberta Court determining that it has jurisdiction to dissolve the marriage by reason of the statute giving W a capacity to acquire a separate domicil under the circumstances mentioned. W subsequently returns to England on a temporary visit and during her sojourn there she marries HH. Is W guilty of bigamy in England? If W goes to reside with HH in New South Wales and children are born to them there, are the children legitimate according to the law of New South Wales, of England and Alberta, as the case may be? Would an English Court grant a divorce to H after W had cohabited with HH, or would it recognize the validity of the existing Alberta divorce? No certain answer can be given to any of these questions.

There is weighty authority for the view that questions involving

the nature, the acquisition and the change of domicil (as distinct from the effects of domicil admittedly established) are to be determined exclusively by the *lex fori.* In other words, the court in which such a question arises applies its own criteria and tests and it pays no attention to the rules of any other system, ignoring even the rules of law of the country in which it is asserted a domicil has been acquired. Thus it has been held that an English Court will apply the rules of English law in determining whether a particular person has acquired a domicil in France although, in deciding that that person has a French domicil, it goes in the teeth of the French law which declares that the person in question has not acquired a French domicil according to the tests laid down by the law of France.[4]

It might be said that the *lex fori* governs in deciding questions involving the definition and existence of the requisite residence or of the *animus manendi,* but that questions relating to the capacity to acquire a residence or to form the *animus manendi* are to be determined by the criteria which are applied in determining personal capacity in other matters affecting status; namely, by the rules of the *lex domicilii.* Thus Westlake[5] takes the view that the question whether a person not of full age, emancipated by marriage, can acquire a domicil of his own, must be answered by that individual's personal law which is presumably the law of the jurisdiction in which he is domiciled and he treats this as being so although English law does not recognize such a capacity on the part of a person who is not *sui juris* because of nonage.

If the tests of the *lex domicilii* are accepted as determinative of capacity to acquire a new domicil of choice, the domicil existing at the moment of forming the intention and not that intended to be acquired, would appear to be the relevant one. Unless we resort to a juristic prolepsis the capacity to establish a new domicil must exist before the new domicil is acquired. It savours of circular reasoning to say that the capacity is retroactively conferred by the law of the new domicil. In the illustration given, W had, at the time she purported to form the independent *animus manendi,* an English domicil and by English law she had no capacity to acquire a domicil distinct from that of her husband. (*Attorney-General*

[4] See Dicey. Conflict of Laws, 3rd ed., p. 119; Halsbury: Laws of England, vol. 6, p. 193; *Hamilton* v. *Dallas,* 1 Ch. D. 257; *Bremer* v. *Freeman,* 10 Moore P.C. 306; *Collier* v. *Rivas* 2 Curt. 855; *In re Martin, Loustalan* v. *Loustalan,* [1900] P. 211; *Doglioni* v. *Crispin,* L.R. 1 H.L. 301.

[5] Private International Law, 6th ed., p. 341.

v. *Cook, supra*). It is exceedingly doubtful whether an English Court would treat an English domicil as determined in a manner not recognized by English law. In any event, why should such Court recognize a rule of law of a jurisdiction in which W was merely resident and not domiciled, such rule being both destructive of an existing English domicil and repugnant to the rules of English law relating to the termination of that domicil?

In *Attorney-General* v. *Cook*,[6] Lord Merrivale bases the incapacity of the wife to acquire a separate domicil upon the unity of personality resulting from marriage, and he treats this unity as being a matter of substance and not merely a procedural device. It might be suggested that, in determining whether a capacity in this respect exists, the law governing the nature of the status existing in the case of the particular marriage ought to be considered to ascertain whether the unity of personality, so important in the English law view of marriage, is postulated by that law. If that law does not insist upon unity of personality, but, on the contrary, recognizes the capacity of the wife to acquire a distinct domicil during the existence of the marriage, then, according to this suggestion, the courts of other jurisdictions ought to recognize a separate domicil acquired in accordance with the law which determines the character of the existing marriage status.

If this suggestion is accepted, it does not go very far in removing the doubts raised by the Alberta statute. The law which determines the substance and content of the marriage status must surely be the law of the domicil of the husband at the time of the asserted acquisition of the independent domicil. The following cases might arise under the Alberta statute in question:

(1) The spouses are domiciled in Alberta at the time of the judgment bringing about the judicial separation. The wife would then have an Alberta domicil immediately after the separation. The question would then arise whether a provincial legislature (as distinct from the Dominion Parliament) has power to break down the conjugal unity of personality which, as Lord Merrivale points out, is so prominent in the English law idea of marriage. The case of *Hill* v. *Hill*[7] recently decided by the Chief Justice of the Trial Division in Alberta, suggests that provincial legislation having this effect is an encroachment on the exclusive Dominion sphere relat-

[6] [1926] A.C., at p. 460 *et seq*.
[7] [1928] 3 W.W.R. 1; [1928] 4 D.L.R. 161.

ing to marriage and divorce. The giving to the wife of an independent capacity to acquire a domicil is directly repugnant to the idea of unity of personality of the spouses.[8]

(2) The spouses are domiciled in Alberta at the time of the judgment. Later the husband acquires an English domicil. The statute does not go so far as to prevent the wife's domicil adapting itself to changes in that of the husband if she remains passive. It merely gives her the power (it is suggested) actively to acquire a domicil of her own. If, at a later date, she determines to make Alberta her permanent home, she then has an English domicil and the nature of the existing conjugal relation or status and the question of her capacity to acquire a separate domicil would, if the suggestion mentioned is adopted, have to be determined by the *lex domicilii* which is, in this respect, laid down in *Attorney-General* v. *Cook* (*supra*).

(3) In cases in which the parties have merely a "matrimonial home," or are merely resident but not domiciled in Alberta, the wife would necessarily have a non-Alberta domicil immediately after the separation and, if she attempts to acquire an Alberta domicil, her capacity in that respect would, if the view suggested is adopted, have to be tested by reference to some system of law other than that of Alberta.

In the first hypothetical case given earlier in this note (the case of H and W), England is taken as the antecedent domicil of the spouses. The same conclusions ought to follow with respect to the attitude of the Courts of Canadian provinces other than Alberta. For matrimonial purposes, each province is a separate jurisdiction: *Attorney-General* v. *Cook.*[9] The "Civil Rights" with which provincial legislatures are competent to deal, have a territorial limitation: *Royal Bank* v. *The King.*[10] Assuming that the legislation in question is so far valid as to bind Alberta Courts, it would appear that, outside Alberta, a capacity or status given or created by Alberta legislation would have to depend for its acceptance elsewhere upon its conformity with the rules of private international law recognized by the courts in which the capacity or status was asserted. Provincial legislation is not *proprio vigore* effective outside the limits of the enacting province. If this is true with respect to other provinces, it would be true *a fortiori* in the case of a foreign country.

[8] *Attorney-General* v. *Cook,* [1926] A.C. at p. 460 *et seq.*
[9] [1926] A.C. at p. 449 *et seq.*
[10] [1913] A.C. 283.

It is important to remember that, in matters involving doctrines of private international law, especially where questions of marriage and legitimacy are concerned, universality and certainty of acceptance are just as important considerations as the intrinsic excellence of the doctrines adopted. The legislation in question seems to have destroyed the certainty which *Attorney-General* v. *Cook* (*supra*) was designed to secure. It can reasonably be suggested that the provisions in question are futile, in whole or in part, and, which is worse, that they may be positively misleading to persons having grave interests at stake. In any event, there are sufficient serious doubts raised to make it expedient to have the effect of the statute authoritatively determined.

* * *

ACTION IN ONTARIO ON JUDGMENT OF QUEBEC COURT—DEFENDANT PERSONALLY SERVED IN ONTARIO—CONFLICT OF LAWS. It is difficult to accept the judgment of the majority of the Court in *Lung* v. *Lee*[1] as being entirely satisfactory. The effect is to read into a statute a qualification not therein contained, and it is submitted that in order to justify a court in construing a statute as saying something which it admittedly does not say, the reasons should be more convincing than those advanced in the case in question. The practical value of a statute is seriously impaired if its meaning is plain on its face, and if nevertheless we must qualify it by reference to the decision of some court.

The action was brought in Ontario upon a judgment of the Superior Court of the Province of Quebec, the writ in the Quebec action having been personally served upon the defendant in Ontario, where the defendant was domiciled and resident. It is enacted by section 51 of The Judicature Act[2] that "Where an action is brought on a judgment obtained in the Province of Quebec in an action in which the service on the defendant or party sued was personal, no defence which might have been set up to the original action may be made to the action on the judgment." It seems quite clear, or, apart from the judgment of the majority would have seemed quite clear, that the case is covered by the enactment, and that wisely or unwisely, the Ontario legislature has chosen to give to a Quebec court a jurisdiction, and to give to its judgment an effect, which they would not have according to the ordinary rules of con-

[1] (1928), 63 O.L.R. 194.
[2] R.S.O. 1927, c. 88.

flict of laws. The judgment, delivered by one member of the Court and concurred in by two others says, "I think it is impossible to believe that it was ever intended by the legislature of this Province to surrender the jurisdiction of the Province over persons domiciled and resident here to the Courts of another Province." There is, however, nothing manifestly absurd in the enactment, however unwise it may be, and it is submitted that the view of the Court as to the lack of wisdom of the legislation is not a valid reason for refusing to give effect to the declared will of the legislature. Similarly, if the legislation of Quebec does not confer upon Ontario courts a reciprocal jurisdiction, this fact is one proper to be considered by the legislature of Ontario in revising the present Ontario legislation, but, it is again submitted, is not a reason which justifies an Ontario court in qualifying the present legislation of Ontario so as to make it accord with the present legislation of Quebec.

The judgment of the majority of the Court also relies upon the decision in *Vézina* v. *Newsome*,[3] not only approving of that decision on the merits, but also declining to enter upon a criticism of it or to disturb the law as settled by it over twenty years ago. The case of *Vézina* v. *Newsome* is, however, subject to several observations in the present connection.

The Court in *Vézina* v. *Newsome* itself did not hesitate to disturb the law as settled 26 years earlier in *Court* v. *Scott*[4] on the ground that the earlier case was based on an erroneous view of the statute law; and it is not quite clear why a court should now, after the lapse of 20 years, hestitate in turn to declare that *Vézina* v. *Newsome* was based on an erroneous view of the statute law.

Vézina v. *Newsome* was decided on section 117 of The Judicature Act of 1897[5] which is in substantially the same terms as section 51, above quoted, and as in *Lung* v. *Lee*, the Court, instead of applying the statute according to its plain and literal meaning, allowed itself to be influenced by extraneous and irrelevant considerations,—and read into the statute qualifying words not contained therein.

It is fairly plain that the legislation requires reconsideration by the legislature. The whole question of the reciprocal enforcement of judgments as between the several provinces of Canada should, it is submitted, be considered as a whole, and the legislature might well adopt the model statute prepared by the Conference of Commissioners on Uniformity of Legislation in Canada. There is no

[3] (1907), 14 O.L.R. 658.
[4] (1881), 32 U.C.C.P. 148.
[5] R.S.O. 1897, c. 51.

reason why Quebec judgments should be treated differently from those of other provinces, and sections 51 and 52 of the Judicature Act should therefore be repealed.

JOHN D. FALCONBRIDGE.

* * *

LIABILITY FOR SPREAD OF FIRE — PRESUMPTIONS — BURDEN OF PROOF. The case of *Stephen* v. *McNeill*,[1] decided by the British Columbia Court of Appeal, is certainly one which merits comment.

T, a tenant occupied an apartment above a vacant store and basement. L, the defendant, owned the whole building. T notified L that her, T's, water pipes were frozen. L, accompanied by F, a friend, came to the premises and attempted to thaw the pipes. F used a blow-torch obtained by L and F from the vacant store. At 11.30 or 12 a.m., L decided that further attempts at that time were useless. He, L, told F that he would try again later when the ground thawed, and both parties abandoned the unfinished job. F returned in the afternoon alone, and again used a blow-torch (apparently the same one). At 2 p.m., F left the premises after making an inspection and satisfying himself that no fire had started. At about 6 p.m., fire suddenly burst out at or near the place at which the blow-torch had been applied in the morning and afternoon. L's premises were destroyed, the fire spread and destroyed several other houses, among them the plaintiff's.

The trial judge gave judgment for the plaintiff, on the basis of *Rylands* v. *Fletcher*.[2] He made no specific finding as to:

(1) Which application of the torch had caused the fire; (2) Whether F returned with or without the authority of L; (3) Whether F had been negligent.

The defendant appealed, on grounds which are not stated in the report, and the appeal was allowed.

Macdonald, C.J.A., in giving judgment allowing the appeal, was clearly of the opinion that the fire started from F's operations in the afternoon and that F was there without the authority of L (and hence as a stranger). Martin, J.A., took the same view as Macdonald, C.J.A. McPhillips, J.A., concurred in allowing the appeal but gave no reasons. Macdonald, J.A., in concurring was of the opinion, but did not so decide, that F's operations in the afternoon were with the implied authority of L, and based his decision on the ground

[1] [1928] 4 D.L.R. 172.
[2] (1868), L.R. 3 H.L. 330.

that the plaintiff had not carried the burden of proving negligence in the operation by F of the blow-torch.

Galliher, J.A., in dissenting, said that *Rylands* v. *Fletcher* did not apply because this was a *natural* user of land. But he decided that F's afternoon operations were done with the implied authority of L, and stated that when fire spread from an owner's premises and injured another's, there was a presumption of negligence on the part of the owner or his servants. He treated this presumption as casting the duty on the defendant of proving due care.[3]

It is fairly clear that the mere fact that L was owner, i.e., reversioner of the leased premises, has nothing to do with the case. The liability, if any, is upon L as (a) occupier, or (b) a negligent actor on ordinary principles of negligence.

As the store and basement were vacant and the evidence shows L performing acts of dominion in relation thereto he was possessor thereof both in fact and in law. Thus, since the operations with the blow-torch were carried on, in or below the basement, L was undoubtedly the occupier of that part of the premises where the fire originated. It is generally agreed that at common law an occupier was absolutely liable for the escape of fire originating on his premises,[4] although in *Turberville* v. *Stampe*[5] there is an implication of exemption by proof of a sudden heavy wind.

The statute of 6 Anne, chapter 31, section 6,[6] provided:

> And be it further enacted by the authority aforesaid, that no action, suit, or process whatsoever, shall be had, maintained or prosecuted against any person in whose house or chamber any fire shall, from and after the said first day of May, accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby, any law, usage, or custom to the contrary notwithstanding: and if any action shall be brought for any thing done in pursuance of this act, the defendant may plead the general issue, and give this act in evidence, and in case the plaintiff become nonsuit, or discontinue his action or suit, or if a verdict pass against him, the defendant shall recover treble costs.

This was meant to protect an occupier in whose house a fire "accidentally begins." This section of the statute of Anne was not restricted to London as were some sections of the same chapter, but

[3] See [1928] 4 D.L.R. 172 at p. 177.

[4] Anon. (1583), Cro. Eliz. 10. See also Responsibility for Tortious Acts, Its History: Wigmore, 7 Harv. L. Rev. at pp. 448-9; Selected Essays on the Law of Torts, Harv. L. Rev. Assoc. pp. 70, 71.

[5] (1698), 1 Salk. 13; Comb. 459; Skinner 681; Carth. 425.

[6] Made perpetual in 10 Anne, c. 14, s. 1. Re-enacted and extended in 14 Geo. III., c. 78, s. 86.

was a public act of general application,[7] and is, of course, in force in the common law provinces.

As to what "accidentally begins" means, there has been some difference of opinion. Blackstone[8] interpreted this term so as to excuse an occupier however negligent. It has at the other extreme been maintained that the words "accidentally begins" refer to the original kindling of the fire, not to its spreading.[9]

The latter seems too narrow a construction. If the statute were so limited, it would protect the occupier only in cases of fire from mice, wiring, spontaneous combustion and vis major. Fire started, without negligence, by a spark from a hearth or from a cigarette butt must under this construction be held to be spread from a fire intentionally kindled, and so not within the protection of the statute. It is difficult to discover a trace of policy whereby this restriction may be justified, and it should be clear that "accidentally begins" refers to the escape of the fire.[10] This it is submitted, is the better view. Unfortunately the law on this point seems somewhat confused.[11] The statute of Anne is expressed in emphatic language. The occupier is exempted in the case of fire which accidentally begins, "any law, usage, or custom to the contrary notwithstanding." A careful reading of section 8 of the Act provides a further ground for believing that Parliament intended to effect a radical change. It states: "provided always nevertheless, that so much of this Act as relates to the indemnity of any person in whose house or chamber a fire shall accidentally begin, shall continue for the space of three years and from thence to the end of the next session of Parliament and no longer." The caution here evident seems rather unnecessary if the change effected by the statute was contemplated to be so extremely slight as would result from the above construction.

It seems that a view between these two extremes is desirable. "Accidentally begins" should be construed to exempt an occupier from whose premises a fire escapes without negligence.[12] On the other

[7] *Richards* v. *Easto* (1846), 15 M. & W. 244.

[8] Commentaries on The Laws of England, vol. 1, p. 431.

[9] Clerk & Lindsell on Torts, 4th ed., p. 436. See also Denman, C.J., in *Filliter* v. *Phippard* (1847), 11 Q.B. 347.

[10] See the two Manitoba cases *infra*, footnote 12. See also *Batchelder* v. *Heagen* (1850), 18 Maine 32.

[11] Duke, L.J., in *Musgrove* v. *Pandelis*, [1919] 2 K.B. 43 at p. 51 said: "The question may some day be discussed whether a fire, spreading from a domestic hearth, accidentally begins within the meaning of the Act. . . . I do not covet the task of the advocate who has to contend that it does."

[12] *Booth* v. *Moffat* (1896), 11 Man. R. 25 (semble); *Dean* v. *McCarty* (1846), 2 U.C.R. 448; *Owens* v. *Burgess* (1896), 11 Man. R. 75; *Batchelder* v. *Heagen, supra*.

hand, when the occupier or his servant has been negligent, in the kindling or maintenance of a fire, liability should be imposed.[13]

The next question arising out of the present case concerns the application of *Rylands* v. *Fletcher*. Assuming that *Rylands* v. *Fletcher* is correctly decided, it is difficult to understand how a court can hurdle the statute of Anne, and apply that doctrine to the spread of fire in *any* case. This is wholly aside from the observations which immediately follow.

The English cases seem to apply *Rylands* v. *Fletcher* to the spread of fire in every case (with a special doctrine requiring proof of negligence in the case of locomotives, based on the theory that Parliament has authorized them to be run).[14] The cases in the United States do not apply *Rylands* v. *Fletcher* to ordinary fires.[15] In Canada the law is very confused. There are some cases which refuse to apply *Rylands* v. *Fletcher* to ordinary fires necessary for husbandry.[16] and other cases which do not discuss it at all,[17] and still other cases which purport to apply it to all fires.[18] In the two Nova Scotia cases, some members of the Court rested the decisions on the theory of negligence. In *Forbes* v. *Daw*,[19] (as well as the case of *McLean* v. *Rhodes*[20]) the decision can be supported on the theory that the fire in question was kindled in violation of a statute.

Although the distinction between natural and non-natural or artificial user of land is unsound and extremely difficult to draw, there are distinctions between dangerous and non-dangerous, reasonably necessary and unnecessary user of land. The general security, at least in modern times, is not unduly threatened by the maintenance of a fire in the furnace or kitchen stove. Such a user is practically a necessity. Clearly *Rylands* v. *Fletcher* should not apply to that kind of a fire.

[13] *Filliter* v. *Phippard, supra; Canada So. Ry.* v. *Phelps* (1884), 14 Can. S.C.R. 132.

[14] *R.* v. *Pease* (1832), 4 B. & Ad. 30; *Vaughan* v. *Taff Vale Co.* (1860), 5 H. & N. 679.

[15] *Read* v. *Penn. R. Co.* (1882), 44 N.J. Law, 280; *Batchelder* v. *Heagen, supra;* cases in note 11, 45 Corpus Juris 850.

[16] *Goch* v. *Youschak* (1924), 34 B.C.R. 454; *Clark* v. *Ward* (1909), 2 Alta. L.R. 101; *Dean* v. *McCarty, supra; Furlong* v. *Carrol* (1882), 7 O.A.R. 145 (dictum).

[17] *McRury* v. *Dominion Coal Co.* (1896), 40 N.S.R. 89; *Gunn* v. *Oak Hall Ltd.* (1922), 55 N.S.R. 265.

[18] *Creaser* v. *Creaser* (1907), 41 N.S.R. 480; *McLean* v. *Rhodes* (1913), 46 N.S.R. 491; *Forbes* v. *Daw* (1920), 19 O.W.N. 262; *Furlong* v. *Carrol, supra,* (perhaps limited to *dangerous* fires).

[19] *Supra.*

[20] *Supra.*

The above considerations apply less clearly to the use of a blow-torch in thawing frozen water pipes. *Rylands* v. *Fletcher* has generally been limited to cases of large powerful agencies, e.g. reservoirs, powder magazines, tanks of oil, steam boilers, and does not apply to lesser agencies, e.g. water piped into a house in ordinary quantities for ordinary purposes.[21] The use of a blow-torch for thawing frozen water pipes by one experienced in its use can be said to be so unlikely to eventuate in harm that it is to be placed in the class with the kitchen stove or ordinary water pipe. If *Rylands* v. *Fletcher* does apply to a blow-torch, the defendant might avoid liability by showing that F was acting without his authority and hence as a stranger, in which case the defendant would not be liable.[22]

This brings us to the main point of difficulty in the case: was F acting under the implied authority or permission of L? The trial judge must have been of the opinion that he was, because he says L must be treated as responsible for F's acts. In the Court of Appeal, two judges felt that he was so authorized, and two felt that he was on a frolic of his own. One judge expressed no opinion on the matter.

This seems to be a question of fact, to be decided by the trial judge acting as a jury, and his finding should not be upset unless clearly against the evidence.[23]

Two judges spoke of presumptions, and the burden of proof; the dissenting judge treated the case upon the theory that a presumption arose which shifted the burden of proof on the issue of negligence. It was held in *Port Coquitlam* v. *Wilcox*,[24] that a presumption arose. The Court there based its decision on a dictum in *Becquet* v. *Mac Carthy*,[25] of Lord Tenterden when he said: "Indeed, by the law of this country before it was altered by the statute 6 Anne c. 31, s. 6, if a fire began on a man's own premises, by which those of his neighbour were injured, the latter, in an action brought for such an injury, would not be bound in the first instance to show how the fire began, but the presumption would be (unless it were shown to have originated from some external cause) that it arose from the neglect of some person in the house. We cannot then say that a French judgment, founded on the article in question in the Civil Code, is

[21] *Ross* v. *Fedden* (1872), L.R. 7 Q.B. 661; 41 L.J.Q.B. 270; *McCord Rubber Co.* v. *St. Joseph Water Co.* (1904), 181 Mo. 678.

[22] *Box* v. *Jubb* (1879), 4 Ex. D. 76. As to who is a stranger, see *Black* v. *Christchurch Finance Co.*, [1894] A.C. 48.

[23] See *Khoo Sit Hoh* v. *Lim Thean Tong*, [1912] A.C. 323.

[24] [1923] 3 D.L.R. 194.

[25] (1831), 2 B. & Ad. 951.

necessarily bad, because it is not averred in the proceedings that the accident was caused by negligence."[26]

It is doubtful whether a presumption should arise, and the reasoning of the dictum in *Becquet* v. *Mac Carthy* (*supra*) is wholly unconvincing. There was no *presumption of negligence* before the statute of Anne. But, what did exist was the old primitive notion of absolute liability, with perhaps certain definite exceptions. The concept of *negligence* had not been evolved in the law at that period. Then comes the statute, not a general declaratory statute, but a specific provision aimed to make a definite change. Whence then comes the presumption of negligence?

Such a presumption was held not to exist in a dictum in *Wolfe* v. *The King*.[27] Unfortunately, no authorities are there cited. The doctrine of res ipsa loquitur would have been applicable here if the defendant had sat tight,[28] but he has not, and the doctrine has no application to the case. Many legal utterances, however,[29] confuse the doctrine of res ipsa loquitur with presumptions, and treat res ipsa loquitur as a presumption. Res ipsa loquitur is not a presumption. A presumption is a *mandatory* inference. Res ipsa loquitur provides a means of getting to the jury where the defendant sits tight with knowledge as to the circumstances of the cause of the plaintiff's injury in his control and in a situation where the most probable inference is negligence.

The members of the jury are *at liberty* to draw an inference of negligence but they are not *bound* to do so, as they would be in the case of a presumption. This confusion of res ipsa loquitur with presumptions may explain the dictum in *Becquet* v. *Mac Carthy* (*supra*) and the cases following it.

Assuming that there is a presumption, to give it the effect of shifting the burden of proof, it is submitted, is erroneous. There are as many burdens of proof as there are issues of fact raised by the pleadings. These burdens *never* shift. A presumption may shift the duty of introducing evidence but the burden of proof is a different thing entirely; it is the ultimate risk of non-persuasion on the issue as raised by the pleadings.[30] When evidence has been produced which rebuts a presumption, its mandatory force is gone,

[26] (1831), 2 B. & Ad. 951, at p. 958.
[27] (1921), 57 D.L.R. 266.
[28] *Kearney* v. *London Brighton & South Coast Ry.* (1870), L.R. 5 Q.B. 411.
[29] See Blackburn, J., in *Kearney* v. *London Brighton & South Coast Ry., supra.*
[30] See the classic discussion of this by James B. Thayer in 3 Harv. L. Rev. 141, 4 Harv. L. Rev. 45.

its raison d'être has ceased to exist and it does not remain as evidence.[31] The burden, as here explained, remains on the party who has the risk of non-persuasion.[32]

The principal case may be supported on the grounds stated on the last page,[33] of the report, namely, that the plaintiff has not carried the burden of proving negligence. That is, after all the evidence is in, the question of negligence by F is left doubtful, and the plaintiff, not having made out his case, must fail.[34]

A further point of difficulty is involved in this case. When the statute of Anne altered the common law liability and provided exemption for the occupier in the case of accidental fires, what of the burden of proving that the fire was accidental? The general rule is that when a statute changes the common law by providing an indemnity or a defence, the burden is on the party claiming that indemnity or defence to prove that his case comes within the statute.[35]

To this rule there are however exceptions, e.g., cases under the Statute of Limitations[36] and the Statute of Frauds.[37] The cases on liability for the spread of fire do not discuss the problem from this angle. Beven says that the effect of the statute is to shift the burden of proof on the issue of negligence from the defendant to the plaintiff.[38]

The English cases apparently do not discuss the point but (leaving *Rylands* v. *Fletcher* out of the discussion) an inference may be drawn that proof of neglience would be required from the fact that the courts speak of finding negligence. They do not say that they fail to find due care, as they would if the burden of proving due care was on the defendant.

The Canadian cases, which do not apply *Rylands* v. *Fletcher*, take the stand that the plaintiff must prove negligence.[39] Some

[31] *Hingeston* v. *Kelly* (1849), 18 L.J. Ex. 360; *Martiartu* v. *Royal Exchange Assurance*, [1923] 1 K.B. 650; *Carnat* v. *Matthews* (1921), 59 D.L.R. 505; [1921] 2 W.W.R. 218.

[32] *Amos* v. *Hughes* (1835), 1 M. & Rob. 464; *Soward* v. *Leggatt* (1836), 7 C. & P. 613; *Cowie* v. *Robins* (1916), 10 W.W.R. 287; 34 W.L.R. 245; *Hingeston* v. *Kelly, supra*.

[33] [1928] 4 D.L.R. 172 at p. 181.

[34] *Cowie* v. *Robins, supra*. For a discussion of the theory of burden of proof, see the article Evidence in 4 C.E.D. (Ont.), sec. 99, especially at p. 786, and *C.P.R* v. *Pyne*, [1919] 3 W.W.R. 125; 48 D.L.R. 243, decided by the Privy Council, there noted.

[35] American & English Encyclopedia of Law, vol. 23, p. 399.

[36] Odgers on Pleading and Practice, 9th ed., p. 309.

[37] *Ibid.*, p. 104.

[38] Beven on Negligence, 4th ed., vol. 1, p. 626.

[39] See cases in footnote 16, *supra*. See also *Brewer* v. *Humble* (1886), 26 N.B.R. 495. (In this case plaintiff was defendant's lessor).

Canadian cases do not discuss the statute of Anne, but reach this result without its assistance. It is settled in Canada that in cases of fires spreading from railway locomotives, authorized by statute to be run, the plaintiff must prove negligence.[40]

The American law is well settled that negligence is the gist of the liability, and that the burden of proof of negligence is on the plaintiff.[41]

It seems that we may tentatively conclude that in jurisdictions which do not apply *Rylands* v. *Fletcher* to the spread of fires kindled for ordinary purposes, the burden of proving negligence is on the plaintiff. This can best be sustained on the theory that although the statute of Anne changed the common law, this change was merely a statutory expression of the development of the doctrine of no liability without fault.

M. M. MACINTYRE.

* * *

RYLANDS V. FLETCHER—ABSOLUTE LIABILITY—NEGLIGENCE.—In [1928] 4 D.L.R. Part 3 there appears an editorial comment on *Stephen* v. *McNeill*[1] which deserves some notice. The commentator says that *Rylands* v. *Fletcher*[2] is a case of negligence and he reasons thus: negligence is a breach of duty. The act of bringing a dangerous agency on one's land creates a duty to see that such agency does not escape and do harm. Therefore the mere fact of its escaping is a breach of duty, i.e., negligence. He regards *Stephen* v. *McNeill* as establishing an exception to the above rule, in the case where the dangerous agency is one that is ordinarily used to enable the owner properly to enjoy his property.

If one is allowed to define his terms to suit himself there is, of course, no limit to what one may include in the terms. If one makes the definition of duty sufficiently wide in its scope, and regards negligence as a breach of that duty, one gets a formula which will give some sort of result undoubtedly. The difficulty is that the standard set is too high. Since *Vaughan* v. *Menlove*[3] the standard by which negligence has been judged is the conduct of the "prudent man," or the "reasonable man," or the "average man." Always there is found in the definitions, the idea that the standard is attainable by ordinary mortals. Why say, now, that a new standard shall

[40] *Oatman* v. *Michigan Central Ry. Co.* (1901), 1 O.L.R. 145; *New Brunswick Ry. Co.* v. *Robinson* (1884), 11 Can. S.C.R. 688.
[41] Cases in note 11, 45 Corpus Juris 850.

[1] [1928] 4 D.L.R. 172.
[2] (1868), L.R. 3 H.L. 330.
[3] (1837), 3 Bing. N.C. 468.

be set for certain kinds of cases, an absolute standard which will judge conduct not by the qualities of the particular defendant, nor by the qualities of the standard man, but by fixing an absolute duty and calling breach of that duty negligence?

What is to be gained by explaining *Rylands* v. *Fletcher* on such a ground? What is the difference between the absolute duty suggested by the comment and the absolute liability declared by *Rylands* v. *Fletcher*? There is none, in the result. The commentator says there is an absolute duty to prevent the spread of a dangerous thing brought on one's land. If the thing does spread, the duty is *ipso facto* violated and the occupier is *ipso facto* liable. This brings us to the same goal as was reached in *Rylands* v. *Fletcher* but the paths followed are entirely different. *Rylands* v. *Fletcher* said: disregard negligence and care, disregard everything, except what actually happened, and lay down the rule, that if certain things do happen, then liability will attach to certain persons. After *Rylands* v. *Fletcher* the law of negligence remained exactly where it was before. After the comment in the Dominion Law Reports, we shall have several kinds of negligence. There does not seem to be any justification for unnecessarily upsetting a well established conception in this way.

It is interesting to note the efforts made from time to time to explain *Rylands* v. *Fletcher* on some other ground than the ground selected by the great judges who decided the case. Sir Frederick Pollock has said that the doctrine of negligence, together with liability for the acts of independent contractors and with the maxim "Res ipsa loquitur," would be sufficient to deal with the case.[4] Salmond[5] says that *Rylands* v. *Fletcher* lays down a rule whereby the occupier of land is responsible for the escape of dangerous things if caused by the negligence of any person except a mere stranger. The late Dean Thayer of Harvard criticized the rule[6] as did Professor Jeremiah Smith.[7] It has been called "an anomalous exception" to the modern theory of liability by V. C. MacDonald.[8] Yet it persists and even flourishes, in the language of Dean Pound, of Harvard[9]: "Nor have the predictions that the doctrine of *Rylands* v. *Fletcher* would disappear from the law through the courts smothering it with exceptions been verified in the event. . . In America

[4] Pollock: The Law of Torts, 12th ed., p. 496; 143 R.R. (preface).
[5] Salmond: The Law of Torts, 7th ed., p. 360.
[6] See 29 Harv. L. Rev. 801.
[7] See 30 Harv. L. Rev. 241.
[8] 1 C.B. Rev. 155.
[9] An Introduction to the Philosophy of Law, pp. 156-158.

where we had been told it was decisively rejected, it has been applied in the past decade by more than one court. . . The vitality and persistence of the doctrine against theoretical assault for more than a generation show that it is more than a historical anomaly or a dogmatic blunder."

Those who think the standards of *Rylands* v. *Fletcher* unmoral or unethical will have to pass similar strictures on the rule that a master is liable for the torts of his servant, no matter how free from fault the master himself is; on the rule that a man who thinks a little more slowly than the average man and therefore drives his car against a pedestrian, is liable, even though he has done the best he could; on the rule that one has to make good the damage caused by his trespassing animals, regardless of his negligence; on the rule embodied in several scores of Workmen's Compensation Acts in America and elsewhere. *Rylands* v. *Fletcher* may not be so anomalous as is sometimes supposed, and it may be that Willes, Blackburn and the other great masters of the common law who decided the case have put it on a foundation that does not require collateral support.

A. L. MacDonald.