CASE AND COMMENT

MORTGAGE—CONSOLIDATION—DIFFERENT MORTGAGORS.—"He who seeks equity must do equity." The doctrine of consolidation of mortgages was founded upon this equitable maxim.[1] But, as in the case of other equitable maxims, its application has been so limited by definite rules that one may well speculate as to whether the invoking of it today in respect of consolidation is not misleading.[2] Equity, having given to a mortgagor, despite his default and the forfeiture of his interest in the subject-matter of his mortgage at common law, a right of redemption, put a price upon the exercise of it where he had made two mortgages and had lost his contractual right to redeem them. He could not redeem one without redeeming the other if the holder of the mortgages so required. This is an example of the application of the doctrine of consolidation in its simplest form. The doctrine has not met with a general approbation by the courts[3] and the trend of modern authority is towards a limitation of it. In 1881 in England, a partial blow was struck at it by statute[4] whereby it provided that the right to consolidate could only be maintained where it is reserved in the mortgages or in one of them.

Two cases involving the doctrine have recently come before Ontario courts. In *Watkins* v. *Adamson*[5] a mortgage was given by two partners on partnership lands to secure a partnership debt to the plaintiff and later one of the partners gave a mortgage on another lot of land to secure a private debt to the plaintiff. The plaintiff commenced an action for foreclosure against the partner who gave the second mortgage and signed judgment for foreclosure and a day was fixed for redemption. No final order of foreclosure was signed. Then the present action was brought on the first mortgage and the plaintiff claimed the right to consolidate the two mortgages. Orde,

[1] See *Cummins* v. *Fletcher* (1880), 14 Ch. D. 699 at p. 708; Falconbridge: Law of Mortgages, p. 137; Falconbridge: Consolidation and Tacking, (1919), 39 Can. L.T. 17 at p. 18.

[2] See Roscoe Pound: The Maxims of Equity, (1921), 34 Harv. L. Rev. 809.

[3] See *In re Raggett* (1880), 16 Ch. D. 117 at p. 119; *Pledge* v. *Carr*, [1894] 2 Ch. 328 at p. 330, and on appeal *sub nom. Pledge* v. *White*, [1896] A.C. 187 at p. 192; *Re Union Assurance Co.* (1893), 23 O.R. 627 at p. 637.

[4] Conveyancing Act, s. 17. See now to the same effect Law of Property Act, 1925, s. 93.

[5] (1928), 63 O.L.R. 315; [1929] 1 D.L.R. 572.

J.A., decided against this claim of the plaintiff, notwithstanding the fact that the two equities had become united in one person holding in the same interest. This limitation of the application of the doctrine is consistent with the view of the text-writers[6] and the attitude of the courts.[7] Orde, J.A., refused to follow *Beevor* v. *Luck*[8] where an opposite result was reached. Although never overruled, that case has been adversely commented upon by judges.[9] In any event, did not the plaintiff, by proceeding to judgment in the action for foreclosure on the mortgage given by the single partner, elect to treat this mortgage as a separate transaction in every way and was it not too late after the judgment, which decreed the sole price of redemption of it, to claim the right to consolidate it with the other mortgage? As the learned judge did not hear argument on this point, he made no ruling upon it.

In *Gillespie* v. *Montgomery*[10] five mortgages given by the same mortgagor were sought to be consolidated by the mortgagee. The trustee in bankruptcy of the mortgagor contended that the mortgagee could not do so on the ground that one of the mortgages in question was a second mortgage made directly to the mortgagee and the other four were assignments by way of mortgage of mortgages given to the assignor by four different mortgagors, in short, four sub-mortgages. It was held that, as the five mortgages were given by the same mortgagor in the same right to the mortgagee, the right to consolidate could be exercised. It is immaterial that the securities comprise properties of different natures.[11]

Whatever justification there was originally for the doctrine of consolidation, it must to-day bring about results never contemplated by the majority of mortgagors and mortgagees. When a mortgage is given, the mortgagor would be surprised to learn that his right to redeem it may depend upon the redemption of another mortgage to be given, for example, five years later. The mortgagee, in turn, is satisfied with the particular security he is receiving and undoubtedly treats the mortgage as an independent transaction. The English

[6] See Falconbridge: Law of Mortgages, p. 140; Coote on Mortgages, 9th ed., p. 890 *et seq.*; Halsbury: Laws of England, vol. 21, pp. 209, 210.

[7] See footnote no. 3, *supra.*

[8] (1867), L.R. 4 Eq. 537.

[9] See James, L.J., in *Cummins* v. *Fletcher* (1880), 14 Ch. D. 699 at p. 710; Selborne, L.C., and Lord Blackburn in *Jennings* v. *Jordan* (1881), 6 App. Cas. 698 at pp. 701 and 718 respectively.

[10] (1928), 34 O.W.N. 261.

[11] *Tassel* v. *Smith* (1858), 2 De G. & J. 713; *Watts* v. *Symes* (1851), 2 De G. M. & G. 240; *Spalding* v. *Thompson* (1858), 26 Beav. 637; *Cracknell* v. *Janson* (1879), 11 Ch. D. 1.

statute in providing that the right to consolidate may only be exercised where it is reserved serves to give effect to the real intention of the parties.

S. E. S.

* * *

GIFT—UNDUE INFLUENCE—FIDUCIARY RELATION—INDEPENDENT LEGAL ADVICE.—One of the fundamental principles of our law is that a person in a fiduciary position shall not be allowed to use the influence and knowledge which he derives from his position to his own advantage and to the prejudice of those whom he is bound to protect.[1] In *Inche Noriah* v. *Shaik Allie Bin Omar*,[2] on appeal from the Straits Settlements, some aspects of the application of this "great rule of the Court" were considered for the first time by an ultimate court of appeal.

The appellant, a Malay woman who was a widow of an advanced age and wholly illiterate, executed a deed of gift of certain landed property in favour of the respondent, a nephew by marriage. Before executing the deed, which related to the whole of her property, she had independent advice from a lawyer.

Applying the doctrine of *Allcard* v. *Skinner*,[3] their Lordships were of the opinion that the relations between the appellant and respondent were amply sufficient to raise the presumption of the influence of the respondent over the appellant and to render it incumbent upon the former to prove that the gift was the spontaneous act of the appellant and that it was the result of the free exercise of her will.

Their Lordships were satisfied that there were no circumstances, except possibly the giving of independent legal advice, to rebut the presumption of influence. But, in view of conflicting expressions of opinion of various judges in previous cases,[4] they felt called upon to

[1] Lord Eldon in *Gibson* v. *Jeyes* (1801), 6 Ves. 266, at p. 278 said, "It is asked, where is that rule to be found. I answer, in that great rule of the Court, that he, who bargains in matters of advantage with a person placing confidence in him is bound to shew, that a reasonable use has been made of that confidence: a rule applying to trustees, attorneys, or any one else."

[2] [1929] A.C. 127.

[3] (1887), 36 Ch. D. 145, particularly at p. 171. Cf. *Bohan* v. *Walker*, [1928] 4 D.L.R. 630. (*Donatio mortis causâ* by a parishioner to his priest).

[4] See *Rhodes* v. *Bate* (1865), L.R. 1 Ch. 252 at p. 257; *Powell* v. *Powell*, [1900] 1 Ch. 243 at pp. 245-6; *Morley* v. *Loughran*, [1893] 1 Ch. 736 at p. 752; *In re Coomber*, [1911] 1 Ch. 723; in *Weir* v. *Weir*, [1920] 1 W.W.R. 785, at p. 786, Murphy, J. said: "The principle . . . that where the donee stands in such a relation to the donor, as to expose the donor to the influence of the donee the latter can maintain no deed of gift from the donor unless he can establish that it was the result of the donor's free will *and effected by the intervention of some indifferent person,* is not affected

state their answer to the question, whether the presumption can be rebutted in any other way. Lord Hailsham, L.C., said: "But their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted."[5]

Then a further question arose as to whether, in order to rebut the presumption of influence, the independent legal advice must be acted upon. The reply to this was: "Nor are they [their Lordships] prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the *result of the free exercise of independent will.*"[6] As it does not appear from the facts that the lawyer approved of the deed of gift, this statement would also appear to be an *obiter dictum.*

Finally the Privy Council laid it down that the independent legal advice to rebut the presumption must be given with a knowledge of all the circumstances. As the lawyer in the case before the Board did not know that the property which was being given away constituted practically the whole estate of the donor, it was held that the deed should be set aside.

S. E. S.

* * *

CONFLICT OF LAWS—EVIDENCE—COMPETENCY TO PROVE FOREIGN LAW.—The headnote of *Gold* v. *Reinblatt*[1] in the Supreme Court Reports is as follows: "In order to prove the law of a foreign country it is not necessary that the witness should be a lawyer actually practising his profession in that country; but, inasmuch as foreign law

by the cases cited to me." See also *Mason* v. *Seney* (1865), 11 Gr. 447, 12 Gr. 143; *McCaffrey* v. *McCaffrey* (1891), 18 O.A.R. 599 at p. 606; *Vanzant* v. *Cootes* (1917), 40 O.L.R. 556; *Toronto Gen. Trusts Corpn.* v. *Lackie* (1917), 13 O.W.N. 243; and as to necessity for independent advice in the case of a gift from a client to his solicitor, *Davis* v. *Walker* (1902), 5 O.L.R. 173, especially at p. 179. On the other hand in *Dixon* v. *Garbutt* (1908), 11 O.W.R. 292, at pp. 295-6, Teetzel, J., said: "While I would hesitate to say that this is a case in which the gift could not stand, in the absence of independent advice, I have no hesitation in finding that this is a case in which the burden should be cast upon the defendant to prove that the transaction was not only righteous, but that the donor deliberately did the act knowing its nature and effect." See also *Trusts and Guarantee Co.* v. *Hart* (1902), 32 Can. S.C.R. 553, especially at p. 558.

The decisions in the foregoing Canadian cases appear to be consistent with the doctrine laid down in *Allcard* v. *Skinner supra,* but the expressions used by the judges therein are quite as at variance as those in the English cases noted above.

[5] [1929] A.C. 127 at p. 135. See also *Krys* v. *Krys,* [1929] 1 D.L.R. 289.

[6] *Ibid.*

[1] [1929] S.C.R. 74; [1929] 1 D.L.R. 959. The headnote in the latter report relates to another point.

is a question of fact which must be proved as any other fact by a competent and qualified witness, any person whose occupation makes it necessary for him to have knowledge of the law of such foreign country may be a competent and qualified witness, the competency and qualification of such witness being a matter for the appreciation of the court."

The propositions of law just quoted are not, either verbally or in substance, to be found in the judgment of the Supreme Court of Canada, but are merely the reporter's statement of the grounds upon which the witness's evidence was admitted, these grounds being presumably inferred from the judgments in the Court of King's Bench, which were approved in a general way in the Supreme Court. When, however, the report of the case in the Court of King's Bench[2] is examined, it does not clearly appear that the grounds of judgment are accurately set out in the headnote in the Supreme Court Reports, or what those grounds were.

The foreign law to be proved was the law of Austria. Prior to the outbreak of the war the witness was studying law at the University of Czernowitz in the province of Bukovina in Austria-Hungary, and after the war he completed his course there and acquired the degree of doctor of law. In 1919 he was admitted to practice law, and began practising, in the same province of Bukovina, which had, by the treaty of peace, been transferred to Rumania, but in which the Austrian Civil Code remained in force. In 1922 he came to Canada, and at the time of the trial of the action, in 1925 or 1926, was an insurance agent in Montreal and was studying law at McGill University.

Before proceeding with the discussion of *Gold* v. *Reinblatt;* it is, I think, worth while to attempt to restate concisely the rules generally applied by English and Canadian courts to the question of the competency of a witness to prove foreign law. I submit the following:

Rule 1. A person is competent to prove the law of a foreign country if, and, as a general rule, only if, he knows that law by virtue of his being, or having been,

(a) a judge or legal practitioner in that country; or

(b) a teacher of law in that country, or the holder there of some other office the duties of which entail a knowledge of the law of that country.

[2] *Reinblatt* v. *Gold* (1928), Q.R. 45 K.B. 136, reversing (1926), Q.R. 65 S.C. 17.

It is said that the "best evidence"[3] is that of a person qualified under clause (a), but under either clause (a) or clause (b), the witness has acquired his knowledge by virtue of his office—he is *peritus virtute officii.*

Rule 2. A person is not competent to prove the law of a foreign country (a) if he has merely studied the law in that country, and, *a fortiori,* (b) if he has merely studied the law of that country in another country.

The decision in *Bristow* v. *Sequeville*[4] specifically supports clause (b) and the discussion in that case suggests that the knowledge of law should be acquired in the foreign country. *In the Goods of Bonelli*[5] and *In re Turner*[6] specifically support clause (a), and in the latter case the opinion is expressed that the witness should be a professional man or hold an official position in the foreign country. In the report of *Embiricos* v. *Anglo-Austrian Bank*[7] in the Court of Appeal a statement of Austrian law is quoted from an affidavit of a doctor of law of the University of Vienna, but it is pointed out in the judgment of the trial judge[8] that there was no dispute as to the foreign law, the expert witnesses of both parties being in agreement.

Rule 3. Much must be left to the discretion of the trial judge, but if the foreign law is foreign in essence as well as in name, a stricter rule as to competency should be applied than if the foreign law is germane to the law of the forum.

In substance this rule is stated in Wigmore on Evidence, 2nd ed., 1923, sec. 690. The author says that the courts in England have on the whole been more strict than the courts in the United States on this question of "expert capacity," and expresses the opinion that for a system of law foreign in essence as well as in name residence in the foreign country and perhaps practice might occasionally be required.

Rule 4. A person who knows the law of the foreign country by virtue of holding in another country an office which entails a knowledge of the law of the foreign country may, in special circumstances, be held to be competent to prove that law.

The exceptional character of this rule is emphasized in *Wilson*

[3] *Rex* v. *Naoum* (1911), 24 O.L.R. 306 at p. 311, where many of the cases are cited.
[4] (1850), 5 Exch. 275.
[5] (1875), 1 P.D. 69.
[6] [1906] W.N. 27.
[7] [1905] 1 K.B. 677 at pp. 678-9.
[8] [1904] 2 K.B. 870 at p. 873.

v. *Wilson.*[9] In *Brailey* v. *Rhodesia Consolidated*[10] a reader in Roman-Dutch law to the Incorporated Council of Legal Education in England was held to be competent to prove the law of Rhodesia, although he had never practised law or held an official position in Rhodesia. His evidence was that the law of Rhodesia was the same as the law of England on the point in question, and therefore the effect of the admission of his evidence was the same as if his evidence had been rejected.

Foote[10a] doubtless goes too far in stating that "the only witness competent to give such evidence is some person who is conversant with the foreign law, either as a legal practitioner in the foreign state, or as holding some other office there the duties of which would entail such knowledge;" but it is submitted that it may fairly be said that rule 1, stated above, is the general rule, and that a court should not, in the exercise of such discretion as it may possess, depart from this rule except in special circumstances. The rule is not of a technical character, but is based upon the substantial consideration that, generally speaking, a person who has lived in a country and has, in the course of his occupation, had occasion, frequently or habitually, to apply its law to particular circumstances, in the light of the practice of the courts and the course of their decisions, will in fact be able to discriminate between the values of different sources and to give an accurate statement of the law to the court of another country. Even in the case of a codified law, a person who has not lived in a country and had immediate contact with the law in its practical application is less likely to be able to give an accurate statement of it.

The rule that the witness should be *peritus virtute officii* is stated in the leading case of the *Sussex Peerage.*[11] It would not appear to be quite accurate to say, as was said in *Rex* v. *Naoum,*[12] that "Bishop Wiseman, who had held a quasi-judicial position at Rome, was held qualified to prove the canon law as to marriage which was in force in that city." The decision was rather that the bishop, by virtue of his holding the office of coadjutor to a vicar-apostolic in England, was to be considered as a person skilled in the Roman canon law of marriage and therefore competent to prove that law.

[9] [1903] P. 157; cf. *Cartwright* v. *Cartwright* (1878), 26 W.R. 684, in which an English barrister practising in Canadian appeals before the Privy Council was held not to be competent to give evidence as to the validity, according to the law of Canada, of a marriage solemnized in Canada.

[10] [1910] 2 Ch. 95.

[10a] Private International Law, 5th ed., 1925, p. 576.

[11] (1844), 11 Cl. & F. 85 at p. 134.

[12] (1911), 24 O.L.R. 306 at p. 311.

The witness's office in England entailed a knowledge of Roman canon law for the purpose of ecclesiastical administration in England.

The witness in *Gold* v. *Reinblatt* seems to have been qualified under rule 1, subject to one objection, namely, that he had practised law not in Austria, but in Rumania. This objection, if taken, would be purely technical, because the province of Bukovina, in which he practised, had been only recently separated from Austria-Hungary and was still governed by the Austrian Civil Code; and it does not appear from the reports of the case that the doubt as to his competency as a witness of Austrian law turned on the objection in question.

The headnote, already quoted, would seem to indicate that the objection was that he was not a lawyer "actually" practising his profession in the foreign country. I conjecture that the word "actually" is a translation of the word "actuellement" occurring in the judgment of Cannon, J., in the Court of King's Bench. The French word means primarily "now" or "presently," whereas the English word means "really" or "in fact." It is, I think, obvious that a person may be a competent witness of the law of a foreign country where he formerly practised law, although he may at the time of giving his evidence, have ceased to practise law there, or even be studying law or selling insurance in another country; but it is quite a different thing to say that it is not necessary that the witness should ever have been in actual practice.

If the headnote means that the witness's study of law at a university would qualify him, the doctrine enunciated is inconsistent with the current of the English cases and, it is submitted, has not yet received the support of the Supreme Court of Canada.

Still less, it is submitted, has the Supreme Court of Canada held that, as Cannon, J., suggests, any educated person who has lived in Austria and who testifies that he knows the law of Austria as to community or separation of property between spouses, is a competent witness to that extent.

JOHN D. FALCONBRIDGE.

* * *

MORTGAGE—ACTION ON COVENANT—INABILITY OF MORTGAGEE TO RESTORE ESTATE.—One of the troublesome problems of the law of mortgages has been disposed of, as far as the Province of Ontario is concerned, by the decision of the Appellate Division of the Supreme Court of Ontario in the case of *Servais* v. *Shear*.[1]

[1] (1928), 63 O.L.R. 381; [1929] 2 D.L.R. 633.

The problem, briefly stated, is: when a man mortgages land to another and it is sold for taxes, and the mortgagee buys the property, either at the tax sale or from a purchaser at the tax sale, can the mortgagee sue the mortgagor on his covenant and recover a judgment for payment, without being forced to reconvey the land to the mortgagor?

At the trial,[2] Rose, J., stated the general rule that "the mortgagee suing on the covenant must be in a position to reconvey the land upon payment of what is due," with an exception that it is inapplicable "where the inability to reconvey is attributable not to the mortgagee but to the default of the mortgagor." The learned judge took the view that "the plaintiff did not sue until after he had taken a conveyance from the municipality and had sold and had conveyed to Sprovieri; so that his present inability to reconvey to the defendants (the mortgagors) upon payment by them is due entirely to his own act, and the general rule applies unless it has become inapplicable by reason of the fact that the title which the plaintiff took under the tax-deed and passed on to Sprovieri was a title entirely distinct from the plaintiff's former title as mortgagee."

In deciding this case, Rose, J., followed the decision in *Miller* v. *McCuaig*,[3] in which a mortgagor moved to stay proceedings by a mortgagee who, after buying the land at a tax sale, had obtained a judgment upon the covenant in a mortgage. Taylor, C.J., refused to stay the proceedings as he was of opinion that a mortgagee who buys at a tax sale is in the same position as if he had bought at a sale by a prior mortgagee. He can resist a suit brought by the mortgagor to redeem, but if "he sues upon the covenant, he must . . . be regarded as having elected to treat the mortgage as still redeemable."

Rose, J., admitted an exception to the general rule in the case where "the inability to reconvey is attributable not to the mortgagee but to the default of the mortgagor." Here the mortgagee was unable to reconvey because of the default of the mortgagor with regard to the payment of taxes. Had the mortgagee sued the mortgagor immediately after the tax sale and before he had bought the land, he would certainly have been able to recover a judgment without having to reconvey the land.

In *Clary* v. *Boulay*[4] the Appellate Division of the Supreme Court of Ontario held that "a mortgagee is entitled for his own benefit to

[2] (1928), 61 O.L.R. 490; [1928] 1 D.L.R. 549.
[3] (1890), 6 Man. R. 539.
[4] (1928), 61 O.L.R. 616; [1928] 2 D.L.R. 144.

purchase the mortgaged lands when sold for taxes, unless disentitled by circumstances other than that of being mortgagee." Mulock, C.J.O., said: "The mortgagee owed no duty to any one to pay the taxes, did not use her position as mortgagee to become purchaser, did not purchase in her character as mortgagee, took no part in connection with the sale except to bid and pay the purchase-money, and she paid it not *quâ* taxes but *quâ* purchase-money."[5] This makes the case of the mortgagee in *Servais* v. *Shear* even stronger as he did not buy the land at the tax sale itself but bought it from the purchaser at the tax sale.

On appeal in the *Servais* case, Latchford, C.J., held that the decision of Rose, J., was contrary to the decision in *Clary* v. *Boulay* and Riddell, J.A., took the view that when the land was sold for taxes, both the mortgagor and the mortgagee lost their interests in the property,[6] and that when the mortgagee bought the land he was not buying back his interest under the mortgage, but was getting an entirely different title. Where he had formerly had an interest subject to the mortgagor's right of redemption, he now had a fee simple absolute under the tax deed. Therefore the case was as if a stranger had bought the land and the mortgagee would be able to recover a judgment against the mortgagor without being forced to reconvey the land.

This decision is strengthened by the decision of the Privy Council in the case of *Gordon Grant* v. *Boos*,[7] where a mortgagee in Trinidad sued and obtained a decree of sale instead of foreclosure. At the judicial sale, the mortgagee got permission to bid and bought the property for a great deal less than the mortgage debt. He entered into an agreement to sell the land and brought an action in the Supreme Court of New York against the mortgagor for the balance of the debt. The mortgagor then sued the mortgagee in Trinidad claiming to be entitled to a reconveyance of the land. Lord Phillimore, delivering the judgment of the Privy Council, held that the mortgagor could not succeed, on that ground that, there having been a judicial sale and the land having brought less than

[5] (1928), 61 O.L.R. 616 at p. 618; [1928] 2 D.L.R. 144 at p. 145.

[6] On this point, see *Soper* v. *City of Windsor* (1914), 32 O.L.R. 352 at p. 367. Riddell, J., quotes Blake, C., in *Tomlinson* v. *Hill* (1855), 5 Gr. 231: "The land tax is made a charge upon the property itself, to the payment of which all persons having any interest in the land are bound to look; and it follows that a conveyance by the Sheriff in pursuance of a sale for arrears of taxes operates as an extinguishment of every claim upon the land and confers a perfect title under the Act of Parliament." See also *Re Hunt and Bell* (1915), 34 O.L.R. 256.

[7] [1926] A.C. 781.

the mortgage debt, the mortgagor was liable to pay the balance of the debt owing. He said: "But, if the mortgagee does not use the remedy of foreclosure but sells under a power of sale given to him by the mortgage deed and brings into account the whole sum thus received and then proceeds to sue his debtor for the balance only, there is no question of double payment, and there would seem to be no reason in principle why he should not recover the balance."[8]

Although this case is not directly in point, the principle that the mortgagor must pay the debt but must not be forced to pay it twice, is applicable to *Servais* v. *Shear*. At first sight, it looks as if there is double payment as the mortgagor not only has to pay the debt but he loses his land as well. But this is not the case, as he did not lose his land to the mortgagee directly, but, through his own default, he lost it to the municipality who sold it. He was then liable to pay the debt, although he had lost the land; and under the doctrine of *Clary* v. *Boulay*, the fact that the mortgagee had bought the land at a tax sale or from a purchaser at a tax sale makes no difference. The mortgagor is not paying twice, but is merely paying a just debt once; and no court could, in justice, prejudice the rights of a mortgagee by refusing him a judgment in such a case.

NORMAN A. TODD.

* * *

LANDLORD — NEGLIGENCE — INVITEE.—A very large measure of protection was given to the landlord under the common law, but the trend of modern statutes and decisions of the courts is to lay a greater burden upon him. This may be due to the fact that in these days the landlord is often a soulless corporation against which the individual needs protection. This trend may be observed in *Taylor* v. *People's Loan and Savings Corporation*.[1] In this case the plaintiff belonged to a lodge which had rooms on the fourth floor of a building owned by the defendants. One night the building caught fire and as there was no fire escape the plaintiff jumped into a fire net and as a result was severely injured. Fortunately for the plaintiff the Court allowed him the full measure of damages asked for in his statement of claim. The result seems like an extension of the rights of the plaintiff for he was held to be an invitee.

[8] [1926] A.C. 781 at p. 786.
[1] [1928] 4 D.L.R. 598.

The facts show that the lodge was not an incorporated body, and there was not any contractual relationship between the plaintiff and the defendants. The next class of "licensee with an interest" appears even too high for him. If that is so, then it does not seem that there should be a duty on the landlord in a case like this to provide any greater measure of security than that offered by the premises in the actual state in which they are found by the person coming thereon.

R. E. INGLIS.

* * *

INTERNATIONAL LAW—HOT PURSUIT—THE FREEDOM OF THE SEAS.—The I'm Alone was a Canadian schooner, registered in Lunenburg, Nova Scotia, of the type known as a "Gloucester Fisherman" equipped with auxiliary engines of two hundred horse-power. She had been engaged for a number of years, under various owners, in endeavouring to smuggle liquor into the United States. On March 12th, 1929, she cleared from Belize, British Honduras, with liquor for Hamilton, Bermuda. On the morning of March 20th, she anchored near Trinity Shoals off the coast of Louisiana, ostensibly to carry out repairs to one of her engines. Shortly afterward the United States coast guard cutter Walcott came up and the I'm Alone hoisted her anchor and sailed for the open sea (in the general direction of Mexico). The Walcott followed and ordered her to halt, and, on her refusing to do so, opened fire. The Walcott's gun jammed and she was unable to stop the I'm Alone. The chase continued, and on the morning of the 22nd the cutter Dexter, summoned by wireless, came up and sank the I'm Alone by shell fire. A heavy sea was running at the time, and before the crew of the I'm Alone could be rescued, one of their number, Leon Maingui, a French national, and a native of the island of St. Pierre, was drowned. The Canadian government, on receipt of this information, asked (via the Department of External Affairs and the Canadian Legation in Washington) the government of the United States to furnish it with a statement of facts with regard to the sinking. This was done. An exchange of notes followed, both governments putting forward their respective points of view.[1] The United States in their final

[1] (a) Statements of His Majesty's Government in Canada and of the government of the United States of America as tabled in the Canadian House of Commons, Thursday, April 25. See also the Mail and Empire, 26-4-29; The Globe, 26-4-29. (b) The American Journal of International Law, vol. 23, p. 351, April, 1929.

note suggested that they would be glad to submit the matter to arbitration, as provided in the Liquor Convention of 1924,[2] and the Canadian government have accepted this proposal.[3]

The issue involves differences of opinion as to fact and law. Captain Randell, of the I'm Alone, states that he was between 14½ and 15 miles from the United States coast. The American authorities claim that he was not more than 10.8 miles from shore. Captain Randell and other members of his crew state that their best speed under canvas and power was 9½ knots. The Americans contend that the I'm Alone could do over 13.5 knots.

Her position and speed are vitally important, because they determine the limits of American jurisdiction over the citizens and ships of other countries. This jurisdiction ends three miles from the coast,[4] according to generally accepted rules of international law; but under the Liquor Convention of 1924, His Britannic Majesty acquiesced in an extension of American jurisdiction to one hour's sailing distance from the coast (of the vessel pursued).[5] From this it is clear that if the I'm Alone were within one hour's sailing distance from shore when first accosted, the Walcott might then have stopped and searched her. An interesting academic point arises here out of the fact that the Liquor Convention was made between Great Britain and the United States, and the Canadian government does not seem to have taken any part in the negotiations.[6] However, the Canadian government has acquiesced in its terms so Canadians are probably bound by it.[7]

Having answered the disputed questions of fact the arbitral tribunal will then have to decide the more difficult questions of international law arising out of the "right of hot pursuit." For the I'm Alone was not sunk within the territorial jurisdiction of the United States but on the high seas over two hundred miles from the coast.

[2] Convention between His Majesty and the United States of America respecting the regulation of the Liquor Traffic (Art. 4), Jan. 23, 1924. Signed by Sir Auckland Geddes and Charles Evan Hughes. Collection of Treaties and Agreements affecting Canada, etc., King's Printer, Ottawa, 1927.

[3] See footnote no. 1 above.

[4] See footnote no. 2 above, Art. 1. See also summary of practice of maritime nations in report of committee of experts for Progressive Codification of International Law submitted to the council of the League of Nations, Document. C. 196. M. 170. 1927 V. and in particular p. 57.

[5] See footnote no. 2 above, Art. 2, sec. 3.

[6] See footnote no. 2 above, particularly heading of the convention and signatures attached.

[7] See statement of Mr. Massey as given in footnote no. 1 above.

The right of hot pursuit is variously defined by the authorities on international law and is well summarized by Brierly[8] in the following terms: "If a foreign ship has committed an offence *'in territorial waters'* and escapes to the high seas the pursuit may be continued there and the ship brought back and dealt with on condition that the pursuit is immediate and continuous." This doctrine, although it developed out of war time practice, has been taken over and applied generally, and even quite recently by both Canada and the United States when enforcing their revenue, prohibition and fisheries protection laws.[9] But does "territorial waters" as used above mean the three mile limit or the treaty extension of one hour's sailing distance from shore?[10] Canada contends that it means the three mile limit only and that any extension of American rights or powers would have to be definitely and explicitly stated in the terms of the Convention. The United States on the other hand claim that the right of hot pursuit was granted, along with the extension of their power to stop and seize, by necessary implication. Both countries cite interesting domestic decisions supporting their respective claims.[11] Another difficulty arises because the I'm Alone was sunk by the Dexter, not by the Walcott, and the United States will have to convince the arbitrators that the action of another vessel which is summoned by wireless or other means and which joins in the pursuit, comes within the terms "immediate and continuous pursuit." Still another difficulty is occasioned by the seemingly excessive force used by the American authorities. This they justify on the grounds that it was impossible or dangerous to stop the I'm Alone in any other way and cite the incident of the "Siloam,"[12] an American fishing vessel that was caught poaching within three miles

[8] J. L. Brierly: Law of Nations, p. 153. See also Jessup: Law of Territorial Waters, pp. 106-110.

[9] See statement of American and Canadian Governments as given in footnote no. 1 (a) above.

[10] Liquor traffic convention, footnote no. 2 above, Art. 2, sec. 3.

[11] *The Ship North* v. *The King* (1906) 37 Can. S.C.R. 385 at p. 394. Davies, J., states: "The Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations, and by that law when a vessel within foreign territory commits an infraction of its laws either for the protection of its fisheries or its revenues or coasts, she may be immediately pursued into the open seas beyond the territorial limits and there taken." *The Vinces* (1927), 20 Fed. (2d) 164 at pp. 174-175. The Vinces was a British vessel, speed of 8½ miles per hour, ordered to halt 7½ miles from land, pursued and taken 12¾ miles from land and condemned. *Ford* v. *United States* (1927), 273 U.S. 593; *Gillam* v. *United States* (1928), 27 Fed. (2d) 296. Argument of Sir Charles Russell, Fur Seal Arbitration, 13 Proceedings, p. 300. *The Marianna Flora*, U.S. Supreme Court (1826), 11 Wheaton 1, 42; *Hudson* v. *Guestier*, 6 Cranch, 281; 3 L. Ed., 224; *The Itata*, 2 Moore's Digest, p. 985.

[12] See statements of Stimson and Massey, footnote no. 1 (a) above.

of the British Columbia coast, was pursued by the Canadian vessel Malaspina, fired at, and eventually sank due, it is claimed, to the action of her crew who scuttled her. One of the crew was killed by a bullet from the Malaspina. But in that case the boat was actually within the three mile limit and was pursued and dealt with by the ship which discovered her breaking the law.

It will be seen then, that the I'm Alone was not within the three mile limit. She may have been within twelve miles of the coast, in which case the validity of certain domestic laws of the United States would come in question.[13] It is submitted that as these are domestic laws they have no application in an international dispute and must be disregarded. If the I'm Alone were within one hour's sailing distance of shore the further question arises as to whether or not the right of hot pursuit ordinarily applied in the case of vessels caught offending against municipal laws within the three mile limit, is extended by implication to the wider area of coastal waters. And finally in the event of "the right of hot pursuit," attaching to that wider area—was the pursuit of the Dexter sufficiently "immediate and continuous" to bring it within the meaning of that doctrine? The use of excessive force is a question of fact and must be decided on the evidence submitted. The case is an excellent one for judicial decision, and is noteworthy because it is the first of its kind to be handled by Canadian officials and representatives alone. The personnel of the board, the counsel, their arguments and the final decision will be awaited with great interest.

N. A. M. MacKenzie.

[13] U.S. Code, sec. 481, Customs Law of Sept. 21, 1922, ch. 356, Title 4, sec. 581, 42 statutes 979.