CASE AND COMMENT.

DEFAMATION—SOLICITOR AND CLIENT—PRIVILEGE OF NON-DISCLOSURE—ABSOLUTE OR QUALIFIED PRIVILEGE. In view of the statements of the members of the House of Lords who allowed the appeal in *Minter* v. *Priest*[1] the doubt expressed by Greer, L.J., in this case, when it was before the Court of Appeal,[2] as to whether the area of absolute privilege in the law of libel may be narrower than the area of the privilege of non-disclosure, appears to have been justified. In *More* v. *Weaver*[3] the Court of Appeal held that communications passing between a solicitor and his client on the subject upon which the client has retained the solicitor, and which are relevant to that matter, are absolutely privileged and are not actionable however defamatory they may be. The actual decision in *More* v. *Weaver*, however, does not extend this far as the defendant in the action for defamation was a *client* who had communicated to her solicitor defamatory statements concerning the plaintiff. The doctrine of *More* v. *Weaver* was considered by the House of Lords in *Minter* v. *Priest*, and, although there was no occasion to decide the question, the majority of the members of the Court indicated that they would not be prepared to hold that the absolute privilege of the client extends to protect the solicitor. Viscount Dunedin reminded the House that the older authorities point to a result contrary to that which was reached by the Court of Appeal in *More* v. *Weaver*, and that the privilege of solicitor and client has been generally dealt with in the books as qualified.

The need for making the communications of a solicitor to his client absolutely privileged is not apparent. Freedom of consultation does not depend upon the protection of a solicitor who is unable to avail himself of the defence of qualified privilege with respect to defamatory statements communicated to his client because he was actuated by malice. Clients will, of course, confide more readily in their solicitors if they realize that their own statements are absolutely privileged—but the privilege of the solicitors, be it qualified or absolute, does not concern the clients.[4] To this

[1] (1930), 46 T.L.R. 301.
[2] [1929] 1 K.B. 655; commented upon, (1929), 7 C.B. Rev. 554.
[3] [1928] 2 K.B. 520.
[4] See Wigmore on Evidence, vol. v., ss. 2290-1.

extent, at least, one can appreciate the statement of Lord Atkin in *Minter* v. *Priest*:[5] "The decision (in *More* v. *Weaver*) considerably extends the protection which up to its date had been confined to communications made by judge, counsel and witnesses in the course of judicial proceedings, and is based upon a view of public policy which appears to be somewhat widely stated."

The members of the Court of Appeal in *Minter* v. *Priest* were of the opinion that it is an ordinary part of a solicitor's business to treat for the sale or purchase of estates for his clients and incidentally thereto to procure the advance of money for those purposes. Lords Buckmaster and Warrington of Clyffe, however, stated that merely to lend money, apart from the existence or contemplation of professional help, is outside the scope of a solicitor's employment.[6]

The appeal to the House of Lords was allowed upon the ground that, as a matter of fact, the solicitor and the client exchanged the communications, in issue in the action for defamation, not for the purpose of giving or receiving professional advice, but that they were spoken for the purpose of carrying out a speculation in real property and to enable the solicitor to secure a participation in the profits. Notwithstanding a contemplated relationship of solicitor and client, communications made in these circumstances were not entitled on any ground to protection from disclosure.

S. E. S.

* * *

LORD CAMPBELL'S ACT—DEATH OF WRONGDOER—APPLICATION OF STATUTE. *The Fatal Accidents Act*,[1] otherwise known as Lord Campbell's Act, was passed in England in 1846 in order to remedy, in some measure,[2] the hardship of the common law rule, *actio personalis moritur cum persona*. Statutes similar in effect have been enacted in all the provinces of Canada. In Quebec the principle of the statute is adopted in Article 1056 of the Civil Code.[3] The Act, in certain circumstances, gives a cause of action against a person who by his wrongful act or neglect occasions the death of another. It confers a right of action on the personal representatives of the person whose death has been so caused. But the right conferred is not for the benefit of the estate of the deceased but

[5] (1930), 46 T.L.R. 301 at p. 308.
[6] See *Hagart and Burn-Murdoch* v. *Inland Revenue Commissioners*, [1929] A.C. 386.

[1] 9 & 10 Vict. c. 93.
[2] See The Law of Torts: Pollock, 13th ed., p. 68 *et seq.*
[3] See *Miller* v. *Grand Trunk Railway Co.*, [1906] A.C. 187.

for the benefit of the "wife, husband, parent, and child of the person whose death shall have been so caused."[4] A correspondent has pointed out that the statute gives a cause of action only against the person who would have been liable to the victim of his wrongful act or neglect in case death had not ensued, and, therefore, there is no remedy if the former died before judgment is recovered by the personal representatives of the latter.[5] According to the common law rule, it is not a civil wrong to cause the death of a human being; the wrong done to the deceased himself by the taking away of his life dies with him. Any cause of action with respect to his death must therefore depend upon the statute which must be strictly construed.[6] Section 1 of the Act reads in part: "Then and in every such case the *person* who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of such person," (that is, the victim). In view of the fact that the action of the personal representative must be brought against the person whom the deceased, if he had lived, might have sued, that is, the wrongdoer himself, the view of the correspondent appears to be correct. As it is not improbable that in motor car accidents the wrongdoer, as well as his victim, may be killed, some amendment to the statute law in this respect is desirable.

It may be that in Ontario the personal representatives of a person who is killed by the wrongful act or neglect of a wrongdoer may have, in at least one case, an action, in the event of the death of the latter, against his executor or administrator. *The Trustee Act*[7] (with sparse regard for any scheme of scientific grouping or classification) provides: "Except in cases of libel and slander, if a deceased person committed a wrong to another in respect of his person or property, the person wronged may maintain an action against the executor or administrator of the person who committed the wrong." At common law a person who suffers bodily harm has no cause of action against the executor or administrator of the wrongdoer who predeceases him. But the Ontario statute confers on him in such a case a right of action. To apply *The Fatal Accidents Act,* as indicated above, it must appear that the victim could have maintained an action had he sustained only a bodily, and not a mortal, injury. The time with respect to which this principle

[4] See *Trueman* v. *Hydro-Electric Power Comm. of Ont.* (1923), 53 O.L.R. 434 at p. 443.

[5] See Order XVII, Rule 1 (Eng.); *Sibbald* v. *Grand Trunk Railway Co.* (1890), 19 O.R. 164.

[6] *Blayborough* v. *Brantford Gas Co.* (1908), 18 O.L.R. 243.

[7] R.S.O. 1927, c. 150, s. 37 (2).

must be applied is at the moment of death with the idea fictionally that death has not taken place.[8] In the given case this condition precedent is fulfilled, and by virtue of *The Fatal Accidents Act* his personal representatives may have a cause of action against the person whom the deceased might have sued, that is, the executor or administrator of the wrongdoer. *The Trustee Act* of Ontario does not afford, it is submitted, a remedy to the personal representatives of a victim if the wrongdoer dies subsequently to the death of the former but before a judgment is recovered against him. There is a need for the reconsideration of *The Fatal Accidents Act* and, possibly, the abolition of the "barbarous common law rule which is the root of the mischief."[9]

S. E. S.

* * *

CONFLICT OF LAWS—RECOGNITION OF FOREIGN CREATED MARRIAGE BY ENGLISH COURTS—NATURE OF MARRIAGE REQUIRED.—Nowhere is a distinctive national policy of the forum more directive than in the English law concerning the recognition of foreign created marriage status. Superimposed upon the rules concerning the proper law which determines the capacity of parties to a foreign marriage and its formal validity[1] is a requirement that it be of a defined type. The sort of marriage required is further defined in two recent English cases.

In one, *Nachimson* v. *Nachimson*,[2] the petitioner for a judicial separation went through a Soviet form of marriage with a Russian, the respondent, at Moscow in 1924, both parties being then domiciled in the Soviet Union. According to Soviet law, the only formalities necessary for a divorce were the registration by both parties of their desire to terminate the union, or a merely formal application by one of them to a court which must then declare the marriage to be at an

[8] *Pym* v. *Great Northern Railway Co.* (1863), 4 B. & S. 396; *Williams* v. *Mersey Dock Board*, [1905] 1 K.B. 804; *Read* v. *Great Eastern Railway Co.* (1868), L.R. 3 Q.B. 555; *Griffiths* v. *Earl of Dudley* (1882), 9 Q.B.D. 357; *R.* v. *Grenier* (1899), 30 Can. S.C.R. 42; *British Columbia Electric Railway Co.* v. *Gentile*, [1914] A.C. 1034; *Walpole* v. *Canadian Northern Railway Co.*, [1923] A.C. 113. "Under the Fatal Accidents Act it is now settled that it is a condition of the respondents' right to recover that the victim of the accident would have had a right of action arising out of the wrong complained of if he had lived": per Duff, J., in *C.P.R.* v. *Parent* (1915), 51 Can. S.C.R. 234 at p. 257; affirmed [1917] A.C. 195.

[9] Pollock: *op. cit.* p. 68.

[1] The terms "form of marriage" and "ceremony of marriage" are synonymous. See *Rex* v. *Grant* (1924), 57 N.S.R. 325 at p. 326.

[2] [1930] P. 85; 46 T.L.R. 166. In the Court of Appeal, [1930] P. 217, 46 T.L.R. 444.

end. The petitioner sought a decree of judicial separation in England, both parties then being resident there, on the ground of cruelty. An issue was directed to be tried as to whether the petitioner and the respondent should be judicially recognized as being married. It was held at the trial that, although the parties may have intended to remain married for life, a union which by its proper law is terminable merely at will is not a marriage in English law and will not be recognized. The petition was therefore dismissed. On appeal to the Court of Appeal this decision was reversed.

Logically, a marriage which is valid by the proper law, the law recognized as governing the creation of the status,[3] should be recognized as a valid marriage everywhere and it should ordinarily be given the same effect in each legal unit as a marriage created there. The general rule is, however, that English courts will not recognize an otherwise valid foreign created marriage if it is a sort unknown to English law. In *Hyde* v. *Hyde*,[4] in refusing to recognize a Mormon marriage performed in the United States, Lord Penzance said: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." The Mormon marriage lacked the exclusive element. The husband had actually taken only one wife in the particular case.[5] Twenty-four years later, in the case of *Brinkley* v. *Attorney-General*,[6] Sir James Hannen, P., recognized a Japanese non-christian marriage as valid because Japanese law creates only monogamous marriages. He said that "though throughout the judgments that have been given on this subject, the phrase 'Christian marriage,' 'marriage in Christendom,' or some equivalent phrase, has been used, that has been only for convenience to express the idea." He thus eliminated any requirement that the marriage be solemnized in Christian form or in the territory of a nominally Christian country. The sort of marriage created by Japanese law complied in all other respects with Lord Penzance's definition.

[3] (a) The capacity to marry is possibly governed by the law of the respective domiciles of the parties. See Dicey, Conflict of Laws, 4th ed., at pp. 686 and 919; *Sottomayor* v. *De Barras* (No. 1) (1877), 3 P.D. (C.A.) 1. Cf. *Simonin* v. *Mallac* (1860), 2 Sw. & Tr. 67; *Ogden* v. *Ogden*, [1908] P. (C.A.) 46; *In re Bozzelli*, [1902] 1 Ch. 751; *In re Allison* (1874), 31 L.T. 638; *Brook* v. *Brook* (1861), 9 H.L.C. 193; *In re De Wilton* [1900], 2 Ch. 481; *The Sussex Peerage Case* (1844), 11 Cl. & F. 85. (b) The formal validity of a marriage is governed by the *lex loci contractus*. See *Dalrymple* v. *Dalrymple* (1811), 2 Hagg. Cons. 54; *Simonin* v. *Mallac*, *supra*; *Kent* v. *Burgess* (1840), 11 Sim. 361. See *Berthiaume* v. *Dastous*, [1930] A.C. 79 at p. 83.

[4] (1866), L.R. 1 P. & D. 130 at p. 133.

[5] Applied in *In re Bethell* (1888), 33 Ch. D. 220; *Rex* v. *Hammersmith*, [1917] 1 K.B. 634.

[6] (1890), 15 P.D. 76.

English cases previous to *Nachimson* v. *Nachimson*[7] have all been mainly concerned with the "exclusive" branch of the definition; they have concerned plurality of wives, and have adhered to monogamy consistently. The question of the validity of Lord Penzance's "for life" requirement arose for decision for the first time in this case.

The Court of Appeal decision in *Nachimson* v. *Nachimson* is in effect that although the marriage status known to English law is an exclusive relationship between one man and one woman, the circumstances under which that relationship can be terminated, if at all, are merely incidental thereto; "dissolubility or indissolubility is not of the essence of marriage." The "for life" element is thus unessential to recognition of a foreign created marriage. This decision avoids not only the scientific error of confounding the marriage status with one of its transient incidents, but also setting up a rule that would assuredly be difficult to apply in practice. "For life" could hardly have been given an absolute meaning; divorce being a thriving English legal institution. To graduate "easy divorce" with the object of establishing a matrimonial zero would be an unenviable task for any court.

In the instant case Romer, L.J., is quoted in the Times Law Reports as follows: "It was obvious that a marriage in Russia was a thing of a more precarious nature than a marriage contracted in England . . . It was said that if the Court was to treat this marriage as valid it must treat as valid a marriage entered into one day and dissolved the next by mutual consent or at the instance of one party. It was meant by this presumably to suggest that what was little more than an act of promiscuous intercourse might have to be treated as a valid marriage. He (his Lordship) thought that the Courts of this country would know how to deal with such a case, if the facts were brought to their notice. But if a man could persuade a woman to marry him, her intention being to form a union for life, and his being, unknown to her, to form a union for a day or two, he saw no reason why the Courts of this country should assist him in his infamous scheme by refusing to recognize the validity of the marriage." This decision does not merely possess the merit of bringing one phase of our somewhat anachronistic matrimonial law into harmony with present day social realities. It provides further proof that English judges "are not so provincial

[7] *Supra.* See article: Fitzgerald: Non-christian Marriages, (1900), 2 J. Soc. Comp. Leg. and Int. Law 359. See *Fraser* v. *Pouliot & Jones,* 12 Q.L.R. 327.

as to say that every solution of a problem is wrong because (they) deal with it otherwise at home."[8]

The second of the two recent cases mentioned above was decided in the Probate Division while the appeal in the *Nachimson* case was pending. In *Spivack* v. *Spivack*[9] the respondent secured a maintenance order in an English magistrate's court against the appellant, her husband, who was summoned on the ground of desertion. It was proved that the parties, who were Jews, went through a form of marriage in Russian Poland in the year 1890, which was valid according to both the Jewish marriage procedure and the law of Russian Poland where they were then domiciled. The appellant contended that as the Jewish marriage was dissoluble at the will of the husband merely by delivery of what is called a "gett" or letter of divorce, it therefore should not be recognized as a valid marriage by an English court under the authority of *Nachimson* v. *Nachimson*,[10] and that the maintenance order should therefore be quashed. In dismissing the appeal, Lord Merrivale, P., said:

> If there is a fact conspicuous in the developments in the last 200 years of the law of marriage in this country. it is that the Legislature and the Courts have known all the time of Jewish marriage, and put Jewish marriages outside of the ambit of enactments providing for the methods of the ceremony of marriage in this country, and left them where they stood before the various Marriage Acts, and it merely required by an enactment in the course of the last century that there shall be a representative of a registrar present who shall see that the marriage is registered. The Legislature has provided in respect of Jewish marriages in a mode which leaves their validity beyond all question and, I should have thought, unimpeachable and unassailable. In the ecclesiastical Courts in this jurisdiction the subject has arisen, and nobody until now has ever suggested in my hearing any doubt whether a Jewish marriage was a marriage of which the Court must take account.[11]

If the decision of the trial court had been sustained in *Nachimson* v. *Nachimson*, Lord Merrivale's decision in the *Spivack* case would have stood as an exception based solely on policy.

The question of the recognition of a foreign created polygamous marriage came before the British Columbia Court of Appeal in 1924. In *Yew* v. *Attorney-General*[12] two widows of a deceased Chinaman claimed exemption from succession duty accorded to a "wife" by the British Columbia Succession Duty Act.[13] The Chinaman was domi-

[8] Cf. Cardozo, J., in *Loucks* v. *Standard Oil Co.* (1918), 224 N.Y. 99, See 30 Col. L. Rev. 740.

[9] (1930), 46 T.L.R. 243.

[10] *Supra.*

[11] 46 T.L.R. 243 at p. 245.

[12] [1924] 1 D.L.R. 1166.

[13] R.S.B.C. 1911, c. 217.

ciled in China when he married his two wives there in due Chinese form. The law of China permitted polygamous marriages. As there was no statutory definition of the word "wife" it was necessary to resort to the common law to discover who should be recognized as having the status of "wife" for purposes of the Act. The Crown contended that neither woman could be recognized as a "wife," founding its contention on the definition of marriage in *Hyde* v. *Hyde*.[14] The British Columbia Court held that the Chinese marriage should be recognized, limiting the application of *Hyde* v. *Hyde*[14] to recognition for matrimonial purposes. Martin, J.A., said, after stating the question at issue:[15]

> It will be observed that this question has really no moral or religious aspect and "no consequent effects upon the position of the wife and legitimacy of the children;" or prosecution for "polygamy which our law forbids" as a felony, as pointed out by Darling, J., in *Rex* v. *Hammersmith*,[16] but is simply a business matter of the collection of a tax for revenue purposes. This primary aspect must be kept clearly in mind because it is that which distinguishes this case from all those which have been cited to us or which I have been able to find after an exhaustive search.[17]

This distinction, which does not seem quite logical, appears to be well founded in policy and much practical and social good is often accomplished by rules and adjustments that defy syllogism. But it is certainly not a policy consistent with that enunciated by Lord Brougham, nor is it more obviously practical. He said in *Warrender* v. *Warrender*: "It is important to remember that we regard (marriage) as a wholly different thing, a different status, from Turkish

[14] *Supra.*

[15] *Yew* v. *Attorney-General*, [1924] 1 D.L.R. 1166 at p. 1171.

[16] [1917] 1 K.B. 634 at pp. 649 and 650.

[17] Cf. McPhillips, J.A., [1924] 1 D.L.R. at p. 1191. In his judgment in *Yew* v. *Attorney-General*, McPhillips, J.A., purports to follow the *Connolly* case, 11 L.C.J. 197, in which a marriage performed in Canada according to the rites of the Cree Indians was recognized as valid although polygamy existed among the Crees. He also refers to the headnote of *Cheang Thye Phin* v. *Toan Ah Loy*, [1920] A.C. 369, in which the Judicial Committee of the Privy Council recognized a Chinese polygamous marriage in the Straits Settlement for succession purposes. However, the property in question was situated in the Straits Settlement, the Chinese law of polygamy is recognized and applied by the Courts of the Straits Settlement, and the case was on appeal to the Judicial Committee from the Supreme Court of the Straits Settlement. These factors seem to distinguish the case effectively from *Yew* v. *Attorney-General.* The authority of the *Connolly* case, *supra*, is very much shaken by the later case of *Fraser* v. *Pouliot & Jones*, *supra*, where an Indian marriage of the same character as in the *Connolly* case, contracted by a Lower Canadian with an Indian woman in the North-West Territories, was held not to be a valid marriage, applying the rule in *Hyde* v. *Hyde*, *supra*. See *Lafleur, The Conflict of Laws*, at p. 63 *et seq.* Such Indian marriages have been commonly recognized in the United States, see *Goodrich, Conflict of Laws*, at p. 269 *et seq.*

or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate."[18]

HORACE E. READ.

Dalhousie Law School.

* * *

COMPANY—SCHEME OF TRANSFER OF SHARES TO ANOTHER COMPANY—DISSENTING SHAREHOLDERS. The recent case of *In re Castner-Kellner Alkali Company, Limited,*[1] calls attention to the fact that statutes and decisions follow the trend of the times.

The shares of a shareholder in a company can now in England be taken from him by nine-tenths of the other shareholders, and shares in another company substituted for them. The majority rules, and private property becomes less and less under the control of the owner. Although this case deals with the interpretation of a statute that will rarely be used, the statute is a step in the evolution of a principle that shareholders can be forced to accept shares of a different character against their will in exchange for present holdings.

The *Companies Act*[2] gives power to assist in effecting the reorganization of companies, not, however, as wide as section 120 of the English Act of 1908. Under both these Acts three-fourths majority is required to initiate a scheme of arrangement or reconstruction, but under section 155 of the English Act of 1929 where the holders of nine-tenths in value of the shares affected approve of a scheme or contract involving the exchange of shares, the court has wide powers to enforce the scheme. Difficulties arose in the application of the former section 120 as is exemplified in the case of *In re General Motor Cab Co., Ltd.,*[3] and the Act of last year provides a code that is intended to make the principle much wider.

In the case under discussion the Brunner Mond Company made an offer to the holders of the shares of the Alkali Company, at the rate of two fully paid ordinary £1 shares in the Brunner Mond Company, for every £1 ordinary share in the Alkali Company. This offer was accepted by ninety per cent. of the shareholders of the Alkali Company who were thus affected. Subsequently on the formation

[18] 2 Cl. & F. 488 at p. 532. (H.L. 1835).

[1] (1930), 46 T.L.R. 592.
[2] R.S.C. 1927, c. 27, s. 144.
[3] [1913] 1 Ch. 377.

of Imperial Chemical Industries, Limited, that company, in turn, offered three of its fully paid £1 shares and two fully paid 10 shilling deferred shares for every two £1 shares in the Brunner Mond Company. A petition was presented to the Court on behalf of Brunner Mond Company asking the Court upon what terms the petitioners were entitled to acquire the shares held by the dissenting shareholders of the Alkali Company.

An objection was raised on behalf of these dissentient shareholders in that the scheme proposed by Imperial Chemical Industries, Limited was not that offered by the Brunner Mond Company, but was an entirely new scheme, and one to which section 155 of the *Companies Act* had no application. It was further pointed out by the objectors that the market value of the five Chemical Industries shares was less than the value of the two Brunner Mond shares.

Eve, J., refused to accede to the objection that section 155 of the *Companies Act* was not applicable. He considered that it was the function of the Court to determine on what terms the dissentients are to be dispossessed of their investments. If the Court considers that the offer is adequate and satisfactory, it should be adopted; and if not, the Court should substitute such other terms as in its discretion it thinks fair and just. The fact that in this case the petitioners were offering shares wholly different from those offered in the first instance did not disqualify them from availing themselves of the opportunity to purchase the shares of the dissenting majority.

Eve, J., was of the opinion that the refusal to accept the shares offered by the Imperial Chemical Industries, Limited was reasonable, and he resorted to some other standard for fixing the pecuniary compensation. He decided that £5, 11s. should be paid for each of the shares outstanding of the Alkali Company.

Halifax.

DONALD MCINNES.

* * *

FINANCIAL RESPONSIBILITY OF OWNERS AND DRIVERS—ONTARIO LEGISLATION. The *Highway Traffic Amendment Act*, 1930 (Ontario) which became effective on September 1st, 1930, introduces a new phase in highway traffic legislation and creates new problems in liability insurance. By this Act it is provided that the owner's permit and driver's license shall be suspended, (a) in case of a

conviction for one of the major traffic offences which are specified in the Act, and (b) upon failure to satisfy a judgment in excess of $100 for damage occasioned by a motor vehicle. When suspended the permit or license of the owner or driver "shall not at any time thereafter be renewed until he shall have given to the Registrar proof of his financial responsibility."

When required, proof of financial responsibility shall be given in the amount of $5,000 for injury to, or death of, one person, and of $10,000 for injury to, or death of, two or more persons in any one accident, and of $1,000 for damage to property, in all $11,000. The proof may be given in the form of (a) a certified insurance policy of an authorized insurer, or (b) the bond of a licensed surety company or of personal sureties approved as to adequacy, or (c) by deposit with the Provincial Treasurer of monies or securities to the amount of $11,000.

The Legislature assumes that the conviction for a major offence, or the failure to satisfy a damage judgment, warrants the exclusion of the offender from the use of the highway until the public has the assurance that if further damage be caused compensation at least will be available within the limits specified.

The development of this legislative idea is interesting. As unsatisfied damage claims against the owners of motor vehicles accumulated, the demand became insistent for some measure of protection, and insurance, not unnaturally, offered the most reasonable solution of the problem. Massachusetts enacted the first compulsory insurance law effective on this continent. That law required every motorist, with or without fault on his part, to commence his user of the highway and to continue it accompanied by an insurance policy guaranteeing that the third party whom he may injure will be able to secure some compensation. That type of legislation aimed at only one evil, the unsatisfied damage claim. As opponents of compulsory insurance predicted, this legislative experiment resulted in excessive demands on the insurance funds and necessarily increased insurance premiums. Compulsory insurance, which was an attractive theory to many, ceased to attract when it was realized that it was the careful and prudent motorists who form the majority of the motor owners who were called upon to assume the excess loss by increase in their premiums.

The safety responsibility laws as enacted in New York, in Ontario and elsewhere, differ fundamentally from the compulsory insurance laws of Massachusetts. The difference is well expressed

by Mr. Justice Hodgins in his interim report on Automobile Insurance Premium Rates:

> The safety responsibility laws leave a motorist alone until he has been convicted of a serious violation of the highway traffic law or criminal law or has caused serious or substantial injuries through a motor accident They then require security against future casualties. This difference makes the safety responsibility law more logical, more acceptable, more workable and less oppressive . . . . . . thus the vast majority of careful drivers are untouched by the law and can remain outside of it so long as they do not bring themselves within it.

The object of this law is not only to provide against pecuniary loss, but also to create a sense of responsibility in a driver and to conduce to his carefulness in operating his motor car. The practical results of this experiment will be awaited with interest.

When proof of financial responsibility is given in the form of an insurance policy, it is obvious that the proceeds of the policy must be as readily available to the claimant as security in the form of cash or bond.. To secure this result statutory incidents have been added to the contract between the owner or driver and the insurance company. These are as follows: (a) The policy must be certified by an authorized insurer, that is, one duly licensed to carry on automobile insurance in Ontario. Difficulties will no doubt arise in connection with non-resident tourists when they bring themselves within the Act. (b) Within the limits of the amounts stated, the liability of the insurer is absolute and therefore cannot be avoided by conviction of the insured, or by fraud, or by breach of any statutory condition on the part of the insured, but the insuring contract may require the person insured to repay to the insurer, any sums which the latter may have become liable to pay to claimants in circumstances where formerly the insurance company could have avoided liability. (c) The claimant is given a right of action directly against the insurer and the practice introduced by section 85 of the *Insurance Act* is amplified to protect the claimant's rights in this respect. (d) Where the limits of the amount in the insuring contract exceed the limits specified in the Act, the insurer may, as against any claimant, and as to the extent of the excess, avail himself of any defence which the insurer is entitled to set up against the insured. (e) According to the interpretation of the law officers of the Crown, an insurance policy must cover both liability and property damage. To this extent the Act relates to compulsory insurance because the insured, if requiring one form of covering, must take both.

Provision is made for the voluntary filing of proof of financial responsibility prior to any conviction or judgment. It is submitted that nothing is to be gained by this requirement. Mistaken ideas are entertained by many that by complying with the Act some immunity is secured against the suspension of the permit or license; that is not the case. Necessity for complying with the Act as to proof of responsibility arises only when renewal is sought of the suspended permit or license.

It is to be noted that the incidents referred to attach by virtue of section 87 of the amending Act to "every motor vehicle liability policy." Every policy now in force or hereafter issued will have these incidents annexed to it, whether the policy came into existence to comply with the provisions of the Act or not. The majority of motorists may remain outside the Act and may, or may not, insure against liability as heretofore. If they do insure for the purpose of protection and not for the purpose of complying with the Act, the Act nevertheless affects the contract of insurance to this extent, it denies to the owner a choice between public liability and property damage, and imposes upon the insurer, within the limits stated, an absolute liability towards the claimant.

Toronto.

T. N. PHELAN.

* * *

MARRIAGE SOLEMNIZED OUT OF QUEBEC—MARRIAGE NULL WHERE SOLEMNIZED—PUTATIVE WIFE ACTING IN GOOD FAITH—RIGHT TO ALIMONY. In the case of *Berthiaume* v. *Dastous*[1] the Privy Council reversing the Quebec Courts[2] held that a marriage performed by a priest in France, where he was not competent to solemnize marriage, was void even though such a priest would have been competent to solemnize marriage in Quebec, both parties being domiciled in that Province, because in Quebec as elsewhere the rule "locus regit actum" is in marriage cases imperative in the absence of positive legislation to the contrary. It was further held that the discretionary power of the court in cases of annulment for irregularity in the solemnization[3] does not extend so far as to cover a void marriage.

[1] [1930] A.C. 79.

[2] 45 K.B. 391, and 66 S.C. 241.

[3] C.C. 156. "Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the court to decide according to the circumstances."

On this point their Lordships approved the dissenting opinion of Bernier, J., on appeal.

The Court also held that a marriage void for lack of the essential formalities of solemnization could, if entered into in good faith, be productive of civil effects,[4] on this point disagreeing with the views of Bernier, J., who, alone in the lower Courts, dealt with it. The opinion of Bernier, J., is obviously based on the view first propounded by Zachariæ and generally accepted in France that defects in the "acte juridique" are of three classes, those which render the "acte" (1) inexistent, (2) absolutely null, (3) relatively null. The conclusions based on this theory were brushed aside with impatience as "an astounding proposition." The theory itself was not mentioned let alone discussed, their Lordships apparently being unaware of its existence.

Having declared the marriage putative as regards the wife, their Lordships then discussed the question as to whether the civil effects produced included (1) the right to alimony, and (2) the creation of community of property. The difficulty, and even the nature, of these problems appear to have escaped their attention, otherwise they would hardly have disposed of them in two paragraphs. Lord Dunedin said:

> . . . . all civil rights appendant to real marriage are not produced by a putative marriage. But the criterion is obvious; those only subsist which are consistent with a real marriage not existing. Alimony is such a right. The duty of a husband to support his wife is quite apart from his duty to co-habit with her . . . . Their Lordships would have felt inclined to hold that inasmuch as nullity of marriage was declared, it was equivalent to saying that no communauté de biens ever really existed . . . .

As this latter point had not been fully argued the question of civil effects was referred to the Quebec Courts for adjudication, "their Lordships being clearly of opinion that the continuance of alimony to the wife is one of the civil effects."

As a statement of the law of putative marriage this pronouncement can at best be described as inaccurate. A putative marriage produces all the civil effects of a valid marriage so long as it subsists as such. When it comes to an end those civil effects subsist which would survive the dissolution of a valid marriage. In France under texts similar to ours the situation is dealt with as though the mar-

[4] C.C. 163. "A marriage although declared null, produces civil effects, as well with regard to the husband and wife as with regard to the children, if contracted in good faith." C.C. 164. "If good faith exist on the part of one of the parties only, the marriage produces civil effects in favour of such party alone and in favour of the children issue of the marriage."

riage were dissolved by divorce; in Quebec, no divorce existing, the marriage affairs have been wound up as though the dissolution had been caused by the death of one of the consorts. The question of the right to alimony, or aliment to use the proper Quebec law term, had however not been raised prior to this case.

Under the Civil code the wife's right to aliment is contained in the general rule that "husband and wife mutually owe each other fidelity, succor and assistance" (C.C. 173), and the idea of it existing apart from marriage is new. This perhaps is owing to the fact that the alimentary debt is intransmissible and cannot therefore survive the dissolution of marriage by death, the only recognized form of dissolution. New ideas however are not necessarily unsound but they do call for critical examination before adoption.

To say that because the marriage was declared null no community could exist is merely to deny to a void marriage contracted in good faith one of the normal civil effects of a valid one. Why this particular effect should not be recognized is not easy to understand.

The judgment of the Judicial Committee decides (1) that the rule "locus regit actum" so far as marriage is concerned is imperative in Quebec, (2) that a marriage, void for lack of essential formalities, will, if contracted in good faith, produce civil effects, (3) that among the civil effects produced is the right to aliment, but probably not community of property. By implication, but apparently accidentally, the tri-partite theory of nullities in the "acte juridique" is rejected, and the possibility of the right to aliment surviving the dissolution of marriage recognized. The effect of this on the rights of divorced persons is worth careful consideration.

Faculty of Law,
McGill University.

C. S. LEMESURIER.

* * *

LIABILITY OF MUNICIPAL COUNCIL FOR PERMITTING ICE AND SNOW TO ACCUMULATE ON SIDEWALKS—GROSS NEGLIGENCE.—The negligence required to hold a municipal corporation liable for damages for injuries caused by the failure to keep its streets free from ice and snow must be that amount of negligence which, in law, is termed gross negligence. In *Marshall* v. *Municipal Corporation of the City of Galt*,[1] the Corporation was held grossly negligent because of its

[1] (1929), 37 O.W.N. 303.

failure to remove ice from a certain part of one of the sidewalks within the City. This particular portion of the sidewalk was frequently in an icy and dangerous condition, and, at the time when the accident occurred, had been covered with ice for a period of six days, during which time snow had fallen, making the condition of the sidewalk so treacherous that when M., a man of sixty-five years of age, was walking over it he fell and broke his leg.

The Corporation had passed a by-law, which provided, *inter alia,* for the removal of ice and snow from the sidewalk by the Corporation in default of the owner of unoccupied land—as in this case—attending to it within twelve hours after such ice had been formed or snow had fallen. By-laws of this nature do not relieve corporations from responsibility if gross negligence has been established. This phase of the question is carefully discussed by Hodgins, J.A., in *Cokers* v. *City of Belleville.*[2]

In giving judgment for the plaintiff in the *Marshall* case Garrow, J., was of opinion that any reasonable inspection on the part of the municipal authorities should have disclosed the condition of the sidewalk, and that a sufficient length of time existed, before the accident, to charge the Corporation with notice of the existing dangerous condition.

The *Municipal Institutions Act*[3] enacts that "Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk."

Gross negligence appears to be a difficult phrase, and it depends upon the circumstances in each case whether there has been that degree of negligence which amounts to the absence of ordinary care and skill which ought to have been exercised by a prudent man.

The expression seems to have been objected to by many judges and other authorities. Many views have been expressed, though mostly in civil cases, as to what constitutes gross negligence. It has been said to be the same thing as negligence with the addition of a vituperative epithet.[4] In *Cashill* v. *Wright*[5] Erle, J., said that the legal meaning of gross negligence is greater negligence than the absence of the ordinary care which under the circumstances a prudent man ought to have taken; such a degree of negligence as excludes the lowest degree of care, and which is said to amount to *dolus.*

[2] (1925), 56 O.L.R. 451 at p. 460.
[3] R.S.O. 1927, c. 233, s. 469 (3).
[4] See Halsbury: Laws of England, vol. 4, p. 5, note.
[5] (1856), 6 E. & B. 891 at p. 899.

In *City of Kingston* v. *Drennan*[6] Sedgewick, J., is reported as follows: "I am not bold enough to enter upon a detailed investigation as to the difference between gross and other kinds of negligence. That question has been discussed by civilians and text-book writers to such an extent that judges have been found to say that there are no degrees of negligence. However this may be, we must, I suppose, give some meaning to this expression of the legislative will and the meaning I give to it is 'very great negligence'."

In *German* v. *City of Ottawa*[7] Meredith, C.J.C.P., said: "It has sometimes been said that it is difficult to define the meaning of the word 'gross' in connection with negligence, and difficult to give it effect under this enactment. But why so; any more than the word 'negligence' alone? What is ordinarily considered a neglect of duty is negligence; and what is ordinarily considered a great neglect of duty is gross negligence. Judges, jurors, and persons generally, do not hesitate to speak of slight negligence, negligence, great negligence, and gross negligence; and in the facts to which the words are applied there is never very much difficulty in understanding that which is meant. So, too, of other things, such, for instance, as gross, or great, ignorance."

In *Killeleagh* v. *City of Brantford*[8] the same judge said: "No exact measure can be given of negligence: generally one can say that it is a neglect of duty such as ordinarily does not happen; and perhaps as much can be said of gross negligence, that it is that negligence, greater than mere negligence, which would ordinarily be described as gross or by some like word. Not merely negligence with an expletive, in the correct meaning of that word, but perhaps negligence which, in describing it, would ordinarily call forth a preceding expletive, profane or otherwise, in its colloquial meaning."

In view of these opinions as to what constitutes gross negligence, it would seem that the learned judge was entirely correct in holding the Corporation liable in damages for the accident as it was "negligent to a degree properly described as gross negligence" within the meaning of the section of the *Municipal Institutions Act* (*supra*).

B. B. Jordan,

Trenton, Ont.

[6] (1897), 27 Can. S.C.R. 46 at p. 60.
[7] (1917), 39 O.L.R. 176 at p. 180.
[8] (1916), 38 O.L.R. 35 at p. 38.