CASE AND COMMENT.

ANIMALS—DOG—SCIENTER—NEGLIGENCE.—The necessity of proving *scienter* when a dog injures a human being has long been condensed into the proverb, "a dog may have its first bite." In view of the decision of the Court of Appeal in *Fardon* v. *Harcourt-Rivington*[1] it may now be added that "a dog may have its first joy ride." The defendant in the *Fardon* case parked his saloon motor-car in a street and left his large airedale dog untied in it. As the plaintiff was walking past the car, the dog, which had been jumping and barking, smashed a glass panel. A splinter of the broken glass entered the plaintiff's left eye which had to be operated upon and removed four days later. The plaintiff alleged that the defendant was negligent in leaving the motor-car and dog unattended on the public highway and in failing to tie up or secure the dog in a safe and proper manner.

Scrutton, L.J., in speaking for the Court of Appeal, expressed his sympathy for the unfortunate plight of the plaintiff, but considered that the members of the Court were bound to follow the principles of law involved in a well-settled classification. His premise was that the liability for injuries caused by animals fell into two classes. First, there is the class of wild animals, as, for example, a tiger, a gorilla or a monkey, which fall within the principles as laid down in *Rylands* v. *Fletcher*.[2] A person taking out such an animal which is dangerous in itself is responsible for any damage which it does. Secondly, there is the class of animals ordinarily kept in comparative freedom, as, for example, horses, dogs, cows, and cats. There is, the Lord Justice said, no obligation to keep cats and dogs under control. They may stray and exercise their ordinary propensities but, if they have, to the knowledge of the owner, a vicious propensity and exercise it, the owner is liable for any damage that they may do.

Lord Cranworth, C., in *Fleeming* v. *Orr*[3] used, with respect to animals *mansuetæ naturæ*, language similar to that used by Scrutton, L.J., when he said: "But, after all, the *culpa* or negligence of the owner is the foundation on which the right of action against him rests, though the knowledge of the owner is the medium, *and the*

[1] (1930), 47 T.L.R. 25.
[2] (1866), L.R. 1 Ex. 265; (1868), L.R. 3 H.L. 330.
[3] (1855), 2 Macq. (H.L.Sc.) 23. See also *Norton* v. *Fitzgerald* (1928), 62 O.L.R. 314.

only medium,[4] through which we in England arrive at the conclusion that he has been guilty of neglect, and in that sense it is said that the *scientia* is the gist of the action." Lord Cranworth, C., and Scrutton, L.J., it would appear, have gone too far in stating or suggesting that *scienter* in the case of an animal *mansuetæ naturæ* is the *sine qua non* of negligence. It has been held that an owner of an animal belonging to the second class of Scrutton, L.J., may be liable without *scienter*, if he himself has been negligent.[5] It is *primâ facie* evidence of negligence to leave a horse unattended in a public street, and if it balks and does damage, its owner, in the absence of an explanation, will be held liable.[6]

In the *Fardon* case the evidence showed that the airedale had a blameless character up to the time of the accident. But, apart from *scienter*, was there not some evidence that the defendant, having regard to the accepted standard of care, was negligent in leaving a large airedale dog untied and unattended in his motor-car which was parked upon a public thoroughfare? Would a reasonably prudent man in the like circumstances have acted in a similar manner? The Court of Appeal, seemingly with reference only to the question of *scienter*, held that there was no evidence on which the jury could find for the plaintiff.

S. E. S.

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DOWER—ABEYANCE OF SEISIN—TESTAMENTARY INSTRUMENT.—In *Riddell* v. *Johnston*[1] a father, for valuable consideration, conveyed by deed certain lands to his son in fee simple, "after the death of the grantor." Subsequently, the father married again and the question arose, on the death of the father, whether his widow was entitled to dower out of the lands so conveyed to the son before the marriage. It was held that the widow was not entitled to dower. With respect, the conclusion reached by the Court appears to be

[4] Italics inserted by the commentator.

[5] *Pinn* v. *Rew* (1916), 32 T.L.R. 451; *Turner* v. *Coates*, [1917] 1 K.B. 670; *Hinckes* v. *Harris* (1920), 65 Sol. J. 781. See also *Layzelle* v. *Proctor* (1914), 7 W.W.R. 916, (where it was held that *scienter* with respect to a horse was not a necessary element of the plaintiff's case); *Zumstein* v. *Shrumm* (1895), 22 O.A.R. 263; *Patterson* v. *Fanning* (1901), 2 O.L.R. 462; *Ryan* v. *McIntosh* (1909), 20 O.L.R. 31; *Street* v. *Craig* (1920), 48 O.L.R. 324, partic. at p. 328. Cf. Atkin, L.J., in *Manton* v. *Brocklebank*, [1923] 2 K.B. 212 at p. 230, where he apparently would limit the owner's liability to cases in which he has intentionally caused the act complained of. Cf. also *Bowen* v. *Lightfoot*, [1920] 2 W.W.R. 153; *Obadchuk* v. *Russniak* (1922), 63 D.L.R. 323; *Temple* v. *Elvery*, [1926] 3 W.W.R. 652; *Rosenthal* v. *Hess*, [1927] 1 W.W.R. 15. See also *Hines* v. *Tousley* (1926), 135 L.T. 296.

[6] *Gayler and Pope, Ltd.* v. *B. Davies & Son, Ltd.*, [1924] 2 K.B. 75.

[1] (1931), 66 O.L.R. 554 (Kelly, J.).

sound in principle and in accordance with the authorities. The case suggests the following two possible problems as to the validity of the deed under which the son was claiming: (1) Whether the conveyance of the freehold to take effect on the death of the grantor was void as a grant *in futuro* involving an abeyance of the seisin; and (2) whether the deed was really a testamentary instrument and hence void because it was not executed in accordance with the formalities required by the *Wills Act*?[2] As to the first question, regarding the deed purely as a common law grant, it purported to create an estate of freehold *in futuro* and hence, at common law, it would have been void as involving an abeyance of the seisin between the date of execution and the date of the death of the grantor.[3]

Since the son gave valuable consideration, a Court of Chancery, however, would decree specific performance of the agreement to convey and would use the instrument, which was void as a common law grant, as a written memorandum of the agreement to satisfy the requirements of the *Statute of Frauds*.[4] Since the specifically enforceable agreement to convey the land was entered into before the father married, the Court of Chancery would regard the son as the real owner of the property out of which the widow of the father could not claim dower.[5] Moreover, since the grantee was a son of the grantor, the instrument could have been upheld as a valid covenant to stand seised to the use of the son.[6] As to the second question whether the conveyance was a testamentary instrument in fact, it is essential to consider the true nature and effect of a will. A will is an ambulatory instrument operating on whatever property the testator happens to have on his death. An instrument which pur-

[2] R.S.O. 1927, c. 149, s. 11.

[3] "It was a principle of the common law that the seisin or freehold could never be put in abeyance; that there must always be a present tenant to answer to the requirements of tenure. Whence the rule that an estate of freehold cannot be limited to commence at a future time." Leake: Land Law, p. 313.

Of course, the draughtsman could have circumvented all difficulties as to abeyance of seisin either through the medium of a use or a trust.

[4] *Burgh* v. *Francis* (1673), Chancery Cases temp. Finch 28; *McCarthy* v. *Cooper* (1884), 8 O.R. 316; 12 O.A.R. 284.

[5] *Gordon* v. *Gordon* (1864), 10 Gr. 466. A widow of a trustee is not entitled to dower, *Noel* v. *Jevon* (1678), 2 Freem C.C. 43. Although the older view that the relationship between the vendor and purchaser of land, while the contract is *in fieri*, is that of trustee and *cestui que trust* has been displaced by the view that a purchaser of land under a contract before completion has an interest commensurate with the relief which equity will give by way of specific performance—see, for example, *Kimniak* v. *Anderson* (1929), 63 O.L.R. 428—nevertheless, in the principal case, the son's equitable right to ask for specific performance came into existence before the marriage of the father and was therefore paramount to the widow's claim for dower.

[6] As in *Roe* v. *Tranmer* (1757), 2 Wils. 75.

ports to dispose of whatever property the grantor may be entitled to when he dies is testamentary, but an instrument which purports to dispose of the present interest of a grantor and give a present vested interest therein to the grantee is not testamentary, even though that vested interest will not fall into possession until the death of the grantor. The mere circumstance that the grantor or donor reserves to himself a life estate does not make the disposition testamentary, nor does the additional circumstance that the grantor or donor reserves a power of revocation render it testamentary. If, however, the grantor or donor purports to reserve to himself a power to encroach on or use up the subject-matter of the gift during his lifetime, the disposition becomes testamentary in character.[7]

In *Foundling Hospital (Governors and Guardians)* v. *Crane*,[8] the English Court of Appeal held that a document, purporting to be a conveyance of land, delivered by the grantor on condition that it should only become operative on his death, was a testamentary instrument and could not take effect as an escrow. This conclusion may be sound in principle because in such a case it could be contended that the grantor retained control of the property and the power to dispose of it before he dies. But the oft-quoted language of Farwell, L.J., that "a deed of grant of the grantor's own property to take effect only on the death of the grantor is necessarily testamentary, and cannot be turned into a deed" must be read, as he intended it, in the light of the facts of the case and cannot be relied upon as a general statement of principle. An instrument is not testamentary merely because it creates a future estate which will fall into possession when the grantor dies. The test must go more deeply than that, and an instrument is testamentary only if it purports to operate on and pass whatever interest the grantor may happen to have retained when he dies.

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* * *

Constitutional Law — The Regulation of Trade and Commerce.—At its last session the Legislature of Saskatchewan passed *The Grain Marketing Act*, 1931, the object of which was, as set forth in the preamble, "to secure the marketing of grain co-opera-

[7] For example, in *O'Flaherty* v. *Brown*, [1907] 2 I.R. 416, and in *McEvoy* v. *Boston Five Cent Savings Bank* (1909), 201 Mass. 50, trusts of personalty created by a donor for the benefit of a donee after the death of the donor were held to be testamentary because the donor retained a power to control and use up, if he wished, the subject-matter of the trust.

[8] [1911] 2 K.B. 367.

tively in an endeavour to obtain wider markets for its sale and to assist in eliminating frequently recurring fluctuations in its price." For this purpose a corporation was established under the name of "Saskatchewan Grain Co-operative," and section 3 of the Act required all grain grown in the province, except seed and feed and such grain as was required for a farmer's own use, to be delivered to the corporation "within such time, at such place and in such manner as the Board may determine," for sale by the corporation as agent for the owner. The Act aimed at the establishment of a one hundred per cent. compulsory grain pool and was to come into force only when brought into force by order of the Lieutenant-Governor in Council. As the power of the Legislature to pass such an Act was doubtful, it was referred to the Court of Appeal for an opinion as to its validity, and the Court has now handed down its decision, unanimously holding the Act to be *ultra vires*.[1]

From a statement of facts submitted to the Court, it was made to appear that Canada exports annually about 270,000,000 bushels of wheat; that sixty per cent. of this amount is grown in Saskatchewan; that by far the greater part of the Saskatchewan wheat is exported from the Province, and that of the quantity exported fifteen per cent. is consumed in Canada and eighty-five per cent. in Great Britain and foreign countries. Under these circumstances the Court held that the real purpose of the Act was to regulate trade and commerce within the meaning of heading number 2 of section 91 of the *British North America Act*, and that it was not a measure dealing merely with property and civil rights in the Province.

In support of the Act it was strongly urged that number 2 of section 91 was not sufficient of itself to support such legislation; that, according to a number of decisions of the Privy Council, that heading occupied a subordinate place in the scheme of federal jurisdiction, and could only be invoked in aid of some power which Parliament possessed independently thereof; that since power to pass the law must reside somewhere and it was not within the jurisdiction of Parliament, it must come under the powers given by the constitution to the Legislature; and that, accordingly, it was a proper exercise of provincial jurisdiction under the heading "property and civil rights in the province," number 13 of section 92. The cases principally relied on for the above position were the *Board of Commerce Reference*[1a] and *Toronto Electric Commissioners* v. *Snider*.[2]

[1] *In re Grain Marketing Act*, 1931, [1931] 2 W.W.R. 146.
[1a] [1922] 1 A.C. 191.
[2] [1925] A.C. 396.

In the *Snider* case, Lord Haldane said:

"It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in section 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the Provinces." And, during the argument of the *Board of Commerce Reference,* His Lordship asked: "Must not it to be taken that since the 1896 case (*Attorney-General of Ontario* v. *Attorney-General of Canada*), at all events, perhaps earlier, sub-sec. 2 of sec. 91 must be taken as containing merely ancillary powers, powers that can be exercised so as to interfere with a provincial right only if there is some paramount Dominion purpose as to which they are applicable?"

Expressions of this kind were generally interpreted as laying down the rule that, as argued on behalf of the Wheat Pool, heading number 2 of section 91 of the *British North America Act* conferred no separate and independent jurisdiction upon Parliament but could be invoked only as ancillary to legislation passed either for the peace, order and good government of Canada in special circumstances, as in time of war, or in pursuance of one of the other enumerated heads of jurisdiction set out in that section. As an example, take the judgment of Anglin, C.J., in *King* v. *Eastern Terminal Elevator Co.*[3] The Chief Justice quoted the relevant decisions of the Privy Council, and expressed his doubts as to the soundness of the reasoning therein contained, but finds them conclusive in relegating the power of Parliament under number 2 of section 91 to a subordinate place. He said finally:

> But for their Lordships' emphatic and reiterated allocation of "the regulation of trade and commerce" to this subordinate and wholly auxiliary function, my inclination would have been to accord to it some independent operation, such as was indicated in *Parsons' Case,*[4] and within that sphere, however limited, to treat it as appropriating exclusively to the Dominion Parliament an enumerated subject of legislative jurisdiction with consequences similar to those which attach to the other twenty-eight enumerative heads of section 91.
>
> It is incontrovertible and readily apprehended that the subject-matter of head number 2 must be restricted as was indicated in *Parsons' Case,* of which the authority has been frequently recognised in later decisions of the Judicial Committee. But that it should be denied all efficacy as an independent enumerative head of Dominion legislative jurisdiction—that it must be excluded from the operation of the concluding paragraph of section 91, except for the subsidiary and auxiliary purposes indicated in recent deci-

[3] [1925] S.C.R. 434 at p. 439.
[4] (1881), 7 App. Cas. 96.

sions—these are propositions to which I find it difficult to accede. They seem to me, with deference, to conflict with fundamental canons of construction and with the views expressed in *Parsons' Case.*

I am far from convinced that the regulation of Canada's export trade in grain, including all provisions properly ancillary to its efficient exercise, may not legitimately be held to come within Dominion legislative power conferred by clause number 2 of section 91 operating independently as an enumerative head of federal jurisdiction.[5]

It happened by a singular coincidence that shortly before the hearing of the reference by the Saskatchewan Court of Appeal, two judgments came to hand bearing upon the subject-matter of the reference, namely, a decision of the Supreme Court of Canada in *Lawson* v. *Interior Fruit and Vegetable Committee of Direction* (not yet reported) and a decision of the Privy Council in *Proprietary Articles Trade Association et al.* v. *Attorney-General for Canada et al.*,[6] in which *The Combines Investigation Act* and section 498 of the *Criminal Code* were considered, and in both these cases the judgment of the Court gave a different complexion to the authorities, above cited, from what had been generally received. In the latter of these cases, Lord Atkin said:

The view that their Lordships have expressed makes it unnecessary to discuss the further ground upon which the legislation has been supported by reference to the power to legislate under section 91(2) for "The regulation of trade and commerce." Their Lordships merely propose to disassociate themselves from the construction, suggested in argument, of a passage in the judgment in the *Board of Commerce case, supra,* under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which parliament possessed independently of it. No such restriction is properly to be inferred from that judgment.

Counsel for the Wheat Pool, on his attention being drawn to this dictum, argued that it was not necessary to the decision of the case and should be disregarded, but the Court did not agree with him. All the judges concurred in holding *The Grain Marketing Act, 1931, ultra vires* the Legislature of Saskatchewan; and concurred also in the propositions with which Turgeon, J.A., summed up their opinion upon the constitutional point:

It was therefore the true intention of the *British North America Act* that Parliament should exercise the important jurisdiction conferred upon it by section 91(2) in such a manner as not to interfere, except perhaps indirectly and incidentally, with civil rights in the provinces, these rights being left in their substance to the control of the local legislatures; but that, such interference being eliminated, clause 2 should constitute in itself an original

[5] (1921) 62 Can. S.C.R. 424.
[6] [1931] A.C. 310.

and independent source of power. . . . . Parliament can pass legislation wholly aimed at the regulation of trade and commerce, and based entirely upon the power given to it by clause 2 of section 91, so long as such legislation does not attempt to regulate civil rights within the province.

Regina. R. W. SHANNON.

* * *

SECURITY FOR COSTS ON APPEAL—NOVA SCOTIA, R.S.C.—ORDER LVII., RULE 8; ORDER LXIII., RULE 5. In the Province of Nova Scotia and in other legal units of Canada where the common law is in force, a defendant within the jurisdiction who has been sued by a plaintiff residing outside can obtain an Order for Security for Costs on the trial. Under Order LXIII., Rule 5, other cases where security for costs will be ordered are also set forth, but the situations for which they provide arise less frequently than the simple case where the plaintiff resides out of the jurisdiction. This comment will be confined to a discussion of the latter.

As to the wisdom and justice of this rule there can be no doubt, for it would be most unfair that every "foreign plaintiff" should be permitted to bring suit against a defendant residing within the jurisdiction and place him in a hazardous position as regards the satisfaction of his costs in the event of a decision in his favour.

A further consideration, however, arises in a case where a "foreign plaintiff" having furnished security for costs to the defendant on the trial receives an adverse decision from which an appeal is taken. Having regard to the apparent reason for the Rule as it stands, it would be logical that a similar Order for Security for Costs be granted on appeal.

A consideration of the authorities, however, reveals the fact that as regards Nova Scotia, this is not the case. An early decision, *Card* v. *Weeks*,[1] is an authoritative case on the subject but it is rather difficult to reconcile it with later decisions. In it, Thompson, J., discussing the question of security for costs on appeal, said:

> Such matters are in the discretion of the Court. See *McCulloch* v. *Robinson*.[2] (A case peculiarly binding on us as settling or declining the practice of the Superior Courts of Common Law in England prior to the first year of the reign of William IV.) Before we could sustain the appeal, it must be made manifest to us that the judge could not with propriety decide as he did in the exercise of discretion.[3]

[1] (1883), 16 N.S.R. 93.
[2] (1806), 2 B. & P., N.R. 352.
[3] (1883), 16 N.S.R. 93 at p. 95.

In *McCulloch* v. *Robinson*[4] Chambre, J., said:

> By general rule of law every man not legally incapacitated may sue without giving security for costs. But the Court has interposed in certain cases and required security. This, however, is a matter of discretion; and being so, the rule which has been adopted is not so positive and inflexible as not to yield to particular circumstances . . . that being a rule of discretion and not of positive law.

Another comparatively early case is that of *Knauth Nachod et al.* v. *Sterne*,[5] but the point was squarely raised in the case of *Crowell* v. *Longard*,[6] where an Order for Security for Costs on appeal was granted to a respondent on the ground that the appellant had no assets within the jurisdiction. This case again re-affirms the view that the matter is one of judicial discretion as distinguished from a positive rule of law, and there, in the exercise of that discretion, security for costs on appeal was ordered.

The matter does not appear to have come before the Courts very prominently until the case of *Fleckney* v. *Desbrisay*[7] in which *Crowell* v. *Longard* is discussed. The case of *Fleckney* v. *Desbrisay* appears to have been decided on the basis of the difference between the Nova Scotia Rules and the English Rules of the Supreme Court (Order LVIII., Rule 15). On the facts of the two cases, *Crowell* v. *Longard* on the one hand, and *Fleckney* v. *Desbrisay* on the other, it was decided in the latter that security for costs would not be ordered on the appeal merely because of the poverty of a party to it. This is borne out in the decision of Harris, C.J.: "I am glad to find the law does not compel me to say that a poor litigant can be prevented from appealing if he or she is unable to put up security for the costs of an appeal." Reference was also made to the case of *Shand* v. *Eastern Canada Savings & Loan Company*,[8] where security for costs on appeal was ordered, and again, by a process of distinguishing the case in hand from those cited, the Court declined to grant security in *Fleckney* v. *Desbrisay*, *Shand* v. *Eastern Canada Savings & Loan Company* having been decided on a different set of facts. The tendency of the Court to allow every appellant to have an opportunity to appeal without security having been furnished as a condition precedent is noteworthy.

In the case of *Grant* v. *Baker*[9] an application was made on behalf of the plaintiff-respondent for security for costs on appeal

[4] *Supra.*
[5] (1897), 30 N.S.R. 295.
[6] (1895), 40 N.S.R. 617.
[7] (1926), 59 N.S.R. 114.
[8] (1900), 33 N.S.R. 241.
[9] (1928), 60 N.S.R. 237.

on the ground that the defendant-appellant was out of the jurisdiction and had no property within it. In this case, the provisions of Order LVII., Rule 13, are discussed and interpreted. In connection with this section, the main point worthy of notice is found in the interpretation as set forth in the decision of Harris, C.J., where he said:

> There is no reference in any part of the Rule to security for the costs of an appeal, or to a stay, unless such security is given and it is quite impossible, in my opinion, to construe the rule as applying to such a case.
>
> An argument was made that the last clause of Rule 13 gave power to "the court or *a* judge" to require security to be given, while under the first part of the Rule power was given to *the* judge appealed from or the court, and it was urged that the last sentence of Rule 13 ought therefore to be construed as referring to something different from what is mentioned in the first part of the Rule, and if so, then it was urged it must be inferred that it gave power to order security to be given for the costs of the appeal. I am quite unable to follow such reasoning, particularly in view of the change deliberately made in the English Rule.[10]

Crowell v. *Longard,* was disapproved in the case of *Grant* v. *Baker* as will appear from the following extract delivered by Harris, C.J., in the latter case:

> The note of the case of *Crowell* v. *Longard* . . . was referred to on the argument, from which it appears that Mr. Justice Meagher in Chambers. with some doubt, seems to have reached the conclusion that there was a discretionary power to require security for the costs to be occasioned by an appeal. This case was also referred to on the argument of *Fleckney* v. *Desbrisay*. So far as I can learn it has never been followed in any other case. With great deference the Court is unable to agree with the conclusion reached in that case as summarized in the report referred to.[11]

The trend of authorities of the Nova Scotia cases with respect to the question of security for costs on appeal seems to be that the Court is opposed to the granting of such applications. It remains to be decided whether or not the Court would not depart from the general tendency in a case where a defendant residing within the jurisdiction is compelled to litigate by contesting an action brought by a "foreign plaintiff" provided that the defendant was successful on the trial, and the plaintiff-appellant gave notice of appeal from the judgment. The reasoning in an Ontario case, *Bailey Cobalt Mines* v. *Benson,*[12] seems to meet the justice of such a matter wherein it is stated, of a "foreign plaintiff-appellant": "Such person or party becomes under the appeal an actor desiring

[10] (1928), 60 N.S.R. 237 at p. 239.
[11] (1928), 60 N.S.R. 237 at p. 239.
[12] (1918), 43 O.L.R. 321.

relief against the rights decreed to other parties; and being outside the jurisdiction, should give such security as will cover the costs of an appeal." The view in the Ontario case has been re-affirmed in a later one, *Re Raikes*.[13]

As regards the Nova Scotia authorities on the subject, one may properly question the logical result of allowing an application for security for costs on the trial, and, carrying the action one step further, refuse a similar motion on the appeal. This becomes even more apparent when it is quite evident that the costs to be occasioned in carrying an action to the Supreme Court *in banco* are much higher than the costs on the trial in the first instance. There is one case, as stated above, which is as yet not provided for in the decisions, and it may be that in a hard case where the merits tend strongly to the allowing of such an application the Court will relax from the apparent tendency and allow an order on suitable terms.

KENNETH S. SMITH.

Annapolis Royal, N.S.

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INTERNATIONAL LAW—DIPLOMATIC PRIVILEGE—WAIVER — LEGAL LIABILITY.—*Dickinson* v. *Del Solar*[1] is a definitive case that should not be overlooked. It is notable not so much for the decision *per se* as for the very apposite language of Lord Hewart, C.J., and his suggestive *dicta*. The facts were, briefly, that the plaintiff sued Del Solar, First Secretary of the Peruvian Legation in London, for damages for injuries caused by defendant's negligence in operating a motor car. Acting on instructions of the Peruvian Minister, Del Solar appeared, defended the action, and damages were awarded against him. Del Solar held an insurance policy with the third parties defendant, an insurance company, whereby the company undertook to indemnify him (*inter alia*) "against legal liability to members of the public in respect of accidental personal injury sustained or caused through driving and/or management of the insured vehicle" (his motor car).[2] Del Solar claimed a declaration against the third parties defendant that he was entitled to be indemnified against any amount that he might be adjudged and ordered to pay the plaintiff by way of damages in the action. Argument in defence of the third parties defendant was that Del Solar owed no legal liability to the plaintiff due to his diplomatic privilege, that he need

[13] (1921), 50 O.L.R. 470.

[1] Mobile and General Insurance Co. Ltd. (Third Parties Defendant), [1930] 1 K.B. 376.

[2] *Ibid.*, at p. 377.

not have waived his privilege, that waiver was a breach of a term of the policy providing against acting "in any way to the detriment or prejudice of the company's interest," and that there had been no effective waiver.

Lord Hewart, C.J., held the third parties defendant liable on the ground that diplomatic privilege was waived by the entry of appearance, that Del Solar was bound to obey his Minister's direction in the matter, and that the judgment created a legal liability as contemplated by the insurance policy. The soundness of the decision cannot be questioned from any aspect.[3]

Since the Statute of 7 Anne c. 12 was passed in 1708[4] the immunities from civil jurisdiction possessed by diplomatic agents and members of their staffs have been becoming gradually settled, but beyond a certain point their nature and extent have not yet been clearly defined, at least by judicial imprimatur.[5] In the course of his judgment in the instant case Lord Hewart, C.J., indicates an extension of the bounds within which this phase of the law may be stated with greater exactitude. He said:[6] "Diplomatic agents are not, in virtue of their privileges as such, immune from legal liability for any wrongful acts. The accurate statement is that they are not liable to be sued in the English Courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction . . . It has been argued that by reason of the privilege execution cannot issue against Mr. Del Solar on the judgment. That is perhaps an open question: *Duff Development Co.* v. *Kelantan Government*.[7] But in my opinion it is not necessary to decide it. Even if execution could not issue in this country while Mr. Del Solar remains a diplomatic agent, presumably it might issue if he ceased

[3] The decision was based on *Taylor* v. *Best* (1854), 14 C.B. 487, and *In re Suarez*, [1918] 1 Ch. 176 at p. 193. Cf. *In re Republic of Bolivia Exploration Syndicate Ltd.*, [1914] 1 Ch. 139. On diplomatic privileges and immunities generally, see Hershey, Diplomatic Agents and Immunities, (1919); Deak, "Classification, Immunities and Privileges of Diplomatic Agents" 1 So. Calif. L. Rev. (1928), pp. 209, 232; Report of the League of Nations Committee of Experts on the Progressive Codification of International Law, League of Nations Document C. 196, M. 70. 1927 V, p. 78, 20 Am. J. of Int. Law, Spec. Supp. (1926), p. 148.

[4] This statute was declaratory of the common law. See Lord Campbell, C.J., in *Magdalena Steam Navigation Co.* v. *Martin* (1859), 2 E. & E. 94 at p. 115.

[5] Cf. Hall, International Law, 7th ed., at p. 184.

[6] [1930] 1 K.B. at p. 380.

[7] [1924] A.C. 797 at p. 830. Cf. Oppenheim, International Law, 4th ed., sec. 391 (n.2). For discussion of this question see Dicey, Conflict of Laws, 4th ed., p. 212, n. (f).

to be a privileged person,[8] and the judgment might also be the foundation of proceedings in Peru at any time."

As diplomatic privilege does not import immunity from legal liability but merely from local jurisdiction of the state to whose Sovereign the agent is accredited, it follows that, apart from the privileges involved in the right of innocent passage,[9] the agent may be sued during the tenure of his diplomatic office in his own or a third state and may be proceeded against there on a cause of action[10] arising before or during his tenure of office, regardless of where the cause of action may arise.[11] This is clearly the effect of the decision in the instant case and of the *dictum* of Lord Hewart, C.J., concerning proceedings being brought against Del Solar in Peru. Also, for example, suppose that M. is Minister from a European state to the United States. W. is wife of M. A Parisian merchant, P., has sued W. in a French court before M. was appointed Minister, and judgment has been given against W. in damages. W., who was residing in Paris when the action was commenced and who was served there, has left France for the United States before execution has been levied under the judgment. While M. is Minister to the United States, W. travels to Nova Scotia on a pleasure trip.[12] W. may be sued in Nova Scotia on the French judgment and execution levied on whatever available property she may own in Nova Scotia.

Again, suppose that A. is Ambassador to Great Britain from some Asiatic state. He commits a tort in England. He waives the immunity of his person with the consent of his Sovereign. Judgment is recovered against him in an English court. As he has probably not waived the inviolability of his property, execution cannot be levied upon it in England. But the plaintiff who has obtained the English judgment *in personam* against A. may go into any state other than England which may have personal jurisdiction in the international sense over A., sue on the English judg-

[8] After a reasonable time, of course: *Musurus Bey* v. *Gadban*, [1894] 2 Q.B. 352.

[9] Cf. *New Chile Gold Mining Co.* v. *Blanco* (1888), 4 T.L.R. 346 (dictum of Manisty, J.); *Wilson* v. *Blanco* (1889), 4 N.Y. Supp. 714; with *Carbone* v. *Carbone* (1924), 206 N.Y. Supp. 40, and *Rush* v. *Rush, Bailey and Pimenta*, [1920] P. 242.

[10] Except penal or revenue actions: See Dicey, *opus cit.* at p. 224 and cases there cited. See also *In re Visser*, [1928] Ch. 877.

[11] Providing there is jurisdiction *in personam*. See *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670.

[12] The *jus transitus innoxi* does not cover *incognito* visits or pleasure trips, or protracted sojourns in third states. See Oppenheim, *opus cit.*, sec. 398.

ment and obtain execution on A.'s available property situate in that other state.

There will probably readily occur to the reader several other factual situations in which the above quoted enunciation of the law by Lord Hewart, C.J., would inferentially lead to similar results to the advantage of persons injured by diplomatic agents. There is, of course, always the possibility that the purely legal result may be modified by the dictates of international courtesy. That, however, is not the concern of the courts.

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MUNICIPAL ELECTIONS—THE RIGHT OF AN UNSUCCESSFUL CANDIDATE TO CLAIM A SEAT—CHALLENGING CANDIDATES PRIOR TO ELECTION.—The last municipal election day in Ontario brought with it the usual crop of motions by unsuccessful candidates and interested voters, praying that elected councillors be unseated. The sections of the *Municipal Act*[1] dealing with the challenging of candidates for office and the unseating of persons elected, but disqualified, would merit the attention of the Select Committee now inquiring into the workings of the Act. It provides no procedure whereby a candidate, nominated for an office, may be challenged effectively prior to the election.[2] In so far as the Act itself is concerned one is driven to the conclusion that, once a person is nominated, his name must go on the ballot, no matter whether he possesses the proper qualifications or not.[3]

Is there any other procedure for challenging a person nominated prior to the election? The case of *Eddelson* v. *Wemp and Littlejohn*[4] is authority for a submission that no other means can be adopted. In that case a disgruntled voter sought an interim injunction to restrain Mr. Wemp placing himself before the electors as a candidate for alderman, and to restrain his co-defendant, Mr. Littlejohn, the city clerk, from placing Mr. Wemp's name on the ballot paper, on the ground that he was not entitled to take office if

[1] R.S.O. 1927, c. 233.

[2] The term "election" is used here in the sense of polling day.

[3] S. 70, ss. 4, provides that every candidate for municipal office shall file a declaration of qualification, Form 2. The prescribed form sets out that the declarant is possessed of the necessary property or financial qualifications, that he is entered on the voters' list, that he is a British subject over the age of 21 years, and that he is not disqualified under s. 53 of the *Municipal Act*. The fact that questions of disqualification do arise in spite of this declaration, leads one to believe that this section has not fulfilled entirely its purpose.

[4] (1922), 23 O.W.N. 462.

elected. The alleged disqualification was that the candidate had not resigned from the Board of Education within the time specified in the *Municipal Act.*[5] The Court (Mowat, J.) refused to grant the order, on the ground that an interim injunction would have disposed of the whole matter as it could not be tried before the election. It seems, however, that the truth of the allegations might very easily have been ascertained and the matter disposed of, with no injustice to anyone.

But even if there did exist a form of procedure, another difficulty would very likely arise. The courts have, on a number of occasions, placed themselves on record as being of the opinion, that, if a candidate is disqualified, that fact should be brought to the knowledge of the voters, so that they may have an opportunity of nominating some other person. The theory is, apparently, that the electors should not be compelled to accept a person who is obnoxious to them, and so they should be given an opportunity to protect themselves against such an occurrence. One must conclude, then, that prior to the election no satisfactory procedure is available for challenging the qualifications of any person nominated.

Once the election has taken place, the Act provides machinery for unseating a person who lacks the proper qualifications.[6] But judicial interpretation of section 181[7] has taken a most peculiar turn. The unseating of a disqualified person presents no difficulty, but the section also confers, on the judge hearing the motion, the power to declare any other person duly elected. As a result of this power, in a number of cases, an unsuccessful candidate has sought a declaration that he is entitled to take office in the place and stead of the person unseated. To permit such a step would be entirely out of line with the attitude of the courts not to foist a minority candidate on the public.[8] Following the procedure in similar cases in England, judges, however, have laid it down that if the candidate is challenged at the time of nomination so as to permit of some other person, who has the proper qualifications, being nominated, and if the public has been made aware at the time of voting that the candidate is disqualified, then, the unsuccessful candidate next in line will be permitted to take office; because, it has been

[5] Now s. 53, ss. 1(*k*).

[6] Part IV, sections 167-193.

[7] S. 181(1). When the election complained of is adjudged to be invalid, the order shall provide that the person found not to have been duly elected be removed from the office, and if it is determined that any other person was duly elected that he be admitted forthwith to the office.

[8] *Rex ex Rel. Hooper* v. *Jackson* (1927), 60 O.L.R. 264, per Middleton, J.A. See also *Reg. ex Rel. Tinning* v. *Edgar* (1867), 4 P.R. 36.

said "If voters perversely throw away votes, the minority candidate has a right to his seat."[9]

It is submitted that, in view of the ruling that the *Municipal Act* is to be construed in the light of its own provisions,[10] there was no authority for the introduction of such an interpretation of the section, as it could be satisfied by restricting it to cases in which bribery or corrupt practices are found to be present.

An examination of the reported cases discloses only two instances[11] where a relator has been given the seat in preference to a disqualified candidate who polled a higher number of votes. These occurred about the middle of the last century, and since then the courts in every case have discovered some loophole of escape from the necessity of declaring a minority candidate elected, sometimes on the ground that the notice was not given at the time of nomination,[12] and again because the notice given did not set out with sufficient particularity the nature of the disqualification.[13]

Aside from its impracticability, such a scheme involves so many legal pitfalls that no person, at the present time,[14] would risk a test of its efficacy. Moreover, even this procedure fails to provide for the case where the disqualification is discovered in the interval between the day of nomination and the election. In view of the cost entailed by new elections one may look with great interest to the result of the efforts of the 1931 Select Committee.

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CORONER — INQUEST — IRREGULAR PROCEEDINGS. — A case which might be usefully added to those cited in the article "Strangers in

[9] *Reg. ex Rel. Forward* v. *Detlor* (1868), 4 P.R. 197.

[10] *Rex ex Rel. Glover* v. *Little and Armstrong* (1926), 59 O.L.R. 28 at p. 38. *Rex ex Rel. Beck* v. *Sharp* (1908), 16 O.L.R. 267 at p. 270.

[11] *The Queen ex Rel. Metcalfe* v. *Smart* (1852), 10 U.C.R. 89; *The Queen ex Rel. Richmond* v. *Tegart* (1861), 7 U.C.L.J. 128.

[12] *Reg. ex Rel. Hesvey* v. *Scott* (1851), 2 U.C. Cham. R. 83; *Reg. ex Rel. Clarke* v. *McMullen* (1853), 9 U.C.R. 467; *Reg. ex Rel. Carroll* v. *Beckwith* (1854), 1 P.R. 278; *Reg. ex Rel. Tinning* v. *Edgar, supra; Reg. ex Rel. Adamson* v. *Boyd* (1868), 4 P.R. 204; *Reg. ex Rel. Ford* v. *McRae* (1870), 5 P.R. 309; *Rex ex Rel. Zimmerman* v. *Steele* (1903), 5 O.L.R. 565; *Rex ex Rel. Robinson* v. *McCarty* (1903), 5 O.L.R. 638; *Rex ex Rel. Dart* v. *Curry* (1919), 46 O.L.R. 297; *Rex ex Rel. Hooper* v. *Jackson, supra; Rex ex Rel. Watson* v. *Boddy* (1931), 39 O.W.N. 479, (1931), O.R. 20; see also *Reg. ex Rel. Coleman* v. *O'Hare* (1855), 2 P.R. 17, and *Rex ex Rel. O'Donnell* v. *Broomfield* (1903), 5 O.L.R. 596.

[13] *Reg. ex Rel. Dexter* v. *Gowan* (1852), 1 P.R. 104; *Reg. ex Rel. Forward* v. *Detlor, supra; Reg. ex Rel. McGuire* v. *Birkett* (1891), 21 O.R. 162.

[14] *Rex ex Rel. Dart* v. *Curry, supra,* is the only modern case where it was attempted.

the Jury Room."[1] is *R.* v. *Devine, Ex parte Walton,*[2] in which the coroner for Kingston-upon-Hull was called upon to show cause why inquisitions on inquests held by him, with a jury, into the deaths of two men in a motor accident should not be brought up and quashed. One of the grounds on which the proceedings were held to be irregular was that the coroner had allowed a police constable to speak and point things out to the jury during an inspection and discussion of the damages to a vehicle involved in the collision.

Another practice which was found objectionable by the Court in this case, and which is probably prevalent in many sparsely populated districts, was the summoning of the same jurors so frequently that they came to be regarded as regular jurymen. The coroner stated that it was the custom of his Court to require eleven jurymen to be summoned, that these were selected by the coroner's officer from a list or panel of sixteen or seventeen, that it necessarily happened that some of the same persons were summoned as jurors time after time and that most of the jurymen who could and did attend were regularly summoned and became "regular jurymen." In fact, it appeared in the evidence that before the inquest, the coroner examined a motor car which had been in the collision, in the company of a man whom he introduced to the garage owner as "one of my regular jurymen." The Court held that such a practice was quite contrary to the principle of the jury system which is a determination of questions of fact by persons taken at haphazard from the general body of qualified persons.

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[1] (1929), 7 C.B. Rev. 161.
[2] [1930] 2 K.B. 29.