CASE AND COMMENT.

VENDOR AND PURCHASER—ASSIGNMENT BY PURCHASER OF CHOSE IN ACTION—RIGHT OF ASSIGNEE TO SPECIFIC PERFORMANCE. A point of considerable importance in the law affecting vendors and purchasers was before Maugham, J., in the case of *Curtis Moffatt, Limited* v. *Wheeler*.[1] It was decided that, on a sale of leaseholds by an original lessee, completion in favour of a solvent nominee of the purchaser can be enforced, unless it is shewn that the sale was granted upon considerations purely personal to the purchaser, but the purchaser must join in the assignment for the purpose of guaranteeing the performance of the covenants. A similar doctrine has been applied in the case of an assignment by a purchaser of his right under a contract with a vendor who had undertaken to grant a lease.[2]

It is proposed to consider whether the foregoing principle enunciated with respect to a contract for the assignment or granting of a leasehold applies to a case where B contracts to purchase Blackacre from A, and B subsequently assigns his chose in action to C. May C enforce the contract against A? If the courts will decree specific performance against A at the suit of C, it is evident that A is forced to give something more than a literal and an exact performance of the contract to convey to B. There is nothing novel in such a result; the same comment may be made in every case of a valid assignment of a chose in action. It was decided, as early as 1740, in the case of *Dyer* v. *Pulteney*[3] that an assignee of a purchaser of land could enforce the contract against the original vendor. Likewise, in *Sveinsson* v. *Jenkins*[4] Robson, J., held that the assignee of a vendee of land could obtain a decree for specific performance against the vendor conditioned upon the payment to the latter of the sum due under his contract with the purchaser. Street, J., in *Smith* v. *Hughes*[5] said: "The foundation of the right to join A, the original vendor, in an action for specific performance by a purchaser C from the original vendee B, seems to be that the purchaser C is the equitable owner under his contract with B of B's rights against A, and

[1] [1929] 2 Ch. 224.

[2] See *Crosbie* v. *Tooke* (1833), 1 My. & K. 431, and *Dowell* v. *Dew.* (1842), 1 Y. & C.C.C. 345.

[3] Barn. C. 160.

[4] (1911), 21 Man. R. 746. See also *Robertson* v. *Matthews* (1911), 17 W.L.R. 552.

[5] (1903), 5 O.L.R. 238 at p. 245.

that he may join A in his action with B as a co-defendant upon offering to perform B's contract with A."

The vendor may, however, in the contract of sale prescribe that the right of the purchaser to a conveyance is purely personal, and that it shall not be assignable. If the vendor does not desire to prohibit absolutely an assignment by the purchaser of his chose in action, he may provide that the vendee shall only assign if and when he gives his approval. In the latter case an assignee, in the absence of the vendor's approval, is not entitled to succeed in an action for specific performance against the vendor.[6] Of course, the contract between the purchaser and his assignee is valid notwithstanding the lack of the required approval on the part of the vendor.[7] It has been held that the vendor's approval is to be regarded as a matter of conveyance rather than of title.[8] An approval fraudulently obtained will not give the assignee any better position than if it had never been procured.[9] It appears from *Iwanicki* v. *Levin*[10] that a provision in a contract of sale of land to the effect that no assignment by the purchaser should be valid unless approved by the vendor is not merely a personal stipulation between the vendor and the purchaser but that it would enure also for the benefit of an assignee of the vendor. Restrictions imposed upon the assignment by the purchaser of his chose in action should be differentiated from conditions in restraint of alienation of the land.[11]

S. E. S.

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GIFTS—MORTIS CAUSA—NECESSITY FOR DEATH IN MANNER CONTEMPLATED BY DONOR. In the Canadian Encyclopedic Digest[1] under the title "Gifts, Mortis Causa," it is stated that, "To be a valid donation, the gift . . . must be intended to take effect only upon (the donor's) death from the existing disorder . . . ," and the last edition of Williams on Executors[2] contains a proposition to the same effect. In the former work a case cited in the related footnotes,

[6] See *McKillop* v. *Alexander* (1912), 45 Can. S.C.R. 551; *Goode* v. *Buro* (1913), 6 S.L.R. 92; *Fitzpatrick* v. *Fitzpatrick* (1923), 16 S.L.R. 286; *Hallson* v. *Brounstein*, [1925] 4 D.L.R. 327.

[7] *Stewart* v. *Born* (1911), 4 S.L.R. 260.

[8] *Mosiman* v. *Carveth*, [1923] 2 W.W.R. 372.

[9] *MacLeod* v. *Sawyer and Massey Co.* (1910), 46 Can. S.C.R. 622.

[10] (1923), 33 Man. R. 420.

[11] Cf. *Blackburn* v. *McCallum* (1903), 33 Can. S.C.R. 65; *Paul* v. *Paul* (1921), 50 O.L.R. 211; 9 C.E.D. (Ont.) 177.

[1] (1929), 5 C.E.D. (Ont.) at p. 399; (1921), 4 C.E.D. (Western) at pp. 295-296.

[2] Williams: A treatise on the Law of Executors and Administrators, 12th ed., 1930. It states at p. 479, (as the second requirement of a *donatio mortis causa*), that "it must be conditioned to take effect only on the death of the

McDonald v. *McDonald*,[3] a decision of the Supreme Court of Canada, contains language in support of this statement of the law,[4] but in the latter no authority is given for it. In the recent English case of *Wilkes* v. *Allington*[5] Lord Tomlin, sitting as additional Judge of the Chancery Division, has held that, as stated in Williams,[6] the proposition is not merely unsupported by any authority but is incorrect. He holds that if the donor contemplates his impending death in making the gift its validity is unaffected by the circumstance that the donor's death ultimately takes place from a different cause.

In *Wilkes* v. *Allington*, the donor knew that he was suffering from cancer, and as a consequence "believed himself to be in the shadow of death, to be a doomed man."[7] In these circumstances he delivered a mortgage deed covering the donees' property, (he being the mortgagee) to the donees, using language which showed that he intended to make a gift of it to them to take effect on his death. Sometime later he caught a chill and died of pneumonia. In the course of his judgment, dismissing the action by the deceased donor's executors against the donees for a declaration that the mortgage was still subsisting and for its delivery up and foreclosure, Lord Tomlin, (after referring to Williams on Executors in the manner mentioned above), said, in part: "In fact, the testator (donor) did not die by the actual disorder from which he was suffering at the time when he handed over the deed. . . . If a man in contemplation of death within the meaning of the phrase, as used by Lord Russell, (in *Cain* v. *Moon*[8]), in fact dies from some cause other

donor by his existing disorder." No such requirement is mentioned in the following works: Williams: Principles of the Law of Personal Property, 18th ed., 1926; Goodeve: Modern Law of Personal Property, 7th ed., 1930; White & Tudor: Leading Cases in Equity, 9th ed., 1928, (note 2 to *Ward* v. *Turner*, "Requisites to a *Donatio Mortis Causa*," p. 355); Halsbury: Laws of England, vol. 15, p. 431 *et seq.*, "*Gifts Mortis Causa*."

[3] (1903), 33 Can. S.C.R. 145.

[4] In (1903), 33 Can. S.C.R. at p. 161, Mills, J., setting out what he considered to be the several requirements of a valid gift *mortis causa*, said: "It (the gift) must be conditioned to take effect only on his death from the existing disorder." This, however, was in a case where the donor's death was actually caused by the disorder that gave rise to his contemplation of death, and the case turned on the question of sufficiency of delivery.

[5] [1931] 2 Ch. 104; 100 L.J. Ch. 262.

[6] *Op. cit.*

[7] Lord Tomlin in [1931] 2 Ch. at p. 110.

[8] In *Cain* v. *Moon*, [1896] 2 Q.B. 283, at p. 286, Lord Russell of Killowen, C.J., said: "For an effectual *donatio mortis causa* three things must combine: first, the gift or donation must have been in contemplation, though not necessarily in expectation of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and thirdly, the gift must be made under such circumstances as to show that the thing is to revert to the donor in case he should recover."

than the disorder which was present to his mind when he made the gift, I have a difficulty in seeing why the gift is not operative."[9]

In a commentary on *Wilkes* v. *Allington* in a recent number of the Law Times[10] the statement in Williams on Executors is referred to in the following terms: "In fact there is authority the other way, for in *Re Richards, Jones* v. *Rebbeck,*[11] Mr. Justice Eve had a case where a man expected to die under an operation but in fact died from entirely different causes, and certain Victory Bonds handed to the claimant were successfully retained by her as a good *donatio mortis causa.*" This comment, in so far as it implies that the editors of the 1930 edition of Williams overlooked a direct authority against their statement of the law, is misleading. In *In re Richards,* the donor, while suffering from the serious illness which later proved fatal, delivered some Victory Bonds to the donee, with appropriate words of gift *mortis causa,* on the day previous to undergoing an operation. Eve, J., was not satisfied that the donor had particularly in mind death from the impending operation, if at all, when he made the gift. His Lordship said: ". . . I cannot bring myself to hold that he ever contemplated that the gift should only take effect if he died under the operation and should not take effect if he died of the combination of maladies from which he was then suffering. There was not in my opinion any condition avoiding the gift in the event of death not taking place by reason of the operation."[12] From this it appears that *In re Richards* is at best indirect authority against the statement in Williams; it being possibly safe to infer *from the language* of Eve, J., in that case that it is immaterial to the validity of a *donatio mortis causa* whether or not the donor later die from the cause of death contemplated by him when making the gift, unless it be established that the donor intended the gift to be conditioned upon his death taking place by the particular cause contemplated and no other. It is suggested with deference that it was probably with this indirectness in mind that Lord Tomlin in *Wilkes* v. *Allington* said, guardedly: "So far as it has any bearing upon the matter I think the case of *In re Richards* before Eve, J., supports the view that contemplation of death is a necessary element, and that if the donor does in fact die the gift takes effect."[13]

[9] [1931] 2 Ch. at p. 110; 100 L.J. Ch. at p. 264.
[10] (1931), 172 L.T. 145.
[11] [1921] 1 Ch. 513; 124 L.T. 597. *In re Richards* is discussed in (1921), 37 Law Q. Rev., at pp. 268-270, where no notice is taken of the point as to the mode of the donor's death. This case is also noted in (1922), 58 Can. L.J. 78, and is cited on another point in Goodeve, *op. cit.,* at p. 115, and White & Tudor, *op. cit.,* at pp. 361 and 364.
[12] [1921] 1 Ch. at p. 520.
[13] [1931] 2 Ch. at p. 110; 100 L.J. Ch. at p. 264.

In conclusion, it is suggested that in view of the decision in *Wilkes* v. *Allington* to the contrary, the statement quoted above from the Canadian Encyclopedic Digest purporting to state the Canadian law on the point under consideration should now be regarded with considerable doubt, and that the proposition in Williams on Executors is wrong in so far as it refers to the present state of English law. As Lord Tomlin indicated, if the essential requirement enunciated by Lord Russell of Killowen in *Cain* v. *Moon*[14] that "the gift or donation must have been in contemplation, though not necessarily in expectation of death," is satisfied, there seems to be no good reason, despite the hostile policy of the law toward non-testamentary dispositions,[15] either in logic or arising from the essential nature of the transaction, to require that the donor should die in the particular manner contemplated in order to validate the gift. Even if his subsequent death occurs from a cause other than that contemplated by him, the gift was induced *mortis causa.* It is therefore submitted that the relevant passages in the Canadian Encyclopedic Digest and Williams on Executors should probably, as a result of the decisions in *Wilkes* v. *Allington* and *In re Richards,* be amended to read: "To be a valid donation *mortis causa* . . . . it is not necessary that the donor shall die from the same disorder as that from which he is suffering and contemplates as the cause of death at the time the gift is made, *unless* it is established that the gift was intended by the donor to take effect only on his death by that disorder."

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JOINT TENANCY IN LAND—SEVERANCE BY WRIT OF EXECUTION. The most important feature of a joint tenancy, as distinguished from a tenancy in common, is the *jus accrescendi* or the right of a surviving joint tenant to acquire the interest of a deceased joint tenant by survivorship. The surviving joint tenant's right to take the interest of a deceased joint tenant cannot be defeated by a will made by the deceased tenant,—*jus accrescendi præfertur ultimæ voluntati.* But a joint tenancy may be severed and the *jus accrescendi* destroyed by a voluntary or involuntary alienation by one joint tenant of his moiety to a third person,—*alienatio rei præfertur juri accrescendi.* Thus a joint tenancy is severed by a conveyance by one joint tenant

[14] *Supra.*

[15] As to the attitude of the courts toward gifts *mortis causa* in particular, see Ferguson, J., in *Hall* v. *Hall* (1891), 20 O.R. 684 at p. 688.

of his interest in fee,[1] or for life,[2] or for years,[3] or by a mortgage,[4] or by an agreement to sell for valuable consideration,[5] or by bankruptcy,[6] or by a sale of the moiety by the sheriff under a writ of execution.[7] The right of survivorship, however, is not affected by a mere burden such as an easement or a rent charge created by one joint tenant, and the surviving tenant takes the moiety free of any such burden created by a deceased tenant,—*jus accrescendi præfertur oneribus*.[8] In *Power* v. *Ough*,[9] the question arose as to whether the filing of a writ of *fieri facias* with the sheriff, pursuant to a judgment against one joint tenant, severed the joint tenancy so as to enable the sheriff to sell the moiety of the judgment debtor after his death.[10] By the Ontario *Execution Act*[11] a writ of execution creates a charge on the land of the judgment debtor from the time of the delivery of it to the sheriff. The problem is, should such a statutory charge be regarded as alienation sufficient to destroy the right of survivorship, or, should it be considered a mere burden on the property such as a rent charge or an easement leaving the right of survivorship unaffected. On principle, since no estate in the land is created, it is submitted that the charge created by the filing of the writ falls within the latter class and does not destroy the right of survivorship. Although there is one American case[12] in which it was held that the delivery of a *fi. fa.* severed the joint tenancy, what English authority there is tends towards the view that no severence is effected. By a strained process of interpretation the English courts have held that the *Statute of Westminster II*,[13] which conferred on a judgment creditor the right to obtain satisfaction of his debt out of the lands of the debtor by a writ of *elegit*, in effect, made a judgment a charge on the lands of the debtor.[14] In other words in England, prior to modern statutes dealing with the subject, a judgment had the same effect on the lands of the debtor as a writ of execution has in Ontario to-day

[1] Litt., s. 292; Co. Litt., ss. 302 and 303.
[2] Litt., s. 294.
[3] *Clerk* v. *Clerk* (1694), 2 Vern. 323.
[4] *In re Elizabeth Pollard* (1863), 3 De G. J. & S. 541 at p. 557.
[5] *Hurley* v. *Roy* (1921), 50 O.L.R. 281 at p. 284.
[6] *Re White* (1928), 33 O.W.N. 255.
[7] *Re Craig* (1928), 63 O.L.R. 192.
[8] Co. Litt., s. 286.
[9] [1931] O.R. 184.
[10] The County Court Judge, whose reasons are not reported, held that there was no severance of the joint tenancy. The Appellate Division did not deal with the problem on the merits but for procedural reasons held that the County Court Judge had no jurisdiction.
[11] R.S.O. 1927, c. 112, s. 9.
[12] *Davidson* v. *Haydon* (1799), 2 Yeates 459 (Penn.).
[13] 13 Ed. I, c. 18.
[14] Sir John de Moleyn's Case, Year Book, 30 Ed. III, 24a.

when filed with the sheriff. In such circumstances it was held, in *Lord Abergavenny's Case,*[15] that if a joint tenant against whom a judgment had been given died before actual seizure of his interest in the lands in execution, the surviving joint tenant acquired the interest free from any claim by the judgment creditor.

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MARRIAGE—QUEBEC.—The position of the various churches in regard to marriage had, it was thought, been settled definitely by the Privy Council in *Despatie* v. *Tremblay,*[1] which seemed to accept what may be described as the secular view of marriage. In particular, Bruneau, J., held in two cases that the officiating minister was a public officer and therefore must be a British subject. Duclos, J., without denying that the minister was a public officer, refused to annul a marriage because he was not a British subject. The question again arose in *Ryan* v. *Cunningham,*[2] in which Ryan attacked his marriage with the defendant on the sole ground that the officiating priest, Father Strubbe of Ste. Anne's parish, was not a British subject. The action was dismissed by Surveyer, J., but, as the decision is not reported, we do not know on what grounds. On appeal to the Court of King's Bench this judgment was confirmed but on grounds of such far-reaching importance that they call for careful examination. The report unfortunately does not contain the formal judgment of the Court and it must be assumed, therefore, that the opinion of Lafontaine, C.J., was that of the whole Court. According to the learned Chief Justice: "The theory of the appellant is that the persons mentioned in this article (C.C. 44), rectors, assistants (vicaires), ministers, are public officers whose duties can only be performed by British subjects so that an alien is incompetent to solemnize marriage."

In order, therefore, for the appellant to succeed he had to establish: (1) That the priest, etc., entrusted with registers of civil status, is a public officer; (2) That public officers must be British subjects; (3) That, notwithstanding the general terms of C.C. 128, 129 and 44, marriage officers are subject to this rule; (4) That the fact that the marriage officer is not a British subject renders marriages contracted before him void even though they were otherwise regular in all respects.

[15] (1607), 6 Co. Rep. 78b.

[1] [1921] 1 A.C. 702.

[2] Quebec, 48 K.B. 489.

Lafontaine, C.J., deals with the first three of these contentions but, owing to the conclusions reached as regards them, he hardly touches upon the fourth. These will now be dealt with in order.

(1) Lafontaine, C.J., describes a public officer as one who in the performance of his duties exercises to a greater or lesser extent some part of the sovereign power of the government (*autorité publique*) and who is appointed by the Government or directly by the people. Accepting this description with the slight modification that the appointment must be made by or under the authority of the State, "that he (the officer) must be mediately or immediately of the King's appointment," we may now ask the question, whether or not the priest entrusted with registers of civil status is or is not a public officer. Lafontaine, C.J., says that he is not, because he does not derive his authority in any way from the State, and does not exercise any part of its authority, but merely performs a duty imposed upon him by law. This reasoning is hard to follow. If the authority of the priest to perform marriages is not derived from the State, from whom is it derived? Clearly not from the churches. The priests and ministers of the Church of England, of the various Protestant dissenting bodies, and of other sects and religions are in Canada, except in so far as their status has been modified by statute, the servants "of a self-created society of individuals, not established, but simply tolerated by law; who, if they be of ecclesiastical denomination, have no more right to appoint an officer for the execution of an Act of Parliament, than a lodge of freemasons, a friendly society, or any other voluntary association of a similar description."

If the Church of Rome is not a "self-created society of individuals not established but simply tolerated by law," it is a foreign power and equally incapable of appointing officers "for the execution of an Act of Parliament."

It must not be forgotten that the *Quebec Act*[8] made the grant of the free exercise of the Religion of the Church of Rome "subject to the King's Supremacy, as declared and established by an Act, made in the First Year of the reign of Queen Elizabeth." The relevant section (XVI) of this statute provides:

> And to the Intent that all usurped and foreign Power and Authority Spiritual and Temporal, may forever be clearly extinguished, and never to be used or obeyed within this Realm, or any other your Majesty's Dominions or Countries; May it please your Highness that it may be further enacted by the Authority aforesaid, That no foreign Prince, Person, Prelate, State or Potentate Spiritual or Temporal, shall at any time after the last day of this Session of Parliament use, enjoy or exercise any Manner of Power, Jurisdic-

[8] 14 Geo. III, c. 83, s. 5.

tion, Superiority, Authority, Preeminence or Privilege Spiritual or Ecclesiastical, within this Realm, or within any other your Majesty's Dominions or Countries that now be, or hereafter shall be, but from thenceforth the same shall be clearly abolished out of this Realm, and all other your Highness' Dominions for ever; any Statute, Ordinance, Custom, Constitutions, or any other Matter or Cause whatsoever to the contrary in any wise notwithstanding. . . .

Moreover, under the old French law it is clear that the priest in solemnizing marriage and making authentic records derived his authority exclusively from the Crown. This question is admirably dealt with by Sewell, C.J., in *Ex parte Spratt*,[4] from whose judgment we have already quoted. In this case, the petitioner, Mr. Spratt, a non-conformist minister, applied for registers of civil status. The question of the qualifications necessary to hold these registers is discussed at length. This decision, it may be noted, was warmly approved by Sir François Lemieux,[5] and by Anglin, C.J.[6] After quoting largely from the old French writers, the learned Chief Justice summarized the authorities as follows: "It is evident that the right of keeping a register of baptisms, marriages and sepultures . . . . vested, at the conquest, in the parish priests of Canada, was by law considered to be so vested in them, not by reason of their spiritual or ecclesiastical character, but because they were, by law, the acknowledged public officers of the temporal government."

This view is amply borne out by Pothier. Both, before and after the date of this decision, the Provincial Legislature passed statutes conferring the right to keep registers of civil status and to perform marriages, these statutes being reproduced in the Consolidated Statutes of Lower Canada.[7] Nowhere is there any suggestion that the authority to marry does not come from the State. The codifiers use the term "public officer,"[8] and in their report, II., p. 181, state that "Our provincial statutes have entrusted this duty to ministers of different religious denominations, who are civil officers for these purposes."

These civil officers or public officers—the codifiers use the terms interchangeably—have duties imposed upon them which they may be compelled by *mandamus* to perform, and failure to perform which renders them liable to various pains and penalties. The truth is that marriage in Quebec is a purely civil matter governed by the

[4] Stuart's K.B. Reports, 90.
[5] *Durocher* v. *Degré*, 20 S.C. 456.
[6] See *In re Marriage Laws* (1912), 46 Can. S.C.R. 132.
[7] 1861, c. 20. s. 16.
[8] See C.C. 41.

civil law, entered into before, and recorded by, purely civil officers, the validity of whose acts depends exclusively on the civil law as applied by secular judges.[9] That this same person at the same moment is also the official of a religious body administering sacraments, the validity of which depends upon canon law and is decided by ecclesiastical tribunals, may confuse the issue, but does not change the fundamental fact. A marriage may be valid as a sacrament and yet invalid in the eyes of the law. For instance, the marriage discussed in *The United Townships of Stanfield and Pontefract* v. *Denault,*[10] in which a woman had married her deceased husband's brother under a dispensation from her bishop, was clearly valid in canon law although obviously the bishop had no authority to waive in any particular case the express provisions of the Civil Code. Conversely, the marriage declared null as a sacrament may be perfectly valid as a matter of law."[11] The conclusion is irresistible. It may be noted that, although it is denied that the authority of the marriage officer is derived from the state, the Court in *Ryan* v. *Cunningham,* relied exclusively on statutes to establish the competence of the priest in question.

(2) Lafontaine, C.J., accepts as indisputable the principle that public officers must be British subjects. It is. This seems clear when it is remembered that the appointment of public officers is a matter of public law and therefore of English law. The statute, 12 and 13 Wm. III, c. 2, s. 3, provides in part that, " . . . . . no Person born out of the Kingdoms of England, Scotland, or Ireland, or the Dominions thereunto belonging . . . . shall be capable to be of the Privy Council, or a Member of either House of Parliament, or to enjoy any Office or Place of Trust, either Civil or Military. . . ." This statute was substantially re-enacted by 1 Geo. I, c. 2, where it was enacted that this provision was not applicable to "any Tything Man, Head Borough, Overseer of the Poor, Churchwardens, Surveyors of the Highways, or any like inferior civil office . . . ." The officer charged with solemnizing marriage and with making authentic records can hardly be considered as *ejusdem generis* with these.

(3) Lafontaine, C.J., considers that the absolutely general terms of Articles 128, 129 and 44, C.C., would be sufficient to except the priests from the operation of this general principle, assuming it otherwise to be applicable, and he suggests with considerable weight

[9] See *L'Heureux* v. *Budgess,* Casault, J., quoted with approval by Lemieux, J., 20 S.C. 505.
[10] 30 K.B. 204.
[11] See *Despatie* v. *Tremblay, supra.*

that the policy of the State has been to leave to the church the most complete autonomy in all matters, making no attempt to restrict the choice of a bishop in appointing priests to the various parishes. This view is plausible, but, it is respectfully suggested, unsound. The delegation to various ecclesiastical bodies of the right to nominate marriage officers surely does not grant to these bodies a wider authority then the Crown itself possesses. Express words would be needed to over-ride the provisions of 12 and 13 Wm. III, c. 2.

(4) Owing to the answers given to the previous questions, Lafontaine, C.J., does not deal with the effect of the Acts of a *de facto* marriage officer, contenting himself with pointing out that marriages solemnized before an incompetent officer are not necessarily null but that under Article 156 the Court seized of an action in annullment has "the right to decide according to the circumstances."

The exercise of this discretion in order to maintain the validity of such a marriage would obviously be proper. This, however, does not go to the root of the matter. Can it not be argued that marriages performed by an officer entrusted in an apparently regular way with registers of civil status, that is, by a *de facto* officer, are valid? It may be noted that although the power of the Catholic priests to solemnize marriage lapsed by the mere fact of the Cession as did all other powers which were a part of the sovereign authority, "Catholic priests continued to exercise it as *de facto* officers . . . until 35 Geo. III, chap. 4, which seems to be the starting-point of the reorganization of this part of public authority."[12] There seems to be little authority here or in England as to the effects of the acts of *de facto* state officers. An old anonymous case,[13] decided "by all the judges of England," held that "judicial acts done in the time of the usurper, bind the rightful King, and all who submit to this judicature. . . . These resolutions were made because the common people cannot judge of the title to the Crown and also to avoid anarchy and confusion . . . . *Salus populi suprema lex.*" In the United States, however, there is much authority to the effect that "the acts of an officer *de facto* are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer *de jure.*"[14]

As a result, it would seem to follow that the priest, minister or other person entrusted with registers of civil status is a public officer,

[12] Per Charbonneau, J., *Hebert* v. *Clouatre,* 41 S.C. 249 at p. 276.
[13] Reported in Jenk. 131, case lxvi.
[14] Corpus Juris, vol. 46, Officers, no. 378. (For a fuller discussion see this title generally.)

and therefore must be a British subject, excepting in so far as that requirement has been derogated from by express legislation. It is probably the better view that there is no such derogation contained in Article 44, C.C., or in any of the special statutes granting the right to keep registers. This question is, however, arguable. The acts, however, of a *de facto* officer are valid and the marriage in question should be maintained without the exercise of the discretionary power of the Court under Article 156, C.C.

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WILLS—SETTLEMENT OF A SHARE OF RESIDUE—LAPSE BY DEATH OF LEGATEE BEFORE TESTATRIX. When a share of a residue has been settled on a legatee for life, with remainder over, the survivorship of the life tenant apparently being assumed, and the life tenant predeceases the testator, it has frequently been necessary to determine whether the bequest lapses, or whether it takes effect for the benefit of the remainderman. As might be expected the decisions have not yielded uniform results.[1] Notwithstanding the warning pointed out by the cases, this same problem has recently arisen again in *In re Taylor*.[2]

The testatrix in that case directed her executor and trustee to stand possessed of the net residue upon trust to divide the same equally between her four named step-children in equal shares. There was a further direction that the share to which Amy Taylor, one of the legatees, "shall become entitled" should be retained by the executor and trustee upon trust to pay such part of the income as he should think fit towards the maintenance of Amy Taylor during her life, and after her death to divide "the said share settled on her as aforesaid" and any unapplied accumulations among the other three legatees. Amy Taylor and Samuel Robert Taylor another of the legatees predeceased the testatrix. The share of Samuel Robert Taylor admittedly lapsed.

Eve, J., held, following *Stewart* v. *Jones*[3] and distinguishing *In re Pinhorne*,[4] that "the will contains an absolute gift of one-fourth share to Amy, but she did not live to take anything, and as the

[1] See *Stewart* v. *Jones* (1859), 3 De G. & J. 532; *In re Roberts* (1885), 30 Ch. D. 234. Cf. *In re Speakman* (1877), 4 Ch. D. 620; *In re Pinhorne*, [1894] 2 Ch. 276; *In re Powell*, [1900] 2 Ch. 525; *In re Whitmore*, [1902] 2 Ch. 66; *In re Walter*, 56 Sol. J. 632; *In re Shannon* (1909), 19 O.L.R. 39.

[2] [1931] 2 Ch. 237.

[3] *Supra.*

[4] *Supra.*

direction to settle affects only the share 'to which the said Amy shall become entitled under this my will' there is in my opinion nothing upon which it can operate."[5]

The decision appears to be sound. No provision against lapse was made in the case of the other legatees, and as the settlement appears to have been made only to prevent Amy Taylor from getting the corpus, it seems only reasonable to suppose that her "share" should suffer the same fate as that of Samuel Robert Taylor. The conclusion is almost inescapable, however, that if the testatrix's attention had been drawn to the matter, she would probably have desired that the surviving legatees should take the whole of her property. Though the statement of Stirling, L.J., in *In re Whitmore* that ". . . the decisions afford little assistance, except so far as they lay down a rule or principle. We can find none laid down except this, that the words in question are susceptible of more than one meaning, and that in ascertaining the sense in which they are used the whole will must be regarded"[6] may also be applied to *In re Taylor*, the moral to the solicitor is obvious.

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[5] [1931] 2 Ch. 237 at p. 240.
[6] [1902] 2 Ch. 66 at p. 70.