THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editorial Board, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

☛ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

COUNCIL MEETING OF THE CANADIAN BAR ASSOCIATION

The Mid-Winter Council Meeting of The Canadian Bar Association will be held at the Chateau Laurier, Ottawa, on Saturday, February 6th, 1937, at 10.00 A.M.

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CASE AND COMMENT

CONFLICT OF LAWS—LEGITIMATION BY SUBSEQUENT MARRIAGE—STATUS AND SUCCESSION.—The case of *In re Williams, Curator of Estates of Deceased Persons* v. *Williams*,[1] decided by the Supreme Court of Victoria (Full Court) raises interesting questions near the border line between status and succession.

The sequence of events was as follows. In September, 1860, Jane Williams was born, and in the following month her parents John Williams and Eliza Jones intermarried. Both of them were domiciled in England[2] at the time of the birth of Jane Williams and at the time of their marriage. The marriage was solemnized in Wales. Thereafter other children, including David Williams, were born in lawful wedlock. John Williams died in 1899 and his wife in 1910. In 1903 a statute of Victoria made provision for legitimation by subsequent marriage, but as

[1] [1936] V.L.R. 223.

[2] So stated in the report of *In re Williams*, although the natural inference from the terms of the declaration of legitimacy of the Welsh court, referred to below, is that the parents were domiciled in Wales.

it was applicable only to children born in Victoria, without regard to the domicile of the parents, it had no bearing on the present case. On January 1, 1927, the Legitimacy Act, 1926, enacted by the Parliament of the United Kingdom, became effective, and it provides (s.1): "(1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens." Jane Williams (Mrs. Roberts) died on February 16, 1932, leaving a son, Alfred John Roberts. David Williams died on May 31, 1932, a bachelor, intestate, domiciled in Victoria, and the claimants to his property, situated in Victoria, were his three surviving sisters and his brother, and Alfred John Roberts, On June 24, 1935, the last mentioned claimant obtained from a court in Wales a declaration, pursuant to the Legitimacy Act, 1926, that his mother, Jane Williams, afterwards Roberts, was legitimated for the purpose of the Act as from the date of its commencement (January 1, 1927) by the marriage of her parents.

In an earlier Victorian case of *In the Estate of Beatty, Deceased, Trustees Executors and Agency Co. Ltd.* v. *Johnson*,[3] Cussen J. had decided that in order to fall within the terms "a brother's children", or "a brother's representatives", in the Statute of Distributions (in force in Victoria), the status of lawful children must have been established during the lifetime of the parents, or at all events the father of the children. Therefore the status of a legitimate child retrospectively conferred by a statute of New York upon children born out of wedlock but whose parents subsequently intermarried, was ineffective to give the child a right to take under the Statute of Distributions in Victoria if the father, domiciled in New York, died before the enactment of the New York statute. After referring to the Victorian statute relating to legitimation as having no bearing on the case, Cussen J. added, "In any event, a modern provision of that kind should not, I think, be held to affect the meaning of children in an ancient British statute in force in Victoria by 9 Geo. IV, c. 83". He also observed that if the father had died intestate prior to the enactment of the legitimation statute, illegitimate children would not have been

[3] [1919] V.L.R. 81.

entitled to a share in his estate, and it would be odd that by reason of subsequent legislation they became entitled as his children to a share in his brother's estate. On substantially the same reasoning the court in *In re Williams* denied the right of Alfred John Roberts to a share in the estate of his uncle.

One member of the court suggested that the status of a person legitimated under a foreign law might be recognized "for some purposes", but held that the status should not be recognized "for the purpose of enabling him to take as one of the surviving next of kin of the intestate". This mode of stating the matter is plausible, but whether it is right is perhaps open to doubt. I should prefer to say that two questions had to be decided, namely, a question of status and a question of succession. The intestate being domiciled in Victoria at the time of his death, and the property being situated in Victoria, the law of Victoria was the governing law as to succession (as the *lex rei sitae* with regard to immovables and as the *lex domicilii* with regard to movables). In the circumstances of *In re Williams* there was, as regards succession, no reference by the conflict of laws rules of the forum to the law of any other country, and therefore the classes of persons entitled to succeed had to be defined exclusively by the law of Victoria. The governing statute, at least as to movables, and as to immovable personal property, was the Statute of Distributions, by which the surviving brothers and sisters of the bachelor intestate and the children of his deceased brothers and sisters were entitled to share. The next question was whether Jane Williams, afterwards Roberts, was a sister of the intestate, that is, whether she was a legitimate child of the parents of herself and the intestate. My submission is that this should be characterized as a pure question of status and not as a question of succession, and that it should be answered by exclusive reference to the *lex domicilii* of Jane Williams' father, this being the governing law in accordance with the conflict rules of the forum. The domicile of the father was in England both at the time of the birth of Jane Williams and at the time of the subsequent marriage, so that nothing turns upon the doubtful question whether the Legitimacy Act, 1926[4] made a

[4] Section 8, which provides in effect that in England or Wales a child is legitimated by the subsequent marriage of his parents if his father was, at the time of the marriage, domiciled in a country other than England or Wales, by the law of which the child became legitimated by virtue of such marriage, and without regard to the domicile of the father at the time of the child's birth. This clarification of the conflict of laws rule relating to legitimation under the law of the foreign domicile of the father might well, it is submitted, be adopted in the various provincial statutes relating to legitimation.

change in English conflict of laws by providing that the domicile at the time of the marriage is alone material. It being clear that Jane Williams was legitimated by the *lex domicilii* of her father, it is submitted that her legitimacy, and consequently her son's right to share in his uncle's estate, should have been recognized in Victoria.

Interesting points of comparison with *In re Williams* are suggested by the case of *In re Askew, Marjoribanks* v. *Askew*.[5] In an English marriage settlement it was provided that in the event of the husband's marrying again he might, as to part of a certain trust fund, revoke the trusts and appoint in favour of the second wife and the children of the second marriage. In 1911, the husband, John Bertram Askew, being then domiciled in Germany, obtained there a divorce from his first wife, and in 1912 married a second wife, by whom he had already had a daughter, Margarete. Owing to the fact that Margarete was born early in 1911, prior to her father's divorce from his first wife, she would not have been legitimated under the Legitimacy Act, 1926, by the subsequent marriage of her parents if her father had been domiciled in England, whereas she was legitimated under German law. It was held that she was a child of the second marriage within the terms of the settlement and therefore the power of appointment was validly exercised in her favour. It is submitted that the decision was right. The legitimacy of Margarete Askew was a pure question of status, governed by the law of the domicile of her father at the material time, that is, by the law of Germany. Being legitimate by that law, she was a child in whose favour the power of appointment might be exercised.

The result actually reached in the *Askew Case* might have been based simply on the local law of the domicile, made applicable by the conflict of laws rule of the forum. The court preferred, however, to reach the same result by the application of the conflict of laws rule of the domicile, which would refer the case to English law and accept the *renvoi* from English law to German law. In this respect, also, it is submitted that the decision may be right. In other words, the question of the status of a person as a legitimate child may belong to a small group of questions with regard to which it is right to say that the question should be decided exactly as it would be decided on the

[5] [1930] 2 Ch. 258.

same facts by a court of the country to the law of which reference is made by the conflict of laws rule of the forum.[6]

In the case of *In re Williams* there is no specific discussion of succession to realty, although it is mentioned in the report that the intestate left realty as well as personalty. If we supposed the rule in *Birtwhistle* v. *Vardill*[7] to be in force in Victoria, the court would of course have been justified in excluding the son of Jane Williams from sharing in the realty, not because Jane was illegitimate, for she was legitimate, but because the law of succession to realty would recognize as heirs only persons born in lawful wedlock. In other words the question would not be one of status, but would be one of succession to realty and would of course be governed by the *lex rei sitae* without regard to any other law.

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EVIDENCE OF NON-ACCESS — PRESUMPTION OF LEGITIMACY IN NULLITY SUITS—DEED OF SEPARATION.—The decision of the House of Lords in 1924 in *Russell* v. *Russell*,[1] was an instance in which that body put the stamp of its approval on a doctrine which had little more to support it than what has been styled a "sonorous utterance"[2] of Lord Mansfield in *Goodright* v. *Moss*.[3] Shortly put, *Russell* v. *Russell* may be said to enunciate the rule that neither a husband nor a wife will be permitted to give evidence of non-intercourse or non-access after marriage to bastardize a child born in wedlock. The importance of the decision lies in the fact that the rule was held to apply not merely to filiation proceedings or cases in which the legitimacy of a child

[6] This is equivalent to saying that with regard to a limited class of questions the theory of the *renvoi*, *alias* the theory of acquired or foreign created rights, is justifiable, notwithstanding that as a general principle the theory, under any of its pseudonyms, is unjustifiable. In particular it is unjustifiable as applied to succession to movables. The subject is one which cannot be further discussed in the present note, but which will be discussed in an article on *Characterization in the Conflict of Laws*, to be published within the next few months.

[7] (1840), 7 Cl. & F. 895, 5 R.C. 748.

[1] [1924] A.C. 687.

[2] WIGMORE, EVIDENCE, sec. 2063. In this section Wigmore traces the history of the so-called rule. Originally, in filiation cases only, there was a rule that required corroboration of a wife who testified her husband was not the father of her child. Such rule was followed in 1807 in *R.* v. *Luffe* (1807), 8 East. 193. In 1777, however, Lord Mansfield in a dictum in *Goodright* v. *Moss*, 2 Cowp. 591 had spoken as follows: "It is a rule founded in decency, morality, and policy, that they [husband and wife] shall not be permitted to say after marriage, that they had no connection, and therefore that the offspring is spurious."

[3] (1777), 2 Cowp. 591.

was directly in issue, but also to proceedings for divorce and "in every case in which, for any purpose, it becomes necessary to determine the question whether a child born of the wife during marriage is the child of the husband".[4] The rule, "founded in decency, morality, and policy", has been stated as designed to protect "the sanctity of married intercourse".[5] Consequently, the rule has been held not to apply when a child was conceived before marriage, but born afterwards.[6] On the other hand, as Lord Sumner in his dissenting judgment in *Russell* v. *Russell* pointed out, married intercourse is frequently inquired into in nullity cases and suits for cruelty, and, therefore, protection of the sanctity of married intercourse cannot be the true principle. Further, as children were bastardized by the evidence of non-access prior to marriage permitted in the *Poulett Peerage Case*, the rule cannot be said to be based solely on a desire to prevent bastardization. It is rather strange that the concurrence of two grounds, neither sufficient in itself, seems to form the basis of the rule. It is probably on this ground that the rule has been referred to as a "taboo" rather than a principle.[7]

Due to the absence of any satisfactory basis for the rule, difficulties arise in its application. One of these difficulties recently came to light in the decision of Langton J. in *Farnham* v. *Farnham*.[8] In that case a husband petitioned for a decree of nullity of marriage on the ground of his wife's incapacity. The evidence disclosed a clear case of impotence *quoad hunc*, but it also appeared that the wife had given birth to a child two years after the date of the marriage ceremony. The court was convinced that the marriage had not been consummated, and that the father of the child was not the petitioner, but the question arose whether this evidence was admissible in view of the rule in *Russell* v. *Russell*. Langton J. held that the rule in *Russell* v. *Russell* did not apply in a nullity suit and hence admitted the evidence. In the course of his judgment he stated there was no recorded instance of an application of the rule to a nullity suit.[9] This must be taken to apply only to English decisions. Only two years previously, in *G.* v. *G.*,[10] the New Zealand Court of Appeal had occasion to consider this very question, and the unanimous opinion of five appellate judges, as well as the trial

[4] Lord Finlay in *Russell* v. *Russell*, at p. 706.
[5] Lord Halsbury in the *Poulett Peerage Case*, [1903] A.C. 395 at p. 399.
[6] *Poulett Peerage Case, op. cit.; Re Duckworth and Skinkle* (1924), 55 O.L.R. 272.
[7] Lord Sumner in *Russell* v. *Russell, op. cit.*, at p. 747.
[8] [1936] 3 All E.R. 776.
[9] At p. 780.
[10] [1934] N.Z.L.R. 246.

judge, was to the effect that the rule in *Russell* v. *Russell* did apply to nullity suits, and where a child had been born to one of the spouses, evidence of impotence could not be received from either husband or wife to bastardize such child. The facts in *G.* v. *G.* were slightly different from those in the English case, in that the suit was brought by the wife for a decree of nullity on the grounds of her husband's impotency. While the evidence, if admissible, disclosed impotency of the husband *quoad hanc*, during wedlock the wife had given birth to a child, and the wife offered evidence to show that the defendant was not the father of the child. This the court refused.

One can sympathize with a desire to avoid the harsh consequences of applying the exclusionary rule of *Russell* v. *Russell* to such cases, but granting the rule, and particularly bearing in mind the statements in that case that it is founded on "policy" (even though that policy be rather vague), it is difficult to see any valid reason for refusing to apply it in nullity suits. True, throughout the speeches in *Russell* v. *Russell*, it is indicated that evidence of non-access is always admissible in nullity suits. The context clearly shows,[11] however, that the possibility of one of the spouses having had a child was not considered, since the illustration was used merely to show that the spouses could testify to "married intercourse" when its effect did not bastardize children born in wedlock. On the ground that such a situation as arose in *Farnham* v. *Farnham* was not, therefore, considered in *Russell* v. *Russell*, Langton J. felt free to reject the rule of this case in a nullity action. In so doing, he relied on Lord Halsbury's statement in the *Poulett Peerage Case* to the effect that the exclusionary rule did not prevent a husband from proving "his own virtue" and showing that he had not had antemarital relations with his wife. If that could be done, reasoned Langton J., the present case was an even stronger one for an exception. With this feeling one must again sympathize. To say, however, that it was no part of the petitioner's case to show adultery and thus bastardize the child, and to argue that it would be the nullity decree itself which would bastardize such child seems scarcely logical, although it undoubtedly is a "form of words" by which a single judge may quite adequately hold himself unfettered by the House of Lords. It is, of course, true that in divorce actions the existence of a child and evidence of non-access are often the only evidence to prove adultery, and

[11] See Lord Finlay at p. 718, who said that in nullity suits "there is no question of paternity, or of bastardising issue". See also Lord Dunedin at p. 728-9.

thus bastardizing the child becomes the main issue. On the other hand, the presence of a child in a nullity suit based on impotency is something that must be explained away as a fact embarrassing to the plaintiff's claim. This would seem, however, a distinction without a difference. In both cases, evidence is offered by one of the spouses to show that a child born during wedlock is not the husband's.[12] This is the evidence which *Russell* v. *Russell* says can never be given. While the *Poulett Case* may seem an exception, as has been indicated, it is confined to showing non-access *before* marriage.

In *Inverclyde* v. *Inverclyde*,[13] Bateson J. drew the distinction between various classes of nullity, and held that while some grounds of nullity rendered a marriage void *ab initio*, nullity on the ground of impotency merely rendered a marriage voidable from the time of the decree. On this view, he thought that "the effect upon legitimacy . . . . of the wife being potent who has a child before the nullity proceedings commence may be a very interesting question . . . . having regard to *Russell* v. *Russell*."[14] Bateson J. apparently considered that a nullity decree for impotence had no retroactive effect. *Newbould* v. *Attorney-General*,[15] indicates that this is not necessarily so, and the true position would seem to be that stated by Macdonnell J.A. in the Ontario case of *Fleming* v. *Fleming*.[16]

> Suits for nullity on the ground of impotence, however, are obviously in a class by themselves. Thus the marriage is not void, as in cases of bigamy, consanguinity, etc., but is only voidable; it remains valid until the person injured takes proceedings to set it aside; no third parties may complain; and the wife does in fact, while the marriage lasts, take the domicile of her husband. A decree of nullity for impotence is therefore very like a dissolution of marriage; it alters the status of the parties. On the other hand it has very different effects; for by it the marriage is declared void *ab initio* and the parties are put in the same position as if they had never been married at all. *Newbould* v. *Attorney-General*, [1931] P. 75.

In so far as the marriage exists until a decree is pronounced, there seems no reason to differentiate between divorce proceedings and nullity suits when dealing with the evidence which courts may receive from the spouses. In a recent English case, *Siveyer* v. *Allison*,[17] Greaves-Lord J. was concerned with a

[12] This is the ground taken by the New Zealand Court of Appeal in *G.* v. *G.*, *supra*.
[13] [1931] P. 29.
[14] At p. 50.
[15] [1931] P. 75.
[16] [1934] O.R. 588 at p. 592.
[17] [1935] 2 K.B. 403.

promise to marry made by a married man to the plaintiff. The defendant had told the plaintiff he was entitled to a nullity decree, and although this was never obtained, Greaves - Lord J. made certain observations concerning public policy avoiding such agreements, even though a suit for nullity of the first marriage could be obtained. He stated:

> In my view the doctrine of public policy applies wherever there is a subsisting marriage, and this is not altered by the fact that the decree of nullity when obtained would declare the marriage null and void.

As the rule of *Russell* v. *Russell* is stated by the House of Lords to be based on public policy it would seem that the rule there enunciated should be similarly extended to nullity suits.

While the writer regrets the decision in *Russell* v. *Russell*, it is submitted that the rule there laid down was correctly applied by the New Zealand court, and that the decision of Langton J., while reaching a highly desirable result, cannot be reconciled on any satisfactory grounds with the decision of the House of Lords.

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In another recent English case, *Stafford* v. *Kidd*,[18] a Divisional Court (Lord Hewart L.C.J., Swift and Macnaghten JJ.) held that a deed of separation had the same effect as a decree of judicial separation in rebutting the presumption of legitimacy of children born during the time of such separation, and therefore evidence of non-access could be given in bastardly proceedings by the mother of the child, even though it bastardized such child. This decision re-establishes the authority of *Mart* v. *Mart*,[19] on which doubts had been cast by the judgment of Luxmoore J. in *Re Bromage, Public Trustee* v. *Cuthbert*.[20] Premising an exception to *Russell* v. *Russell* in the case of a judicial separation, there seems no reason for differentiating the case of a voluntary separation evidenced by a deed of separation.[21]

C. A. W.

[18] [1936] 3 All E.R. 1023.
[19] [1926] P. 24.
[20] [1935] 1 Ch. 605; see a note in 13 Can. Bar Rev. 761.
[21] See also *McIntosh* v. *McIntosh*, [1934] N.Z.L.R. s. 132, following *Mart* v. *Mart*.

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NEGLIGENCE—RES IPSA LOQUITUR—MOTOR CAR.—In *Davies* v. *Bunn*,[1] the High Court of Australia had to deal again with the troublesome question of *res ipsa* loquitur. The plaintiff was injured while standing by his motor car which was stationary and on the correct side of the road. The defendant's motor van suddenly swerved across the road and struck the plaintiff and his car. Apparently as the van approached, the rim and tyre of the off-side wheel of the van came off. After the collision the axle-arm of the steering mechanism was found to be broken. There were two suggested explanations of the accident. Firstly, by the defendant, who said that the steering mechanism had suddenly failed owing to a latent defect and that the sudden turning of the wheels had torn off a rim. Secondly, by the plaintiff, that the rim had been negligently fixed and that this had caused the steering to fail. The jury found negligence, but the High Court was equally divided as to whether a new trial should be ordered. In part the dispute was as to the sufficiency of the directions of the judge, but there is an interesting argument as to the real meaning of the doctrine *res ipsa loquitur*. The fullest discussion is that by Evatt J. "If the trial judge has correctly applied the doctrine of *res ipsa loquitur*, and the defendant having elected to call no evidence, the jury find for the plaintiff, the verdict will stand, but if they find for the defendant the verdict will equally stand unless the Court of Appeal considers that the verdict was so unreasonable as to be practically perverse." He dissented from the view that if the doctrine of *res ipsa loquitur* applies and no explanation is given the jury must find for the plaintiff. "It has to be remembered that cases where *res ipsa loquitur* applies may vary enormously in the strength, significance and cogency of the *res* proved." This seems to place the matter on a simple and intelligible basis. The view of Dixon J. also is that the doctrine of *res ipsa loquitur* raises no more than a presumption of fact. It may interest readers of the REVIEW to know that two articles[2] in this journal were discussed by Evatt J.; Canadian contributions to legal literature are being increasingly considered in Australia.

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[1] [1936] Argus L.R. 411.

[2] Underhay, *Manufacturers' Liability* (1936), 14 Can. Bar Rev. 283; and a discussion of a previous decision of the High Court by the present writer in 14 Can. Bar Rev. 480.

CONSTITUTIONAL LAW — MAGISTRATES' POWER TO AWARD MAINTENANCE OR ALIMONY — APPOINTMENT OF JUDGES.—The Appellate Division of the Supreme Court of Alberta in the recent case of *Kazakewich* v. *Kazakewich and Attorney-General for Alberta*,[1] delivered a judgment which held that provincial legislation empowering magistrates appointed by the Province to make orders for maintenance or alimony is ultra vires. The legislation declared to be ultra vires was section 26 of The Domestic Relations Act, which provided in part as follows :

> Any married woman deserted by her husband may apply to a police magistrate who . . . . . may make an order that the husband shall pay to the applicant . . . . . such weekly sum not exceeding twenty dollars for the maintenance of his wife or his wife and family, as the magistrate shall, having regard to the means of both husband and wife, consider reasonable.[2]

Other provinces have similar legislation.[3] Under the Ontario, New Brunswick, Saskatchewan and British Columbia legislation the application is made to a magistrate, while the Manitoba statute allows the application to be made either to a magistrate or to a County Court judge.

The facts in *Kazakewich* v. *Kazakewich and Attorney-General of Alberta* were undisputed on the appeal. A police magistrate ordered the appellant to pay his wife, the respondent to the appeal, the sum of four dollars per week. This order was made pursuant to section 26, *supra*, and was made after evidence had been adduced that the husband had deserted his wife and wilfully neglected to maintain her, although he was able to do so.

The notice of appeal to the Appellate Division set forth two grounds for appeal, only one of which will be considered in this comment, *viz :* that the provisions of The Domestic Relations Act, 1927 Statutes of Alberta, cap. 5, and in particular section 26 as amended, are ultra vires the Provincial Legislature. The Attorney-General for Alberta intervened to support the constitutionality of the legislation involved. Counsel for the appellant husband advanced several arguments to uphold his contention that section 26 was ultra vires. He argued that the section related to marriage and divorce and to the criminal law, which are matters within the exclusive jurisdiction of the Dominion parliament. Clarke and Lunney JJ.A., both of whom

[1] [1936] 3 W.W.R. 699.
[2] 1927, Alta. c. 8.
[3] R.S.O. 1927, c. 184, s. 1; R.S.N.B. 1927, c. 207, s. 3; 1936, Man. Statutes, c. 53, s. 11(c); R.S. Sask. 1930, c. 191, s. 3; R.S.B.C. 1924, c. 67, s. 4.

dissented, did not give effect to these contentions, and McGillivray J.A. in giving judgment for the majority of the court, based his decision on another ground and did not consider these two arguments.

Actually, therefore, the entire case turned upon a single point which constituted the third argument as to ultra vires presented by counsel for the appellant, namely, that section 26 conferred upon a police magistrate the powers of a judge of a superior court and was therefore ultra vires as contravening section 96 of The British North America Act, which reads as follows :

> The Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

McGillivray J.A. held that on this ground, section 26 was ultra vires and the appeal was accordingly allowed, since Harvey C.J.A. and Ewing J. concurred.

Before discussing the details of the majority judgment it is convenient to examine briefly some of the reasons given by Clarke and Lunney JJ.A., in dissenting. One reason which appeared in both dissenting judgments was that, in the words of Clarke J.A.,

> similar Acts . . . . . have been for many years on the statute books in different provinces of Canada.[4]

With respect, it is submitted that this statement is without force unless some judicial authority has declared such "similar Acts" intra vires; and no such authority is put forward in the judgments. Lunney J.A. in his dissenting judgment cited the case of *French* v. *McKendrick*,[5] and in particular the following words of Orde J.A. :[6]

> . . . . . I am of the opinion that merely increasing the jurisdiction of an inferior Court, without any other changes in its constitution or character, does not make it a County Court or District Court within the meaning of sec. 96.

This statement seems contradictory because an increase of jurisdiction, if unlimited, could not only change the constitution and character of a court, but could completely usurp the jurisdiction of any Superior, District or County Court.

[4] At p. 703.
[5] (1930), 66 O.L.R. 306.
[6] At p. 313.

A second case quoted by Lunney J.A. was *In re Small Debts Recovery Act*,[7] and the judgment of Harvey C.J.A. upholding the legislation attacked was set out in part as follows :

> The proposed Act now under consideration (i.e., Small Debts Recovery Act) does not give justices of the peace any larger jurisdiction than was exercised by justices of the peace at the time of Confederation and there would appear therefore to be no ground for concluding that the tribunal of the justices thus created . . . . . is one of the Courts included in sec. 96. . . . . .

This language does not appear to bear out the conclusion reached by Lunney J.A., since no magistrates or justices of the peace either in England or Canada prior to Confederation were empowered to make orders for maintenance or alimony. Lunney J.A. further relied upon the case of *Dixon* v. *Dixon*,[8] which differed from the *Kazakewich Case* in that it dealt, not with an order for maintenance or alimony, but with an order protecting the separate property and earnings of a deserted wife from her husband.

McGillivray J.A. disposed of the *Dixon Case* by pointing out the difference between protection orders and alimony orders:

> Protection orders and alimony orders were both provided for in The Divorce and Matrimonial Causes Act, 1857. A reference to sec. 21 and to secs. 17, 24 and 32 serves to show that protection orders and alimony orders are dealt with as quite different matters and that while magistrates and justices of the peace were empowered to grant protection orders, alimony orders could only be granted by the Court empowered to deal with matrimonial causes. Protection orders were made in favour of a deserted wife, although wealthy, to protect property which she herself had acquired and of which by a fiction of law she would otherwise be deprived. Maintenance orders were made in favour of a deserted wife on the theory that she was in need of support which the husband was under a greater duty to supply than was the state.[9]

And further : [10]

> In my opinion the jurisdiction which justices of the peace or magistrates may have exercised in Canada at the time of Confederation in the making of protection orders was a jurisdiction in respect of married women's separate property rights as created by statute, which is something quite different from a jurisdiction to grant the alimony order to which a married woman may be entitled for her support on separation from her husband.

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[7] [1917] 3 W.W.R. 698 at p. 706.
[8] (1932), 46 B.C.R. 375.
[9] At p. 714.
[10] At p. 716.

Upon this reasoning McGillivray J.A. concluded that although "Protection Orders" is the heading in The Domestic Relations Act immediately preceding section 26, that section from its very wording is "in effect an enactment in respect of alimony in favour of women who under the Act shall be deemed to have been deserted."

McGillivray J.A. next dealt with the main point in issue, which he described in this way :

> The submission (of the Attorney-General) put in plain English, amounts to this, the provincial legislature may so enlarge the jurisdiction of justices of the peace of this province as to confer upon them all of the powers now exercised by a Judge of the Supreme Court.

An approach to this proposition was effected by first referring to several decisions which enunciated the principles, inter alia, upon which The British North America Act is to be interpreted. Summing up his study of these cases, McGillivray J.A. asserted:

> I take it then that in approaching the interpretation of the pertinent sections of The B.N.A. Act with respect to the administration of justice, a Court should keep in mind that these sections are embodied in an Imperial statute to which the ordinary rules for the interpretation of statutes apply, that therefore the intention of the framers of this Imperial statute must be ascertained as at the date of the enactment by having regard to the words employed without extraneous aids to interpretation where the language is unambiguous, and that having regard however to the nature of the statute, a great constitutional charter, the widest and most liberal construction of the words used should be adopted with a view to giving effect to the whole scheme of Canadian union.

With this statement in mind attention may properly be directed toward those sections of The British North America Act which deal with the administration of justice. In his judgment McGillivray J.A. referred to the case of *Martineau and Sons Ltd.* v. *Montreal (City)*,[11] which contains the following dictum of Lord Blanesburgh concerning section 96 of The British North America Act :

> . . . . . it cannot be doubted that the exclusive power by that section conferred upon the Governor-General to appoint the Judges of the Superior, District and County Courts in each province, is a cardinal provision of the statute. Supplemented by section 100, which lays upon the Parliament of Canada the duty of fixing and providing the salaries, allowances and pensions of these Judges; and also by section 99, which provides that the Judges of the Superior Courts shall hold office during good behaviour, being removable only by the Governor-General on address of the Senate and House of Commons;

[11] [1932] 1 W.W.R. 302; [1932] A.C. 113.

> the section is shown to lie at the root of the means adopted by the framers of the statute to secure the impartiality and the independence of the provincial judiciary. A court of construction would accordingly fail in its duty if it were to permit these provisions and the principle therein enshrined to be impinged upon in any way by provincial legislation.

The Provinces are empowered under section 92(14) of the British North America Act to carry out "The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." Thus it is clear that the Provinces may constitute courts with unlimited jurisdiction but that was not the issue in the *Kazakewich Case*, as McGillivray J.A. pointed out. Section 92(14) must be considered as a part of the general scheme of The B.N.A. Act. Accordingly, all the provisions referring to Judges, their salaries, qualifications, tenure of, and removal from, office read together with section 92 (14) serve to strengthen the conclusion reached by McGillivray J.A., in his interpretation of section 96 when he stated :

> . . . . . the intention of Parliament was that all matters which were comparatively trivial and unimportant should continue to lie within the jurisdiction of judicial officers who presided over the inferior Courts and that jurisdiction to deal with cases of the type traditionally dealt with by Courts with plenary powers in England and by Courts of the kind mentioned in Sec. 96 in Canada, which involve consequences of grave importance to the individual or to the state, should be committed only to the judicial care of persons appointed by the Governor-General on the theory that the persons so appointed, since they would presumably be appointed on merit and since they would be drawn from amongst men learned in the law and since their independence for life was assured, could best be relied upon to administer justice according to law in the new dominion.[12]

And further : [13]

> In the case at bar the province has enlarged the jurisdiction of a police magistrate, an appointee of the province, so as to give him jurisdiction over a matter of alimony, a jurisdiction exclusively exercised by Judges of Courts of the kind mentioned in sec. 96 at the time of Confederation. This is in my view beyond the legislative competence of the province.

This learned opinion is supported by several cases which are briefly mentioned in the judgment.

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[12] At p. 728.
[13] At p. 733.

That the *Kazakewich* decision may have far reaching results is indicated by this general observation of McGillivray J.A. : [14]

> . . . . . any judicial body whether it be called a Court or a commission, or a board, which is exercising a jurisdiction like unto that exercised by the Courts named in sec. 96 at the time of Confederation, must have as its presiding officer or officers a person appointed by the Governor-General.

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[14] At p. 732.