THE CANADIAN BAR REVIEW

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☞ 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.

CASE AND COMMENT

CONFLICT OF LAWS — AGENCY — CONSTRUCTION OF AUTHORITY—REVOCATION—AUTHORITY AND POWER.—In *Sinfra Aktiengesellschaft* v. *Sinfra Ltd.*[1] the plaintiff was a company incorporated in 1933 under the law of Switzerland for the purpose of marketing certain patents owned by one Meiwald, a German national, or the machines to be manufactured in accordance with the patents. In 1935, in Switzerland, the company, through Meiwald, authorized one Wronker-Flatow, a German national (who had recently left Germany, financially destitute), to go to the United States of America to complete negotiations begun there by Meiwald. These negotiations proving to be fruitless, Meiwald joined Wronker-Flatow in the United States, and on their way back to Europe on the S.S. Washington they signed an agreement (referred to in the case as the Washington agreement) by which the plaintiff company should become a holding company, and subsidiary companies should be organized with the help of financial men whose interest might be secured with the assistance of Wronker-Flatow. The agreement was subsequently approved by the plaintiff company, and among the companies organized pursuant to the agreement was the defendant company, incorporated in England in 1936. Shortly afterwards, in Switzerland, the plaintiff company, hereinafter called P (the principal), issued to Wronker-Flatow, hereinafter called A (the agent), a power of attorney which the latter might exhibit to third parties, without disclosing the financial terms as between P and A contained in the

[1] [1939] 2 All E.R. 675.

Washington agreement. The power of attorney went beyond the agreement in one respect in that it authorized A to join the board of a subsidiary company and exercise voting powers. On the instructions of A, within the scope of his authority as stated in the power of attorney, the defendant company, hereinafter called TP (the third party), made certain payment on behalf of P, and TP counterclaimed for the amount of these payments in an action for money had and received brought by P against TP. P's defence to the counterclaim was based on the fact that P had revoked A's authority, and that TP knew of the revocation at the time of the payments in question. TP contended in reply that A's authority was irrevocable because it was an authority coupled with an interest, and therefore that the payments were properly made on A's instructions. It was agreed that the construction and validity of the Washington agreement and the revocation of any authority given by it were governed by German law, and on a conflict of witnesses as to German law, Lewis J. held that the agreement was one for service, and not for a partnership or quasi-partnership, and that the authority was revocable. As regards the power of attorney Lewis J. held that the governing law was English law, so far as the authority was to be exercised in England, that by English law the authority was not coupled with an interest, and that the authority was revocable, and therefore that P was entitled to succeed against TP. The same result, he held, would be reached if either Swiss law or German law were applied to the power of attorney.

The judgment contains a casual reference to *Chatenay* v. *Brazilian Submarine Telegraph Co.*,[2] and no reference at all to *Ruby Steamship Corporation* v. *Commercial Union Assurance Co.*,[3] although both cases would seem to deserve serious con-

[2] [1891] 1 Q.B. 79, C.A. The reference is to the following passage in the judgment of Lindley L.J., at p. 85: "We have to deal with a power of attorney—a one-sided instrument, an instrument which expresses the meaning of the person who makes it, but is not in any sense a contract."

[3] (1933), 150 L.T. 38, 39 Com. Cas. 48, 46 Ll. L. Rep. 265, C.A. See comment on this case in (1934), 5 Cambridge L.J. 251. The judgment is quoted in full, with comment by Dr. Magdalene Schoch, in 4 GIURISPRUDENZA COMPARATA DI DIRITTO INTERNAZIONALE PRIVATO 285. It is not cited in CHESHIRE, PRIVATE INTERNATIONAL LAW (2nd ed. 1938) or in Breslauer, *Agency in Private International Law* (1938), 50 Juridical Review 282. The last mentioned article is noteworthy as a methodical and specific study of certain aspects of agency law from the point of view of the conflict of laws. Briefer discussion of analogous problems is to be found in WESTLAKE, PRIVATE INTERNATIONAL LAW, §§ 151, 223, 224; FOOTE. PRIVATE INTERNATIONAL LAW (5th ed. 1925) 474 - 476; DICEY, CONFLICT OF LAWS, rules 179, 180; the CONFLICT OF LAWS RESTATEMENT (1934), especially §§ 342 - 345; 2 BEALE, CONFLICT OF LAWS (1935), pp. 1192 - 1199.

sideration in the circumstances. In the *Chatenay Case* the plaintiff, a Brazilian national, resident in Brazil, signed in Brazil a power of attorney in the Portuguese language authorizing a broker resident in England to buy and sell shares. The broker having failed to account for the proceeds of certain shares in the defendant company sold by him for the plaintiff, and the shares having been transferred to the purchasers in the books of the company, the plaintiff brought an action for rectification of the register on the ground that the sale of the shares was unauthorized. On the trial of a preliminary issue to determine whether Brazilian law or English law governed the construction of the power of attorney, it was held by the Court of Appeal, according to the headnote, "that the intention of the plaintiff was to be ascertained by evidence of competent translators and experts, including if necessary Brazilian lawyers, and that if, according to such evidence, the intention appeared to be that the authority should be acted on in England, the extent of the authority, so far as transactions in England were concerned, must be determined by English law." We are not told what was the result of applying English law, but the argument for the plaintiff is reported in part as follows: "It would be impossible for a third party contracting in England with the agent to determine what is the law of Brazil applicable to the transaction. It is enough for him to see what is the apparent authority given to the agent with respect to a transaction in England, and then to determine what is the law of England applicable to it. The contention of the plaintiff is that if the power of attorney is construed according to English law, it did not authorize the transfer of any shares without a letter of advice from the plaintiff to his agent. This the company would be able to see for themselves, and they acted wrongly in not demanding the production of such an authority." On the other hand, counsel for the defendant company said in part: "If the view of the defendants is correct and the document is to be construed according to the law of Brazil, then they are in a position to show that the authority is perfectly general to buy and sell, so that the plaintiff would be bound by the acts of his agent. If the opposite view is right, he might be bound in one country and not bound in another in transactions exactly similar in character."

The reference in the argument above quoted to "apparent authority" points of course to the principle that A may have *power* to bind P even though A acts beyond the scope of his *authority*. This distinction between authority and power is

fundamental in the domestic law of agency[4] and, it is submitted, may be important in agency problems in the conflict of laws. What was really in issue in the *Chatenay Case* was whether A had power to bind P in the circumstances, and not merely whether A had authority, because P might be bound by A's unauthorized act. Authority is a matter solely between P and A, and the question is simply whether P has expressly or impliedly authorized A to do the act in question. In the conflict of laws it would seem that this question should be governed by the proper law of the transaction between P and A. (I avoid saying the "proper law of the contract", because a contract between P and A is not essential to the existence of the relation of principal and agent; all that is required is P's assent to A's acting for him, and the assent of A.) This proper law would ordinarily be the law of the country in which the alleged authority is given, though, if the authority is to be exercised in another country, the law of that country may be the proper law. The matter of A's power to bind P, on the other hand, it is submitted should ordinarily be determined by the law of the country in which A acts, at least if P has authorized A to act for him in that country. P may be bound to TP by A's act either because the act is an authorized act, that is, is within the scope of A's authority as construed by its proper law, or because the law of the country in which A acts confers a power on A to bind P in the circumstances by an unauthorized act on the basis of apparent authority or independantly of either authority or apparent authority.

The *Chatenay Case* and the *Sinfra Case* are substantially in accord with one another, whether one reaches the result by construing the authority given by P so as to cover the act done by A or, as may be preferable, by saying that under the law of the country in which A acted he had power to bind P even by an unauthorized act; but it is not so easy to reconcile either of these cases with the *Ruby Case*.[5] The facts of the *Ruby Case* are complicated, but for the present purpose it is sufficient to state that a New York broker was instructed in New York to obtain insurance in England on a ship, and that he necessarily employed an English broker, who effected insur-

[4] In *Law of Agency* (1939), 17 Can. Bar Rev. 248, I laid stress on this distinction, with references to cases and important extra-judicial discussion. The expression "power of attorney", in inveterate use in English, is confusing because the so-called power is not a power but is merely a manifestation of the authority given by P. to A. Quite another question is what is A's power to bind P under the authority expressed in the "power of attorney".

[5] Note 3, *supra*.

ance with an English underwriter. Under English law the English broker became liable to the underwriter for the premium, and because the underwriter had acknowledged receipt of the premium the broker and the underwriter were not entitled, without the consent of the assured, to cancel the policy for non-payment of the premium,[6] but the English broker would naturally look to the New York broker for the premium, and the New York broker would in turn look to the assured. According to New York law, applicable to insurance effected in New York, a broker and an insurer may cancel insurance without the consent of the assured on the ground of non-payment of the premium by the assured. The Court of Appeal held that the governing law was New York law, on the principle stated in Dicey's rule 179:[7] "The agent's authority as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created." One would have thought that in the *Ruby Case* it might have been worth while for the court to discuss the *Chatenay Case*, and that in the *Sinfra Case* it might have been worth while for the court to discuss the *Ruby Case*. If the law of the country in which the agent acted was the governing law in the *Chatenay* and *Sinfra Cases*, it is not obvious how in the *Ruby Case* a policy obtained in England by an English broker from an English underwriter—a policy which by English law could not be cancelled without the consent of the assured—was transformed into a policy which under New York law could be cancelled by agreement between the English underwriter and a New York broker without the consent of the assured. It is submitted that problems of agency in the conflict of laws deserve more consideration than they have so far received from English courts.

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[6] *Xenos* v. *Wickham* (1866), L.R. 2 H.L. 296.

[7] Supported by a dictum of Lindley L.J., delivering the judgment of the Court of Appeal, in *Maspons* v. *Hermanos* v. *Mildred* (1882), 9 Q.B.D. 530, at p. 539; but it is to be noted that Lindley L.J. said that the law of the place in which P gives authority to A must be taken into account in considering the nature and extent of the authority given by P to A, but is not "material for any other purpose". In the particular case A, without disclosing P, made a contract in his own name but really for P with TP, and accordingly A shipped goods from Cuba to TP in England and TP obtained insurance upon the goods in England in the name of TP for the benefit of all persons whom it might concern. The goods having been lost at sea, A having become insolvent and TP having received the insurance money, it was held that the right, if any, of P, as undisclosed principal, to sue TP in respect of the insurance money was governed by English law, not Spanish (Cuban) law.

ADMINISTRATOR AD LITEM — APPOINTMENT FOR PURPOSE OF DEFENDING A PROPOSED ACTION—PRACTICE IN ONTARIO.—A man is killed in a motor car accident and dies intestate. He had been insured against third party risks, and other persons injured in the same accident wish to sue his estate for damages.[1] The action cannot, of course, be brought against the estate as such;[2] but the parties, if any, who are entitled to take out administration fail to apply therefor. Can the prospective plaintiffs have someone appointed to represent the estate and defend their intended action? *In the Goods of Knight*[3] supplies the answer in so far as the English practice is concerned. In that case, an order was made for a grant of letters of administration to the Official Solicitor,[4] limited to his defending the proposed action. The order was made under s. 162 of The Supreme Court of Judicature (Consolidation) Act, 1925, c. 49, as amended by s. 9 of The Administration of Justice Act, 1928, c. 26, which provides:

> If, by reason of the insolvency of the deceased or of any other special circumstances, it appears to the Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the court may, in its discretion, notwithstanding anything in this Act, appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the court thinks fit.

There is no comparable provision in Ontario; moreover, there does not appear to be any other provision, either under the Statutes or Rules of Court, which would authorize an Ontario Court to appoint an administrator *ad litem*, *i.e.*, for the purpose of a lawsuit,[5] as was done in the *Knight Case*.

Rule 90[6] is not wide enough to confer the power, and this is clearly demonstrated by a consideration of its origins and history. It derived from the English *Act to Amend the Practice*

[1] The Trustee Act, R.S.O. 1937, c. 165, s. 37; The Law Reform (Miscellaneous Provisions) Act, 1934, 24 and 25 Geo. V, c. 41, s. 1 (1) (Eng.) See Winfield, *Recent Legislation on the English Law of Tort* (1936), 14 Can. Bar Rev. 639.

[2] *Patterson* v. *Hambleton*, [1933] O.W.N. 247; *Crane Ltd.* v. *McKeown* (1923), 25 O.W.N. 455.

[3] [1939] 3 All E.R. 928.

[4] See The Supreme Court of Judicature (Consolidation) Act, 1925, 15 and 16 Geo. V, c. 49, s. 126.

[5] *Abbott* v. *Brown*, [1921] 1 W.W.R. 1188 (Alta. C.A.), per Stuart J. at p. 1190.

[6] Consolidated Rule of Practice, 1928. Rule 30 of the Consolidated Rules of Alberta, 1914, is wider than Ontario Rule 90 in that it expressly provides that it shall apply in any action or proceeding *commenced or intended to be commenced*. *Cf. Abbott* v. *Brown*, *supra*, note 5.

and Course of Proceeding in the High Court of Chancery, 1852, 15 and 16 Vict., c. 86, s. 44, which provided :

> If in any suit or other proceeding before the Court it shall appear to the Court that any deceased person who was interested in the matters in question has no personal representative, it shall be lawful for the Court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court shall think fit, either specially or generally by public advertisements; and the order so made by the said Court and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and had submitted his rights or interests to the protection of the Court.

With slight changes in wording this English provision became Chancery Order 30 of June 3, 1853, and when the Ontario Chancery Orders were consolidated, Order 56. The decided cases illustrated the limitations of the Order: (1) It was confined to mere formal parties having no substantial or beneficial interest;[7] (2) It did not apply where the personal representative would have active duties to perform;[8] (3) It did not apply where the object of the suit was to administer the intestate's estate.[9] (4) It did not apply where the personal representative would represent interests adverse to the plaintiff;[10] (5) It seemed that the Court might decline to act under the Order when the next-of-kin expressly refused to administer;[11] (6) So too, where the interests of the intestate were identical with those of the plaintiff;[12] (7) If the entire adverse interest was not represented the Court would not appoint a person to represent that interest. In *Gibson* v. *Wills*,[13] Romilly M.R. stated :

[7] *Sherwood* v. *Freeland* (1857), 6 Gr. 305; *Bank of Montreal* v. *Wallace* (1864), 1 Chy. Chrs. 261 (Per Vankoughnet C: The Court will only appoint an administrator *ad litem* to a party who has no substantial interest, such as a naked trustee.); *Toronto Savings Bank* v. *Can. Life Assur. Co.* (1867), 13 Gr. 171; *Re Tobin, Cook* v. *Tobin* (1873), 6 P.R. 40, 9 C.L.J. 191; *Leonard* v. *Clydesdale* (1874), 6 P.R. 142.

[8] *Fowler* v. *Bayldon* (1853), 9 Hare, Appendix II, lxxviii.

[9] *Silver* v. *Stein* (1852), 1 Drew 295; *Grove* v. *Lane* (1852), 16 Jur. 1061. It could not be said that the deceased person "was interested in the matters in question" when the object of the suit was to administer his estate. *Cf. Leonard* v. *Clydesdale, supra*, note 7.

[10] *Headden* v. *Emmott* (1853), 22 L.T. 166.

[11] *Haw* v. *Vickers* (1853), W.R. 242; *Tarratt* v. *Lloyd* (1856), 2 Jur. N.S. 371.

[12] *Cox* v. *Taylor* (1853), 22 L.J. Ch. 910.

[13] (1856), 21 Beav. 620.

> *The object of the statute was this:*—where you have real litigating parties before the Court, but it happens that one of the class interested is not represented, then, if the Court sees that there are other persons present who *bona fide* represent the interest of those absent, it may allow that interest to be represented; but it will not allow the whole adverse interest to be represented.

(8) The Court would not appoint a person to represent the estate under this Order without his consent;[14] (9) Finally, the Order "has never been held to apply to cases originally defective for want of parties".[15]

Sec. 9 of The Administration of Justice Act, R.S.O. 1877, c. 49, "virtually superseded"[16] Order 56 and attempted to remedy some of its defects,[17] as appears from its terms which were as follows :

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[14] *Prince of Wales Co.* v. *Palmer* (1858), 25 Beav. 605; *Pratt* v. *London Passenger Transport Board*, [1937] 1 All E.R. 473; *In re Curtis and Betts*, [1887] W.N. 126: "It is wrong to appoint a person to represent the estate of a deceased person who was the only person liable and also wrong to appoint a person who was unwilling to act."

[15] *Harris* v. *Sumner* (1910), 39 N.B.R. 456 per Barker C.J. at p. 465, referring to s. 116 of The Supreme Court in Equity Act, C.S.N.B. 1903, c. 112, which was a copy of s. 44 of the English Act from which Ontario Chancery Order 56 derived.

[16] See Holmested's Rules and Orders (1884), Vol. 1, The Chancery Orders, p. 32. Sec. 9 originated in s. 23 of 1876, 39 Vict., c. 7, a Statute Law Amendment Act.

[17] In *Hughes* v. *Hughes* (1881), 6 O.A.R. 373, Burton J.A., speaking of this section and of the original English provision, said, at p. 383: "The words used in both Acts confine the exercise of the power thus to appoint a representative to those cases only in which it is made to appear that a deceased person, who was interested in the matters in question in the suit, has no personal representative; and the decisions to which I have referred, show that where the administration of the estate of a deceased person forms the subject of a suit, such person cannot be said to be a party interested in the matters in question in the suit within the meaning of the Act; and that our Act equally with the English statute is confined to cases in which the deceased person was so interested; although the section goes on to provide that the Court may then appoint a person to represent the estate, notwithstanding that he may have active duties to perform, or may represent interests adverse to the plaintiff." The action was for administration of an estate and the Court held that it was improperly constituted because the deceased's personal representative was not before the Court. Moreover, s. 9 of the Administration of Justice Act could not be invoked to aid the plaintiff. See also *Fairfield* v. *Ross* (1902), 4 O.L.R. 534, following the reasoning of the *Hughes Case, supra*, in a similar situation.

The original English provision is now Rule 46 of Order 16 of The Rules of the Supreme Court, 1883. The discretionary character of the power to make an order thereunder (as under the Ontario provision also) is emphasized in the *Pratt Case, supra*, note 14, per Greer L.J. at p. 477. The Court in that case refused to consider and determine the question of the respective powers given by Order 16, Rule 46, and s. 9 of the Administration of Justice Act, 1928, amending s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, the provision acted upon in the *Knight Case, supra*, note 3.

> Where, in any suit or other proceeding, it is made to appear that a deceased person who was interested in the matters in question has no legal personal representative, the Court or a Judge may either proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court thinks fit, either specially or by public advertisement, and *notwithstanding that the estate in question may have a substantial interest in the matters, or that there may be active duties to perform by the person so appointed, or that he may represent interests adverse to the plaintiff, or that there may be embraced in the matter an administration of the estate whereof representation is sought;* and the order so made and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly appointed legal personal representative of such person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and had submitted his rights and interests to the protection of the Court.

This section became Rule 310 of the Consolidated Rules of 1888, and, with changes in wording, Rule 194 of the Consolidated Rules of 1897; this Rule, substantially unchanged, became Rule 90 in the Consolidated Rules of 1913 and remained Rule 90 in the Consolidated Rules of 1928, currently in force. In its present form it reads :

> Where it appears that a deceased person who was interested in the matters in question has no personal representative, the Court may either proceed in the absence of any person representing his estate or may appoint some person to represent the estate for all the purposes of the action or other proceeding, on such notice as may seem proper, notwithstanding that the estate in question may have a substantial interest in the matters, or that there may be active duties to be performed by the person so appointed, or that he may represent interests adverse to the plaintiff, or that administration of the estate whereof representation is sought is claimed; and the order so made and any orders consequent thereon, shall bind the estate of such deceased person, in the same manner as if a duly appointed personal representative of such person had been a party to the action or proceeding.

That the scope of this Rule is still narrow, and that it is inapplicable where an action has not yet been commenced appears from the remarks of Street J., in *Hunter* v. *Boyd*,[18] that "the 194th Rule [of the Rules of 1897] does not authorize the appointment of an administrator *ad litem*, but only of a person to represent the estate". Certainly, the mere fact that Rule 90

[18] (1901), 3 O.L.R. 183, 188. See also the editorial note to the *Pratt Case, supra*, note 14, in the *All England Reports*.

does not begin with the words "where, in any suit or other proceeding", as did the original Chancery Order 30 of 1853, is an insufficient ground for contending that it is applicable to intended actions, even if other difficulties presented by its terms, which are far from supporting the contention, are disregarded.[19] Perhaps more significant in this connection is s. 11 of *An Act for Further Improving the Administration of Justice*, 1885, 48 Vict., c. 13, (Ont.), which provided :

> Where no probate of the will of a deceased person or letters of administration to his estate have been granted by a Surrogate Court, and representation of such estate is required in any action or proceeding in the High Court, the court may appoint some person administrator or Administrator *ad litem* (according as the case may require) to the estate. . . .

This became Rule 311 of the Rules of 1888, and Rule 195 (1) of the Rules of 1897, in which it was rephrased as follows :

> Where probate of the will of a deceased person, or letters of administration to his estate have not been granted, and representation of such estate is required in any action or proceeding in the High Court, the Court may appoint some person administrator *ad litem*.

For some reason, unknown to the writer, this Rule does not appear in the Consolidated Rules of 1913 or in those of 1928. From the decision of Street J. in *Hunter* v. *Boyd*,[20] and that of Middleton J. in *Re Hoover and Nunn*,[21] (assuming that

[19] For example, Rule 90 speaks of the Court proceeding "in the absence of any person representing his estate". *Cf. Perry* v. *Danby* (1928), 34 O.W.N. 214. This little accords with any intention that it should be applied to a situation like that in the *Knight Case*, *supra*, note 3. Subsequent provisions of the Rule are as difficult to reconcile with such an intention. In short, the Rule cannot very well be given any sensible construction, except in the light of its history, which reveals its objects.

[20] *Supra*, note 18. Per Street J. at p. 189: "Where the object is merely to make the record complete and an estate to which no executor or administrator had been regularly appointed is a necessary party for the purpose without having any substantial interest in the result, by reason of insolvency or otherwise, the Rules [194 and 195 of the Rules of 1897] seem of safe and proper application. But where the object of the action is directly to recover a judgment against an estate which is not a necessary party to the action there the Court may properly, under ordinary circumstances, refuse to make an order under these Rules for the reason that a judgment against the limited administrator being in fact merely declaratory of the plaintiff's rights against the estate and not enforceable against it until a proper administrator is appointed, the plaintiff may as well wait for a proper administrator before proceeding at all against the estate." What the reason was for apparently treating Rules 194 and 195 of the Rules of 1897 in like manner is a mystery.

[21] (1911), 19 O.W.R. 418, 2 O.W.N. 1215. Equally puzzling is Middleton J.'s analysis of Rule 195 of the Rules of 1897 in terms more appropriate to a discussion of Rule 194. An application was made for the appointment of an administrator *ad litem* for the purposes of an action not yet begun. His Lordship said: "Rule 195 does not apply to a case

this case is correctly reported) one might conjecture that the Rule was dropped as being unnecessary in view of the present Rule 90; this does not, however, seem reasonable because s. 11 of the Act of 1885 was passed at a time when the provisions upon which Rule 90 is based were in force, and it must have been intended that it should have an independent effect. This is evident from the cases decided under it[22] and is implicit in the decision in *Re Toronto General Trusts Corp* v. *Sullivan*.[23] In that case the trust company, proposing to bring a mortgage foreclosure action upon a mortgage made by a person who had since died intestate, moved *ex parte* for an order appointing an

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of this kind and is of very limited application. There must be an action or proceeding and in that action or proceeding representation of the estate must be required. This does not cover the case of a person deceased who has no executor or administrator and against whose estate no action or proceeding can be brought, nor do I think it covers a case in which what is required is a general personal representative who has active duties to perform. In these cases a general administrator must be appointed in the Surrogate Court. Without attempting to define all the cases in which C.R. 195 may be applied it is intended to enable the Court to facilitate litigation in which the parties mainly concerned are before the Court by appointing some one to represent an estate which has a nominal interest only, or as the form of order says: 'For the purpose of attending, supplying, substantiating and confirming these proceedings only. Such an administrator has no power to deal with the assets of the estate and a valid foreclosure cannot be granted against him. *Aylward* v. *Lewis*, [1891] 2 Ch. 81. In the case of an intestacy the estate will not vest in an administrator *ad litem* and proceedings against the administrator *ad litem* cannot be resorted to when the desire is to reach the assets of the deceased. The estate may be bound by the findings of fact when it is represented under the Rule in question but neither under the Devolution of Estates Act nor under general law are the assets of the deceased vested in him."

There are two comments which one might make on this judgment: (1) If it is really an exposition of Rule 195, the provisions of the Rule do not warrant the limitations which this judgment would place upon it; (2) If there has been some mistake, and Rule 194 is meant, then the judgment is open to objection as expounding the Rule as if it were in the words of the Chancery Order from which it derived instead of in terms calculated to obviate some of the limitations of the Chancery Order. See *supra*, note 16.

[22] *Re Chamblis and Can. Life Assur. Co.* (1888), 12 P.R. 649 (administrator *ad litem* appointed in mortgage action); *Meir* v. *Wilson* (1889), 13 P.R. 33 (delay; exercise of discretion; refusal to order appointment of administrator *ad litem*); *Cameron* v. *Phillips* (1889), 13 P.R. 78 (mortgage foreclosure action; administrator *ad litem* appointed; order to file written consent); *Ford* v. *Landed Banking & Loan Co.* (1889), 13 P.R. 210 (order to appoint administrator *ad litem* refused, following *Meir* v. *Wilson*); *McLaren* v. *Rivett* (1887), 7 C.L.T. 202 (Ont.) (mortgage foreclosure; administrator *ad litem* appointed); *Re Williams and McKinnon* (1891), 14 P.R. 338 (order appointing administrator *ad litem* for purpose of intended action; consent of appointee required; proper to apply before bringing intended action). *Cf. Abbott* v. *Brown*, *supra*, note 5 (administrator *ad litem* will be appointed without his consent only in exceptional cases). *Fairfield* v. *Ross* (1902), 4 O.L.R. 534. (Rule 195 "authorizes no more than the grant of limited administration *ad litem*, but the object of this suit is substantially to get in the whole estate".)

[23] (1920), 17 O.W.N. 486. *Cf. Martin* v. *Evans* (1917), 39 O.L.R. 479.

administrator *ad litem* of his estate. In giving reasons why the order could not be made, Meredith C.J.C.P. said:[24]

> In the first place, the Rule of Court which formerly expressly conferred power to make such an order—Con. Rule 195 (Rules of 1897)—no longer exists; it was not brought into the Rules now in force (Rules of 1913). Under earlier Rules—of legislative origin and effect—the power of this Court to appoint administrators was very wide; but, by the Rules of which Con. Rule 195 was one, that power was very much curtailed; and now it has vanished altogether. So there is no power to make the particular order applied for. But in Rule 90 of the current Rules of Court (1913), power is brought down from earlier Rules under which the Court may, in certain cases, proceed in the absence of a person representing the estate of a deceased person who has no personal representative, or appoint some person to represent the estate; which is quite a different thing.

The judgment in *Patterson* v. *Hambleton*[25] appears to lend support to this statement.

The situation in Ontario with respect to administration *ad litem* requires clarification, to say the least. In the first place, the cases reveal a difference of opinion as to what the term means;[26] and even a book like Holmsted's Judicature Act is not free from error in this respect.[27] Secondly, the limited application of Rule 90, further emphasized by *Evans* v. *Playter*,[28] reveals a definite need for some such provision as exists in England and as was availed of in the *Knight Case*. Thirdly, Rule 90 derived from a Chancery Order and, notwithstanding

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[24] *Ibid.*, 486. He also pointed out that there was no need to make a personal representative of the estate a party because of the provisions of s. 10 (1) of the Devolution of Estates Act, R.S.O. 1914, c. 119.

[25] *Supra*, note 2. In that case the Master said: "The Courts do not appoint an administrator *ad litem* merely to give the plaintiff the right to sue such administrator on an independent contract with deceased, but an administrator *ad litem* is frequently appointed to bind an estate that is interested with others in the administration of an estate in Ontario." *Quaere*, as to his correct use of the term "administrator *ad litem*".

[26] *Cf.* Street J., in *Hunter* v. *Boyd*, *supra*, note 18; *Re Kirkpatrick*, *Kirkpatrick* v. *Stevenson* (1883), 10 P.R. 4 (where administration *ad litem* seems to be confused with administration *pendante lite*); *Patterson* v. *Hambleton*, *supra*, note 2.

[27] In the 4th edition, 1915, at p. 471, the statement is made that the Surrogate Court can appoint an administrator *ad litem*, and statutory authority is cited. Upon reference to this, it is clearly apparent that the power given is to appoint an administrator *pendente lite*. This error is, unfortunately, perpetuated in the 5th ed., (1938), at p. 542.

[28] [1935] O.W.N. 505 (action to set aside transfers of land on grounds of unprovidence and undue influence; death of plaintiff; *ex parte* order under Rule 90 appointing person to represent plaintiff's estate for purposes of the action; no difficulty shown to exist in appointment of a personal representative in the regular manner; order appointing representative under Rule 90 set aside.)

the provisions of the Judicature Act,[29] still betrays its origin and the purposes for which it was originally passed;[30] these did not encompass the obviating of difficulties arising in a situation such as was presented under the facts of the *Knight Case.*

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Toronto.

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DEFAMATION — RADIO — INTERJECTED REMARK — LIABILITY OF LESSOR BROADCASTING COMPANY. — *Summit Hotel Co.* v. *National Broadcasting Co.*,[1] a Pennsylvania decision, deals with a question of liability for defamation by radio on which there is no Canadian or English authority. A broadcasting company leased its facilities to an advertising company for some sponsored programmes. One of the performers interjected a remark, allegedly defamatory of the plaintiff hotel, which did not appear in the script submitted to the lessor's inspection. The Court held that, assuming that the remark was defamatory, the lessor broadcasting company was not under an absolute liability. This holding recognizes that defamation by radio is *sui generis* and that the analogy of newspaper libel is inappropriate, especially where the defamation by radio consists of an *"ad libbed"* remark. In view of this decision, the statement in *Gatley* on *Libel and Slander*,[2] that "a broadcasting corporation are liable as joint publishers of any defamatory matter broadcast on their radio" is too wide to be acceptable.

The statement in the judgment that "the distinctions of libel and slander seem inapplicable to the law of radio"[3] should meet with no dissent.

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[29] In the *Pratt Case, supra,* note 14, Slesser L.J. at p. 478, points out that since the Judicature Act, the powers under Order 16, Rule 46 (comparable to Ontario Rule 90) extend to common law as well as to chancery proceedings. See also, *Morris* v. *Morris* (1871), L.R. 13 Eq. 139.

[30] *Cf.* DANIELL, CHANCERY PRACTICE, 4th Am. ed., 1513: "Great expense was, until recently, occasioned by the necessity which the Court imposed of having the estate of every deceased person who was interested in the suit represented at the hearing. If no other representation had been taken out it was frequently necessary for the plaintiff himself to take out administration for the purpose of this suit. To obviate this difficulty it was enacted by 15 and 16 Vict., c. 86, s. 44, as follows. . . . ."

[1] (1939), 8 Atl. 2d. 302 (Pa.)

[2] 3rd ed., 1938, p. 109. In *Sorensen* v. *Wood and K.F.A.B.*, (1932) 123 Neb. 348, 243 N.W. 82, cited in Gatley for the proposition quoted in this comment, the objectionable remark was included in the script available for inspection by the broadcasting company, although it was not in fact inspected.

[3] (1939), 8 Atl. 2d. 302, 310.

PRESUMPTION OF DEATH — RIGHT TO DECLARATION OF DEATH WITH VIEW TO REMARRIAGE—JURISDICTION OF COURT.—The presumption of death arising from the establishment to the satisfaction of the Court that a person has not been heard of for seven years or more has been invoked (1) in connection with the administration and distribution of estates;[1] (2) to support a claim to the proceeds of insurance policies;[2] (3) in an action for alimony where the defence of a prior existing marriage was raised;[3] (4) to sustain an action of dower where it was objected that the husband was still living.[4] Whether a declaration generally of presumption of death can be obtained, when no legal right is asserted or is in issue, is a question that has been raised by numerous applications in the provincial courts by husbands and wives for declarations of presumption of death of their spouses in order that they might remarry. Applications of this kind have been allowed in Alberta,[5] but the Court has refused to include in its order permission to remarry, being unwilling to vouch in advance for the legitimacy of the proposed marriage.[6] In British Columbia, however, orders have been made which have included permission to remarry.[7] The

[1] *In re Baillie Estate, Montreal Trust Co.* v. *Baillie*, [1930] 3 W.W.R. 92, [1930] 4 D.L.R. 1011 (Alta.); *Re Forsyth*, [1927] 2 D.L.R. 72 (N.S.) *Cf. Re Coots* (1910), 17 O.W.R. 727, 1 O.W.N. 807; *Re Dwyer* (1910), 17 O.W.R. 728, 1 O.W.N. 889; *Re Hocking* (1910), 17 O.W.R. 729, 2 O.W.N. 380; *Re McFarlane* (1921), 19 O.W.N. 586. In *In re Bricker Estate*, [1929] 3 W.W.R. 697 (Man.), the plaintiff in a pending action against the surviving executors of an estate applied for an order that one of the executors was deemed or presumed to be dead, this having been formally denied in the statement of defence. A question of joinder of parties was involved and the Court held that Rule 928 (h) justified an application of this kind by originating notice, there being a question "arising in the administration of an estate or trust."

[2] *Re A.O.U.W. and Marshall* (1908), 18 O.L.R. 129: *O'Donnell* v. *North American Life Assur. Co.*, 60 O.L.R. 502, [1927] 3 D.L.R. 412; *Re Oag and Order of Can. Home Circles* (1913), 23 O.W.R. 796, 4 O.W.N. 643. See The Insurance Act, R.S.O. 1937, c. 256, s. 174 (2).

[3] *Homanuke* v. *Homanuke*, [1920] 1 W.W.R. 673, 13 Sask. L.R. 186, affirmed [1920] 3 W.W.R. 749, 13 Sask. L.R. 557. *Cf. Irwin* v. *Irwin*, [1926] 1 W.W.R. 849 (Man.)

[4] *Giles* v. *Morrow* (1882), 1 O.R. 527.

[5] *In re Jelfs*, [1925] 1 W.W.R. 735 (Alta.)

[6] *In re DeMille*, [1926] 2 W.W.R. 148, (Alta.)

[7] *In re Carlson*, [1923] 2 W.W.R. 798 (B.C.); *In re Ball*, [1924] 1 W.W.R. 33, 33 B.C.R. 162. In *In re Holl; In re Cowper*, [1933] 1 W.W.R. 17, 46 B.C.R. 297, an order as to death had been made in 1930 to permit a wife to obtain a pension and it stated that it "has no effect or bearing upon the question of remarriage." The wife remarried and in 1932 her husband applied to have the order of 1930 rescinded. The Court held that he had no status since he did not have any interest which was affected by the order at the time it was made. In *In re Honeyman*, [1930] 1 W.W.R. 999, an application was made for an order that the petitioner's husband, who had disappeared about seven months previously, should be presumed to be dead. Upon a statement of the facts of the disappearance, that there were five minor children, that the estate consisted of cash and

meagre reports of the cases in these provinces do not disclose the grounds upon which the courts exercised jurisdiction. In Ontario, in *Re Sell*,[8] an application for a declaration of presumption of death was refused, Rose J. asserting that "to declare generally and not because the declaration is necessary to justify the exercise of some jurisdiction, that a person is dead, would seem to me to be a practice open to objection, even if it could in this Province be upheld as an exercise of the power conferred by sec. 16 (b) of the Judicature Act." In Saskatchewan, an order of presumption of death was obtained by a wife who based her application on s. 30 of The Marriage Act, 1933, c. 59 (Sask.), which provides that before a marriage license is issued to a widow or widower a certificate of the death of the husband or wife must be filed with the issuer.[9] In Manitoba, Adamson J. in *In re Tomes*,[10] refused to make an order declaring that the applicant's spouse be presumed to be dead, but Donovan J. in *In re Deloli*,[11] decided that he could exercise the jurisdiction to make such an order under s. 25 (e) of The King's Bench Act, R.S.M. 1913, c. 46, the applicant having stated that the object of securing the declaration was to enable her to meet the requirements of The Marriage Act, R.S.M. 1913, c. 122, with a view to remarrying.[12]

From 1934, until the decision in *In re Morgan*,[13] thirty-three declarations of presumption of death of a husband or wife were granted in Manitoba.[14] In that case the problem was canvassed by the Manitoba Court of Appeal, and it upheld the refusal of Taylor J. to make an order upon the usual *ex parte* application for a declaration of presumption of death in order that the applicant might obtain a marriage license. The following grounds of decision were given: (1) The application did not come within s. 62 (8) of The King's Bench Act, 1931, c. 6 (Man.), which provides that "no action or proceeding shall be open to objection on the ground that a merely declaratory

life insurance, an order was made that the husband was presumed to have died on a certain date. The grounds for the application or for the extra-ordinary exercise of jurisdiction are not stated in the report of the case.

[8] 56 O.L.R. 32, [1924] 4 D.L.R. 1115.

[9] *In re Marriage Act, 1933 : In re Shook*, [1935] 3 W.W.R. 115 (Sask.)

[10] [1927] 1 W.W.R. 429 (Man.)

[11] [1929] 2 W.W.R. 327, 38 Man. R. 279.

[12] Under s. 17 of this Act, as under s. 22 (1) of The Marriage Act, R.S.O. 1937, c. 207, and s. 13 of The Solemnization of Marriage Act, 1925 (Alta.), c. 39, an affidavit must be made to the effect that there is no legal bar, etc., to the marriage, and the condition in life of each of the parties, whether bachelor, widower, spinster, widow, (or divorcee, in the Ontario Act), must be stated, before a license will be issued.

[13] 47 Man. R. 142, [1939] 3 D.L.R. 142 (C.A.)

[14] 47 Man. R. at 144, [1939] 3 D.L.R. at p. 144.

judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not." (This provision is exactly similar to s. 25 (e) of The King's Bench Act, R.S.M. 1913, c. 46, invoked in *In re Deloli*, and to s. 16 (b) of the Ontario Judicature Act,[15] referred to in *Re Sell.*) No declaration of legal rights in a dispute between husband and wife was sought and there was no subject matter in respect of which a declaration might be made;[16] (2) The Marriage Act, R.S.M. 1913, c. 122, gave no jurisdiction to make the declaration; (3) In the words of Trueman J.A., the applicant's "wish to marry or right to marry in the circumstances is not a jural right to which the Court can give effect by a categorical imperative";[17] (4) The applicant was asking the Court "to make a declaration based on a conditional presumption which determines no rights and which is subject at any moment to *ipso facto* nullification by the reappearance of the first wife, whose contractual rights never have been affected."[18]

The declaration of presumption of death of a spouse in the cases in which it has been made "simply declares that the legal presumption of . . . . . death has arisen but it does not establish . . . . . death as a fact."[19] Accordingly, and as appears also from the last ground of the decision in *In re Morgan*, above stated, if it is later shown that the spouse presumed to be dead is or was alive at the time of the second marriage, the latter may be declared null and void at any time. This is pointed out in the recent English case of *Chipcase* v. *Chipcase*,[20] where the position under the presumption is contrasted with that under s. 8 of The Matrimonial Causes Act, 1937. Under this English Act, if the Court is satisfied that there are reasonable grounds for supposing that one party to a marriage is dead, it may make a decree of presumption of death and of dissolution of the marriage and, once the decree absolute is given, it is of no consequence that the party is afterwards shown to have been alive at the material time.

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[15] Now s. 15 (b) of The Judicature Act, R.S.O. 1937, c. 100.

[16] 47 Man. R. at 149, [1939] 3 D.L.R. at p. 147, per Robson J.A.: "The jurisdiction to pronounce declaratory judgments applies to litigation in usual form of issues between actual parties. I cannot see how it can possibly be invoked here."

[17] 47 Man. R. at 147, [1939] 3 D.L.R. at p. 146.

[18] 47 Man. R. at 148, [1939] 3 D.L.R. at p. 146.

[19] *In re De Mille*, [1926] 2 W.W.R. 148 (Alta.), at p. 149.

[20] [1939] 3 All E.R. 895.

ANIMALS — BEES — PROPERTY — HONEY AS SUBJECT OF LARCENY.—The decision in *People* v. *Hutchinson*,[1] a New York case, may usefully be considered in connection with the recent discussion in this REVIEW[2] of the extent to which one may have a property right in bees. In that case, the accused persons went upon the land of another and took from a tree thereon a quantity of honey that had been produced by wild bees which had not been reduced to possession. They were convicted of larceny. The conviction was quashed on appeal on the ground that since the bees were not the subject of larceny, neither was the honey that they produced.[3] The decision is criticised in (1939), 23 *Minnesota Law Review* 957, for failing to distinguish between wild bees and their honey, the contention being that the honey should be treated as an ordinary chattel entitling the landowner to absolute property in it, and thus a subject of larceny.

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DAMAGES—LORD CAMPBELL'S ACT—REDUCTION OF DAMAGES BY REASON OF WAR.—In awarding damages under Lord Campbell's Act, Oliver J. in *Hall* v. *Wilson*[1] enumerated among the factors to be taken into account in reduction of the amount of damages to be given for the pecuniary loss to the deceased man's widow and family, brought about by his death, "such considerations as this, that he might have been killed in an accident, as anyone might, and that he might, particularly now, have been killed in a war, either as the result of going to fight in it, or as the result, possibly, of air raids which might have terminated his life." Upon reflection, he concluded, with some doubt, "that it would be safer to assume that that additional war risk does apply to this case, although at the moment he died it did not. I have, therefore, discounted the sum which I would have given by making some allowance in respect of that."

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[1] (1938), 9 N.Y.S. (2d) 656.
[2] (1939), 17 Can. Bar Rev. 130.
[3] The Court followed *Wallis* v. *Mease*, (1811), 3 Bin. Pa. 546.
[1] [1939] 4 All E.R. 85.