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

CONDITIONAL SALES—BONA FIDE PURCHASER AT EXECUTION SALE OF CONDITIONAL BUYER'S GOODS—WHETHER A SUBSEQUENT PURCHASER CLAIMING FROM OR UNDER CONDITIONAL BUYER.—Section 2(1) of the Conditional Sales Act, R.S.O. 1937, c. 182, states that "where possession of goods is delivered to a purchaser . . . . in pursuance of a contract which provides that the ownership is to remain in the seller . . . . until payment of the purchase or consideration money or part of it, as against a subsequent purchaser or mortgage claiming from or under the purchaser . . . . without notice in good faith and for valuable consideration, such provision shall be invalid" unless the contract is fully set out in writing and a copy filed in the proper office. In *Commercial Credit Corp.* v. *Niagara Finance Corp. Ltd.*,[1] a majority of the Court of Appeal for Ontario (Masten and McTague JJ. A.), Robertson C.J.O. dissenting, held that the assignee of a seller under an unrecorded conditional sales contract for a car had no rights in respect thereto against an execution creditor of the conditional buyer who purchased the car at a sale under the execution in good faith, for value and without notice of any claim against it.

The holding of the majority that the purchaser from the bailiff at the execution sale claims "from or under" the conditional buyer, within s. 2(1) of the Act, is strongly opposed by the opinion of Chief Justice Robertson that a subsequent purchaser must be a purchaser of the goods themselves and not of a mere equity or interest therein of the conditional buyer,

[1] [1939] 4 D.L.R. 311.

which was all that the bailiff could pass:[2] and that the purchaser at the execution sale was not a purchaser claiming from or under the conditional buyer but under the bailiff, who wrongfully sold the car. The Chief Justice, further, makes out a plausible case when he says that the Act does not make it lawful for the conditional buyer to sell the property of the conditional seller but merely protects subsequent purchasers and mortgagees, claiming from or under the conditional buyer, against the consequences of an unlawful sale of the goods themselves. According to Masten J.A., however, the test is not the validity of the sale but the bona fides of the sub-purchaser.[3]

In the absence of a statute, a sale and delivery of a chattel with a reservation of title in the seller until the price is paid vests no title in the buyer, before such payment, which will pass, as against the seller, by a sale on execution against the buyer.[4] Barron on the Law of Conditional Sales,[5] in discussing the Ontario Act asserts that "a bona fide purchaser at a sheriff's or bailiff's sale is a purchaser intended to be protected by the statute." *McKnight* v. *Gordon*,[6] a South Carolina decision cited for this statement, involved a chattel mortgage recording statute; but some support for the decision in the principal case may be derived from its holding that a purchaser under an execution sale against the chattel mortgagor was a subsequent purchaser within the meaning of the statute and was entitled to its protection against an unrecorded mortgage. Further support is afforded by an early Saskatchewan decision, *Palmer* v. *May*,[7] where the Court held that "subsequent purchaser" within the meaning of the Bills of Sale Ordinance, 1898, included all purchasers who traced their titles in a chattel to the bargainor, and not merely a subsequent purchaser who took directly from him. McTague J.A., in the principal case, states that ordinarily all the purchaser at an execution sale obtains is what the debtor could give him; but he

[2] The Execution Act, R.S.O. 1937, c. 125, s. 18. It was Chief Justice Robertson's contention that since the bailiff could sell only the conditional buyer's equity under the execution, the purchaser at the execution sale got only that; the Conditional Sales Act added nothing to a valid sale of the conditional buyer's equity. See *Drain* v *La Grange State Bank* (1922), 135 N.E. 780.

[3] [1939] 4 D.L.R. 311, 318.

[4] *Blanchard* v. *Child* (1856), 73 Mass. 155; 25 Am. & Eng. Encyc. of Law, 2nd ed., pp. 486-487; WILLISTON on SALES, 2nd ed., s. 326, p. 754; *Crane & Sons* v. *Ormerod*, [1903] 2 K.B. 37.

[5] 3rd ed. (1928), p. 40.

[6] (1867), 15 S.C. Eq. 222. The Court said (p. 237): "Is not he who, without notice of the mortgage, purchases the mortgaged chattel for valuable consideration as the property of, and at a sale under execution against, the mortgagor equally within the mischief with him who so purchases by immediate negotiation with the purchaser himself?".

[7] (1911), 18 W.L.R. 676, 5 Sask. L.R. 20.

is a person claiming under the debtor's title such as it is, and therefore, under the debtor. And where the sale purports to be a sale of the chattel itself, the Ontario Conditional Sales Act operates to preclude a conditional seller who has not filed the contract from asserting rights which he might otherwise possess, just as if the sale had been made by the debtor himself.[8]

The paucity of direct authority on the question raised by the principal case is in part attributable to the fact that the Ontario Act, in contradistinction to conditional sales recording Acts in other jurisdictions, Canadian and American, confines its protection to two classes, subsequent purchasers and mortgagees.[9] *Pineo* v. *Bell*[10] appears to be the only Canadian decision which is at all on the point, but the report of the case in the Ontario Weekly Notes is short and far from clear, and in any event it appeared that the purchaser at the execution sale was chargeable with notice of the state of accounts between the conditional buyer and the conditional seller. It is the decision of a single judge, and, for what it is worth, supports the opinion of the Chief Justice who, while at the bar, was counsel for the successful party. A number of Alabama decisions, however, are in favour of the majority in the principal case. In *F. A. Ames & Co.* v. *Slocomb Mercantile Co.*,[11] the statute involved provided that an unrecorded conditional sale was void against purchasers for valuable consideration, mortgagees and judgment creditors without notice. The Court stated that the statute, in making the reservation of title void as against subsequent purchasers without notice, was not limited to those who purchased at voluntary sales but included those who purchased at judicial or execution sales against the conditional buyer. The plaintiff's title in that case rested on an unrecorded conditional sale. The conditional buyer was adjudicated a bankrupt and his property was sold by a receiver, the sale being confirmed by the Court. The plaintiff's claim against a purchaser for value without notice was denied. In *Gober Motor Co.* v. *Valley Securities Co.*,[12] there was an explicit holding that a purchaser at an execution sale against a conditional buyer was within the protection of the Act mentioned in connection with the *Ames Case*. *Gayle Motor Co.* v. *Gray-Acree Motor Co.*[13] indicates how far this protection goes.

[8] [1939] 4 D.L.R. 311, 321-2.
[9] *Cf.* WILLISTON on SALES, 2nd ed., s. 327; 25 Am. & Eng. Encyc. of Law, 2nd ed., p. 494.
[10] (1923), 25 O.W.N. 55.
[11] (1910), 166 Ala. 99, 51 So. 994.
[12] (1929), 124 So. 395 (Ala.). See Alabama Civil Code, 1923, s. 6898.
[13] (1921), 90 So. 335 (Ala.).

There it was held that the title of a seller under an unrecorded conditional sales contract was good as against a purchaser from one the source of whose title was not shown; since it was not made to appear that that person claimed any title under or through that of the conditional buyer, which alone the statute intended to protect, the purchaser from him was not protected.

A number of other cases may be adverted to. In *Meisel Tire Co.* v. *Mar-Bel Trading Co.*,[14] the seller under an unrecorded conditional sales contract for a car repossessed upon default of the buyer and the car was sold at a sale by a licensed auctioneer. The seller bought the car without notice of an unrecorded conditional sale of the tires and heater with which it was equipped. He was held to be a purchaser, within the meaning of a recording statute, against whom the reservation of title in the tires and heater was void. Where a statute provided that an unrecorded conditional sales contract was void as against third parties without notice, it was held that a buyer without notice at an execution sale under a judgment against the conditional buyer took a title superior to the conditional seller under an unrecorded contract.[15] The broad terms of the statute in this case as compared with the corresponding provision of the Ontario Act must of course be considered in comparing the decision with that in the principal case.

Perhaps as strong support as there is for the decision of Masten and McTague JJ.A., is *Harris* v. *Gunn*,[16] where the recording statute involved protected purchasers but not creditors. There W sold horses to T under a conditional sales contract which was not filed. S purchased them from C, a marshal, who sold the horses under an execution issued upon a judgment recovered by S against T. The horses were left in T's hands for hire and were seized by the defendant, a marshal, acting under an execution issued on a judgment obtained by W against T and C. The question that arose was whether the failure to file the contract made the reservation of title void as against S and the plaintiff, his assignee. The Court admitted that S was a creditor and that, in his capacity as such, the reservation of title may have been valid. But, while it was true that the plaintiff obtained title through a creditor he also obtained it through T, the conditional buyer, against whom S secured the execution under which the plaintiff purchased. Had he purchased

[14] (1925), 280 N.Y.S. 335, 155 Misc. 664.
[15] *Meyer Herson Auto Sales Co.* v. *Faunkhauser* (1933), 62 App. D.C. 161, 65 F. (2d) 655.
[16] (1902), 77 N.Y.S. 20, 37 Misc. 796.

from T directly there could be no question of his being a subsequent purchaser in good faith, within the statute, and of his title being good. The fact that he bought T's interest under an execution sale rather than by private purchase did not make his position any worse.[17]

The case made by Robertson C.J.O. would be easier to uphold if the contest had been between the assignee of the conditional seller and the judgment creditor claiming by virtue of his judgment and execution. Ordinarily a judgment creditor is not regarded as a bona fide purchaser.[18] In *Fennikoh* v. *Gunn*,[19] it was held that an unrecorded conditional sales contract was not void as against the execution creditor of the conditional buyers in possession or as against the marshal who seized the goods conditionally sold, since neither were purchasers for value within a statute making an unrecorded conditional sales contract void as against subsequent purchasers. So too, in *Bank of Hamilton* v. *Mervyn*,[20] a district court Judge pointed out that since the Ontario Conditional Sales Act covered only purchasers and mortgagees and that a creditor could not claim the benefit of its provisions, the execution creditors in that case fell outside its protection. And in *Overby* v. *McLean*,[21] the Court asserted that an execution creditor was not entitled to seize goods in the possession of the debtor under a conditional sale agreement. The judgment creditor, in *C.I.T. Corp.* v. *Carl*,[22] was held not to be within the classification of "third persons acquiring title to said property from said purchaser", and therefore the assignee of the rights of the seller under an unrecorded conditional sales contract had a claim superior to that of a judgment creditor of the conditional buyer. *Woolley* v. *Geneva Wagon Co.*[23] may also be noted; the statute there considered protected only subsequent purchasers and mortgagees, and accordingly, a sale was not invalidated as against a creditor of the conditional buyer where the contract was not filed. In *Re Hodges, John Deere Plow Co.*

[17] A question similar to that raised in the principal case in relation to chattels arises in the case of land. In *Pugh* v. *Highley* (1899), 53 N.E. 171 (Ind.), for example, it was held that a judgment creditor purchasing in good faith at an execution sale on his own valid judgment is a bona fide purchaser for value and takes the land free from secret equities. There is, however, some conflict of authority whether an execution creditor purchasing at his own sale is a bona fide purchaser within the meaning of land recording acts; see 25 Am. & Eng. Encyc. of Law, 2nd. ed., p. 825. See also the Canadian cases collected in 19 Can. Abridgment, col. 485 *et seq.*

[18] *Higgins* v. *Central Cigar Co.* (1929), 59 App. D.C. 9, 32 F. (2d) 400.

[19] (1901), 69 N.Y.S. 12, 59 App. Div. 132.

[20] (1909), 14 O.W.R. 132.

[21] [1928] 3 W.W.R. 328, 37 Man. R. 525.

[22] (1936), 66 App. D.C. 232, 85 F. (2d) 809.

[23] (1896), 59 N.J.L. 278, 35 Atl. 789.

v. *Trusts & Guarantee Co. Ltd.*,[24] where the statutory protection was confined to purchasers, mortgagees and holders of judgments, executions or attachments against the conditional buyer, it was held that an assignee for the benefit of creditors of the conditional buyer was not a purchaser or mortgagee and, if a creditor, was not a creditor having a judgment, execution or attachment.

The decision of the majority in the principal case is sound from the standpoint of policy and this is possibly the justification for giving a somewhat extended interpretation to the provisions of s. 2(1) of the Ontario Act. While Masten J.A. asserts that "this Court is not at liberty to read into [s. 2(1)] additional words so as to confine the benefit of the section exclusively to subsequent purchasers, to whom a voluntary sale is made by the original vendee",[25] there is some difficulty in appreciating how an illegal seizure and sale can perfect a title in a purchaser which is referable to the interest of a conditional buyer; for it is questionable whether the Legislature, in giving protection against an unrecorded instrument to a "subsequent purchaser or mortgagee claiming from or under the [conditional] purchaser" intended these words to be construed in the light of s. 18 of the Execution Act, R.S.O. 1937, c. 125, by virtue of which the bailiff assumed to sell the conditional buyer's interest in the car. In any event, consideration might be given to the question whether the Ontario Act is not too narrowly confined. In a case under a similar statute, it was held that a pledgee was not a purchaser or mortgagee and consequently not protected as against an unrecorded instrument.[26]

BORA LASKIN

Toronto.

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[24] (1916), 11 Alta. L.R. 198. See also *Thomas Mfg. Co.* v. *Huff*, 62 Mo. App. 124 (assignee under an assignment for the benefit of creditors executed by the conditional buyer is not a purchaser in good faith but stands in the place of the assignor).

[25] [1939] 4 D.L.R. 311, 318.

[26] *Kauffman* v. *Klang* (1896), 38 N.Y.S. 56, 16 Misc. 379. In *McCormick Harvesting Mach. Co.* v. *Callen* (1896), 48 Neb. 849, 67 N.W. 863, it was held that a mortgagee of a conditional buyer was not a purchaser within the meaning of a statute making an unrecorded conditional sale invalid against "a purchaser or judgment creditor of the vendee". To the same effect is *Campbell Printing-Press & Mfg. Co.* v. *Dyer*, 46 Neb. 830, 65 N.W. 904. Williston termed this "an unfortunate construction" (SALES, 2nd ed., s. 327, p. 761).

NEGLIGENCE—DOCTRINE OF DONOGHUE V. STEVENSON—APPLICATION TO DISTRIBUTOR OF GOODS MANUFACTURED BY ANOTHER.—The decision in *Watson* v. *Buckley, Osborne Garrett & Co., Ltd., and Wyrovoys s Products Ltd.*,[1] holding that a distributor of a deleterious hair dye, manufactured by another, must respond in damages, under the principle of *Donoghue* v. *Stevenson*,[2] for injuries sustained by a hairdresser's customer as a result of the application of the dye to his head, does not mark the beginning of an uncritical extension of the *Donoghue* v. *Stevenson* doctrine. Imposition of liability was impelled by the facts.[3] From these it appeared that W and O entered into an agreement under which O was to be sole selling agent and distributor for a certain territory of a hair dye manufactured by W. The packing and get-up of the product for sale was to be in O's discretion subject to W's approval. O was to advertise and push the sale of the hair dye which W guaranteed, to the best of belief, to be harmless. The product consisted of the dye proper and a fixative lotion containing an acid which was not to exceed 4% in the lotion; this fact was mentioned in conversation between W and O but not included in the agreement. Before application to the head the 4% acid solution was to be diluted to 2%. Deliveries of the dye in cartons and of the lotion in carboys were made by W to O from time to time. The practice was for O, without any preliminary test as to whether the lotion contained a safe proportion of acid, to pour it into bottles in which it was distributed to the trade, and the dye was supplied in some other container. O advertised the product under a trade name as safe and harmless, requiring no preliminary test. The plaintiff's hairdresser showed him these advertisements, telling him that she had not put the hair dye to any test and that she had no experience of it in action. He decided to try it and it was applied without negligence and in accordance with the directions for its application. The lotion contained a 10% acid solution and the plaintiff contracted dermatitis. Although W was responsible for the strength of the lotion, Stable J. held O liable. Referring to Lord Thankerton's judgment in the *Donoghue Case*,[4] he said:[5]

> I do not think that it matters whether the man is a manufacturer or whether he is a distributor. It seems to me to be the same in the case of a person through whose hands there has passed a commodity

[1] [1940] 1 All E.R. 174.
[2] [1932] A.C. 562.
[3] An alternative ground of liability advanced by the Court was that, on the facts, the hair dye was a dangerous thing for the distributor to put into circulation.
[4] [1932] A.C. 562, 603.
[5] [1940] 1 All E.R. 174, 183.

> which ultimately reaches a consumer to his detriment. Where that person has intentionally so excluded interference with, or examination of, the article by the consumer, then he has, of his own accord, brought himself into direct relationship with that consumer so as to be responsible to the consumer for any injury the consumer may sustain as a result of the distributor's negligence. The duty is there.

American authority[6] supports the conclusion in this case which, on its facts, resembles a line of cases imposing, upon a person putting out as his own product something manufactured by another, the same liability as though he were the manufacturer.[7] There is nothing in the decision, however, which should alarm the jobber who carries on normally as the conduit between the manufacturer and retailer.

There is one remaining point of interest. W did not appear in the action but Stable J. declared that "if there had been any doubt as to the duty . . . . the plaintiff . . . . could have sued both defendants. The negligent act of the manufacturer was putting in the acid in too strong a solution. The negligent acts of the distributor were the various acts and omissions and representations which intervened between the manufacture af the article and its reaching [the plaintiff]."[8]

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CRIMINAL LAW — APPEAL BY THE CROWN — ACCUSED DISCHARGED BY TRIAL JUDGE WITHOUT VERDICT OF JURY— NEW TRIAL.—In *The King* v. *Steele*,[1] the Supreme Court of Prince Edward Island *in banco*, purporting to follow *Walker* v. *The King*,[2] granted a new trial on appeal by the Crown because the trial Judge, being of opinion that the Crown had not made out a *prima facie* case and that there was no evidence to go to the jury, discharged the accused upon motion by his counsel, instead of directing the jury to bring in a verdict of acquittal. It is questionable whether, in view of s. 1014 (2) of the Criminal Code, applicable *mutatis mutandis* by virtue of s. 1013 (4). (5) to appeals against acquittal, a new trial should have been granted.

There can be no quarrel with the proposition stated by Duff C. J. in the *Walker Case* that "the proper practice, where the trial Judge decides that there is no evidence to go to the jury in the well understood meaning of those words, is to direct the

[6] See *Restatement of Torts*, Vol. 2, ss. 388, 399, 402; Harper on Torts, s. 106.

[7] *Burkhardt* v. *Armour & Co.* (1932), 115 Conn. 249, 161 Atl. 385; *Thornhill* v. *Carpenter-Morton Co.* (1915), 220 Mass. 593, 108 N.W. 474.

[8] [1940] 1 All E.R. 174, 183.

[1] (1939), 14 M.P.R. 321 (P.E.I. C.A.).

[2] [1939] S.C.R. 214, affirming [1938] O.R. 636.

jury to acquit and discharge the accused."[3] What the Supreme Court of Canada decided in that case on this question was that the action of the trial Judge in discharging the accused without obtaining a verdict of acquittal from the jury constituted a judgment or verdict of acquittal; that the question with which he was dealing was one of law alone so that his judgment was appealable under s. 1013(4) to the Court of Appeal; and that an appeal lay to the Supreme Court of Canada under s. 1025(3). The Supreme Court was merely passing on its jurisdiction.

The Crown's appeal in the *Walker Case* from the trial Judge's acquittal revolved around his refusal to admit certain evidence without which the Crown had no case. A majority of the Court of Appeal for Ontario (Latchford C.J.A. and Fisher J.A.), Henderson J.A. dissenting, ordered a new trial, and this was affirmed by the Supreme Court of Canada. Latchford C.J.A. considered that the evidence in question should have been admitted and that the practice of withdrawing a case from the jury and discharging an accused person was wrong; accordingly he ordered that the accused be properly tried. Fisher J.A. agreed that there should be a new trial because of improper rejection of the evidence and stated that it was unnecessary to deal at length with the question of the withdrawal of the case from the jury although he understood the law to be that it was for the jury to render the verdict. Henderson J.A., while dissenting as to the admissibility of the evidence, agreed with the other members of the Court that an accused person could only be discharged, where a jury has been sworn in for the trial, by a verdict of the jury although upon the Judge's direction. But he continued: "While this is so, it does not, in my opinion, warrant the granting of a new trial. The irregularity in the procedure at the trial, according to my view, does not call for such a direction."[4]

It is submitted that Henderson J.A. is right in his view, An accused person, against whom the Crown has, in the trial Judge's opinion, failed to make out a case, should not be forced to undergo the torment of another trial because of a mere irregularity in procedure. Nor is *Rex* v. *Hancock*[5] comparable. In that case the accused person pleaded guilty and the Judge, without obtaining a verdict of the jury, passed sentence. A new trial was directed because a verdict of the jury was necessary for conviction, and until that was given and recorded no sentence could be

[3] [1939] S.C.R. 214, 216.
[4] [1938] O.R. 636, 645-6.
[5] (1931) 23 Cr. App. R. 16, 100 L.J.K.B. 419.

imposed. Considerations of regularity which obtain in the criminal law in favour of an accused do not necessarily apply in favour of the Crown. The decision of the Prince Edward Island Court is regrettable since there appeared to be nothing upon which the Crown could appeal save the irregularity of the accused's discharge.

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EVIDENCE—COMMUNICATIONS BETWEEN HUSBAND AND WIFE—STATUTORY PRIVILEGE OF NON-DISCLOSURE—PERSONS COVERED BY PRIVILEGE.—The English Court of Appeal in *Shenton* v. *Tyler*[1] has exposed as baseless the easy assumption that the privilege attaching to communications between husband and wife was grounded in the common law; that assumption resulted from confusing competency and compellability. The exposé would have had but academic interest were it not for the Court's holding that the privilege, being a creature of statute, must be confined in accordance with its terms, and these were not wide enough to cover widowers, widows and divorced persons.

At common law spouses were not competent as witnesses for or against each other;[2] their evidence not being admissible, no question of privilege could arise. This rule of incompetency was extended by the case law to exclude the evidence of a divorced wife against her former husband[3] and the evidence of a widow against the administratrices of her husband's estate.[4] In that state of the law, a rule of privilege, if one existed, had to be sought in those cases in which neither husband nor wife nor the personal representative of either was a party. The exhaustive researches of the Court and of counsel revealed nothing which indicated that there was a rule of privilege at common law.

Section 1 of the Evidence Amendment Act, 1853,[5] made husbands and wives of parties competent and compellable witnesses save in criminal proceedings and in proceedings instituted in consequence of adultery; and s. 3 provided: "No husband shall be compellable to disclose any communication made to him

[1] [1939] 1 All E.R. 827, reversing [1938] 4 All E.R. 501.

[2] There were certain exceptional cases, however, affecting the wife's liberty or person, in which she was a competent witness for the prosecution against her husband. See *Rex* v. *Bissell* (1882), 1 O.R. 514; *Ex Parte Abell* (1879), 18 N.B.R. 600; *Ex Parte Robichaud*, [1926] 1 D.L.R. 639, 45 C.C.C. 181, 39 Que. K.B. 359.

[3] *Monroe* v. *Twisleton* (1802), Peake, Add. Cas. 219; *Doker* v. *Hasler* (1824), Ry. & M. 198.

[4] *O'Connor* v. *Marjoribanks* (1842), 4 Man. & G. 435, 11 L.J.C.P. 267.

[5] This Act was known as Lord Brougham's Act, as was the Evidence Act, 1851, which made parties competent and compellable witnesses (but preserved the incompetence of husbands or wives of parties) except in certain cases, particularly criminal matters.

by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." This latter section was, according to the Court, the foundation of the rule of privilege, a rule not confined to cases where the witness or his or her spouse was a party but extending to all cases, and a rule which conferred the privilege upon the witness alone so that the other spouse could not object to the disclosure of a marital communication. The scope of the privilege, accordingly, fell to be determined by the words of the statute creating it, and the Court in *Shenton* v. *Tyler* refused to extend those words to include widowers, widows and divorced persons.

The Canada Evidence Act,[6] the Ontario Evidence Act,[7] and Evidence Acts[8] in other provinces contain a provision similar in terms to s. 3 of the English Act of 1853. There have been few discussions of the provision in the Canadian cases dealing with privileged communications.[9] In *Connolly* v. *Murrell*,[10] Street J., referring to the statutory provision said :

> . . . . the principle embodied in this section had been a settled rule of evidence, resting upon broad grounds of public policy and jealously guarded against encroachment. It was not restricted to communications of a confidential character; the death of the husband or the wife did not remove the seal from the lips of the survivor; even their divorce did not compel them to break their silence. . . . The principle lost nothing of its force when it took its place in a statute. . . .

The reference of Street J. to the rule of privilege as a principle which "had been a settled rule of evidence", that is, at common law, must now be reconsidered in the light of *Shenton* v. *Tyler;* and so must his further assertion that widowers, widows and divorced persons were within the scope of the privilege, since, as indicated in *Shenton* v. *Tyler*, the case law supposedly sanctioning this extension dealt with competency and could not be considered in construing the statutory privilege. In *Wood* v. *Mackey*,[11] Weldon J. seemed to consider the question of non-disclosure of marital communications as one of competency, for he said :

> [The Evidence Act, C.S.N.B. 1877, c. 46] while it allows parties in a suit to be witnesses, distinctly declares that no wife shall be compell-

[6] R.S.C. 1927, c. 59, s. 4(3).
[7] R.S.O. 1937, c. 119, s. 8.
[8] The Evidence Act, R.S.N.S. 1923, c. 225, s. 40; The Evidence Act, R.S.N.B. 1927, c. 131, s. 11; The Evidence Act, 1939 (P.E.I.), c. 14, s. 9; The Saskatchewan Evidence Act, R.S.S. 1930, c. 55, s. 31; The Alberta Evidence Act, R.S.A. 1922, c. 87, s. 9; The Manitoba Evidence Act, 1933 (Man.), c. 11, s. 8; The Evidence Act, R.S.B.C. 1936, c. 90, s. 9.
[9] See 18 Can. Abridgment, col. 1089 *et seq.*
[10] (1891), 14 P.R. 187, at 188; affirmed, 14 P.R. 270.
[11] (1881), 21 N.B.R. 109, at 112.

> able to disclose any communication made to her by her husband during the marriage. So that she could not be a witness for that purpose, neither could her statement be evidence—and even if the Act did not exclude her testimony, it would be excluded from motives of policy.

Since competency and compellability are questions distinct from one another, the statement of Weldon J. cannot be supported; moreover, the privilege arising under the statute is, as pointed out in *Shenton* v. *Tyler*, that of the witness. Further, the intimation of Weldon J. that, aside from statute, the policy of the law would exclude marital communications springs from his failure to differentiate competency and compellability, following in this respect Starkie on Evidence, Vol. 1, p. 69, which he quotes. In any event, *McBay* v. *Merritt and Merritt*,[12] a later New Brunswick decision, now adequately covers the matter.

Although the Court in *Shenton* v. *Tyler* made a thorough investigation into the history of non-disclosure of marital communications, resulting in a conclusion that the privilege was statutory, it is disappointing to find the construction of the statute very briefly considered. Greene M.R. said merely that "the section in terms relates only to husbands and wives, and no principle of construction known to me entitles me to read into the section a reference to widowers or widows or divorced persons."[13] And Luxmoore L.J. stated: "Plainly, the words of the section do not include the case of any persons other than husbands and wives, and, since I have come to the conclusion that the privilege is statutory, I am unable to find any warrant for extending the words of the section by construction so as to include widowers and widows and divorced persons."[14] If the privilege of non-disclosure exists for the purpose of protecting domestic confidence,[15] it is arguable, as has already been pointed out elsewhere,[16] that the confidence should be protected after the death of one of the spouses, lest freedom of communication during life be hindered. The reasoning is equally applicable to the case of divorce.[17]

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[12] (1936), 11 M.P.R. 20.
[13] [1939] 1 All E.R. 827, at 841.
[14] *Ibid.*, at p. 849.
[15] *Cf.* WIGMORE on EVIDENCE, Vol. 4, p. 3258.
[16] Note, (1939), 55 Law Q. Rev. 329.
[17] *Cf.* also Note by J. G. Mann in (1939), 2 Res Judicatae 70.

DEFAMATION—LIBELLOUS STATEMENT TRUE OF ANOTHER PERSON—OBJECTIVE TEST OF LIABILITY.—In Gatley on Libel and Slander[1] it is stated that "a logical application of the law laid down in *Hulton* v. *Jones* is—as Fletcher Moulton L.J. pointed out in the Court of Appeal—to impose liability on a defendant who makes a statement true of A, but which, by an unfortunate coincidence, is equally descriptive of B, of whom it is false and defamatory. And indeed, it has been so held in America and in Australia." An English authority for the statement in Gatley is now provided by the decision of the Court of Appeal in *Newstead* v. *London Express Newspaper, Ltd.*[2] The defendants published in their newspaper underneath a photograph of two women that "Harold Newstead, a 30-year-old Camberwell man . . . ." had been convicted and jailed for bigamy. They were sued for libel by another man, Harold Cecil Newstead, a hairdresser who assisted his father at Camberwell Road and who was about 30 years of age and unmarried. Two questions confronted the Court of Appeal: (1) Was the trial judge justified in leaving to the jury the question whether reasonable men would understand the words complained of to refer to the plaintiff? (2) Assuming that the words were capable of a meaning defamatory of the plaintiff did the fact that they were true of another person afford a good defence? As to the first question the Court held, MacKinnon L.J. *dubitante*, that it was properly left to the jury; and as to the second, that the defendants' liability did not depend on their intention and the fact that words were true of one person did not make it as a matter of law impossible for them to be defamatory of another.

The difficulties in the *Newstead Case* may be gathered from the argument of counsel for the defendants that "there is no reported case of a true statement having been held to constitute an actionable libel, so far as the English Courts are concerned."[3] In *E. Hulton & Co.* v. *Jones*[4] the name "Artemus Jones" was chosen as that of a fictitious individual, and while there is some controversy as to whether the *ratio decidendi* of that case turned on the intention or recklessness of the defamer or on the fact of defamation,[5] Farwell L.J. in the Court of Appeal[6] made two

[1] 3rd ed., (1938), p. 128.
[2] [1939] 4 All E.R. 319, affirming [1939] 3 All E.R. 263.
[3] Ibid., at 321.
[4] [1910] A.C. 20, affirming [1909] 2 K.B. 444.
[5] *Cf.* G. W. Paton, Reform and The English Law of Defamation (1939), 33 Ill. L.R. 669, at 676; Note, (1930), 46 Law Q. Rev. 1; Note by W. S. Holdsworth (1930), 46 Law Q. Rev. 133; C. K. Allen, The Judge as Man of the World (1930), 46 Law Q. Rev. 151.
[6] [1909] 2 K.B. 444, at 480, 481.

statements that are particularly interesting in view of the *Newstead Case;* he said :

> But it is not enough for a plaintiff in libel to show that the defendant has made a libellous statement, and that the plaintiff's friends and acquaintances understand it to be written of him; he must also show that the defendant printed and published it of him; for if the defendant can prove that it was written truly of another person the plaintiff would fail.

And again :

> If the libel was true of another person and honestly aimed at and intended for him, and not for the plaintiff, the latter has no cause of action, although all his freinds and acquaintances may fit the cap on him.

These statements are consistent with the position taken by Farwell, L.J., and those who support his contention,[7] that there must be intent to defame, which is proved by showing actual intent or recklessness whether the plaintiff is held up to ridicule or not; for it is difficult (although perhaps possible) to show recklessness, if there is a person having the name used in the allegedly libellous statement of whom it is true. Salmond on Torts[8] adopts and quotes the second statement above of Farwell L.J., and Winfield,[9] after discussing *E. Hulton & Co.* v. *Jones,* says cautiously that "it is probably correct to say that the plaintiff cannot succeed if the defendants can disprove that they have been reckless in their use of the name and careless whether there was such a person or not or what the consequences might be to him." Winfield's statement requires him to explain away *Cassidy* v. *Daily Mirror Newspapers,*[10] which re-emphasizes the objective or "fact of defamation" principle which, Sir Frederick Pollock asserted,[11] was the basis of *E. Hulton & Co.* v. *Jones.* He does this by alleging that "there is nothing in the decision to show that if the defendants had taken all reasonable care to substantiate the paragraph they would have been liable."[12] But, as Professor Paton points out,[13] "the decision is not based on the failure to take sufficient care, but on the theory that the test of defamation is not the state of mind of the writer or publisher but the meaning that would be drawn from the words by a reasonable

[7] E.g. Holdsworth, *supra,* note 5, supports the view that an intention to defame is an essential ingredient of an action for libel.
[8] 9th ed., at 412.
[9] Text-Book of the Law of Tort, at 280.
[10] [1929] 2 K.B. 331.
[11] Note, (1930), 46 Law Q. Rev. at 2.
[12] *Supra,* note 9, at 279.
[13] *Supra,* note 5, at 677.

man knowing the relevant facts." And as is stated in Salmond[14] "if *Cassidy's Case* lays down the true rule of law, ... the publisher of a defamatory statement may be liable even in the absence of negligence"; further, the principle of the case applies equally to words not defamatory in their primary sense. The *Newstead Case* makes it clear that the question whether there was negligence in not guarding against the applicability of the libellous words to the plaintiff is irrelevant to the fixing of liability though it may be a circumstance properly to be considered in assessing damages.[15]

Intent to defame being immaterial and negligence not affording a defence, a defendant who publishes a statement true of one person but which is defamatory of the plaintiff must rely, to escape from liability, on the failure of the plaintiff to satisfy the jury that reasonable men would understand the defamatory words to refer to him. Two English cases prior to the *Newstead Case* may be referred to. The defendants in *Shaw* v. *London Express Newspaper Ltd.*[16] reproduced a postcard addressed to Mrs. B. Shaw, 29 St. Paul's Road, Camden Town, in connection with an account of the murder of P.D., a woman who had been living with a man named Shaw as his wife. Thomas Matthew Shaw lived at the same address at the time of the publication of the story by the defendants. Horridge J., after pointing out that the article was a true description of a murder and not a fictitious story as in *E. Hulton & Co.* v. *Jones*, and that it stated quite truly that a man named Shaw lived with the dead woman, withdrew the case from the jury. The case is very shortly reported and it is not clear to what extent the fact that the newspaper story was true of another person operated against the plaintiff. While referred to in argument of counsel, neither this case nor *Thomson & Co.* v. *McNulty*[17] were mentioned by the Court in the *Newstead Case*. In *Thomson & Co.* v. *McNulty*, a newspaper published an account of certain experiences of "Elizabeth McNulty, a 23 year old Anderston girl". The plaintiff, Elizabeth McNulty, aged 21, who lived in Anderston, sued for libel alleging that the article might by any person reading it be reasonably supposed to refer to her. The House of Lords, following *E. Hulton & Co.* v. *Jones*, held that an issue was properly directed to be tried by the jury as to whether any reader could reasonably think that the article referred to the plaintiff. There

[14] Law of Torts, 9th ed., at 411.
[15] [1939] 4 All E.R. 319, at 326.
[16] (1925), 41 T.L.R. 475.
[17] (1927), 71 Sol. J. 744; The Times, July 29, 1927.

are two reports of the case, both inadequate. In one,[18] Lord Dunedin is recorded as having said that "he was quite unable to say that there was not here a good case for enquiry. It might be torn to pieces at the trial because it might be shown that the article could not possibly relate to her, or that it related to a person who was not the respondent and on that finding the defendant would escape." In the second,[19] a newspaper account, Lord Dunedin is reported to have said that if it could be shown that "the article was a true narration of facts relating to a person who was not the pursuer the defendant would escape." This statement could well support the argument that where words are published which are true of an existing person no action will lie at the suit of another even if that other satisfies the jury that the words were reasonably understood to refer to him, because proof of intention is essential, and it would be wanting in the circumstances.[20] There is much, however, to be said for the argument that if Lord Dunedin meant to express an opinion that although the words were found actually to reflect on the plaintiff the defendant could escape by showing that they also related to some other person of whom they were intended to be written, such an opinion would not have been conveyed in a mere phrase.[21] In any event, in view of the unsatisfactory nature of the reports of *Thomson & Co.* v. *McNulty* and because Lord Dunedin's remarks were obiter, the case is of no assistance, nor is the *Shaw Case*, on the problem of the *Newstead Case*.

Lee v. *Wilson and Mackinnon*,[22] a decision of the High Court of Australia, is apposite in connection with the *Newstead Case* although there the statement sued on, made of a person incorrectly described, the description of whom fitted two other persons who recovered damages, was untrue of the first person against whom it was directed. Dixon J., after referring to passages in the judgments of Lord Loreburn and Lord Shaw in *E. Hulton & Co.* v. *Jones*, states :[23]

> These passages express the grounds of the decision of the House of Lords, and, ... they express a test which makes the tort of libel consist in the operation of defamatory matter as an actual disparagement of the plaintiff's reputation. This principle logically applied appears to me to require the conclusion that a description on its face designating

[18] 71 Sol. J. 744.
[19] The Times, July 29, 1927.
[20] *Cf.* argument of counsel in the *Newstead Case*, [1939] 4 All E.R. 319, at 321.
[21] *Lee* v. *Wilson and Mackinnon* (1934), 51 C.L.R. 276, per Dixon J., at 295.
[22] (1934), 51 C.L.R. 276.
[23] Ibid., at 290.

> one person only may, nevertheless, be a libel of two or more, if, being capable of denoting each of them, it is reasonably understood by one group of people to refer to one of them, and by another group to another and so on.

And further :[24]

> It is not easy to see what other operation a rule could have which definitely makes the application of the defamatory words to the plaintiff depend upon objective considerations. And such a rule appears to be generally accepted as that established.

Certainly the objective theory of liability for defamation is well established in the United States and the implications of the *Newstead Case* would there be considered as in the ordinary course.[25]

Since, on the objective theory of liability for defamation it must follow that defamatory words true of one person may be defamatory of another, it may be urged that serious hardships will result from such a strict notion of liability. But, as Greene M.R. pointed out in the *Newstead Case*,[26] any hardships, at least in the case of statements *ex facie* defamatory, can be obviated if the publishers take care to identify the person aimed at so clearly that it could not reasonably be held that such statements could refer to anyone else.

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[24] Ibid., at 292, See *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Ltd.* (1934), 50 T.L.R. 581.

[25] Restatement of Torts, vol. 3, ss. 579, 580. *Hanson* v. *Globe Newspaper Co.* (1893), 159 Mass. 299, at 301, 302, 305; *Peck* v. *Tribune Co.* (1909), 214 U.S. 185; *Washington Post Co.* v. *Kennedy* (1925), 3 F(2d) 207.

[26] [1939] 4 All E.R. 319, at 325.