bers of the Association who had been consulted, the conclusion was reached that it was inexpedient to continue with the plans for the August Meeting at this time.

It has, therefore, been decided that the 1940 Annual Meeting of The Canadian Bar Association, which was to have been held in Ottawa on August 28th, 29th and 30th next, be postponed until next year or until such other time and place as the Council may decide.

It is the sincere hope of everyone of us that before another year is gone that the dark spectre of War will have passed and that new plans may be made for an assured future.

Sincerely yours,

D. L. McCARTHY,
President.

CASE AND COMMENT

CONFLICT OF LAWS—ADOPTION UNDER FOREIGN LEX DOMICILII—STATUS OF ADOPTED CHILD—MEANING OF "CHILD".—The recognition in domestic English law of the status of an adopted child began with the coming into effect on the 1st of January, 1927, of the *Adoption of Children Act, 1926*,[1] and prior to that date it was not clear how far, under English conflict rules, recognition would be given in England to the status of a child adopted in some other country in accordance with the law there prevailing.

The *Adoption of Children Act, 1926*, empowers a court in England or Wales to make an "adoption order", authorizing an applicant who is domiciled in England or Wales to adopt a child under twenty-one years of age who is a British subject resident in England or Wales. By s. 5, sub-ss. 2 and 4, it is provided as follows:

> (2) An adoption order shall not deprive the adopted child of any right to or interest in property to which, but for the order, the child would have been entitled under any intestacy or disposition, whether occurring or made before or after the making of the adoption order, or confer on the adopted child any right to or interest in property as a child of the adopter, and the expressions "child", "children" and "issue" where used in any disposition whether made before or after the making of an adoption order, shall not, unless the contrary intention appears, include an adopted child or children or the issue of an adopted child.
>
> (4) For the purposes of this section "disposition" means any assurance of any interest in property by any instrument whether inter vivos or by will including codicil.

[1] As will be noted later, in most of the provinces of Canada statutes had already been passed providing for the adoption of children.

In view of the expressed intention of the British Parliament, in the case of a child adopted in England, to exclude an adopted child from the category of persons entitled to take under the description of child or issue of the adopter, unless a contrary intention appears, the decision of Farwell J. in *In re Luck's Settlement Trusts*[2] is remarkable because of the liberal attitude there manifested with regard to an adopted child's right to take under the description of issue in an English settlement by virtue of the child's adoption under the law of the foreign domicile of the adopter. Under a will made in 1887, and under a marriage settlement to which the testator was a party in 1867, two funds were left on trust for the issue of the testator living at the time of his death or born within 21 years thereafter. The testator died in 1896, leaving him surviving a son and other children. The son married A in 1893, and there were two children of this marriage, the second and third defendants. Some years after this marriage the son left A and went from England to the United States, and ultimately went to California with a woman, B, with whom he had been living. A child of this union, the first defendant, was born in California in 1906, the testator's son not having yet lost his domicile of origin in England. In 1922 A obtained a divorce, and in 1925 the testator's son married C (not B), and shortly after this marriage he, being then domiciled in California, adopted the first defendant, and took him into his house with the consent of C. By the law of California, as found by the court, the effect of the adoption was to make the adopted child, as from the date of his birth, the legitimate son of the adopter. Consequently it was held that the first defendant was entitled to share along with the second and third defendants as issue of the testator, the testator's son having died in 1938.

The result of the decision is to give full effect in England to the legitimation of a person by his adoption under the law of his adopter-father's domicile at the time of the adoption, without regard to the domicile of the adopter-father at the time of the child's birth, that is, without applying by analogy the former English rule, if it was the rule,[3] that in the case of

[2] *In re Luck's Settlement Trusts, In re Luck's Will Trusts, Walker* v. *Luck*, [1940] Ch. 323.

[3] The rule has of course been changed in England by the *Legitimacy Act, 1926*, both as regards the domestic law of England and as regards the conflict rules of English law. In either case it is now only the domicile at the time of the subsequent marriage that is material. This clarification of the English law has not been adopted (that is, the point is not mentioned) in the legitimation statutes of the provinces of Canada: see my *Conflict of Laws: Examples of Characterization* (1937), 15 Can. Bar Rev. 241–243.

legitimation by subsequent marriage the father must, at the time of the child's birth and at the time of the subsequent marriage of the father and mother, have been domiciled in a country or in countries by the domestic law of which legitimation by subsequent marriage is recognized.[4]

The decision appears to be reasonable in itself, that is, apart from the provisions of the *Adoption of Children Act, 1926*, and, if regard is had to the fact that the operation of the statute is confined to the case of an adopter who is domiciled in England or Wales, it is also reasonable that an English court should follow by analogy a conflict rule by which the effect of adoption in another country is governed by the law of the domicile of the adopter.

Obviously the decision challenges comparison with *In re Donald*,[5] in which the Supreme Court of Canada held that a child adopted under the law of the State of Washington was not within the description of children in a will made in Saskatchewan, by a person domiciled in Saskatchewan, notwithstanding that the adopter (a son of the testator) was at the time of the adoption domiciled in Washington[6] and by the law of that State the adoption had the effect of making an adopted child "to all intents and purposes, the child and legal heir of the adopter or adopters, entitled to all the rights and privileges and subject to all the obligations of a child of the adopter or adopters begotten in lawful wedlock."

The subject of adoption of children has both domestic and conflict of laws aspects. From the purely domestic point of view the trend of modern legislation has set unequivocally in the direction of giving effect to the obvious social desirability of making provision for the adoption of children. A new status, that of an adopted child, has been created by statute. There has been less unanimity, however, on the subsidiary questions whether an adopted child should be considered within the description of a "child" in a domestic will or settlement and what an adopted child's succession rights should be. Then from

[4] There seems to be no authority or justification for the statement of Smith J. in *In re Donald, Baldwin* v. *Mooney*, [1929] S.C.R. 305, [1929] 2 D.L.R. 244, that the place of birth of the child is material, or, more specifically, that the child must be "born in the domicile".

[5] See note 4, *supra*. *In re Donald* was followed in *Re Skinner* (1929), 64 O.L.R. 245, [1929] 4 D.L.R. 427, and discussed in *Culver* v. *Culver*, [1933] 2 D.L.R. 535, [1933] 1 W.W.R. 435 (Sask.)

[6] *In re Donald*, in the Court of Appeal for Saskatchewan, [1928] 4 D.L.R. 771, [1928] 3 W.W.R. 388. The fact is not specifically stated in the judgment of the Supreme Court of Canada, and was apparently regarded as immaterial in that court.

the conflict point of view there is lack of unanimity on the two correlative questions whether domestic adoption should be limited to domestic cases, as, for example, on the basis of the domestic domicile of the adopter or the domestic domicile of the adopted child, and whether recognition should be granted in one country to the status of a child adopted under the law of the adopter's (or adopted child's) foreign domicile. In connection with the latter question arise also the same subsidiary questions already mentioned from the domestic point of view, namely, as to the meaning of "child" in a will or settlement and as to the succession rights of an adopted child. The question of succession rights is especially complicated from the conflict point of view because it may involve the double question of rights of succession to the natural parent as well as rights of succession to the adopted parent. It is true that in the judgment of the Supreme Court of Canada in *In re Donald* it was denied that the case involved a question of status,[7] but it is to be observed that the testator died on April 17, 1922, and a reporter's note[8] draws attention to the fact that in the province there in question, Saskatchewan, the *Adoption of Children Act, 1922*, came into force on May 1, 1922, that is, a few days after the death of the testator. In some of the other provinces the status of an adopted child had already received statutory sanction. Statutes providing for the adoption of children have been passed in New Brunswick (1890), Nova Scotia (1896), Alberta (1913), British Columbia (1920), Ontario (1921), Manitoba (1922), Saskatchewan (1922), Quebec (1924), and Prince Edward Island (1930).

In England, in view of the fact that the status of an adopted child has received statutory sanction in domestic English law, it appears from the *Luck Case* that English courts may be more inclined than they would have formerly been to recognize a similar status created under a foreign law, so it may be that Canadian courts should adopt a more liberal attitude towards the recognition of the status of an adopted child created under a foreign law, and it is respectfully suggested that the Supreme Court of Canada might treat the *Donald Case* as a special case dependent on the then condition of provincial legislation and as not being a decision which should preclude reconsideration of the court's attitude towards the recognition of adoption under a foreign law.

[7] And it was asserted that the case involved only a question as to the meaning of "child" in a will or settlement. Some observations on this question will be made later in the present comment.

[8] [1929] S.C.R. 306.

Apart from any possible reconsideration of the subject by the Supreme Court of Canada, the provinces might of course by appropriate legislation preclude the application of the *Donald Case* to situations arising in the future. So far, however, there is not only a deplorable diversity in the various provincial statutes,[9] but there has been little or no attempt on the part of the provincial legislatures to deal with the conflict aspects of adoption. It would seem that the subject is one which the Conference of Commissioners on Uniformity of Legislation in Canada might well put upon its agenda.

The Ontario legislature[10] has followed the principle of the English legislation in requiring that the adopter shall be domiciled and resident in the province and that the adopted child shall be resident there (thus impliedly suggesting a conflict rule by which adoption of a child elsewhere in accordance with the law of the adopter's domicile should be recognized in Ontario), but, somewhat inconsistently, makes provision for succession rights to property in Ontario in the case of a person adopted under the law of another province where he is domiciled (thus suggesting that only the adopted child's domicile is material).

There is much to be said for the suggested conflict rule making the adopter's domicile the connecting factor or criterion of jurisdiction,[11] but the matter cannot be fully considered here. Another view is that the criterion should be the domicile of the adopted child.[12] Still another view is that a distinction should be made between legitimization by adoption by a father of his own child, governed by the law of the domicile of the adopter, on the analogy of legitimation by subsequent marriage, and

[9] *Cf.* JOHNSON, CONFLICT OF LAWS, vol. 1 (1933) 348–354, with especial reference to succession rights; *cf. Ibid.*, vol. 3 (1937) 79–81 as to *In re Donald.*

[10] *The Adoption Act*, R.S.O. 1937, c. 218, s. 3(8) and S. 13.

[11] The rule is approved by GOODRICH, CONLFICT OF LAWS (2nd ed. 1938) 383. See also *Re Throessel* (1910), 12 W.L.R. 683 (Alta.); *Robertson* v. *Ives* (1913), 15 D.L.R. 122 (P.E.I.); *In re McGillivray, Purcell* v. *Hendricks* (1925), 35 B.C.R. 516, [1925] 3 D.L.R. 854, [1925] 2 W.W.R. 689; *In re McAdam* (1925), 35 B.C.R. 547, [1925] 4 D.L.R. 138, [1925] 2 W.W.R. 593. On the other hand, see *Burnfiel* v. *Burnfiel* (1926), 20 Sask. L.R. 407, [1926] 2 D.L.R. 129, [1926] 1 W.W.R. 657, approved in *In re Donald*, note 4, *supra*. Notwithstanding the decision in the *Donald Case* and without any reference to it, the *McAdam Case* was subsequently followed in *In re Testator's Family Maintenance Act and Estate of Ramsey* (1935), 50 B.C.R. 83, [1935] 2 W.W.R. 506, holding that a child adopted by a testator under the law of the adopter's foreign domicile was entitled to the benefit of the *Testator's Family Maintenance Act* in British Columbia.

[12] JOHNSON, CONFLICT OF LAWS, vol. 1, (1933) 353; CONFLICT OF LAWS RESTATEMENT (1934) §142; BEALE, CONFLICT OF LAWS (1935), vol. 2, pp. 715–716.

adoption of a stranger, governed by the law of the domicile of the adopted child.[13]

In Quebec it is provided[14] that the application for adoption shall be made by the adopter by means of a petition addressed to a judge of the Superior Court of the district in which he has his domicile,[15] and that the petitioner who has no domicile in the province must present his petition to the Superior Court of the domicile of the child whom he proposes to adopt.

In Nova Scotia it is provided[16] that the application be made to a county court of the district in which the adopter resides, or, if the adopter does not reside in the province, to a county court of the district in which the child resides.

In the statutes of each of the provinces of Alberta, British Columbia, Manitoba, Quebec, Saskatchewan and Prince Edward Island, provision is made for the recognition of the status of a child adopted outside the province in the sense that the child's succession rights within the province are defined, but there is no indication of the domicile either of the adopter or of the adopted child as the criterion of adoption outside the province.

The Quebec statute provides :[17]

> 22. A person resident outside the Province who has been adopted according to the laws of the United Kingdom or any part of the British possessions other than the Province of Quebec, or of any foreign country, shall possess in this Province the same rights of succession that he would have had in the said United Kingdom or part of the British possessions or in the said foreign country, in which he was adopted.

In Alberta it is provided as follows :[18]

> 48. A person resident out of the Province who has been adopted according to the laws of any of the provinces of Canada, shall upon proof of such adoption be entitled to the same rights of succession to property as he would have had in the province in which he was adopted, save in so far as these rights are in conflict with the provisions of this Act.

In Saskatchewan it is provided as follows :[19]

> 96. A person resident out of the province, who has been adopted in accordance with the laws of any of the provinces of Canada, shall,

[13] See especially STUMBERG, CONFLICT OF LAWS (1937), 302–310.
[14] R.S.Q. 1925, c. 196, s. 5.
[15] The fact that the "domicile" in question is localized in a particular district of the province suggests the possibility that domicile is here used in the sense of residence.
[16] R.S.N.S. 1923, c. 139, s. 1.
[17] R.S.Q. 1925, c. 196, s. 22, as amended by 1935, c. 67, s. 2.
[18] The *Domestic Relations Act, 1927.*
[19] The *Child Welfare Act,* R.S.S. 1930, c. 231.

upon proof of the adoption, be entitled to the same rights of succession to property as he would have had if he had been adopted in accordance with the laws of this province.

A similar provision has been enacted in Prince Edward Island.[20]

In British Columbia it is provided as follows :[21]

11. Any person adopted elsewhere than in this Province and his parent by adoption shall, in the case of intestacy, have the same rights in respect of the property of each other in the Province that they would have if the property were situate in the country where the adoption took place, except so far as those rights are in conflict with the provisions of this Act.

In Manitoba it is provided as follows :[22]

97. Where another jurisdiction has legislation respecting adoption which provides or substantially provides that upon the adoption of a child all rights and duties as between the child and the natural parents are to cease, except the right to inherit from his natural parents or kindred, and the child is thereafter to be or to be deemed to be the child of the adopting parent or parents, a child adopted in and in accordance with the law of that jurisdiction shall be deemed to have been adopted under the provision of this part.

None of the other provinces except Ontario as already mentioned, appears to have attempted to make any provision with regard to the effect in the province of adoption outside of the province, so that this problem of the conflict of laws is left to be solved by the courts of the province on general principle, if such principle there be.

In most of the provinces, however, provision is made as to the succession rights of a child adopted in the province and as to his right to take under the description of "child", etc. It is outside the scope of this comment to discuss the diverse provisions as to succession rights,[23] which are in general more generous to the adopted child than the English legislation, but there is practical unanimity in the provincial legislation which enables a child adopted in a particular province to take under the description of "child", etc. In particular in the province in question in *In re Donald*,[24] Saskatchewan, it is provided as follows :[25]

[20] 1930, c. 12, s. 15.
[21] The *Adoption Act*, R.S.B.C. 1936, c. 6.
[22] The *Child Welfare Act*, R.S.M. 1940, c. 32, Part VIII.
[23] See Alta. 1927, c. 5, s. 46; R.S.B.C. 1936, c. 6, s. 10; R.S.S. 1930, c. 231, s. 94; R.S.M. 1940, c. 32, s. 96; R.S.O. 1937, c. 218, s. 6(3); R.S.Q. 1925, c. 196, s. 18; R.S.N.B. 1903, c. 112, s. 244; R.S.N.S. 1923, c. 139, s. 7; P.E.I. 1930, c. 12, ss. 13, 14.
[24] Note 4, *supra*.
[25] R.S.S. 1930, c. 231.

> 95. The word "child" or its equivalent in any instrument shall include an adopted child unless the contrary plainly appears by the terms of the instrument.

It is true that this provision does not overrule the actual decision in the *Donald Case*, which related to a child adopted outside the province. On the other hand, if, as already suggested, the Supreme Court of Canada should be induced to adopt a more liberal attitude towards the recognition of the status of a child adopted under a foreign law in view of the general recognition of the status of an adopted child under the domestic legislation of the provinces, it would appear difficult for the court to maintain its adverse attitude towards the right of an adopted child to take under the description of "child" in view of the practically unanimous favourable view of the provincial legislatures in the case of domestic adoption.

Substantially the equivalent of the Saskatchewan provision is to be found in the statutes of some of the other provinces,[26] but in British Columbia,[27] Ontario[28] and Nova Scotia[29] the provision is limited to a disposition made by the adopting parent.

In Quebec the corresponding provision reads as follows :[30]

> 21. The word "child" or any other word of the same meaning in any other act or in a deed, shall include also an adopted child unless the contrary clearly appears; but it shall not include the adopted child where it relates to a substitution in which the adopter's own children are the institutes or substitutes.

It would have been tempting at this point to discuss the so-called "plain meaning" rule, but as this comment is already over long, only a few observations can be made. In applying the rule in question courts seem inclined to assume that where the word "child" is used in a will the testator's plain meaning is that only a legitimate child is referred to, unless elsewhere in the will itself there is some indication to the contrary. An extreme example is to be found in the case of *In re Paine*,[31] in which a testatrix made provision for the children of her daughter, referring to her daughter by her married name, Toepfer, and yet an English judge held that as the daughter's marriage with Toepfer was invalid, the children of this marriage were not

[26] See Alta. 1927, c. 5, s. 47; P.E.I. 1930, c. 12, s. 17.
[27] R.S.B.C. 1936, c. 6, s. 12.
[28] R.S.O. 1937, c. 218, s. 6(3).
[29] R.S.N.S. 1923, c. 139, s. 8.
[30] R.S.Q. 1925, c. 196.
[31] [1940] Ch. 220, commented on (1940), 18 Can. Bar Rev. 220; *cf.* footnote 2 on p. 221, with particular reference to the "plain meaning" rule.

entitled to take. Again, in the case of *In re Donald*[32] the Supreme Court of Canada held that a child adopted by the testator's son was not entitled to take a gift made by the testator to the son's children. Whatever may be said for a rule excluding any one except a legitimate child from the benefit of a "statutory will" or "the will of the law" in cases of intestacy, the case is different when it is a question of construing an actual will, and one may wonder whether courts have not sometimes lost sight of the fact that in the construction of a will it is after all the intention of the testator to which effect should be given.[33] On the other hand, the notable judgments of Adams J. and the Court of Appeal of New Zealand in the case of *Day* v. *Collins*[34] contain an illuminating review of the cases, concluding in favour of the admissibility of extrinsic evidence of the testator's intention with the result that a bequest to "my wife" was held to be a bequest not to his "lawful wife" whom he had deserted many years before, but to another woman whom he had subsequently "married" and to whom in a former will, since revoked, he had made a bequest under the description of "my wife Emily Sophia Collins". *Inter alia*, reliance was placed upon *National Society for the Prevention of Cruelty to Children* v. *Scottish National Society for the Prevention of Cruelty to Children*[35] as a case supporting the admissibility of extrinsic evidence to show what meaning should be given to words used by a testator.

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NUISANCE—TREES—BURROWING ROOTS.—The defendants plant trees the roots of which spread and burrow underneath the foundations of the plaintiff's house. Has the plaintiff a remedy? In *Butler* v. *Standard Telephones and Cables, Ltd.*,[1] apparently a case of first impression in England, Lewis J. held that the plaintiff, besides having the right to cut the roots of the offending tree, could recover in an action any damages suffered. He approved an Irish decision *Middleton* v. *Humphries*[2] in which damages and an injunction were given where the plain-

[32] Note 4, *supra; cf.* criticism of the decision by C.A.W. in a comment (1928) 6 Can. Bar Rev. 729, written before the Supreme Court of Canada had affirmed the judgment of the Saskatchewan court.
[33] *Cf.* C.A.W., (1928), 6 Can. Bar Rev. at pp. 730–731.
[34] [1925] N.Z.L.R. 280.
[35] [1915] A.C. 207.
[1] [1940] 1 All E.R. 121, 56 T.L.R. 273.
[2] (1912), 47 Ir. L.T. 160.

tiff's wall collapsed as the result of the burrowing action of the roots of a tree on the defendant's land. No distinction was drawn in that case between damage caused by overhanging branches and damage caused by roots which burrow. Similarly in *Lemmon* v. *Webb*,[3] Kay L.J. in the Court of Appeal stated that "the encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this an action on the case would lie. Also, the person whose land is so affected may abate the nuisance . . . . ." But in *Tanner* v. *Wallbrunn*,[4] a Missouri case, it was indicated that while there might be an action for overhanging boughs there would probably not be one for invading roots. This difference, however, seemed to be grounded on the fact that substantial harm was necessary to the cause of action and that it existed in the case with respect to the action of the branches but not the roots.

In an entertaining and instructive article "The Growing Lawlessness of Trees" an American writer[5] has indicated that in the United States the remedy of self-help is the one to which the courts generally confine a person who complains of invading boughs and roots. Thus, in *Michalson* v. *Nutting*,[6] it was held that no liability existed in Massachusetts where the roots of a poplar tree on the defendant's land penetrated the plaintiff's land, clogged the sewer and drain pipes and caused the cement cellar to crack, threatening injury to the foundation of his dwelling. "An owner of land", said the Court, "is at liberty to use his land, and all of it, to grow trees." There was no liability in the case of natural growth resulting in overhanging boughs or invading roots. "The common sense of the common law has recognized that it is wiser to leave the individual to protect himself." A similar result was reached in California in *Grandona* v. *Lovdal*[7] and in Iowa in *Harndon* v. *Stultz*.[8]

On the other hand in *Ackerman* v. *Ellis*,[9] a New Jersey case, it was held that trees which overhang the premises of another

[3] [1894] 3 Ch. 1, at p. 24, affirmed [1895] A.C. 1.

[4] (1898), 77 Mo. App. 262.

[5] Sayre Macneil, in *Legal Essays in Tribute to Orrin Kip McMurray*, at p. 375, 389 *ff.*

[6] (1931), 275 Mass. 232, 175 N.E. 490. The Court relied on *Bliss* v. *Ball* (1868), 99 Mass. 597, which pointed out that injury by the shade of trees was no violation of the rights of an adjoining owner.

[7] (1886), 70 Cal. 161, 16 P. 623; (1889), 78 Cal. 611, 21 P. 366.

[8] (1904), 124 Iowa 440, 100 N.W. 329. *Cf.* also *Countryman* v. *Lighthill* (1881), 24 Hun. (N.Y.) 405.

[9] (1911), 81 N.J.L. 1, 79 Atl. 883. *Cf.* also *Brock* v. *Connecticut & Passumpsic Rivers Ry.* (1862), 35 Vt. 373 (injunction against the planting of trees which would by growing and spreading branches over and roots into the complainant's land cause serious injury thereto).

are a nuisance and there is a right to damages against the person responsible for their presence there. So too, in *Toledo, St. Louis & Kansas City Ry.* v. *Loop*,[10] it was pointed out that there was a right to damages if injury was shown as a result of branches overhanging a boundary.

In England in *Crowhurst* v. *Amersham Burial Board*,[11] the yew tree case, and in *Smith* v. *Giddy*,[12] the elm and ash trees case, liability was imposed because of overhanging branches. According to the Australian case of *Sparke* v. *Osborne*,[13] the decisions in the two English cases were grounded on the fact that the trees were kept and improved by the owners who were thus actively responsible for the overhanging of their branches. In *Sparke* v. *Osborne*, a quantity of prickly pear, a noxious weed, grew so as to overhang the plaintiff's land and caused damage to the boundary fence; but, following *Giles* v. *Walker*,[14] the thistle case, the Court held that there was no liability (where it was not alleged that the defendant was responsible for introducing the weed to his land or was guilty of negligence) for merely permitting natural growth. No common law duty was imposed on a landowner to do anything with his land or with what naturally grows on it in the interest of either his neighbor or himself. A member of the Court, O'Connor J., stated :[15]

> It is not necessary here, nor would it be possible, to lay down generally the proposition that a landowner is under no circumstances bound to keep a tree or plant of natural growth from overhanging his neighbour's land. There may be circumstances under which the overhanging of a tree or plant the natural product of the soil would, if it caused damage to the adjoining landowner, amount to an actionable nuisance. But in all such cases there must have been some act done by the landowner in the use of his land which has rendered the wild growth more likely to injure, or there must have been some use or adoption of it by the landowner which put it in the same position as a growth brought by him upon his land.

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CONTRACTS — PUBLIC POLICY — CESSATION OF CONSORTIUM AND HOPE OF RECONCILIATION — AGREEMENT TO PROVIDE FOR FIRST WIFE BY WOMAN SUBSEQUENTLY BECOMING SECOND WIFE. —In *Fender* v. *Mildmay*,[1] Lord Thankerton remarked: "There

[10] (1894), 139 Ind. 542, 39 N.E. 306.
[11] (1878), 4 Ex. D. 5.
[12] [1904] 2 K.B. 448.
[13] (1908), 7 C.L.R. 51.
[14] (1890), 24 Q.B.D. 656.
[15] (1908), 7 C.L.R. 51, at pp. 70, 71.
[1] [1937] 3 All E.R. 402, [1938] A.C. 1. *Cf.* Note, (1938), 16 Can. Bar Rev. 393, at pp. 397 *ff*.

is no general principle of public policy that no contract is enforceable which is inconsistent with maintenance of the obligations of the marriage tie, or, to phrase it otherwise, with loyalty to the other spouse." In that case, a majority of the House of Lords concluded that a promise to marry made by a husband after his wife has obtained a decree nisi is enforceable by the promisee. The decree nisi relieved the spouses from the obligations that married persons owed to one another and thus the promise of marriage could not be deemed to have a tendency to breach of matrimonial obligations or immorality nor did it tend to prevent reconciliation which, as was well known, was a rarity after a decree nisi had been obtained. *Pope* v. *Pope*,[2] a decision of a single Judge in British Columbia, seems to go a little further and to rest on the implications of *Fender* v. *Mildmay*.[3]

In *Pope* v. *Pope*, P and his wife ceased to live together in 1919 and in that year entered into a separation agreement which provided for certain payments to the wife. The payments fell into arrears and in May, 1923, another agreement was entered into between the wife, another woman C, of whom P had become enamoured and whom he wanted to marry, and P. Under this agreement C set up a trust fund for the payment of a certain sum monthly to the wife which was guaranteed by P. Shortly afterwards a parliamentary divorce was obtained by the wife and in the following year P married C. Robertson J. held that the new agreement was enforceable and not contrary to public policy.[4] Consortium had ceased from the time of the making of the first separation agreement and there was no possibility of reconciliation. As a matter of principle there was no real difference between *Fender* v. *Mildmay* and the instant case. In both, consortium had, as a matter of fact, ceased before the making of the impugned agreements; in the one case, by reason of the *decree nisi*, as a matter of law; in the second case by reason of the separation agreement. In both cases there was no hope of reconciliation.

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[2] [1940] 2 D.L.R. 661.

[3] *Cf.* also *Davies* v. *Elmslie*, [1937] 4 All E.R. 68, 471.

[4] The Court referred to *Scott* v. *Scott*, [1913] P. 52, where it was held that a wife who had obtained a judicial separation with permanent alimony could enter into an arrangement with her husband, in consideration of an agreement to pay her more alimony, to apply for a divorce on the ground of adultery committed by the husband prior to the arrangement. The Court then stated that it did not think it would have any difference in the case if the person making it possible for the husband to pay the larger alimony, and accordingly entering into an agreement with the wife to pay, was the one whom he hoped to marry after the divorce.

EVIDENCE—CONFESSION—PRELIMINARY ISSUE OF ADMISSIBILITY—WHETHER ACCUSED CAN BE CALLED AS WITNESS ON ISSUE.—Ample authority supports the proposition that the admissibility of a confession is a question for the Judge, to be determined by a "trial within a trial";[1] as Wurtele J. stated in *Rex* v. *Viau*:[2]

> The trial Judge must determine as a preliminary question whether the confession . . . . . was made with that degree of freedom which should allow its reception in evidence, and this question should be determined before allowing the confession . . . . . to go to the jury; and he should determine the question of admissibility after hearing not only the preliminary examination of the witnesses for the Crown on this point, but also such evidence as may be offered by the prisoner to show that the confession . . . . . was procured by promises, threats or inducements.

In a recent Ontario case, *Rex* v. *Thauvette*,[3] Urquhart J. received the evidence of witnesses for the defence on the preliminary issue of the admissibility of a confession, the jury not being present, with respect to the accused's mental condition, as bearing on the question whether the confession was made voluntarily.

The question whether the accused may give evidence on the issue of admissibility has been considered in two English cases. In *Rex* v. *Baldwin*,[4] which is unsatisfactorily reported, objection was taken on a trial for murder to the admissibility of a confession and it was desired to call the accused as a witness on this matter. The trial Judge declined to receive his evidence and on appeal the ruling was upheld. In *Rex* v. *Cowell*,[5] where the facts were similar, Humphreys J. allowed the accused to give evidence on the issue of admissibility to show that the confession was improperly obtained. On appeal, the Court, in upholding what had been done, stated that, whatever *Rex* v. *Baldwin* decided, it was proper in such circumstances to allow the calling of the prisoner himself as a witness if the justice of the case required that it should be done.

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[1] *Rex* v. *Baschuk*, [1931] 2 W.W.R. 713, 39 Man. R. 554; *Rex* v. *DeMesquito* (1915), 9 W.W.R. 113, 21 B.C.R. 524; *Rex* v. *Brown*, [1931] O.R. 154; *Thiffault* v. *Rex*, [1933] S.C.R. 509.

[2] (1898), 7 Que. Q.B. 362; appeal quahsed, 29 S.C.R. 90.

[3] [1938] O.W.N. 185.

[4] (1931), 23 Cr. App. R. 62.

[5] [1940] 2 All E.R. 599. Humphreys J. stated, *inter alia*: "I should follow [*Rex* v. *Baldwin*] loyally if that was in fact the decision of the Court, but I cannot help thinking that it may not be and that what a judge has to be satisfied of is that there is *prima facie* evidence before him that a statement is admissible in that it was not made as a result of any inducement or threat, and that it was made after the proper caution, if a caution was necessary in law in the circumstances."

WIGMORE ON EVIDENCE[6] deals with the question of admissibility of a confession as follows: "In determining admissibility: (1) The Judge must hear the defendant's evidence (including evidence from cross-examination of the prosecution's witnesses) upon the issue of voluntariness, although under the heterodox rule [that the question should be left to the jury] this could logically be dispensed with; (2) The jury, during the hearing of this evidence, may be withdrawn, as is proper during all proof and arguments upon questions of admissibility; (3) But, when a confession is ruled to be admissible, the same evidence and all other circumstances affecting the weight of the confession may be introduced for the jury's ultimate consideration."

* * * *

QUASI-CONTRACT—MISTAKE OF FACT—WHAT IS MISTAKE INTER PARTES — ESTOPPEL — CHANGE OF POSITION. — In *Weld Blundell* v. *Synott*,[1] the first mortgagees under a mortgage, after exercising their power of sale, miscalculated the amount of interest owing to them with the result that in accounting to the second mortgagees for the balance of the proceeds they paid over a sum which included part of that interest. The Court allowed recovery of the overpayment as made under a mistake of fact and found against the second mortgagees on their two contentions that (1) the mistake was not one between the parties and (2) that an estoppel existed.

Conspicuously absent from the Court's judgment was any talk of unjust enrichment, the notion which lay behind the right of recovery. English Courts are not habituated to phrasing their judgments in such terms. The second mortgagees were clearly enriched at the expense of the first mortgagees whose unilateral mistake resulted in the overpayment. This sum was not paid "voluntarily", i.e. in circumstances which negative any mistake so that no right of recovery exists, as in *Hollinger Consolidated Gold Mines Ltd.* v. *Northern Ontario Power Co.*[2] The onus is on the plaintiff to show that he was induced to pay (what he seeks to recover) by a mistake of fact.[3] Moreover, there is no right of recovery where knowledge of the fact would not have affected the plaintiff's conduct.[4] As Wright J. pointed out in *Home & Colonial Ins. Co. Ltd.* v. *London Guarantee & Accident Co.*,[5] to

[6] 3rd, ed., 1940, vol. 3, s. 861, p. 348.
[1] [1940] 2 All E.R. 580.
[2] [1939] O.W.N. 529.
[3] *Home & Colonial Ins. Co. Ltd.* v. *London Guarantee & Accident Co.* (1928), 45 T.L.R. 134. See Note (1928), 62 Ir. L.T. 305.
[4] *Ibid.* See also *Holt* v. *Markham*, [1923] 1 K.B. 504.
[5] *Ibid.*

entitle a plaintiff to recover, the mistake must have been as to a fact which was essential to liability.

The second mortgagees sought to resist restitution on the ground that the mistake which existed was one between the first mortgagees and the mortgagor concerning the amount of interest owing on the mortgage and that the second mortgagees had nothing to do therewith. But according to Asquith J., "when a mistake is one affecting obligation . . . . . it is between the parties."[6] Where what A owes to B depends on what A is owed by C, and A, because of a mistake as to the latter amount automatically also makes a mistake as to the former amount, there is a mistake not only as between A and C but also as between A and B.

The second mortgagees second contention that an estoppel existed was based on an allegatio ı that they were led by the first mortgagees to believe that the sum paid to them, and no less, was owing, and that they altered their position on the faith of a representation to that effect. Although finding that there was no sufficient representation or a sufficient acting thereon to the second mortgagees' detriment, the Court held that no estoppel could arise until it could be shown that there was neglect or misconduct on the part of the person making the representation. Said Asquith J. : "When the decisions as to estoppel in connection with payment of money under a mistake of fact are closely examined much seems to turn on whether the payer was subject to a duty as against the payee to inform him of the true state of the account, which is in effect a duty not to make a mistake of fact in that regard."[7] Although the first mortgagees were under a duty to hold the balance of proceeds, after satisfying their own debt, in trust for encumbrancers ranking after them, no additional duty was imposed on them at their peril to inform the second mortgagees correctly of the true state of the account. The duty did not exceed that of an ordinary trustee who would not be estopped in similar circumstances, even though exclusive knowledge of the matter involved resided in the trustee, as in this case it resided in the first mortgagees.

Kelly v. *Solari*[8] represents the weight of authority that a plaintiff is not precluded by his negligence in recovering on the ground of a mistake of fact, a doctrine whose extension is not

[6] [1940] 2 All E.R. 580, at p. 584.
[7] *Ibid.*, at p. 585.
[8] (1841), 9 M. & W. 54; and see Note (1905), 18 Harv. L. Rev. 546.

warranted to cases where the plaintiff consciously refrains from ascertaining the true facts.[9] This doctrine, however, is, aside from any question of change of position or estoppel, a fact which was not clearly perceived, apparently, by the majority of the House of Lords in *Jones* v. *Waring & Gillow*.[10] On the other hand, where the defendant alone is negligent, or where the balance of blame is against him, he cannot avail himself of the defence of change of position.[11] The question of what circumstances will give rise to the defence of change of position as precluding recovery has often been skirted by saying that the burden of proving the defence rests on the defendant.[12] Under American authority, at any rate, it is not a change of position that the defendant has spent the money paid to him under mistake as if it were his own.[13] Cave L.C. in his dissenting judgment in *Jones* v. *Waring & Gillow* states the same proposition, pointing out that in such circumstances it can be said that the payee has suffered no real detriment.[14] The English cases have tended to emphasize the right of restitution in situations where change of position could plausibly be set up.[15] In fact the crystallization of change of position as a defence has been confined generally to situations where the defendant is the agent of a known principal and has accounted to him before notice of the mistake.[16]

The English cases appear to use the language of estoppel in connection with the defence of change of position.[17] At any rate, no clear distinction, if there is one, is drawn between the two, although logically such a distinction is possible when the elements of estoppel are considered.[18] It does not seem to be necessary to enable a defendant to avail himself of the defence of change of position that a representation should have been made to him by the plaintiff, unless it be said that in every case in which a payment is made by mistake there is a representation of fact. The statement of Asquith J. that estoppel depends on

[9] *E. G. Bartlett* v. *Liberty Glass Co.*, 124 Okla. 104.
[10] [1926] A. C. 670.
[11] Note (1934), 47 Harv. L. Rev. 1066.
[12] Cohen, *Change of Position in Quasi-Contracts* (1932), 45 Harv. L. Rev. 1333, at pp. 1361–2.
[13] *Ibid.*, at p. 1363.
[14] [1926] A.C. 670, at p. 683–4; see also *Standish* v. *Ross* (1849), 3 Ex. 527.
[15] *Cf. Baylis* v. *Bishop of London*, [1913] 1 Ch. 127; *Durrant* v. *Ecclesiastical Commrs.* (1880), 6 Q.B.D. 234.
[16] *Cf. Buller* v. *Harrison* (1777), Cowp. 565; and see *Newall* v. *Tomlinson* (1871), 6 C.P.D. 405. See Duff J. in *Dominion Bank* v. *Union Bank* (1908), 40 S.C.R. 366, at p. 382.
[17] *Cf.* Cave L.C. in *Jones* v. *Waring & Gillow*, [1926] A.C. 670.
[18] *Cf.* Cohen, *op. cit.*, *supra*, note 12, at p. 1360, note 66.

whether there was neglect or misconduct on the part of a plaintiff in making the representation on which the defendant acts to his detriment is in itself hardly understandable since both these factors were present in *Jones* v. *Waring & Gillow* where, nevertheless, recovery was allowed. Apparently, however, the statement must be considered in relation to his further observation that the decisions on estoppel in connection with payment of money under mistake of fact turn largely on whether the payer was subject to a duty to the payee to inform him of the true state of accounts so that neglect thereof resulting in a mistake is irremediable. *Skyring* v. *Greenwood & Cox*,[19] the authority quoted in this connection, was a case in which the paymasters of a military corps had a running account with an officer in the corps and they credited him with certain increased pay to which they supposed he was entitled under army regulations, although they had previously been informed by the Board of Ordnance that persons in the officer's position were not entitled to the increase. The officer was not informed of this by the paymasters until some years later and after they had rendered an account in which a balance was owing to the officer. Subsequently the paymasters continued to receive the officer's pay but no further account was rendered until his death. His personal representative brought an action in which the paymasters sought to set off the moneys mistakenly credited and they were not allowed to do so. Although the Court spoke of the breach of duty of which the paymasters were guilty in not communicating the instruction of the Board of Ordnance, there was also talk of the long lapse of time during which the officer was allowed to consider that the increased pay was rightfully his. But in the circumstances there may be some doubt whether there was a mistake of fact at all. In *Holt* v. *Markham*,[20] which followed the *Skyring Case* and where the facts were somewhat similar, the Court stated that if there was any mistake it was one of law, namely, a failure to apply the true construction of the regulations to the defendant's case. However, Scrutton L.J. in *Holt* v. *Markham*, grounded his judgment on estoppel as follows: "The plaintiffs represented to the defendant that he was entitled to a certain sum of money and paid it, and after a lapse of time sufficient to enable any mistake to be rectified he acted upon that representation and spent the money. That is a case to which the ordinary rule of estoppel applies."[21]

[19] (1825), 4 B. & C. 281.
[20] [1923] 1 K.B. 504.
[21] *Ibid.*, at p. 514.

There is, however, another explanation of *Skyring* v. *Greenwood and Cox*, and that is, that it was based on a neglect to give notice of the mistake at a time when this could reasonably have been done and before there was any change of circumstances. The question of a plaintiff's negligence or carelessness in relation to a payment by mistake may arise either at the time of making payment or subsequently in failing to give notice of the mistake. In either case, it is submitted, if there is a change of position, there should be no recovery.[22] The question in *Weld Blundell* v. *Synott* is thus reduced to a consideration whether there was carelessness in making the overpayment which was followed by a change in position on the defendant's part, or, if not, whether there was subsequently a neglect to tell the defendants of the mistake before they changed their position.

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[22] Costigan, *Change of Position as a Defence in Quasi-Contracts* (1907), 20 Harv. L.R. 205.