the subject, the REVIEW is in a position to announce that an Anthology of Canadian legal verse is at present in course of preparation. The compiler would welcome suggestions and selections from our readers. They may be sent to the Editor of the REVIEW.

NOTES.

SECURITY FOR COSTS WHERE CO-PLAINTIFF OUT OF JURISDICTION.—In the Ontario case of *Plumb* v. *W. C. Macdonald Registered,* Mowat, J., in Chambers, (June 28th, 1924) allowed an appeal from the order of a Master requiring certain co-plaintiffs resident out of the jurisdiction to give security for the costs of the defendants. In the report of the case in 26 O. W. N. 460 it appears that the appeal was allowed and the Master's order set aside because there were plaintiffs within the jurisdiction well able to pay the costs if the defendants succeeded in the action. Mowat, J., cited *Smith* v. *Silverthorne*[1], where Boyd, C., reversed an order of the local Judge of Simcoe requiring parties out of the jurisdiction to give security for costs in an action by the widow and children of a deceased person to recover possession of land. The widow was within the jurisdiction, the children, her co-plaintiffs, were resident outside. A point was sought to be made of the fact that three of the children were sons of another mother, but the learned Chancellor said that such fact did not diversify their interest. "They are all in the same boat as to the defence raised, and must win or lose together."

But it would appear from the English cases that in order to excuse the foreign plaintiff from giving security his co-plaintiff within the jurisdiction must be more than a nominal plaintiff. In *Sykes* v. *Sykes*[2] Montague Smith, J., said: "The cases in which a plaintiff has been compelled to give security on the ground of insolvency, are cases in which the specific debt sought to be recovered had been transferred to a third party, for whose benefit the action is brought. That is founded on reasons of obvious justice. The real plaintiff ought not to be allowed to enforce his right through the instrumentality of a nominal plaintiff who is not of ability to pay costs if unsuccessful." In *Belmonte* v. *Aynard*[3] Denman, J., said: "I think the principle on which security for costs is ordered is clearly this, viz., that one who is substantially in the position of plaintiff initiating an action, and is a foreigner residing abroad, shall be bound to give security for costs;

[1] (1893) 15 Ont. P. R. 197.
[2] (1869) 4 C. P. 645 at p. 648.
[3] (1879) 4 C. P. D. 221 at p. 223.

and if Belmonte occupied that position as between himself and Ford, we should as a matter of course order him to give security. It is, however, admitted on both sides that he is put in the position of plaintiff as against Ford simply for convenience of the proceedings, but in no sense, I think, can it fairly be said that he occupies the position of a plaintiff suing here, being a foreigner residing abroad. Mr. Lamaison has called our attention to several authorities, and invited us to say that they are in his favour. But I think the *ratio decidendi* is that the Court, in considering a question of the present kind, will see whether the party against whom security is claimed really is in the position of plaintiff or not. In some cases he is so, although he may be called defendant, and may come into the case in an unusual and anomalous way." That case was affirmed on appeal.[4] In *Jones* v. *Gurney*[5] it was held that where the attorney of the real plaintiff, who was not within the jurisdiction, was joined as co-plaintiff, the real plaintiff was not excused from giving security by reason of a nominal plaintiff being resident within the jurisdiction. See also *White* v. *Butt*.[6] In *Winthorp* v. *Royal Exchange Assurance Company*[7], Lord Chancellor Hardwicke discharged an order calling upon a co-plaintiff out of the jurisdiction to give security. We quote from the report:—"As one of the plaintiffs lived in England, who would be always liable to the costs, and as there was no evidence before him of the inability of such plaintiff to answer them, the order was improper; and therefore his Lordship discharged the order." It seems that even where the co-plaintiff's interests are separate but both join in the action, the non-resident will not be required to give security. In *D'Hormusgee* v. *Grey*[8], where the statement of claim alleged a contract by the defendant with the plaintiffs jointly, and in the alternative with each of the plaintiffs separately, it was held that one of the plaintiffs who resided abroad could not be ordered to give security. Denman, J. (at p. 15) said that the Judicature Orders did not make any alteration in the old practice relating to security. This is his language:—"But there can be no doubt that, by the law before the Judicature Acts, where one of two joint plaintiffs is a foreigner, out of the jurisdiction, yet if the other resides in England, there can be no order for security for costs. It is also clear from *Umfreville* v. *Johnson*[9] in the Chancery Division, that where an injunction is prayed for by two owners of separate pro-

[4] *See* 4 C. P. D. 352.
[5] (1913) W. N. 72.
[6] (1909) 1 K. B. 50.
[7] (1755) 1 Dick. 282.
[8] (1882) 10 Q. B. D. 13.
[9] L. R. 10 Ch. 580.

perties, and is refused to one co-plaintiff and granted to the other, the successful plaintiff is liable to pay the costs of the other who is unsuccessful. This is a strong authority to shew that in a joint action the liability to costs is not limited by the separate interests of the co-plaintiffs." C. M.

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JURISDICTION AS AFFECTED BY UNQUALIFIED COUNSEL.—The case of *Rex* v. *Wessell*[1] is a striking example of the growing tendency of some Western Canadian Courts to take a highly artificial and strained view of the meaning of "jurisdiction." The point raised in this decision was a novel one, viz., whether a conviction by a stipendiary magistrate was void, because another magistrate of the county had acted as prosecuting counsel, contrary to the following statutory provision:—

"No police or stipendiary magistrate shall act as solicitor, agent or counsel in any case, matter, prosecution or proceeding of a criminal nature, nor shall such Magistrate act as aforesaid in any case which by law may be investigated or tried before a Magistrate or a Justice of the Peace."

On this sole ground, the conviction was held void, as made without jurisdiction.

Without any serious attempt to analyze what jurisdiction really means, it may be pointed out that the old synonym was "conusance," and that in general the question of capacity is the basic one. That the capacity or judicial powers of a Court can be impaired or affected by the identity or qualifications of persons who appear before it as counsel is a startling proposition. For a decision to be without jurisdiction it must be *coram non judice:* Can a Judge be any the less one because unqualified counsel appear before him? The Court in *R.* v. *Wessell* attempt to meet this difficulty by saying "in effect the magistrate is just as much prohibited from hearing a case in such circumstances as is the counsel-magistrate from appearing in it." But with all deference to that Court, there seems to be nothing in the section to justify this statement. And in any event, it seems highly controversial ground whether even such a meaning would affect jurisdiction.

If the decision is correct, some very peculiar results may follow. One attribute of jurisdiction is the power to make a binding decision either way: *R.* v *Bradley,*[2] *R.* v. *Nat. Bell Liquors Ltd.,*[3] if then the

[1] 1923, 3 W. W. R. 233.
[2] 70 L. T. 379 at 381.
[3] (1922) 2 A. C. 128 at 152.

magistrate had no jurisdiction to convict, he had none to acquit. Sauce for the goose is sauce for the gander, but undoubtedly the defendant would have been severely shocked if he had been acquitted, and was then proceeded against *de novo* on the ground that this result was a nullity, as obtained through an incompetent tribunal. Yet this would be the logical result.[4] Again, if jurisdiction was lost, at what stage was it lost? Was it gone as soon as the magistrate-counsel took any part whatever? If so, and the trial magistrate after hearing his opening for the Crown had learned of the section and insisted on substitution of other counsel for the prosecution, would his decision still have been bad? If good, his jurisdiction must have been restored in some mysterious way, and by his own act. The orthodox view has always been that jurisdiction can be conferred only by the Crown or by Statute: *Mayor etc. of London* v. *Cox*;[5] yet here the magistrate would be conferring it upon himself.

It is submitted that such considerations show the treatment of what happened in *R.* v. *Wessell* as involving jurisdiction in any sense, is a misconception.

It was laid down in *R.* v. *Bolton*,[6] and affirmed in the *Nat. Bell* case (*supra*), that: "the question of jurisdiction . . . is determinable on the commencement, not on the conclusion of an inquiry, and affidavits to be receivable, must be directed to what appears at the former stage and not to the facts disclosed in the progress of the inquiry." Unless it could be suggested that the magistrate's jurisdiction did not attach until some competent counsel had appeared for the Crown, the theory adopted in *R.* v. *Wessell*, though not made clear, must be that jurisdiction had attached at some prior time, but was ousted by what occurred later. The only exception in English authority to the rule cited from *R.* v. *Bolton* is merely an apparent one, occurring when an issue arises in the course of a trial which is not within the classes of issues which the Court has power to decide. But this is because the Court never really had jurisdiction but only appeared to have until the real question it had to decide became clear. The rule in England, therefore, is that jurisdiction attaches if at all, at the commencement of proceedings, once for all. There have been many doctrines repugnant to this canvassed in Canada, some of which were given their quietus in the *Nat. Bell* case (*supra*). Until the orthodox rule is adhered to in its entirety the development of the law will bring forth many anomalies. D. M. G.

[4] *R.* v. *Galway Judges*, 1906, 2 I. R. 499 at 504, 508.
[5] L. R. 2 H. L. 239 at 254.
[6] 1 Q. B. 66 at 74.

The subjoined letter, which has been handed to us by Mr. M. J. Gorman, K.C., of Ottawa, has a pathetic interest in connection with the death of Sir John Salmond of the Supreme Court of New Zealand, which we announced in our October number. Sir John was the first writer on the subject of Torts to urge the adoption of the Rule of the Admiralty and of the Civil Law in cases of contributory negligence. This he did in the fifth edition of his learned work, which was published in 1920. Mr. Gorman had previously advocated this step in the *Canadian Law Times* in 1917. The writer's expressed desire to know how the experiment succeeded in Canada indicated that, if he had lived, he probably would have obtained the passage of somewhat similar legislation in the far-off sister Dominion of New Zealand.

Judge's Chambers,
Wellington, New Zealand,
July 21, 1924.

"Dear Mr. Gorman:

I received with interest, your letter of April 2nd, enclosing a copy of your Bill amending the law of Contributory Negligence, and I presume that by this time it has become law. If so, may I congratulate you on the results of your efforts in this direction? Subject only to the doubt already expressed by me as to the trustworthiness of a jury in the exercise of the discretion to apportion damages, I fully agree that the change is expedient, not merely from the point of view of justice to the parties, but from that of logic and intelligibility of the law. The present state of the authorities on the question is merely chaotic. I shall be glad to know from you how the experiment succeeds.

Yours very sincerely,
John W. Salmond."