RAYMOND et al. v. MIRON et al.

PROMISE OF SALE WITH TRADITION — REGISTRATION OF INVALID SALE OF IMMOVEABLES — STELLIONATE — ART. 2085 C.C. — RIGHT TO DISSOLVE *res inter alios acta* FOR FRAUD — ART. 957 C.P. — AMENDMENT THERETO — DIRECT ACTION OF INJUNCTION PRIOR TO 1954 — NATURE OF THE RIGHT GRANTED BY PARAGRAPH 3 OF ART. 957 C.P. — TEXTUAL DISCREPANCY — SUGGESTED AMENDMENT OF THE CODE OF CIVIL PROCEDURE. .....

On March 5th, 1954, the Act of 2-3 Eliz. II, c. 27, s. 11 amended act. 957 of the Quebec Code of Civil Procedure by the addition of a third paragraph, so that the article now reads:

> 957. Any judge of the Superior Court may grant an interlocutory order of injunction in any of the following cases:
> 1. At the time of issuing the writ of summons:
> a. Whenever it appears by the petition that the plaintiff is entitled to the relief demanded, and that such relief consists, in whole or in part, in restraining the commission or continuance of any act or operation, either for a limited period or perpetually;
> b. Whenever the commission or continuance of any act or operation would produce waste, or would produce great or irreparable injury;
> 2. During the pendency of a suit:
> a. Whenever the commission or continuance of any act or operation during the suit would produce waste or would produce great or irreparable injury;
> b. Whenever the opposite party is doing or is about to do some act in violation of the plaintiff's rights, or in contravention of law, respecting the subject of the action, which is of a nature to render the final judgment ineffectual.
> 3. Without the issue of a writ of summons ,in the case of sub-paragraphs *a* and *b* of paragraph 1, if at the time the plaintiff has no other recourse to exercise than an injunction. The application for injunction shall then itself constitute a suit.
> The issue of an interlocutory order of injunction in such circumstances shall not deprive the petitioner of the right to obtain later the issue of a writ of summons to exercise any other recourse on the same subject, but based on a ground of action subsequent to his petition for an interlocutory injunction.

The wording of articles 965 and 968 C.P. was slightly amended by the same Act,[1] apparently to bring them into line with the revised Art. 957 C.P.

This amendment has been considered recently in two unreported and two reported decisions, the last one of which is *Raymond et autres* v. *Miron et autre*,[2] a judgment of the Court of Queen's Bench. In all four cases it was held that the effect of the amendment has been to introduce into Quebec law a principal demand of injunction as distinguished from the existing right to demand an injunction incidentally to an action. In each of these cases, however, the court refused to allow such injunction on the grounds that the requirements of paragraph 3 of art. 957 C.P. had not been met.

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[1] By Sections 12 and 13 respectively.

[2] [1957] Q.B. 571; *Champlain Oil Products Ltd.* v. *Beaudin*, [1956] P.R. 270; *Guaranteed Pure Milk Co. Ltd.* v. *Patry*, Q.B. No. 5289; *Segal* v. *P. Caplan Construction Co. Ltd. and Partridge Realty Co.*, C.S.M. No. 3891164.

The facts of the *Raymond* case are rather unusual. On May 8th, 1953, Raymond, the owner of two lots, signed a promise of sale in favor of two relatives, Eva Gagnon and Jean-Louis Gagnon. They accepted it on November 9th, 1953. This did not deter Raymond, on November 12th, from making Miron a promise of sale of the same lots, which was accepted on November 23rd. The next day Raymond put Miron in possession. However, three days later Raymond signed an authentic deed of sale of the lots in favor of the Gagnons. The deed was registered. The same day the Gagnons granted to one Maloney an option on the lots, which he accepted and proceeded to transfer to one Phelan who, in August 1954, signed a contract of sale with the Gagnons. This contract did not become authentic because, on September 22nd, 1954, Miron was successful in a petition before the Superior Court for a peremptory injunction against Raymond, the Gagnons, Phélan, and two *mis-en-cause* (including the notary).

The petition asked that appellants be enjoined to cease immediately "la commission ou continuation d'un acte de vente partiellement complété" before notary Massicotte; (2) that appellants Eva and Jean-Louis Gagnon be ordered to cease "la commission ou la continuation de toute autre action tendant à céder, transférer ou transporter" the lots to either Phelan or anyone else; (3) that one Baudry be enjoined from signing the act of sale and notary Massicotte, *mis-en-cause,* from completing it.

Judge Montpetit of the Superior Court granted the request. This decision was appealed to the Court of Queen's Bench which reversed the lower court, revoked the injunction and granted to appellants costs in both courts. The judgement of the Court of Appeal was rendered by Mr. Justice Bissonnette. Justices Hyde and Owen concurred without comment.

The decision is founded on the following two grounds:

1. Since the injunction asked for was not incidental to any action it could only be upheld if it fell within the provisions of the last paragraph of art. 957 C.P. It was held that the petition did not meet the essential condition of that paragraph that a principal demand of injunction can only be entertained if there is no other recourse.[3] In this case petitioner was said to have another remedy since he could have sued for the dissolution of the sale by Raymond to the Gagnons and of the sale made by them to Phelan, on ground of "dol" or fraud.

2. Furthermore, the court said,[4] even if it were granted, the enjoining order would be ineffective because

> l'ordonnance du tribunal . . . tendrait uniquement à empêcher la signature du contrat d'une vente qui, de fait, est conclue par le consentement des parties, même si le notaire n'a pas encore signé l'acte, (Gagnon à Phelan) et laisserait, en même

[3]Bissonnette J. stated his view on the point in identical terms in the unreported case of *Guaranteed Pure Milk Co. Ltd.* v. *Patry* Q.B. No. 5289, which was cited and followed in *Champlain Oil Products Ltd.* v. *Beaudin* [1956], P.R. 270.

[4]At p. 575.

> temps, subsister une autre vente (Raymond à Gagnon), de sorte que ne serait pas surmonté l'obstacle qui, dans le cadre de la contestation actuelle, empêche les intimés de réclamer, sous une forme ou sous une autre, la revendication de ces deux lots de terre. Au cours des dernières années, la jurisprudence de cette Cour s'est fixée dans ce sens.[5] Il me paraît évident que l'ordonnance d'injonction ne serait pas un remède efficace à la cause des requérants. Différent eût pu être le résultat d'une demande d'injonction greffée sur une action en résolution des deux ventes.

This decision raises three important points of law, one with respect to Art. 2085, one with respect to the dissolution of contracts made by third parties in fraud of the rights of the plaintiff, the other involving the law of injunction.

As Mr. Justice Bissonnette states it, anyone who is defrauded by a contract made between third parties could sue for its dissolution. No authorities are cited for this proposition. What then are the main applicable rules of the Civil Code? Art. 1023 C.C. says:

> Contracts have effect only between the contracting parties: they cannot affect third persons, except in the cases provided in the articles on the fifth section of this chapter.[6]

Articles 991, 993 and 1000 C.C. are of no assistance as they refer only to the effect of fraud or "dol" as between the parties to a contract. The rule of art. 1027 C.C. is:

> The rules contained in the two last preceding articles apply as well to third persons as to the contracting parties, subject in contracts for the transfer of immoveable property, to the special provisions contained in this Code for the registration of titles to and claims upon such property.

Of the preceding provisions to which this article refers, only the first paragraph of art. 1025 C.C. is relevant here:

> A contract for the alienation of a thing certain and determinate makes the purchaser owner of the thing by the consent alone of the parties, although no delivery be made.

Article 2098 C.C. stipulates that:

> All acts *inter vivos* conveying the ownership of an immoveable must be registered.
>
> In default of such registration, the title of conveyance cannot be invoked against any third party who has purchased the same property from the same vendor for a valuable consideration and whose title is registered.

This rule is reinforced drastically by art. 2085 C.C. which says:

> The notice received or knowledge acquired of an unregistered right belonging to a third party and subject to registration, cannot prejudice the rights of a subsequent purchaser for valuable consideration whose title is duly registered, except when such title is derived from an insolvent debtor.

With respect to promise of sale there are two important provisions of the Civil Code which must be borne in mind:

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[5]Here Bissonnette J. is referring to his opinions in *Johnson Woollen Mills Ltd.* v. *Southern Canada Power Co. Ltd.* [1945] K.B. 134 and *Brisebois* v. *Beauséjour* (1951), K.B. 584.

[6]Articles 1028-1031 C.C. (promise of *porte fort* and *stipulation pour autrui*).

> *Art. 1476.* A simple promise of sale is not equivalent to a sale, but the creditor may demand that the debtor shall execute a deed of sale in his favor according to the terms of the promise, and, in default of so doing, that the judgment shall be equivalent to such deed and have all its legal effects . . .
>
> *Art. 1478.* A promise of sale with tradition and actual possession is equivalent to sale.

What can one deduce from these articles? Since Miron had a promise of sale and was put into possession, he had acquired ownership of the two lots as of November 24th (art. 1478 C.C.).[7] The promise of sale to the Gagnons made previously was not equivalent to sale and thus could not have transferred ownership (art. 1476 C.C.). So when Raymond signed a deed of sale with them on November 28th he no longer owned an immoveable he could sell and the sale was null in virtue of art. 1487 C.C. Up to this point there would be no need for Miron to seek the dissolution of a transaction which was null *ab initio,* and which could be presumed to be a radical nullity since the Gagnons must be held to have known that the lots no longer belonged to their vendor.[8]

However, the deed of this invalid sale was registered. What is the effect of such registration? If we combine articles 2098 and 2085 C.C. we are forced to conclude that a first purchaser cannot invoke his title against a subsequent buyer whose title is registered, even though the latter may have received notice or acquired knowledge of the unregistered right, provided nevertheless he gave valuable consideration.[9] Thus, on the surface, Miron could not defeat the registered right of the Gagnons notwithstanding the circumstances under which they acquired it. But there is one element which can cancel the extraordinary protection given to second purchasers in art. 2085 C.C.: collusion in a fraud.

Marler[10] suggests that Codifiers drafted art. 2085 C.C. principally to enforce more strictly the registration of titles to land which was often neglected prior to the Code.[11] But, he then points out, to ensure the success of the second purchaser five conditions must be met, the fifth one of which is particularly relevant to the case under discussion:

> 5. That his title had not been obtained by collusion with that person, (the vendor) to defeat the unregistered right, for that would be fraud of such a flagrant nature as to vitiate his acquisition, as he would be then his accomplice and a participator in the stellionate committed by the common vendor.

This is the opinion of the French authorities and of the Quebec jurisprudence.[12] In other words, neither notice nor even positive knowledge of an anterior

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[7]See *The Law of Real Property,* by William de Montmollin Marler, Toronto, 1932, No. 443.

[8]Marler, *op. cit.,* No. 421.

[9]See e.g. *Goulet* v. *Duvauchel* (1954), R.L. 232.

[10]*Op. cit.,* No. 1120.

[11]Mignault, *Traité de Droit Civil Canadien,* Montreal (1909) T. IX, p. 197.

[12]*Trenton Construction & Supply Co.* v. *Lavoie* [1946], R.L. 6; *Noel* v. *Chartier* (1935), 41 R.L.n.s. 111; *Samson* v. *Décarie* (1921-22), 63 S.C.R. 11: Mignault J. at 27; Bernier J. at 30; Duff J. at 13; *Fonderie de Plessisville* v. *Brisson* (1908), 33 S.C.

alienation can hinder a second purchaser from taking advantage of his prior registration unless he is in collusion with the common vendor. The problem arises in determining the presence of collusion. It necessarily must be more than positive knowledge for that, according to art. 2085 C.C. does not debar a second purchaser. There must be active participation in the fraud. Where does one draw the line between positive knowledge of a fraud which is being perpetrated and collusion? No court has yet given even a definition of the collusion required to checkmate art. 2085 C.C. How fine the line is can be seen from the *obiter* of Duff J. in the Supreme Court decision of *Samson* v. *Décarie:*[13]

> I observe only with respect to art. 2085 that while it deprives notice or knowledge of an unregistered right of any effect as prejudicing the title of the purchaser who complies with the provisions of the law in relation to registration, it does not follow that such knowledge may not be cogent evidence which coupled with other circumstances may afford adequate proof of fraud on the part of such purchaser disentitling him to rely upon the rights which otherwise would be his. On the other hand it is important to be on one's guard against applying this process of interference in such a way as virtually to equiparate knowledge itself with fraud thereby in effect sterilizing the enactment of the article.

Marler is equally cautious;[14]

> The vendor who sells the same thing to two different parties is guilty of stellionate; the purchaser who acquires from him having had notice of a previous alienation is not in bad faith because the alienation of which he has had notice may, notwithstanding, not have taken place, or may never have been consummated; if he has positive knowledge of the previous alienation he is in bad faith, but not to the extent of depriving him of the benefit conferred by law, for if he can induce the common vendor to sell the property to him and he obtains and registers his title from him, the law protects him, if he is the first to register.[15] . . . Some authors are of opinion that knowledge of the unregistered right, even when there is no collusion, constitutes fraud, but the majority of writers, and the plain provisions of our Code, are against them.

Esmein describes the French jurisprudence as holding that there must be proof of a "concert frauduleux," although he adds that in reality the courts are often satisfied with the knowledge of the second purchaser that the vendor intends to defraud the first buyer.[16] The French courts have gone so far as to hold that if the second (collusive) purchaser resells to a third buyer in good faith, the latter cannot invoke the lack of transcription (registration) of the right of the first buyer.[17] There was such third purchaser in the *Raymond* case — Phelan — and Mr. Justice Bissonnette casts grave doubt on his good faith.

23; *Farmer* v. *Devlin* (K.B.) (1887), 15 R.L. 621; *Lefevre* v. *Branchaud* (1878), 22 L.C.J. 73.

[13](1921-22), 63 S.C.R., 11 at 13.

[14]*op. cit.*, No. 1122.

[15]*Charlebois* v. *Sauvé* (1889), 32 L.C.J. 37.

[16]*Traité de Droit Civil Français,* by Marcel Planiol and George Ripert, Vol. VI, by Paul Esmein, Paris, 1952, No. 349.

[17]*Ibid.*, Vol. III, No. 650, p. 665 and authorities cited there; F. Laurent, *Principes de Droit Civil,* 4th ed., Bruxelles, 1887, Vol. XXIX, No. 191, p. 226.

Since in the case under discussion there obviously was collusion between the common vendor and the Gagnons, the prior registration of their invalid title could not have availed against Miron. Nor would Maloney and Phelan be in a better position, since it is suggested that they too were parties to the fraud. But even if they were in good faith, their title would be worthless against Miron's under the French jurisprudence cited above.

There is no mention in the report of what consideration if any was given by the Gagnons, Maloney and Phelan. But if it could be shown that none had been given, or that it was not serious,[18] or even that it was, conversely, disproportionate to the value of the property[19] there would be no need to prove collusion since the protection of art. 2085 C.C. is predicated on valuable consideration having been given by the second purchaser.

It thus appears that Miron's unregistered title might have been opposable to the registration of the deed obtained by the Gagnons. He could probably have sued for the cancellation of that registration under articles 2149 and 2150 C.C.[20] The recourse *en passation de titre* of art. 1476 C.C. no doubt was also open to him. But Mr. Justice Bissonnette suggested a much broader remedy: that there was a right to annul a contract between third parties on grounds of fraud. The negative protection afforded by art. 1023 C.C. would thus be reinforced by a positive right to strike at contracts defrauding third parties. Is there in truth such right of dissolution in Quebec law? We must leave aside for the moment the Paulian action of articles 1032 to 1040 C.C. which is usually restricted to cases involving insolvency, for the issue raised by the *Raymond* case is whether the right to annul for fraud a *res inter alios acta* exists in our law purely and simply, irrespective of the question of insolvency.

Trudel, the only Quehec author to deal at any length with this matter, recognizes the existence of such remedy and puts it on a quasi-delictual basis:[21]

> Les tiers, ne tirant ni droit ni obligation du contrat souscrit par d'autres, en subissent pourtant certaines conséquences . . . La source et la mesure de leur droit ne résident pas dans les rapports contractuels; elles sont toutes entières dans le délit et le quasi-délit que commettent à leur endroit les co-contractants. Le remède spécifique consiste — non pas à annuler le contrat d'autrui — mais à en supprimer les effets l'égard des tiers qu'on voulait frauder. Le lien contractuel demeure intact entre les parties; mais l'exécution de l'obligation est prohibée ou censée non réalisée dans la mesure requise pour sauvegarder les droits des tiers. Mais pareils résultats ne sauraient venir que d'une faute; sans faute ou délit chez les co-contractants, les tiers restent étrangers aux conséquences d'une convention.[22]

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[18]*Lacroix* v. *Nault et al.* (1909), 18 K.B. 145.

[19]id.; *Barbe* v. *Barbe* (1901), 20 S.C. 119.

[20]Mignault, *op. cit.*, p. 285; *Daigneault* v. *Demers* (1882) 26 L.C.J. 126; Demers, Claude, in *Traité de Droit Civil du Québec,* by Gérard Trudel, Vol. XIV, Montréal, 1950, p. 437; "L'enregistrement sans droit c'est celui qui est fait pour un droit . . . qui est fictif ou inexistant."

[21]*Op. cit.*, Vol. VIII, p. 334; see also p. 192.

[22]Louis Josserand, *Cours de Droit Civil Positif Français,* 2nd ed., Paris, 1933, No. 410 *bis* cites steillionate as a typical example of delict, once punishable by coercive emprisonment.

Trudel assimilates the remedy to an extension of the Paulian action while pointing out that the Paulian technique may in practice be hardly recognizable.[23] Indeed, the wording of articles 1032 and 1033 of the Civil Code is broad enough to cover contracts made to defraud third parties in general irrespective of insolvency. The French doctrine, however, rejects this extension of the notion of Paulian fraud.[24] But there are impressive authorities in support of Trudel's arguement that the action is not really one in nullity but only a demand that the fraudulent act between third parties be declared of no effect with respect to the plaintiff.[25] The rule is clearly stated by Esmein:[26]

> En tant qu'il s'agit de protéger le tiers contre la manœuvre ourdie à son détriment, la sanction consiste en principe à décider que l'acte lui est inopposable mais qu'il reste valable entre les parties . . .
> . . . la manœuvre est déclarée inefficace. Si un acte juridique a été employé pour atteindre le résultat visé, cet acte pourra être déclaré nul et inopposable à ceux contre qui la manœuvre était dirigée. *Fraus omnia corrumpit.*[27]

The Quebec decisions on this point are few. The reported cases recognize this right to annul contracts made *inter alios* without even the qualification that it is not really a dissolution but rather a declaration of inefficacity of the contract with respect to the party it was aimed to defraud. In *Hyde* v. *Webster,*[28] Gervais J., whose dissenting opinion in the Court of Appeal was upheld by the Supreme Court, criticized article 1023 C.C. as being vaguer than art. 1165 C.N.[29] which it was supposed to clarify. According to art. 1165 C.N., he wrote, and according to the principles of Roman law from which it is derived

> un contrat nuisible à un tiers peut être attaqué par celui-ci, car notre droit dit avec le droit romain: *inter alios acta aliis nec nocere, nec prodesse potest.* Evidemment un tiers peut faire mettre de côté un traité ou une convention que des parties font dans l'espoir, dans le but, avec l'objet, avec l'effet de lui porter préjudice, de diminuer, d'amoindrir, le patrimoine de ce tiers. C'est justement parce qu'un tiers qui ne peut pas me nuire par ces contrats me cause préjudice par ceux-ci, que j'ai droit d'en demander l'annulation sous l'article 1023.

The Supreme Court, with two dissents, maintained plaintiff's action to have a lcase made by his partner in fraud of his rights declared not binding on him.

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[23]*op. cit.,* p. 191. See also *Ruffer* v. *Rattray* (1911), 39 S.C. 245; *Russell* v. *Guertin* (1886), 10 L.C.J. 133 (the headnote of which is broader than the actual *ratio dividendi* of the judgment.)

[24]Laurent, *op.* cit., Vol. XXIX, No. 191; Paul Esmein in *Traité de Droit Civil Français* by Marcel Planiol and Georges Ripert, Vol. VI, Paris, 1952, No. C. 348, 346.

[25]Esmein, *ibid.,* an authorites cited there.

[26]*id.,* No. 348.

[27]*id.,* No. 346.

[28](1914), 23 K.B. 1 at 5; (1915), 50 S.C.R. 295; (1915), 20 D.L.R. 662.

[29]*Art. 1165 C.N.;* "Les conventions n'ont d'effet qu'entre les parties contractantes; *elles ne nuisent point* au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121." (stipulation pour autrui). Italics mine.

The issue again arose, a few months later, in the case of *St. Denis* v. *Quevillon and Paquette.*[30] In spite of a unilateral promise of sale and a "pacte de préférence" given by Quevillon to his tenant St. Denis, Quevillon sold the immoveable to Payette, the latter being aware of St. Denis's right. St. Denis took action in specific performance against Quevillon. Lafontaine J. maintained the action in the Superior Court and annulled the sale to Payette on the ground of collusion. The Court of Appeal[31] reversed. The original judgment was restored by the Supreme Court, with two dissents. Sir Charles Fitzpatrick C.J.[32] agreed with Lafontaine J. and rescinded the sale on the ground of collusion, citing French authorities. Idington J. held[33] that Payette was in bad faith but reached a conclusion for specific performance by means which did not require the dissolution of the sale. Duff and Anglin J.J.[34] being unable to see any collusion. Brodeur J.[35] concurred with the first two judges but saw no need to dissolve. Thus, only one judge of the Supreme Court and the trial judge were unequivocally prepared to dissolve the sale on the ground of collusion. Nevertheless, one derives the impression from reading their opinions that at least Brodeur and Anglin (diss.) J.J. would have envisaged the possibility of dissolution if the circumstances had warranted it.

Finally there is the decision of *Trenton Construction & Supply Co.* v. *Lavoie*[36] which recognizes the right to dissolve.

In the absence of any authority in the report of Mr. Justice Bissonnette's opinion in the *Raymond* case, we thus have the authority of Trudel, the Supreme Court and French doctrine that there is in Quebec a right to dissolve contracts made with the intention to defraud a third party. The exact scope of and the conditions for such action remain in doubt. Nevertheless, the action is held to be of a quasi-delictual or delictual nature and not strictly one in nullity, but rather a demand that the act complained of be declared as of no effect with regard to the third party. As between the parties to the agreement, the contract survives.

The third, and main point raised by the opinion of Justice Bissonnette relates to his discussion of the effect of the amendment of 2-3 Eliz. II, c. 27, s. 11. The avowed purpose of the amendment was to eliminate the uncertainty which existed in Quebec before 1954 as to the possibility of bringing a direct demand of injunction, *i.e.* of asking for an injunction independently of another action, not as an incident or an accesory to another, principal, action, The amendment echoed the wishes of many practitioners.[37]

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[30](1915), 51 S.C.R. 603.
[31](1914), 23 K.B. 436.
[32]At p. 605 *et seq.*
[33]At p. 610 *et seq.*
[34]At pages 615 and 617 respectively.
[35]At page 622.
[36](1948) R.L. 6.
[37]See, for instance, Solomon Weber, "Injunction by direct action and interim injunction" 38 at page 543 in (1945), 5 R. du B. 400 at 403.

Bissonnette J. describes the state of the law before the amendment as follows:[38]

> Avant l'amendement . . . à l'art. 957, on pouvait recourir à l'injonction, soit lors de l'assignation sur l'action principale, soit au cours de l'instance. En un mot, l'injonction était une procédure connexe et ancillaire à une action. L'amendement qui a ajouté les deux derniers alinéas à cet article a institué l'action directe d'injonction.

In other words, it is said that prior to the amendment there was no direct action of injunction, that an injunction could only be granted at the issue of a writ of summons in a main action or during the course of that action. The amendment would thus have had the effect of introducing in Quebec the direct action of injunction. It must be respectfully suggested that this widely-held opinion is not entirely accurate. While it cannot be denied that there existed an abundant jurisprudence holding that an injunction could only be granted as an accessory to a suit and that there was no independent action of injunction,[39] there are several important decisions, including that of the Supreme Court in *Canada Paper Co.* v. *Brown*,[40] asserting the existence of such direct action in Quebec, a view strongly supported by various writers on the law of procedure (as we will see).

The theory upheld in the first line of cases was originally advanced in the seminal case of *McArthur Bros.* v. *Coupal*.[41] It was argued that the 1897 Code of Civil Procedure, which replaced the Code of 1867, had abolished the direct action of injunction which was said to have existed under articles 1033a-n of that Code. The result was that an injunction under art. 957 C.P. could only be granted as an incident to an action. So that a petition for an injunction to restrain a breach of a contract not to enter into the same business was denied because it was not coupled to a suit.[42] The court refused to grant an injunction against the implementation of a decision of the board of directors of a company because it was not grafted on an action to annul that decision.[43]

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[39]*Cournor Mining C.* v. *Perrond Gold Mines Ltd.* [1952] R.L. 149; *Jonstone* v. *Shaw* [1949] P.R. 269; *Tourigny* v. *Croteau* (1944) S.C. 241; *Roncarelli* v. *Forand* [1942] R.L. 169, [1942] K.B. 306; *Nesbitt, Thomson & Co. Ltd.*, v. *McColl Frontenac Oil Co. Ltd.* (1940), 43 P.R. 138; *Ville d'Amos* v. *Pelissier and Blouin* (1930), 49 K.B. 434; *Cohen* v. *Jacobs and Asbestos Corp. of Can. Ltd.* (1926), 40 K.B. 345; *Berthiaume et al.* v. *La Corp. de St. Elzéar et al*-(1925-26), 28 P.R. 46; *Dubord* v. *L'Orientale Ltée* (1925), 63 S.C. 538; *Gingras* v. *Gauthier* (1924), 26 P.R. 25; *Lombard et al.* v. *Varennes et Théâtre National* (1922), 32 K.B. 164, especially Dorion J.; *Faucher* v. *La Cie de l'Hôtel St. Louis* (1921), 23 P.R. 100; *Davis* v. *Jacobs Asbestos Mining Co. of Thetford Ltd.* (1920), 22 P.R. 225; *Wilson et al.* v. *The School Commissioners of the Municipality of Hudson* (1920), 26 R.L.n.s. 283; *Allaire* v. *Cardinal* (1919-20), 21 P.R. 17; *Brisebois* v. *Les Commissaires d'Ecoles de St. Grégoire le Thaumaturge et Archambault* (1917), 23 R.J. 546; *Hum Hop Sing Tong* v. *Wing* (1916), 22 R.L.n.s. 253; *McArthur Bros.* v. *Coupal* (1899), 16 S.C. 521.

[40](1922), 63 S.C.R. 243; (1921), 31 K.B. 507.

[41](1899), 16 S.C. 521.

[42]*Hum Hop Sing Tong* v. *Wing* (1918), 22 R.L.n.s. 253.

[43]*Davis* v. *Jacobs Asbestos Mining Co. of Thetford Ltd.* (1920), 22 P.R. 225.

On the other hand, while the reported cases favoring the opposite view may not be quite as numerous,[44] it may plausibly be argued that they represent a more correct view of the law. It would be difficult to disregard the categorical decision of the Supreme Court in *Canada Paper Co.* v. *Brown.*[45] Furthermore, as was pointed out by Cross J. of the Court of Appeal in *Rhéaume* v. *Stuart*[46] the claim of the *Coupal* school of cases that the 1897 Code restricted the scope of the injunction is in direct contradiction with the statement of the Codifiers themselves that their intention was to widen, rather than restrict, the field of application of the remedy:

> L'effet principal du changement sera d'étendre le champ d'action de ce recours utile.[47]

Mr. Justice Carroll in *Audet et al* v. *Jolicoeur*[48] again drew attention to this contradiction:

> Est-il vrai de dire que le nouveau code de procedure a aboli le bref d'injonction comme demande principale? Pourtant telle n'était pas l'intention des codificateurs qui déclarent étendre le champ d'action de ce recours utile. Si l'opinion émise dans *McArthur* v. *Coupal* prévalait, le champ d'action aurait rétréci et non élargi . . . la décision rendue dans *McArthur* v. *Coupal* était probablement correcte pour la cause qu'il s'agissait de décider: une action en dommages. Mais *les principes généraux qui y sont posés sont contraires à la lettre et à l'esprit de nos lois.*[49]

It was held in *Berliner Gramophone Co. Ltd. et al.* v. *Musical Merchandise Co. Ld.*[50] that art. 957 C.P. did not deprive a party of the right to demand hy the conclusion of a direct action that an order be issued to do or to suspend certain acts. In *Canada Paper Co.* v. *Brown*[51] the Supreme Court held explicitely that a perpetual injunction may be maintained even if no interlocutory injunction has been issued and this view was followed in later decisions.[52] The Supreme Court refused to award damages for an industrial nuisance but held that it was not restricted to that relief and could restrain by perpetual injunction the continuation or repetition of the nuisance.

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[44]*Constant* v. *Vachon* [1947] S.C. 206; *Transportation and Power Corp. Ltd.* v. *Beauharnois Light, Heat & Power* (1933), 55 K.B. 344; *Garneau* v. *Citadel Brick Co.* (1931), 51 K.B. 9; *Berliner Gramophone Co. Ltd.* v. *Musical Merchandise Co. Ltd.* (1925), 31 R.L.n.s. 453; *Canada Paper Co.* v. *Brown* (1922), 63 S.C.R. 243; (1921), 31 K.B. 507; *Audet* v. *Jolicoeur* (1912), 22 K.B. 35; (1912), 5 D.L.R. 68; *Rheaume* v. *Stuart* (1911), 20 K.B. 411; *Wilder* v. *Cité de Québec* (1904), 25 S.C. 128.

[45](1922), 63 S.C.R. 243; (1921), 31 K.B. 507.

[46](1911), 20 K.B. 411.

[47]*Rapport des Commissaires,* Ch. XXXVIII, as cited in *Code de Procédure Civile,* annotated by Henri Gérain-Lajoie, Montreal, 1920, p. 1359.

[48](1912), 22 K.B. 35 at 40.

[49]Italics mine.

[50](1925), 31 R.L.n.s. 453.

[51]*Cf. supra.*

[52]C.J. *Constant* v. *Vachon* [1947], S.C. 205; *Garneau* v. *Citadel Brick Co.* (1931), 51 K.B. 9.

In *Robinson* v. *Robinson*[53] Lamothe C.J. went so far as to argue that injunction had always been part of our law and that 41 Vic. c. 14 which introduced articles 1033a-n into the 1867 Code, merely facilitated its application:

> L'injonction a toujours existé dans notre droit; on a toujours pu la demander par les conclusions d'une action ordinaire. *Ce droit n'a jamais été révoqué.*[54] L'acte 41 Vic. c. 14 a eu pour but de rendre plus usuelle et plus facile dans notre procédure l'injonction provisoire pendant l'instance.

Cross J. in *Rhéaume* v. *Stuart*[55] said:

> The practical change introduced by the new code consists in the fact that the injunction is not now embodied in the wording of a writ, but "consists of an order enjoining the opposite party . . . to refrain from a specified act, or to suspend all acts and operations, respecting the matters in controversy, under pain of all legal penalties (article 964), which order is served upon the opposite party in the manner provided for writs of summons, or prescribed by the judge" (art. 965).
>
> It is a mere question of language or words whether the injunction is an independent action or a mere accessory of what may be called a common law action. It can hardly be seriously contended that a demand for an injunction to restrain breaches of a written agreement, or infringement of trademark rights, or breaches of a Partnership-deed would not constitute an action standing by itself.
>
> It seems proper to conclude (from 968 and 969) that there can be a final judgment which "pronounces the injunction required" and which, unlike an ordinary final judgment remains in force notwithstading appeal or review.[56]

This was also the view of the anonymous reviewer of the *Revue du Droit* in 1932.[57] A few years later Léo Pelland, in the same journal,[58] argued that there had always been a direct action of injunction in Quebec and even suggested that its application be extended rather than restricted. Solomon Weber, editor of the Code of Civil Procedure, reviewing the jurisprudence echoed that view:[59]

> The provisions governing injunction could be clarified (by amendment or in the expected revision of the Code of Civil Procedure) asserting the right of a plaintiff to ask for an injunction by the conclusion of his declaration only without prior necessity of a petition for an interlocutory injunction.

The necessary conclusion from this examination of the jurisprudence and of the authorities is that the direct action of injunction continued to exist after 1897, even though a large number of decisions erroneously held the contrary view. The amendment to art. 957 C.P. no doubt was intended to eliminate the uncertainty on the matter. But art. 957 C.P., paragraph 3, cannot be said to have created a new right, to have the effect of "instituer l'action directe d'injonction." We will see that far from clarifying the situation, the amendment has added to the confusion and has furthermore restricted, rather than widened, the right to a direct injunction.

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[53](1922), 33 K.B. 181 at 184.

[54]Italics mine.

[55](1911), 20 K.B. 411 at 414.

[56]Carrol J. was of the same opinion in *Wilder* v. *Cité de Québec* (1904), 25 S.C. 128.

[57](1931-32), 10 R. du D. 108-10.

[58](1934-35), 13 R. du D. 303.

[59]*op. cit.*

What then is the law today, in the light of the amendment? Mr. Justice Bissonnette, in the *Raymond* case, says:[60]

> L'amendement . . . a imposé comme condition formelle qu'une telle procédure (par action directe d'injonction) ne se justifiât qu'à défaut de tout autre droit d'action.

This is a reiteration of his view in the unreported case of *Guaranteed Pure Milk Co. Ltd.* v. *Patry*,[61] as cited and followed by Sylvestre J. in the *Champlain Oil Products* case.[62] It is a prerequisite for this injunction that there be no other recourse available. If there is such other remedy, the injunction can only be demanded as an accessory to the suit seeking that remedy. However, even within this qualification, it cannot be said that amendment provides for an unlimited right to a direct suit of injunction. In the very words of Bissonnette J.:[63]

> . . . le droit à l'injonction, même par une instance directe n'est pas absolu; tout au contraire, il est subordonné aux cas envisagés dans le premier paragraphe et ses deux alinéas *a* et *b*; ce qui revient à dire que l'instance d'injonction n'existe que si son objet a pour but d'empêcher la commission ou la continuation d'une action ou encore si celle-ci est de nature à causer un tort sérieux ou irréparable. Dans le premier cas, une application pourrait se trouver dans l'exercice d'une concurrence déloyale, tandis que la démolition d'un immeuble peut être un exemple du second.

To sum up, under the third paragraph of art. 957 C.P., the remedy of direct action of injunction only lies when:

1. there is no other recourse then available *and*
2. provided the injunction aims at restraining the commission or continuance of any act of a nature to produce great or irreparable injury.

It remains to be seen what interpretation the courts will place on the condition that the plaintiff have "no other recourse to exercise than an injunction." Does it mean "no other recourse" or no other *satisfactory* recourse? If the first interpretation is adopted, as the Court of Queen's Bench seems inclined to do, one may well wonder whether *Canada Paper Co.* v. *Brown* has not in effect been overruled by legislation. In that case there was another remedy (in damages) but the court granted the injunction on the grounds, not that there was no other recourse, but rather on the ground that that recourse would not be satisfactory. Of course, it might be retorted plausibly that "no other recourse" means the same as "no other satisfactory recourse," or vice versa. But cases might conceivably arise in which the distinction might have to be made. The decision might depend on whether the courts will have overcome their present hostility to a principal demand of injunction.

However, there is a much more important area of doubt created by the amendment. We have seen that it has been interpreted in four recent decisions as instituting a direct action of injunction. The text of the amendment itself is as follows:

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[60] at p. 574.

[61] See footnote 2 .

[62] *id.*

[63] at p. 574.

> 957. Any judge of the Superior Court may grant an *interlocutory order* of injunction in any of the following cases:
> 3. Without the issue of a writ of summons, in the case of sub-paragraphs *a* and *b* of paragraph 1, if at the time the plaintiff has no other recourse to exercise than an injunction. *The application for injunction shall then itself constitute a suit.*
> The issue of an *interlocutory order of injunction* in such circumstances shall not deprive the petitioner of the right to obtain later the issue of a writ of summons to exercise any other recourse on the same subject, but based on a ground of action subsequent to his petition for an *interlocutory injunction.*[64]

In other words, a *principal demand* has been created for an *interlocutory injunction!*

But what is an interlocutory injunction? *Webster's New International Dictionary*[65] defines 'interlocutory' as:

> 3. *Law.* Intermediate; not final or definitive . . .

Black's Law Dictionary[66] defines it as:

> Provisional; temporary; not final.

In *Mozley and Whiteley's Law Dictionary* it is defined as:

> *INTERLOCUTORY.* Intermediate, with especial reference to suit or action.

The same dictionary defines 'interlocutory injunction' as follows:

> INTERLOCUTORY INJUNCTION is an injunction granted for the purpose of keeping matters *in statu quo* until a decision is given on the merits of the case.

Halsbury[67] says:

> The object of an interlocutory or interim injunction is to preserve matters *in statu quo,* until the case can be decided.

Bouvier's Law Dictionary[68] uses the following terms:

> *Preliminary* or *interlocutory injunction* are used to restrain the party enjoined from doing or continuing to do the wrong complained of, either temporarily or during the continuance of the suit or proceeding in equity in which such injunction is granted, and before the rights of the parties have been definitely settled by the decision and decree of the court in such suit or proceeding.

Recent Quebec decisions define it variously as "essentiellement une *mesure provisionnelle* qui ne doit avoir aucune portée pratique sur le mérite de la cause,"[69] or as an order whose aim is "to preserve the *statu quo* until the right claimed has been finally adjudicated upon."[70] Even more explicit is Mr.

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[64]Italics mine throughout.

[65]N.Y., 1949; *cf.* also *Harrap's Standard French and English Dictionary,* Part One, London, 1945, p. 463.

[66]4th ed., St. Paul, Minn., 1951, p. 952.

[67]*Halsbury's Laws of England,* 2nd ed., 1935, Vol. 18, p. 4.

[68]3rd. ed., Cleveland, 1946, p. 549.

[69]Lacroix J. in *Mailloux* v. *Corp. Municipale de St. Edmond* [1952] R.L. 495.

[70]Smith J. in *Allen* v. *Sun Life Assurance of Canada* [1953] S.C. 454.

Justice Marquis in *Noranda Mines Ltd.* v. *The United Steelworkers of America*:[71]

> les articles 957, 960, 961, 966 et 969 emploient le mot "interlocutoire" pour cette *mesure porvisionnelle,* soit qu'elle soit décernée lors de l'émission du bref ou au cours de l'instance, soit qu'elle soit temporaire ou qu'elle reste en vigueur jusqu'au moment où elle est décidée par jugement final.

Thus, in Quebec as well as in English and American law, an interlocutory order of injunction is a provisional measure granted incidentally to another action and which is finally decided at the time of the adjudication of the main action. It obviously cannot be an injunction granted as a principal demand. Since there is no other action, there can be no 'final adjudication' at the time judgment is rendered on that action. If the amendment has instituted a principal action of injunction, as the Court of Queen's Bench holds, it cannot be 'interlocutory', it cannot be 'provisional'. It necessarily must be a final or perpetual injunction. The later recourse of which subparagraph 2 of paragraph 3 speaks is another action entirely and may never be sought. All the cases which had held that there was a direct action of injunction in Quebec stated that in such case a final or perpetual injunction would be granted without need for a interlocutory injunction. The very purpose of the amendment was to enact the existence of such independent injunction. Indeed, the fact that it was intended to create an action for a final injunction is evident from the amendment to art. 968 which was made at the same time as that to art. 957. It added the last four words to the first paragraph, which now reads:

> The *final judgment* adjudicating upon the conclusion of the petition, as well as upon the merits of the action, *if there is one.*

This confusion between interlocutory and final judgment of injunction is not new. In 1948, the Court of King's Bench, through the mouth of Chief Justice Létourneau speaking for all the judges of the Court except one absentee, made the following clarifying statement:[72]

> . . . un jugement qui accorde ou refuse l'émission d'une injonction interlocutoire après l'institution d'une action ou instance principale, est un *interlocutoire* . . .
>
> Si ce n'était les difficultés que font encore naître certains cas exceptionnels, comme par exemple l'action en reddition de comptes, l'action en bornage ou l'action en partage, l'unanimité des juges de la Cour d'appel — j'en excepte l'hon. juge Stuart McDougall, présentement au Tribunal international siégeant àTokyo—, serait aussi dès maintenant acquise aux définitions et règles que voici:
>
> 1. Il ne peut y avoir en toute instance principale qu'un jugement *final* et des *interlocutoires.*
>
> 2. Le jugement *final* est proprement celui qui termine un procès et met fin à l'instance sur le fond; le jugement interlocutoire est celui qui est prononcé durant le procès, savoir entre l'institution de l'action ou de la demande initiale, principale et le jugement qui met fin, et comprend toute décision quant à un incident . . .
>
> J'espère qu'on y viendra à cette règle générale et le plus tôt possible.

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[71][1954], P.R. 191 at 192.

[72]*L'Association Patronale des Manufacturiers de Chaussures du Québec* v. *Dependable Slipper and Shoe Mfg. Co. Ltd. and l'Union Internationale des Ouvriers de la Fourrure et du Cuir des Etats-Unis et du Canada et Boivin et Feiner et al.* [1948] K.B. 355 at 357.

The purpose of the Appeal Court was to remove the prevailing ambiguity as to the distinction between both types of judgment and the right of appeal therefrom. It is clear from this important declaration that the judgment granting the injunction under the third paragraph of art. 957 C.P. is a 'final' judgment and not an interlocutory one.

To call it interlocutory and to insert it in art. 957 C.P. was thus a flagrant error. Furthermore, since it is a final remedy, it should not have been included in the Fourth Part of the Code dealing with "Provisional Remedies." It might have been placed perhaps in the Fifth Part on "Special Proceedings," where in fact it was before 1897, at a time when, according to the *Coupal* school, there *was* a direct action. At present, a plaintiff succeeding in obtaining a perpetual injunction under the third paragraph of art. 957 C.P. would receive an order which is only 'interlocutory' or 'provisional.' Provisional until when? Interlocutory with respect to what final jugment?

We are not confronted here with a mere problem of terminology, but with a situation which may have far-reaching practieal consequences. For, if one argues that the amendment has created a principal demand for an "interlocutory" order of injunction, one must also assume that all the articles dealing with interlocutory injunctions and judgments apply. Even a cursory examination of these articles discloses the practical implieations of the discrepancy. For instance, what are we to make of art. 959 C.P. which permits additional injunctions when necessary? Does it apply to a direct injunction? Or could a plaintiff petitioning for a direct order invoke art. 961 C.P. which stipulates that

> In case of urgent necessity the judge may grant an *interlocutory injunction without notice?*

In other words, could a plaintiff secure what might really be a perpetual injunction without giving notice to the respondent? The protection given by art. 966 C.P.[73] to the other party in such cases is meaningless since there is no other "judgment." Or, how can one reconcile art. 957 C.P., paragraph 3, with art. 967 C.P.? For, if, as we have seen, the amendment allows the issue of a final order of injunction without prior issue of an interlocutory injunction, that finality would be fragile indeed if it could, in the terms of art. 967 C.P.,

> from time to time be suspended for such period and upon such conditions, as to security, or otherwise, as the judge deems reasonable, and may afterwards, in like manner, be renewed from time to time.

If this provision applies to the injunction granted under the amendment, the remedy it grants would be less effective than the final order of injunction prior

[73]Art. 966 C.P.: "When an interlocutory injunction is granted without notice the person against whom it is directed may, *at any time before judgment,* apply to have it vacated or modified."

to 1954! Or how is one to interpret art. 969 C.P.[74] now? While it might be argued that the first paragraph of that article creates no problem, save for the words "confirming an interlocutory injunction," the second paragraph becomes entirely meaningless if one tries to apply it to the injunction by direct action.

A problem also arises in connection with the right of appeal from a judgment on the injunction. Do arts. 46 and 1211 C.P. (appeals from interlocutory judgments) apply? Or, since it is a final judgment, do the provisions of art. 43 C.P. come into play? One can hardly overemphasize the importance of the answer to these questions.

It appears thus that the amendment to article 957 C.P. has created not only an inconsistency within the article itself, but also between art. 957 C.P. and articles 959, 966, 967 and 969. It is suggested that this is essentially the result of the error in terminology and of the illogical placing of the provisions enacting a direct action of injunction in a chapter dealing essentially with *provisional* remedies. A special chapter should be created in Part V, direct injunctions being more properly "Special Proceedings" than "Provisional Remedies." The new chapter might contain a revised and more explicit version of the amendment and other provisions peculiar to a direct action in injunction, with reference perhaps to the relevant articles in Chapter XXXVIII.

CLAUDE-ARMAND SHEPPARD*

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[74]*Cf.* page 32.

[73]Art. 969 C.P.: "Any final judgment confirming an interlocutory injunction, remains in force notwithstanding appeal.

A interlocutory injunction remains in force, notwithstanding a final judgment dissolving it, whenever the petitioner, immediately upon the rendering of the judgment, declares his intention to take the case to appeal, and, within two days thereafter, serves his inscription in appeal."

*Of the Board of Editors.

BOOK REVIEWS

SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA, EVIDENCE

TORONTO: RICHARD DE BOO LIMITED. 1955. PP. xiii, 342, ($12.50)

Some of the lectures in this series of seventeen lectures on Evidence by prominent members of the Ontario bar would not be considered great contributions to the scholarship of the law. But in this work-a-day world where not every lawyer can be a law professor there is a real need for instruction in the work-a-day practices that are largely taken for granted by experienced practitioners. Until very recently the learning of these practices was left to the haphazard chance of articled clerkship and the young lawyer was frequently without adequate training. These lectures, of the variety which Mr. Edson Haines Q.C., calls, in his talk on Examination for Discovery (pp. 23-45), "how-to-do-it" lectures, will go a long way to supplement the proper content of a university law school's course in evidence in those provinces, other than Quebec and Ontario, where reliance is still placed on the unimproved (and barren) land of articled clerkship.

It would be wrong, however, to suggest that all the lectures are on this lesser level of "practicality" or that the "practical" lectures contain not even the seeds of wholesome academic thought. In fact, the element of academic thought present in such a "how-to-do-it" lecture as Mr. Haines' own, is sufficient to demonstrate the futility of separating the academic from the practical. Mr. Haines tells us how he explains the adversary system to his clients so as to help them overcome the fear of the unknown and thus to make them less nervous witnesses. It is, unfortunately, a rather oversimplified statement compelled by the limits of time and space, but he does suggest, as if it were significant, that "a lawsuit is [not] a scientific enquiry into the truth." Of course it is not, because the scientific method has very little to offer in the task of enquiring into what happened in a dispute over the facts. When our sense of values dictates that some protection be given to the disputing individuals, it is doubtful whether science could find any fairer and more effective method of enquiring into the truth than the common law trial. Admittedly, where the adversary character of the procedure is pressed to the extreme, some of the exclusionary rules of evidence unquestionably result in distortions of the truth.

For example, Dean Wright, in his estimable lecture on *Res Ipsa Loquitur*, dismisses as "unwarranted", on the "existing principles of the adversary system", Judge Frankfurter's view that a trial judge should have called a witness on his own motion in order to have all available evidence. Frankfurter

J. refused to believe that a trial was a game of blindman's buff. He was, in my opinion, quite right, and somehow I feel that Dean Wright would agree that the "existing principles" might better have been described as court of appeal authority awaiting clarification in the Supreme Court of Canada.[1]

It is abundantly apparent from the lecture titles that the "how-to-do-it" element varies greatly, from such "practical" topics as Preliminary Hearings (by G. Arthur Martin Q.C., pp. 1-21), Identification Procedures and Police Line-Ups (by Charles L. Dubin Q.C. pp. 329-342), Cross Examination (by Joseph Sedgwick Q.C., pp. 199-214) to such "academic" matters as the Hearsay Rule (by J. J. Robinette, Q.C. pp. 279-306) and, by the same contributor, Circumstantial Evidence (pp. 307-312).

In addition to the "practical lectures", Dean Wright and Professor J. Desmond Morton (as he now is) present two most interesting "academic" lectures, Dean Wright (pp. 103-36) on *Res Ipsa Loquitur* (a Latin phrase now running a close second to Res Gestae as the most meaningless and misleading Latin tag in the common law) and Professor Morton on Presumptions (pp. 137-153). In the short space of a review it is impossible to comment on all the contributions, but it would be hard to find a more qualified display of contemporary forensic talent in Canada, and the young lawyer will find much of immediate value from the "how-to-do-it" lectures as well as stimulation of a different character provided by Dean Wright and Professor Morton.

This volume of lectures is the second of two major pieces of writing in the law of Evidence in Canada. The other, of course, is Dr. MacRae's contribution to the Canadian Encyclopedic Digest, recently revised by Messrs Auld and Morawetz. It is of some importance, I think, that both Dr. MacRae and his successors, and the committee in charge of the Osgoode lectures, have excluded from the subject of evidence the topic of judicial notice. The C.E.D. relegates the topic to three pages (671-3 in Vol. 10) under the title Trials without even a cross reference from the title Evidence. Apparently the editors revising the second edition plan to follow this classification. Canadian

[1]Contrast Rule 105 (d) of the Model Code of Evidence which permits the trial judge the privilege of calling a witness of his own motion. And contrast Professor Morgan, himself a staunch supporter of the adversary system, in *Some Problems of Proof Under the Anglo-American System of Litigation* (1956) at p. 128: "We must concede that the trial is a proceeding not for the discovery of truth as such, but for the establishment of a basis of fact for the adjustment of a dispute between litigants. Still it must never be forgotten that its prime objective is to have that basis as close an approximation to the truth as is practicable. The emphasis upon the protection of the adversary and the fact that the result is binding only upon the parties and their privies have tended to make this objective seem of secondary importance . . . It cannot be too emphatically asserted that such a beclouding of the objective is an abandonment of the fundamental principle of the adversary system, namely, that each adversary because of his interest will be keen to discover and present materials showing the strength of his position and the weakness of his opponent's, so that the truth will emerge to the perception of the impartial tribunal."

lawyers who depend on standard works like the C.E.D., or lectures by such qualified persons as the Osgoode volume here reviewed might be forgiven if they never learned that judicial notice is not only a main branch of the law of evidence, but also a most difficult branch. It is, of course, treated, all too briefly, in standard English works, and Wigmore gives it due place in his monumental treatise. But since Wigmore's third edition in 1940 Professor Kenneth Culp Davis has carried the analysis much farther and the subject can be said to have made important strides forward in terms of basic legal analysis in the past fifteen years.[2] This review is not the place to expound Professor Davis' theory at length, but it is clear that judicial notice is an ambiguous concept, and its clarification could lead to better briefs (factums) in our courts and a better understanding of a court's use of extra record material.

In his introduction to these lectures on Evidence, Mr. Cyril Carson, Q.C., says, of an unsuccessful attempt to introduce the London Resolutions in evidence before the Privy Council in a constitutional case, "their Lordships . . . thus ran no risk of something that was inadmissible in law having some unconscious effect upon their decision upon the merits of the case." (p. xiii). One can easily imagine a judge having already read the London Resolutions long before he reached the bench, and having already formed some idea of their relation to the British North American Act. Is it better to reject the "evidence" of the London Resolutions and have the judge unconsciously affected by previous reading, or should we accept the matter as one of which judicial notice might be taken but insist that intelligent discussion be heard from the opposing parties? If the latter view is accepted, then the whole question of how and when matters might be judicially noticed will have to be reexamined. This task still faces our academic scholars in the law of evidence.

J. B. MILNER.

[2]See particularly Davis, *Administrative Law* (1951) pp. 487-497, on "Legislative and Adjudicative Facts."

AN INTRODUCTION TO EVIDENCE

By G. D. Nokes, LL.D.

SECOND EDITION. LONDON: SWEET & MAXWELL LIMITED, TORONTO: THE CARSWELL COMPANY LTD. 1956. PP. xxxvl, 480 ($7.25)

This is the second edition of a work first published in 1952. Both editions have been the subject of deservedly complimentary reviews in the Canadian Bar Review.[1]

The new edition has been necessitated by a number of new cases (numbering between 250 and 275 if one can judge from the Table of Cases) which have been decided in the British Isles since the first edition was published.

While the general plan of the book has been retained almost unaltered, the text has been expanded by more than fifty pages.

The various subjects are treated in an order different from the order followed by Phipson. The author proceeds from the origin of the various methods of proof to their application in court. The preliminary part of the book is devoted to the nature and sources of evidence and special means of establishing facts. Admissibility of Facts and Admissibility of Hearsay comprise parts *II* and *III*. Then follows Means of Proof and the fifth part deals with the Burden of Proof and with Cogency.

The conclusions are supported by reference to jurisprudence, to authors both English and American, and to articles in legal periodicals including several articles published in the Canadian Bar Review. I was unable to find any reference to Canadian cases (unless decided by the Privy Council) and all the jurisprudence appears to be English, Scottish or Irish.

The book is a happy combination of the theoretical and the practical. It is not designed for use by the practicing advocate in Court, as is Phipson or Cockle, nor is it of much utility to a Quebec lawyer or student. It does however contain a clear and concise exposition of the general principles of the law of evidence in England.

GEORGE S. CHALLIES.

[1](1952) 30 Can. Bar Rev. 759 (André Nadeau) and (1956) 34 Can. Bar Rev. 871 (J. B. Morton).