

Correspondence.

THE PARDONING POWER.

Editor of THE CANADA LAW JOURNAL :

The decision of the Chancery Division of the High Court of Justice in the case of *Canada v. Ontario*, upholding the constitutionality of the Ontario statute 51 Vic., cap. 5, enabling the Lieutenant-Governor to pardon offences committed under the laws of that province, is so important as to challenge criticism.

The first section of the statute which has been upheld, would seem to be a mere affirmance of the power given to a Lieutenant-Governor by section 65, of the B. N. A. Act, though the language is by no means the same, and there would appear no great objection to it from a Dominion point of view, especially as it is made, "subject always to the royal prerogative."

The difficulty which this Ontario statute presents arises from the second section, which provides that "the powers mentioned in the first section shall be deemed to include the power of remitting sentences for offences against the laws of this province." The question then is, was it competent for the Legislature of Ontario to confer the prerogative of pardoning the offences referred to upon the Lieutenant-Governor. The three judges of the Chancery Division of the High Court of Justice have held that it was, though the learned Chancellor was the only one who gave a written judgment on the subject. It might here be incidentally remarked that the practice which some judges adopt of merely "concurring" in the written opinions of other judges instead of preparing written opinions for themselves, to borrow a remark made in Taylor on Evidence (section 25, latter part) as to a certain peculiar habit some judges have of addressing jurors, "though sanctioned by the practice of many able but somewhat lazy judges, is but little calculated to promote the attainment of truth."

The learned Chancellor in his polished judgment has allowed several important sections of the B. N. A. Act to escape his distinguished attention, and the result is both surprising and disappointing. If he had referred to section 12 with reference to the powers of a Governor-General, he would have seen that the same language was used with reference to the powers of His Excellency as are used in section 65 with reference to the powers of a Lieutenant-Governor, with this important addition, "as far as the same continue in existence," which is not to be found in section 65. Surely this 12th section means that the prerogative rights of the crown, which the Queen's representative had before Confederation been wont to enjoy and exercise under express grant from the crown, were to continue unimpaired, especially as they are re-granted to every succeeding Governor-General of Canada, so that section 65 is subordinate to section 12.

Now the power to pardon is a branch of the prerogative of the crown. It belongs to the king *de facto* and not to the king *de jure*. It is an uncommunicable prerogative except by grant from the crown: Chitty on Prerogative, 89-90; so that if there be no grant of prerogative there can be no prerogative to exer-