HON. ALFRED B MORINE, K.C.

Canada Law Journal.

VOL. XLV. FEBRUARY 15. No. 4.

HON. ALFRED B. MORINE, K.C.

Mr. Morine is a native of Nova Scotia. In 1883 he became the editor of a daily newspaper in St. John's, Newfoundland. In 1886 he was elected representative of Bonavista District in the Legislature of Newfoundland, and remained its representative continuously until his resignation in 1906.

In 1890 Mr. Morine was chosen, with two others, as a delegate to London to represent to the government and to the public the sentiments of the people concerning French Treaty rights in Newfoundland; in reference to which subject he and his co-delegates prepared and published a pamphlet dealing with the whole question. He was one of the five delegates sent by the Legislature on the same mission in 1891. On this occasion the delegates were received at the Bar of the House of Lords and presented an address prepared by Mr. Morine.

Mr. Morine was appointed Colonial Secretary of Newfoundland in 1894, Minister of Finance in 1897, and Minister of Marine and Fisheries in 1898.

In 1898 he represented the government of the colony at London in a successful effort to procure from the British government the appointment of Commissioners to enquire and report on the effect of French rights in the colony. Mr. Morine, then Minister of Marine and Fisheries, accompanied the delegates around the French treaty coast. As a result of the enquiry and report of the Commissioners, the rights so injurious to Newfoundland were terminated by arrangement between France and Great Britain.

In 1894 Mr. Morine was called to the Bar of Nova Scotia and of Newfoundland, and in 1898 was made a Q.C. In 1906 he removed to Toronto and was admitted to the Bar of Ontario, and

in 1907 was made a K.C. of that province. He and his son, A. Nevill Morine, LL.B., are now engaged in the practice of the profession in the city of Toronto.

In politics Mr. Morine is a Conservative and at the last Dominion election contested the constituency of Queens-Shelburne, Nova Scotia, with the Hon. Mr. Fielding, the Minister of Finance, reducing somewhat the majorities previously given to that popular gentleman.

RECENT APPOINTMENTS.

The profession has been worthily represented in two recent appointments to high positions. Hon. James Munro Gibson, K.C., Attorney-General in the late government of Ontario, being now the Lieutenant-Governor of that province, an appointment which has met with universal approval. The other appointment is that the new Speaker of the Senate of Canada in the person of the Hon. James Kirkpatrick Kerr, K.C., a lawyer of prominence in the city of Toronto. We venture to prophesy that he will with dignity, courtesy and wisdom represent the august body of which he is a member. Both these gentlemen are eminently qualified to fulfil the duties of the dignified positions to which they have been promoted.

COURTS AND THEIR CRITICS.

It seems almost impossible for the unthinking public, and even for the average layman who seeks to instruct them, to grasp the rules which necessarily govern courts and judges in applying to cases before them the fundamental principles of the law under which we live. This presumably arises from ignorance. It was once said, many years ago, that every Englishman who might have any public duties to perform should go through a course of Blackstone's Commentaries on the laws of England. Whilst this might be a somewhat ponderous book for our public

schools it is manifestly most desirable that some compendium setting forth the underlying principles and general rules applicable to the laws of the land and its administration, including the rights and limitations of judges and the duties and responsibilities of lawyers should be part of the course of study for the youths of this country.

We are led to these observations by reading an article which recently appeared in the Toronto *Daily Globe*, criticising something that was said in the columns of this journal. The writer in the article referred to says: "No doubt the Imperial Privy Council's interpretation of the street railway agreement is in accordance with established principles of law. No doubt other principles could be cited that would sustain a reasonable interpretation. The decision shews that under the law as it is, it is impossible by any use of the English language to bind a company to a simple agreement. We cannot change the language, but can change the law."

The writer of the foregoing extract gives evidence of a strange want of knowledge of the principles of judicial decisions when he says that "the decision shews that under the law as it is, it is impossible by any use of the language to bind a company to a simple agreement." It shews nothing of the kind. But it does shew that the agreement in question, impartially construed by disinterested experts, failed to carry out what one of the parties claimed was the agreement, but which the other party denied. We are but stating what all ought to know when we say that one of the fundamental principles of jurisprudence is that judges are not to make law in the sense of making new principles of decision and they are bound by their oaths, even in new cases, to frame and base their decisions on "the established principles."

Law is difficult enough as it is; but it would become worse than a mere will o' the wisp if the courts were to be at liberty, as this writer suggests they should be, to determine cases not on "established principles," but according to the popular clamour of the moment. Surely this must be evident to any thinking person of ordinary education.

The concluding sentence, which evidently in the mind of the writer settles the whole matter much to his satisfaction, sounds Johnsor .nd oracular: "We cannot change the language, but can ch: the law." Like the utterances of the sibyl these words may mean several things or nothing at all; but taking one possible meaning it is inconceivable that there could be any reasonable change of the law which would enable judges to construe documents otherwise than according to the language which is used in them. Nor is it conceivable that any British legislature would change the law for the purpose of giving to one of the litigants that which the courts say he is not entitled to under the contract between them. The conception of some people in these days as to meum and tuum is becoming very hazy.

Another extract from the same article is equally extraordinary and shews a strange lack of appreciation of the subject. It reads: "As the *Law Times* (the writer means the CANADA LAW JOURNAL) points out, it would be most unfortunate if through criticism the public should lose due respect for the law and its administration. It would also be unfortunate if through the absence of criticism the public would (sic) develop undue respect for the law and its administration. Like all institutions (sic) it should have that measure of respect it is entitled to by its results—no more and no less. Many a man has lost his farm through undue faith in the law as an engine for the rectifying of wrongs."

This is probably the first time that the statement has been made by any one except a socialist orator that there could be "undue respect for the law and its administration." Certainly there is no fear of that so long as leading journals do their best to destroy such respect. Classing "the law and its administration" with other "institutions" strikes one, if we may be permitted to say so, as positively comical. Taking another step in the same direction would logically compel that journal to advocate the handing over the "law and its administration," as a great public service "institution," to the appropriate municipalities to be dealt with by them as a part of the municipal owner-

ship scheme which is to make us all wealthy and happy. Something similar to this was tried at the time of the French Revolution, but was not found to be an unqualified success.

CANCELLATION OF TREATY PRIVILEGES TO ALIEN SUBJECTS.

We lately published an article on the above subject from the pen of Mr. Justice Hodgins urging the British and Canadian governments to concur in denouncing or cancelling the fishery privileges conceded to in 1818 to "inhabitants of the United States" who follow the trade of "American fishermen," in which he supported his arguments by precedents from Congress and the Supreme Court of the United States that at the exercise of such a right is a matter of high national prerogative, which cannot be surrendered indefinitely to foreign nations by the treaty-making power of the Crown; and also giving extracts from many recognized French authorities on international law in confirmation of his argument, and arguing from the American precedents that a treaty concession to the alien subjects of another nation was only "during pleasure."

The article also clearly shewed that the teeming fish wealth of our colonial coast waters is part of the national resources of the colonial subjects of the Crown for their food supply, and is specially valuable to them as one of their commercial assets for colonial trade and revenue purposes, and therefore should not be conceded to and enjoyed by American fishermen without compensation to the Dominion revenue or some reciprocal privileges. It therefore goes without saying that such a gratuitous concession should be revoked before our teeming coastwaters are depleted as American fishermen have depleted their own coastwaters.

To the precedents and authorities cited in the article referred to, Japan now proposes to add her diplomatic action by cancelling all her commercial treaties granting trade privileges or concessions to the alien subjects of other nations, so that she may

be able to "negotiate new treaties unhampered by any unequal engagements." The British government's gratuitous concession in 1818 giving American fishermen freedom to fish in our national coast waters may be cited as one of the many "disturbing examples" of British favouritism to the United States. The following is the announcement by recent cable of the diplomatic policy of the government of Japan:—

"Count Kamura concluded an important speech in Parliament to-day by announcing that the Imperial government had decided to notify the various powers next year of the termination of existing commercial treaties, to be effective one year after such notice was given. He said that it was the intention of the government to negotiate new treaties 'unhampered by any unequal engagements.' The new compacts, he continued, will be based entirely upon the principle of reciprocity with a view to the free development of international commerce."

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The following is the address delivered by Hon. Wallace Nesbitt, K.C., on the above subject, at the meeting of the Bar Association of New York State, held at Buffalo, N.Y., on the 20th ul'. He spoke as follows:—

The Judicial Committee of the Privy Council is the court of last resort for all that portion of the British Empire situated outside the United Kingdom. It sits as a committee of advice to the Crown, and its jurisdiction is founded solely on the royal prerogative.

From the beginning of our national existence the King has been accustomed to act with the advice of the magnates or great men of the realm, and at an early period exercised legislative, executive, and judicial authority, especially of an appellate character, from the shire and hundred courts. I have been unable to ascertain when appeals to the Privy Council were first instituted, but there is no doubt that from the earliest times petitions for justice were presented to the King in Council, especially when

the courts were liable to be intimidated by an influential suitor, it being an ancient rule of our Constitution that the subject who failed to obtain justice in the ordinary courts might in all cases petition to the King to exercise his royal prerogative in his behalf. As the Empire increased, this right has been gradually extended to all the King's subjects. Those residing in the United Kingdom have apparently found the custom of presenting their petitions to the King in Parliament the most convenient, and this practice is now confirmed by statute, the House of Lords being the court of last resort for the United Kingdom. The King's subjects beyond the seas, on the other hand, found that their petitions were more speedily heard if addressed to the King in Council, which has thus gradually become the tribunal of final appeal for India and the Colonies. The statutes which have been enacted from time to time regulating the power and procedure of the Council are of a most interesting character and clearly reflect the popular opinion of the day. One of the most interesting is that of 24 Henry VIII., passed in 1532, which provides "that appeals in such cases as have been used to be pursued to the See of Rome, shall not be from henceforth taken, but within this realm."

The power thus conferred upon the Council of hearing appeals in all cases was greatly abused, and by statute I., Charles I., ch. 10, passed in the year 1646, it is enacted that neither His Majesty or Privy Council have any jurisdiction or power to draw into question any matter of any of the subjects of this Kingdom, but that the same ought to be tried in ordinary courts of law, thus transferring the appellate authority of the King in the United Kingdom from the Council to the Parliament or House of Lords. It will be noticed that the words of this statute do not apply to the King's subjects outside the United Kingdom, and in the same year we find mention made in the records of the Council of proceedings in a matter from the Island of Guernsey. The Council was put on its present basis and the Judicial Committee formed by 3 & 4 Wm. IV., 1833, and by subsequent statutes jurisdiction has been given to the Judicial Committee in

matters within the United Kingdom in Ecclesiastical, Admiralty and Patent cases.

Owing to the great expansion of our Empire, which is mainly due to the acquisition of new territory, the laws administered by this Council are of the most diverse and complex character, and the judicial enquiry entered into by it, of the most cosmopolitan description. It is laid down by most eminent authority that all territory which is newly acquired, whether by conquest, colonization, or peaceful annexation, is acquired for the benefit of the Crown. If an uninhabited country is discovered and peopled by English subjects, they are supposed to possess themselves of it for the benefit of their sovereign, and carry with them such portions of the English common law as are necessary and applicable to their situation. In the case of possessions acquired by conquest or annexation, the sovereign, unless he has limited his prerogative by the articles of capitulation or treaty, has the inherent power to make new laws for the conquered country, but until he sees fit to do so the laws in force in the newly acquired territory at the time of the capitulation or annexation, remain in force and equally effect all persons and property. It has been the almost universal custom of our Empire to refrain from interfering with the laws and institution which have been in force in those countries which have been added to it. As an illustration of the extent of jurisdiction, Sir Frederick Pollock, when in Toronto in 1905, stated that, whilst proceeding on the tour which he was then completing, he had left Liverpool and had visited Gibraltar, Minorca, South Africa, India and Canada, all countries under the rule of the British Empire, and all, with scarcely an exception, under laws which differed. Go into the Judicial Committee of the Privy Council for a single week and watch its operations. You will see it deciding on one day a question according to the Roman Dutch law; on another a question according to the French law as it prevailed before the Revolution, modified by subsequent Canadian statutes; and on another day according to the common law of England, as modified by Australian or New Zealand legislation; and at the end of the week

according to the customs of the Hindu or Mohammedan law. The truth of these observations may be readily understood by perusing a list of the different territories from which appeals may be taken to this court. The number is upwards of 150, and occupies in one work on the subject over seven printed pages. If Europe is taken as an example, appeals lie from six different principalities, and the laws administered range from the ancient customs of the Isle of Man to those in force in the Island of Cyprus. Other interesting examples may be given in the Leeward Islands, composed of Montserrat, Saint Kitts and Ben Nevis, where it administers the common law introduced by Royal Proclamation in 1764, and Newfoundland, which is our oldest colony. In Asia, besides India, appeals lie from the courts of twenty-four separate principalities, differing from the Bombay High Court to the Consular Court in China and Corea.

If we should now examine the actual working of this Council, we find that the governments of the various dependencies as a general rule have the power to legislate and limit the right of the subject to carry his case to the foot of the Throne. They cannot, however, legislate with regard to the right of the Sovereign to hear those appeals. As a general rule, legislation has been passed restricting the right of appeal to cases when the matter in controversy exceeds a certain value. If the matter is not of sufficient importance to comply with the regulation in force in the particular territory in which the suit is instituted, an application may be made to the Council itself for special leave to appeal. The application is made by way of petition, which must set out the facts of the case, the portion of the judgments in the courts below which are said to be erroneous, and the reasons upon which counsel base the application. The statements contained in the petition must be characterized by the utmost frankness and good faith, and a prima facie case must be made out. The committee in granting the petition will be greatly influenced by the wishes of the colony as expressed by its legislation. The exercise of the prerogative will not be recommended except in cases of general importance, and will only be granted

(1) where constitutional questions are in controversy, (2) where there is an important point of law involved and the amount in controversy is large. The Privy Council, in deference to the wishes of our government, have laid down the rule in criminal cases that they will not interfere to grant special leave unless the clearest injustice has been done. Two cases of recent years excited great interest. In Riel's case, where, following the North-West Rebellion, Riel was convicted of high treason, leave to appeal was refused. In Gaynor and Green's case, where the United States were petitioners, leave to appeal was granted, and upon the argument being heard an order was made favourable to the United States government.

Where, however, the local legislature does not prohibit the appeal, the appellant proceeds to the Privy Council as of right, and no leave is necessary.

The first step in the appeal is the printing of the record, which contains the pleadings, the judgments delivered by the courts below, and such parts of the evidence as may be necessary for the determination of the matters in dispute. Each counsel then prepares his case, which should contain a short statement of the facts relied on by counsel in support of his contentions, and a memorandum of the points to be argued. It is not customary to cite authorities in the case. Indeed, it is not considered to be in good taste, as owing to the great learning and vast experience of the members of the Board, they are usually familiar with such as have a bearing on the matters in question. The Privy Council does not sit as a court, but as a committee, and the argument takes place in a chamber in the Colonial Office in Downing street. Only the other day Viscount Wolverhampton, a solicitor who for many years was head of the Incorporated Law Society, and who has been elevated to the peerage and made a member of the committee, sat along with the law Lords. He would not have been entitled to appear as an advocate or to don the wig and gown in any court in the United Kingdom, and yet he was sitting as a judge in this committee. I fancy it was the only occasion when such a thing has happened. Of course, many of the solici-

tors in England are probably as great lawyers as are to be found anywhere in the world, but they cannot, under the English system, appear in court or be created judges. The Lords appear in their ordinary street attire, and are seated round a table at one end of the room. When the court opens, the doors are unbarred, counsel are allowed to enter and take their places in a small railed enclosure at the other end of the room. They are expected to wear the ordinary court attire, which includes a wig and gown. There is a small reading desk on which the counsel addressing the court may place his documents and other papers. If an authority is cited to their Lordships, usually an attendant of the court is directed to obtain the report, which is perused by their Lordships at the time. Judgment is delivered, or counsel may be requested to withdraw while their Lordships deliberate. Counsel are then admitted and judgment is delivered, or judgment may be reserved.

The Council is not a court, and the judgment is delivered by one of the judges on behalf of the whole committee, no dissenting view being expressed, it being the duty of each Privy Councillor not to disclose any advice he may have given to the Crown.

During a recent stay in London I more than once visited the Council rooms, and was astonished by the variety and magnitude of the business transacted. On one day their Lordships were engaged in a reference from the Colonial Office as to the conduct of the Chief Justice of Grenada. On the next day their Lordships heard argument in a case from Ceylon, where two native ladies of high rank were appealing in an endeavour to quash a conviction for the alleged crime of beating a servant to death. The next case concerned the question of the pedigree of an Indian Rajah, and the right of succession to his vast estate, in which Sir Robert Finlay, ex-Attorney-General of England, was opposed to distinguished members of the Indian Bar, several Parsee lawyers acting as junior counsel on either side. On the next day, a dispute involving the title to a Cobalt mining claim was heard, and in the afternoon a question as to the title to a piece of foreshore in the eastern part of Quebec was disposed

of. I have seen their Lordships dispose of five petitions for special leave to appeal one morning in less than an hour and these petitions originated from places as distant from one another as Gibraltar, India, the Straits Settlements, and Canada, and apparently with a full appreciation of the law and facts involved in each case. I supposed the petitions had been carefully perused before the Committee met.

There has been some discussion looking towards abolishing the Judicial Committee, or amending its constituion. Objection has been taken that the highest appellate courts of the great federated and self-governing colonies should be the courts of last resort for such colonies, and suggesting that the existence of the court is a reflection on the ability and learning of their own judges; also objections based upon the delay and expense. The subject was so fully discussed on the occasion of the debate in the House of Commons of England on the Commonwealth of Australia Constitution Bill, that I cannot do better than quote one or two passages. The first is from Mr. Faber, who has been Registrar of the Privy Council for nine years. He said, in part:

"But the proposed limitation of the appeal to the Privy Council falls altogether into a different category. That is a matter which concerns not Australia alone, but Australia in relation to this country; and, more than that, concerns our whole Empire. The Privy Council appeal is the right, in the last resort, of every subject of Her Majesty's dominions beyond the seas to petition the Sovereign for justice; it is the prerogative right of the Sovereign to hear all such matters of complaint, and to grant such redress as the Sovereign may think fit. The Sovereign delegates the hearing to the Judicial Committee of the Privy Council, who report their opinion to the Sovereign; the Sovereign confirms their report by an Order in Council; until so confirmed the report has no validity whatever. It has been found necessary, from time to time, to cut down and modify the right of appeal to the subject. Throughout our Empire abroad, speaking generally, the subject has no right of appeal, unless the value of the matter in issue is £500 or over. Other-

wise special leave to appeal must be obtained from the Privy Council before an appeal can be brought. In the case of the Supreme Court of Canada, the subject has no right of appeal to the Privy Council at all. Special leave to appeal must in every case be obtained, and until that is obtained the subject is precluded from any appeal so far as the Privy Council is concerned. Then there is the free, unrestricted prerogative of the Sovereign to admit any appeal to the Privy Council she may think fit. In 1867 the British North America Act was passed, which incorporated the various provinces of Canada into one dominion. That Act ascribed certain topics of legislation to the Dominion Legislature, and certain topics to the Legislatures of the provinces. Questions constantly arose, between the Dominion and the provinces, as to whether a particular topic of legislation fell within the powers of the Dominion or of a province, large questions, in which the people of Canada were deeply interested —questions of education, of liquor license, of boundaries, of the rights of the Indians, among many others. These questions came, in the last resort, before the Privy Council, and I think the people of Canada were glad that they did, and were well satisfied with the decisions given. I should confidently appeal to the people of Canada to-day, to say whether or no they would prefer to keep the Privy Council appeal. I feel certain that their answer would be in the affirmative. Then there is a different objection which has been taken to the Privy Council appeal, and I allude to it because the subject has come within my own experience. It has been said that there are long delays in the Privy Council. My memory tells me that, so far as delay is concerned, in bringing a case before the Privy Council, that criticism is scarcely justified by the facts. I know there have been long delays in cases from Australia and elsewhere, but they have generally taken place in the colony from which the appeal has come, and before the record of the proceedings has reached the Privy Council office. It frequently takes a long time to prepare the record in the colony, and that is where the real delay, as a rule, occurs. But when the record has arrived at the Privy Council office there is no delay in bringing the matter on for

hearing, unless the parties themselves delay it. If the criticism means that there is a delay in delivering judgment, then I must confess that there have been delays. But I do not think that fault is confined to the Privy Council alone. I think that many of our courts in this country, and perhaps in the colonies, are equally open to that criticism. I venture to doubt whether judges are sufficiently alive to the serious inconvenience which is caused to suitors by delaying judgment in an appeal for sometimes many months after the hearing. Another objection which has been made to the Privy Council appeal is its expense. I know that all litigation is expensive, and that law is a luxury of the most expensive nature. I do not think, however, that an appeal to the Privy Council is any more expensive than an appeal to the House of Lords, and I venture to doubt whether it is any more expensive than an appeal will be to the High Court of Australia. Another objection taken—and the most serious one of all—is, that the Privy Council is not a strong enough tribunal; that, in the words of one of the delegates, the Privy Council is not a tribunal that this country would be satisfied with. In answer to the latter part of that criticism I may say that for years past the Privy Council has been a stronger tribunal than the House of Lords, which is the final court in this country. To-day the Privy Council consists not only of all the Lords who sit judicially in House of Lords cases, but of many members besides, including three distinguished judges from Canada, Australia, and South Africa. The real trouble does not lie there, but it lies in the fact that when the Privy Council and the House of Lords sit at the same time, as they frequently do, it is very difficult to make up two strong courts, with the result that one is apt to be sacrificed to the other. There is only one remedy for this, and that is that there ought to be more paid judges. We have relied far too much in the past upon gratuitous assistance, which has been nobly given, and which nobody desires to criticise. But when you have paid judges you have, of course, a right to call for their services, which you have not when they are unpaid. The right honourable gentleman, the Secretary of

State for the Colonies who introduced this bill has foreshadowed the change that is going to be made. I myself hope the Privy Council will not be incorporated in the House of Lords. I am sure such a scheme would not be agreeable to India. The natives of India set great store by the fact that their appeals are made to the Queen Empress. Nor do I think it would be agreeable to the colonies. There are many Parliaments in the British Empire, but there is only one Crown, and I think the colonies, if they had to choose between the two, would prefer a strong Privy Council, which is the court of the Sovereign, to the House of Lords, which is a court of our Parliament. In my view the time has now come for the establishment of a new court altogether, which would be neither the Privy Council nor the House of Lords. What I should like to see established would be a court entitled 'Her Majesty's Supreme Court of the British Empire.' Such a court would satisfy both the colonies and India."

The court, of course, is only human, and, like all other things, must sometimes make mistakes, but as a general rule its decisions disclose a depth of learning and breadth of character which are not surpassed by those of any other forum in the world. Being far removed from the cause of the litigation, their judgments are not affected or tainted with local spirit of prejudice. It is unfortunate that it sometimes happens that they are misunderstood by even learned members of our legal profession. Their Lordships do not, as a rule, cite authorities in their written decisions, which sometimes lead one to suppose that they have been overlooked. As they constantly decide matters of the very greatest importance, it occasionally happens that their decisions do not commend themselves to popular opinion, but it cannot be otherwise in any court of last resort. The Council's most vehement detractors have never denied the undoubted ability and eminence of those brilliant statesmen and lawyers who have taken part in its decisions and dispensed justice for the entire Empire. Among these I may mention Lord Brougham, Lord Westbury, the late Lord St. Leonards, Lord Selborne, Lord Cairns, Lord Watson, Lord Herschell, Lord Halsbury, the present Chancellor Lord Loreburn, Lord Macnaghten and Lord Lindley.

So much for the criticisms referred to. On the question of its political importance the Privy Council itself, in 1871, in a memorandum, said "The appellate jurisdiction of Her Majesty in Council exists for the benefit of the colonies, and not for that of the mother country; but it is impossible to overlook the fact that this jurisdiction is part of Her Majesty's prerogative, and which has been exercised for the benefit of the colonies since the date of their settlement. It is still a powerful link between the colonies and the Crown of Great Britain, and secures to every subject throughout the Empire the right to claim redress from the Throne. It provides a remedy in many cases not falling within the jurisdiction of the ordinary courts of justice. It removes causes from the influence of local prepossession; it affords the means of maintaining the uniformity of the law of England and her colonies which derive a great body of their laws from Great Britain, and enables them, if they think fit, to obtain a decision in the last resort, from the highest judicial authority, composed of men of the greatest legal capacity existing in the metropolis."

And again in 1875 the Privy Council pointed out that "this power has been exercised for centuries over all the dependencies of the Empire by the Sovereign of the mother country sitting in Council. By this institution, common to all parts of the Empire beyond the seas, all matters whatever requiring a judicial solution may be brought to the cognizance of one court in which all have a voice. To abolish this controlling power and abandon each colony and dependency to a separate Court of Appeal of its own, would obviously destroy one of the most important ties connecting all parts of the Empire in common obedience to the courts of law, and to renounce the last and most essential mode of exercising the authority of the Crown over its possessions abroad."

At the date of the Australian debate, the Government of New Zealand said that, "in the best interests of the Empire, the right of appeal on constitutional grounds is one of the strongest links binding us to the mother country."

And Western Australia was of opinion "that by the possession of one Court of Appeal for the whole British race, whose decisions are final and binding on all the courts of the Empire, there is constituted a bond between all British people which should be maintained inviolate as the keystone of Imperial unity."

Canada has given many recent evidences that she has no reason to regret the absence of absolute finality in the decisions of her own courts, and has many times shewn that together with all other portions of the British Empire, her people look to the advisers of the Sovereign in Council in matters of the highest moment for a breadth of decision not surpassed by that of any other tribunal in the whole world.

To appreciate our view of this tribunal, you have to enter into the difference of spirit prevalent under the English Constitution and others. It is said that "one of the great glories of the Roman Empire was that the system of jurisprudence which we know as the Roman law extended in its application practically throughout the Empire. Napoleon will be remembered by the only beneficent act of his life which remains, and which still influences the lives and the actions of the vast continent of Europe over which his dominion was once overspread. Napoleon, by sweeping away all the separate systems of local law which prevailed in Europe, and substituting the Code Napoleon, with its comparative simplicity and reasonableness, did undoubtedly introduce a uniformity of law throughout his empire. That has not been the method of the British Empire. Our method has been totally contrary. We have always proceeded on the principle of jealously preserving and maintaining local laws and usages."

The veneration in which the Council is held is afforded in the well-known story which is, I believe, founded on fact, of the conduct of some poor villagers in an obscure corner of Rajputana, who had for years been struggling for their rights against the oppression of the powerful Rajah of that district. An appeal was finally taken upon the question in dispute to the Privy Coun-

cil and a judgment being obtained in their favour, they conceived that any institution possessing such great powers must be of Divine origin. They erected an altar to this great unknown being, the Privy Council.

It cannot be doubted that it is one of the strongest links which binds the Empire together.

The fire of patriotism burns in our colonies with a pure, clear flame which is the wonder of the world. In South Africa, men from Canada, New Zealand and Australia fought side by side with men from England, Ireland and Scotland, under one flag. With the copious outpouring of their blood they sealed our Empire together. In the words of a great orator: "Their blood has flowed in the same stream and drenched the same field; when the chill morning dawned their dead lay cold and stark together; in the same deep pit their bodies were deposited; the green corn of spring breaks from their commingled dust; the dew falls from heaven upon their union in the grave."

While they in their lives and their deaths joined our Empire together, I trust that we shall not put it asunder by striking at the Privy Council appeal. The Privy Council, one of the most unique tribunals in the world, is the keystone upon which, if we work wisely, we may build up the great edifice of Imperial Federation.

We sincerely trust that the opinion expressed in this most interesting and masterly address as to the desirability of retaining for the Dominion this right of appeal to His Majesty in Council may meet with approval. It is the view of the profession as a whole, as well as that of the large majority of writers familiar with the subject. It is the view that was expressed at the recent meeting of the Ontario Bar Association and the one which this journal has consistently advocated. We trust it may prove to be the view that will be taken by the Ontario Legislature at its coming session. This right of appeal is of the widest interest. It is not a question for lawyers, except as citizens, but for the country at large. Its loss would be a serious blow to the best interests of the Dominion, as well as of the Empire.

ONTARIO REGISTRY ACT.

The annual report of the Inspector of Registry Offices for the Province of Ontario for 1907, cannot be said to have been published very promptly, but we suppose there was good reason for its not being issued sooner. It contains a number of notes of decisions by the Inspector of Registry Offices, Donald Guthrie, K.C., on various points which arose during the year on the construction of the Registry Act and the administration of its provisions by Registrars. As Mr. Guthrie is a sound lawyer and has had a large experience in the work of Registry Offices, his opinions are well worth noting.

In his report the Inspector refers to the mode in which original wills are permitted to be registered. At present the Registry Act permits an original will to be registered by filing a sworn copy, the original not being left in the Registry Office. He calls attention to the fact that this is an exceptional provision, and that these documents are, in his opinion, of the class which should be deposited, if the parties concerned desire them either to be registered or admitted to probate in some public office. He supposes that the present provisions were made because it was thought that original wills might afterwards be required to be produced in connection with applications for letters probate. He makes the suggestion that if a will which has not been proved and filed in a Surrogate Court comes for registration the original should be left in the Registry Office; and then, should it be necessary to admit it to probate, the original could be sent to the Surrogate Court, retaining a certified copy in the Registry Office.

A question arose before him of some interest to country practitioners as to searches made by a Registrar on the request of parties other than solicitors. It appears that a solicitor was asked to examine a title by a farmer, who being of an economical turn of mind thought that the $2 which would be required by the solicitor to pay for his services in that respect was too much. He went therefore himself to the Registry Office and got the Registrar to examine the title, and was informed that

there were certain undischarged mortgages on the property. The Registrar made the search, but he says expressed no opinion as to the title. The Registrar contended that under s. 27, sub-s. 1 of the Registry Act, he was justified in making the search. It was on the other hand contended that this was advising upon the title, and that it should not have been done by the Registrar and he had no right to charge any fees therefor. The ruling of the Inspector was that the Registrar has no right to tell enquirers that there is good title to a lot or that the lot is free from encumbrances; but that if persons searching ask if there are any mortgages or any mechanics' liens registered, he might and should inform them as to the facts and charge accordingly; and that such information might either be in a form of an abstract or a certificate, and if the information asked for is simply whether there are mortgages registered against the lot, and there are mortgages registered, the Registrar should give an abstract in the usual form, or a certificate containing particulars of any mortgage registered against the lot. He held in the case before him that the Registrar did not go beyond the provisions of the statute, and that he had a right to charge 25 cents for the search and 25 cents additional for the certificate or writing in the nature of a certificate which he had given. As to whether or not the Registrar had advised on the title, it made no difference whether the information he gave regarding the fact that certain mortgages were on record was given verbally or by a formal certificate or by abstract.

Another question that was raised and submitted to the Inspector was as to whether and when, an affirmation may be used instead of an affidavit by a witness to a will. The solicitor who tendered an affirmation to prove a copy of the will contended that it was sufficient under R.S.O. c. 73, ss. 13, 14 and 15. The difficulty arose because the witness to the will declined to make an affidavit. The Inspector was of the opinion that if the person who was required to make an affidavit necessary to procure registration of a will refused or is unwilling from conscientious motives to be sworn, the person qualified to take affidavits might permit him, instead of being sworn, to make a solemn

affirmation and declaration in the words of s. 13; and that this would be sufficient for registering purposes under the Registry Act.

The statistical part of the Inspector's report is not of any special interest. The number of instruments registered in 1907 throughout Ontario was 176,437, as compared with 161,063, which was the number registered in 1906. The gross amount of fees earned by Registrars last year was $267,293, and the net amount received by them was $125,864.

LAW'S DELAYS.

Our contemporary, the English *Law Times,* referring to some eulogistic remarks of Mr. Justice Eve in the case of *Re Wallace, Wallace* v. *Wallace,* on the benefits which had accrued to the suitors by reason of the estate having been administered in court, goes on to say that the last dying embers of cases like *Jarndyce* v. *Jarndyce* must have been put an end to by the Judicature Acts of 1873 and 1875.

It may perhaps be regarded as rank heresy to say so, but we dare to think there never was a case like *Jarndyce* v. *Jarndyce.* That fictitious case was a mere playful exaggeration of a novelist bent on attracting attention to the no doubt very grave abuses then existing in the administration of justice in the Court of Chancery. The suit is described as one for the construction of a will, which is represented as being brought on and adjourned through a long series of years without ever reaching a hearing until the whole estate in question had been eaten up in costs. But it is safe to say that no case of that kind ever occurred. Delays in the Court of Chancery did not arise in the way depicted in "Bleak House." In Lord Eldon's time one fruitful cause of delay was the neglect to give judgment, after a case had been heard, and although that abuse is to a large extent unknown in modern practice, yet suitors in Ontario know, unhappily too well, that it is still existent. Another reason of the apparently never-endingness of suits in Chancery was that estates were adminis-

tered by the court through a period of perhaps twenty years, but that was not due to any vice in the court, but to the fact that the parties interested or some of them were infants. This difficulty has largely disappeared in Ontario since the Devolution of Estates Act of 1886 enabled estates to be dealt with by the personal representatives under the supervision of the court, but without the necessity of an administration suit. We once met with a suit for specific performance which dragged on for 25 years: see *Birch* v. *Joy*, 3 H. L. C. 565, but that was one in which the title was complicated by various outstanding incumbrances, and probably no fault could be attributed to the court. We do not pretend to say that no abuses existed in Chancery; there were plenty; but Dickens' typical case, though good enough for a novel, is hardly a good instance for a lawyer.

The result of trial by newspapers, one of the warts of modern civilization, is evidenced in various ways. Two men were recently charged by a woman with criminal assault. Some of the daily papers made the most of the occasion in the usual sensational manner and a strong feeling of anger was roused against the men who were charged with the crime. The evidence at the trial was apparently so insufficient for a conviction that the presiding judge advised an acquittal. To the amazement of everyone the jury brought in a verdict of guilty. Whilst, of course, we are unable to fathom the train of thought in the minds of these twelve men which led to this unexpected result, and whilst it may be that the jury may have had some light which had not been shed for the benefit of the court, it may also be true, as asserted by some of those present, that the jury would not have disregarded the suggestion of the judge if their feelings had not been unduly swayed by what they had seen in the evening papers. But however this may be the evil complained of is a very serious one; and whilst it may be a waste of time for a legal journal to attempt to put a stop to this mode of trial we can very properly say that those responsible

for the administration of justice according to the laws of the land should certainly make some effort in that direction. The *Law Journal* of New York in referring to this subject speaks of it as a "serious menace to the administration of justice."

The fourth bill introduced into the House of Commons at its present Session is one by Mr. Bickerdike to amend the Criminal Code by providing the punishment of whipping for certain offences in addition to imprisonment. His thought is to include in this punishment persons guilty of carrying dangerous weapons, of robbery and of assaults with intent to rob, and of assaults on females whereby actual bodily harm is occasioned. The last case might perhaps be covered by this punishment, and there is something to be said in favour of providing more rigorous repression of robbery, but the first offence above referred to does not seem to warrant the suggested treatment and is not likely to receive it.

The English *Law Times* announces that the paintings for the decoration of the walls of the Central Hall of the new Sessions House in the Old Bailey, by Sir William Richmond, R.A., have been completed. The subjects selected are allegorical, viz., "The Golden Age," "Roman Law," and "Spartan Law," and they are said to be an appropriate completion of the decoration of the building. We have more than once suggested a similar treatment of the walls of the court rooms at Osgoode Hall, but in this utilitarian community our demand is naught but a voice crying in a wilderness of indifference.

REVIEW OF CURRENT ENGLISH CASES.

NOTARIES PUBLIC.

Foy v. *Societies of Notaries for Victoria* (1909) P. 15 was an application to the Master of the Faculties for the appointment of a notary to act in the state of Victoria. It appeared that the appointment was opposed by the Society of Notaries for the State of Victoria, but it being proved to the satisfaction of the Master that the appointment of an additional notary for the city of Melbourne was necessary, the Master, though conceding that great weight ought to be allowed to the views of the society, nevertheless made the appointment. This case though perhaps of no practical importance in Ontario is interesting from an historical point of view. Prior to the Reformation notaries were appointed throughout Europe by His Holiness the Bishop of Rome. By 25 Henry VIII. ch. 21, the King and his subjects were forbidden any longer to obtain or apply for any licenses, faculties or delegacies, etc., "from the Bishop of Rome called the Pope;" and thenceforth the Archbishop of Canterbury was empowered to issue all such licenses, faculties, etc., not being contrary or repugnant to the Holy Scriptures which had been formerly granted by His Holiness the Pope; and it is by virtue of the power thus conferred that the Archbishop's officer, the Master of the Faculties, made the appointment in question. Probably it would be held, as far as Ontario is concerned, that this extra territorial jurisdiction of the Archbishop is wholly superseded by R.S.O. c. 175, which empowers the Lieutenant-Governor in Council to appoint notaries public for this province, at the same time it may be remarked that there is nothing in the Act expressly excluding the jurisdiction of the Archbishop. It seems to be conceded in Australia that his jurisdiction extends there.

MARRIED WOMAN—CONTRACT OF MARRIED WOMAN—JEWELLERY—SEPARATE ESTATE — WILL — APPOINTMENT — EXERCISE OF GENERAL POWER—MARRIED WOMEN'S PROPERTY ACT, 1882 (45-46 VICT. C. 75) S. 1 (3) (4), S. 4—(R.S.O. C. 163, S. 3).

In re Fieldwick, Johnson v. *Adamson* (1909) 1 Ch. 1. In this case the point in controversy was as to the validity of a covenant made by a married woman to repay £4,000, part of a sum of £10,000, then advanced to her husband. The covenant was

made on 29th January, 1891, and at that date the married woman had a certain amount of jewellery and a reversionary interest in a sum of £7,000 assigned to trustees of her marriage settlement, subject to a restraint against anticipation and as to which she had a general power of appointment. The married woman appeared to have had no other property. The reversionary interest fell into possession in 1901 and by her will she exercised the power of appointment whereby the fund became assets for the payment of her debts. Parker, J., held that the debt of £4,000 was payable out of the £7,000 fund; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ) reversed his decision on the ground that at the time the contract was made the married woman had no separate property with reference to which she could be presumed to have contracted, following *Palliser* v. *Gurney*, 10 Q.B.D. 519, and *Stogdon* v. *Lee* (1891) 1 Q.B. 661, and that mere personal ornaments such as jewellery could not be said to be such property: see *Braunstein* v. *Lewis*, 65 L.T. 449.

HIGHWAY—DEDICATION—LAND IN SETTLEMENT—TENANCY FOR LIFE WITH REMAINDER IN FEE—PRESUMPTION—ACQUIESCENCE.

In *Farquhar* v. *Newbury Rural District Council* (1909) 1 Ch. 12 the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed the decision of Warrington, J. (1908) 2 Ch. 586 (noted ante, vol. 44, p. 734). It will be remembered that the question was whether a highway had been effectually dedicated. The land in question was in settlement, the tenant for life and remainderman were both sui juris, but the land was in the occupation of the remainderman, who laid out the road in question more than sixty years ago, in substitution of another way to a church and it had since been used and enjoyed by the public with his consent. There was no evidence that the tenant for life was a party to the dedication, and he did not die till 1851. In 1849 the remainderman resettled the estate, whereby he became tenant for life with remainder to other persons. The Court of Appeal agreed with Warrington, J., that the proper inference was that the tenant for life had concurred in the dedication of the highway, and that it was effectual; and that the user of it could not be restricted merely to the rights which existed in the way for which it had been substituted.

MINES—OVERLYING AND UNDERLYING SEAMS OF COAL—RIGHT TO SUPPORT—SUBSIDENCE—INJUNCTION.

Butterley Co. v. *New Hucknall Colliery Co.* (1909) 1 Ch. 37. This was an appeal from the decision of Neville, J. (1908) 2 Ch. 475 (noted ante, vol. 44, p. 690). The plaintiffs were lessees of a seam of coal, which contained a reservation to the lessor and his assigns of the right to work the mines underneath the plaintiffs' seam with provisions for indemnifying the plaintiffs against any physical damage which might thereby be occasioned. The lessor leased to the defendants a seam of coal lying 174 yards beneath the plaintiffs' seam. In working their seam the defendants caused a subsidence in the plaintiffs' seam which occasioned no physical damage to the plaintiffs' coal, but rendered it more difficult to mine. Neville, J., had granted an injunction against the defendants; but the Court of Appeal (Cozens-Hardy, and Moulton and Farwell, L.JJ.) came to the conclusion that the plaintiffs' primâ facie right to support was displaced by proof that their seam would not be destroyed, but only injured to such an extent as would admit of compensation, and that it was impossible to get the minerals leased to defendants at all, without letting down the upper seam, and therefore the reservation in plaintiffs' lease which shewed that it was the intention of the parties that the lower seam should be worked, ought to be given full effect. The action was therefore dismissed.

EXPROPRIATION—DEATH OF OWNER BEFORE COMPLETION—PROBATE—COSTS.

In re Elementary Education Acts (1909) 1 Ch. 55. Where land is expropriated for a public purpose under a statute and before completion of the sale the owner dies, it was held by Joyce, J., that the expropriator is not liable to pay the costs of obtaining probate of the deceased owner's will for the purpose of completing the transaction and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.).

WILL—LATENT AMBIGUITY—NAME—DESCRIPTION—EXTRINSIC EVIDENCE TO EXPLAIN WILL—INSTRUCTIONS FOR WILL—ADMISSIBILITY.

In re Offner, Samuel v. *Offner* (1909) 1 Ch. 60. In his case a testator by his will bequeathed a legacy to his "grand nephew

Robert Offner." He had no grand nephew of that name; but he had four grand nephews (1) Alfred Offner and (2) Richard Offner who were brothers and (3) Curl Offner and (4) Botho Offner. For the purpose of clearing up the ambiguity as to who was meant by the "grand nephew Robert," evidence was tendered of instructions in the testator's handwriting to his solicitors for the will. This memorandum so far as material specified as legatees "to my grand nephew Dr. Alfred Offner of Prague £200 . . . To his brother Robert Offner £100." Eady, J., held that this evidence was inadmissible; but the Court of Appeal (Cozens-Hardy, M.R. and Moulton, and Farwell, L.JJ.), held that it was admissible not as evidence of intention, but for the purpose of shewing who the "grand nephew" was whom the testator had wrongly described as "Robert," and that being done, it was clear that the nephew meant was the brother of Alfred and that the name "Robert" was a mistake for "Richard."

WATER COMPANY — UNAUTHORIZED NEW WORKS — ANCILLARY MAIN UNDER PUBLIC FOOT PATH—SOIL OF ROAD VESTED IN PLAINTIFF—TRESPASS—PLAINTIFF'S RIGHT TO SUE WITHOUT ATTORNEY-GENERAL—ULTRA VIRES.

Marriott v. *East Grinstead Gas & W. Co.* (1909) 1 Ch. 70. This was an action brought by the proprietor of land abutting on a public foot path the soil of which was vested in the plaintiff, to restrain the defendants from laying an unauthorized main under the foot path. The defendants claimed that the proposed main was ancillary to their statutory works, but Eady, J., who tried the action found that it was not, and that it was ultra vires of the defendant's statutory powers. It was contended by the defendants that the plaintiff's were not entitled to relief because the Attorney-General was not a party, and because the injury to the plaintiff was insignificant; but the learned judge held that neither of these objections could prevail, and that the plaintiffs were entitled to a declaration that the proposed work was unauthorized and to an injunction.

DISTRESS—EXEMPTION—WEARING APPAREL—BEDDING AND TOOLS AND IMPLEMENTS OF TRADE TO THE VALUE OF £5—LAW OF DISTRESS AMENDMENT ACT, 1888 (51-52 VICT. c. 21) s. 4—(R.S.O. *c.* 170, s. 30).

Boyd v. *Bilham* (1909) 1 K.B. 14 is, we believe, a case of first impression as to the construction of 51-52 Vict. c. 21, s. 4. That

section exempts from distress the apparel and bedding of the tenant or his family and the tools and implements of his trade to the value of £5. It was contended by the plaintiff that each class of property to the value of £5 was exempted; but Channell, J., held that the true meaning of the statute was that the collective value of the articles exempted was not to exceed five pounds in all. The wording of R.S.O. ch. 77, s. 2, which controls R.S.O. c. 170, s. 30, would, however, seem to shew that the like construction would not be applicable to the Ontario Act.

WATERWORKS—EXPROPRIATION OF LAND—SPECIAL ADAPTABILITY OF LAND FOR PURPOSE FOR WHICH IT IS TAKEN—METHOD OF VALUATION.

In re Lucas & Chesterfield Gas & Water Board (1909) 1 K.B. 16. The Court of Appeal (Williams, Moulton and Buckley, L.JJ.), on appeal from Bray, J., on a motion against an award as to the value of lands expropriated under a statute for waterworks, holds that although it is proper for the arbitrators in estimating the value, to take into account the contingency of the property being required, and its adaptability, for the purpose of a reservoir, yet they should not take into account that the possibility has been realized by reason of the promoters having obtained statutory powers for the construction of the reservoir on the land in question.

DENTIST — UNREGISTERED PERSON — DESCRIPTION—"SPECIALLY QUALIFIED TO PRACTISE DENTISTRY"—DENTISTS ACT, 1878 (41-42 VICT. C. 33) S. 3—(R.S.O. C. 178, S. 26).

Barnes v. *Brown* (1909) 1 K.B. 38 was a prosecution for practising as a dentist without being registered as such. The defendant had an office in which he carried on the business of a dentist and on the door and windows of his office he had the words, "H. J. Barnes, finest artificial teeth at moderate prices; extractions; advice free, hours 10-7; English and American teeth; painless extractions." It will be noticed that he did not explicitly describe himself as a dentist, and if he had not actually carried on the business of a dentist, the words used might not, in the opinion of Lord Alverstone, have been sufficient to make him liable to the penalties of the Act for carrying on business without being registered. But coupled with the fact that he actually did carry on the business of a dentist, the Divisional Court (Lord

Alverstone, C.J., and Bigham, and Walton, JJ.) held that they imported that he was authorized to practise dentistry and was specially qualified to act as a dentist within the meaning of the Act, and was therefore liable to the penalty. In the view of the Divisional Court the words exhibited on the defendant's windows and door amounted to an intimation to the public that he had special qualifications to extract teeth.

PRACTICE—SECURITY FOR COSTS—ACTION BY TRUSTEES FOR WIFE UNDER SEPARATION DEED—"NOMINAL PLAINTIFFS."

White v. *Butt* (1909) 1 K.B. 50 was an action brought by the trustees for a wife under a separation deed, and the defendant applied for security for costs on the ground that the plaintiffs were merely "nominal plaintiffs" and were without means of paying costs if the action should be unsuccessful. Eve, J., affirmed the order of the Master refusing the application and the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) affirmed his decision, holding that the plaintiffs as trustees were not merely "nominal plaintiffs" within the rule, they not having been constituted trustees merely for the purpose of bringing the action. Their Lordships discuss *Greener* v. *Kahn* (1906) 2 K.B. 374.

TRAMWAY—DUTY OF TRAMWAY TO KEEP TRACKS IN REPAIR—REMOVAL OF SNOW.

In *Acton* v. *London United Tramways* (1909) 1 K.B. 68 the question arose as to how far the defendants, who were bound by statute to keep the street between their tracks in repair, were liable to remove snow from their tracks. Darling and Walton, JJ., held that the duty to "maintain" did not involve a liability to remove snow, unless the road became impassable thereby. The mere fact that the removal of the snow would make the passage over the snow more convenient was held not to be enough to bring the case within the meaning of the statute as to maintenance of the road in good repair.

PROMISSORY NOTE—COMPANY—SIGNATURE BY DIRECTOR—PERSONAL LIABILITY.

In *Chapman* v. *Smethurst* (1909) 1 K.B. 73 a simple question was in issue. The defendant, who was the managing director of a limited company, had signed the promissory note sued on, which was worded, "six months after demand I promise to pay, etc.," "I. H. Smethurst's Laundry & Dye Works, Limited, I. H.

Smethurst, managing director." The point was, had he thereby incurred any personal liability. Channell, J., who tried the action, held that he had and that the wording of the note, "I promise to pay," imported a personal obligation, and there was nothing in the mode of signature to indicate that he was merely acting or signing as an agent on behalf of the company.

BAILMENT—HIRE PURCHASE AGREEMENT—POWER TO OWNER TO TAKE POSSESSION ON BREACH OF AGREEMENT—DEFAULT OF HIRER IN PAYMENT OF RENT—RIGHT OF OWNER TO ARREARS OF RENT, AFTER RE-TAKING POSSESSION.

In *Brooks* v. *Beirnstein* (1909) 1 K.B. 98. The plaintiff was the owner of goods let to the defendant under a hire agreement with option to purchase. The agreement was subject to a condition that if the defendant made default in payment of rent, for the goods, the plaintiff might re-take possession. The defendant fell into arrear for rent and the plaintiff re-took possession; the present action was then brought to recover the arrears of rent. The defendant contended that by re-taking possession the plaintiff had in effect abandoned his right to recover the arrears of rent, but the Divisional Court (Bigham and Walton, JJ.), overruling a County Court judge, held that that contention was invalid, and that the plaintiff was entitled to succeed.

Correspondence.

COSTS ON DISTRESSES FOR RENT.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—You would confer a boon on the profession generally if you could secure some authoritative pronouncement upon the following questions.

1. What are the proper charges to be made by a solicitor when a claim of, say, $100 to $600, consisting of arrears on a mortgage, is placed in his hands for collection by distress.

I think it will be found that scarcely any two solicitors have the same ideas upon the subject, and probably all of them will admit that there is no definite rule to guide one, and that the matter has to be settled by a kind of rule of thumb in each particular case.

The question seems to resolve itself into two heads. First, should the remuneration depend in any sense upon the amount collected? In other words should a commission on the amount collected be charged to cover all the solicitor's services? And secondly, if not, what should be the form of the bill of costs?

As an assistance to the discussion of the matter, the writer suggests that the bill of costs might be found to assume somewhat the following form. We will assume that the mortgage covers land in an outside county. Let us suppose also that part of the arrears consists of principal and part of interest, and that the mortgage contains an attornment clause reserving a rental equivalent to, and payable on the days for payment of, the interest, and that the mortgage also contains a clause authorizing distraint for principal as well as interest, so that part of the moneys distrained for (the interest) would be distrainable both under the attornment and under the license to distrain, and part (the principal) under the license to distrain only.

In settling any scale of charges on this subject, it would of course, be necessary to bear in mind the responsibility cast upon the solicitor by reason of the highly technical, not to say treacherous, nature of this extraordinary remedy, and the fact that a comparatively small misstep in the procedure may, and very frequently does, result in an action for serious damages for illegal distress. It should also be borne in mind that it becomes necessary at the outset for the solicitor to consider the situation carefully for the purpose of determining what rights of distress exist and of framing the appropriate warrant.

Instructions, $3; drawing distress warrant and engrossing necessary copies and attending, $2; drawing paper of instructions to bailiff (setting out the main requirements of the law to be observed on executing the distress) and engrossing, $1; drawing other forms (if any) for use by bailiff, 20 cents p.f.; engrossing same, 10 cents p.f.; letter to agent at nearest centre to property, with warrant and instruction paper, to select suitable bailiff and hand papers to him, 50 cents; letter to bailiff with instructions to seize, etc. (to be enclosed in letter to agent to be

handed by him to bailiff) 50 cents; Attg. on receipt of $—— from bailiff and letter in reply, $1; Attg. clients with money and closing case, $1.

Another case of a somewhat similar nature is in a similar position, namely: Suppose a client hand a claim of any amount, say from $100 to $10,000 to a solicitor with instructions to collect the same by action. The solicitor, after certain attendances and one or more letters threatening action eventually collects the amount without actually issuing a writ. On what basis should the charges of the solicitor be made? Should he merely charge instructions, and one or two letters as the case may be or should he make his charge with reference to the amount collected?

It may be helpful to some of your readers to publish precautions and instructions to be observed by bailiff when distraining, which I have found useful in practice.

"When making the seizure the bailiff will adopt the same method of procedure as when seizing under an ordinary landlord's warrant for rent.

"He should bear in mind that as soon as the distress is made notice thereof and of the cause of such taking should be left at the chief house or most notorious place on the premises. Then, if the tenant does not, within five days after such distress made and such notice given, replevy the same, at the expiration of such five days the bailiff may cause the goods and chattels to be appraised by two sworn appraisers, and after such appraisement, may lawfully sell the goods for the best price that can be got.

"It is customary with bailiffs to advertise the goods by a few printed placards or posters of bailiff's sale; and it must be remembered that there must be five clear days between the day of distress and the day of sale.

"It is also necessary that the bailiff should give notice of the place where the goods and chattels, if removed, are lodged to the tenant or leave same at his last place of abode within one week. The notice should be given as soon as the distress is levied and should be accompanied by an inventory of the goods distrained. It should set forth the amount of rent distrained for and the particulars of the goods taken.

"As to costs and expenses of distress, references should be made to R.S.O. 1897, c. 75.

"The bailiff should see that a copy of the demand and all costs and charges of distress, signed by him, is given to the person on whose goods the distress is levied.

"After the expiration of five days from the day of the seizure, the good should be removed from the premises and impounded unless the tenant agrees to their remaining on the premises, in which case, the safest course is to take an agreement in writing from him to that effect.

"Should you think it best to remove the goods from the premises, it is necessary to give notice to the tenant of the place where the same are lodged and to leave such notice at his house within one week.

"The inventory above mentioned should be left with the tenant at the time the distress is made."

If you can do anything to give the profession a rule for their guidance in these two cases, I think, as I say, that you will confer a boon for which the great majority of them will be very grateful. Possibly some of your readers may have a word to say on the subject.

Yours truly,

LEX.

[For so technical and treacherous a matter as distresses under mortgage the suggested charges seem altogether inadequate. We think that in both cases, something in the nature of a reasonable charge on a commission basis graduated according to the amount collected would be the proper basis of charge. There is a good deal of responsibility attaching to a matter of this kind:—The question of the right of distress, whether a tenancy has validly been created by the attornment, and if so, whether the present occupant, who may be an assign of the original mortgagor, is liable under the tenancy; whether the distress should be made as for rent under the demise, or simply under the license to distrain contained in the mortgage, and the additional point relating to the strict observance of the many technicalities required in the legal execution of a distress.

We should be glad to hear from some of our readers on the practical subject above discussed. An interchange of views between practitioners is most desirable, and our columns are open to them for that purpose.—EDITOR, *C.L.J.*]

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P.] RE ROBERTSON. [Jan. 7.

Infant—Legacy—Payment at age of 18*—Payment into court—Payment out—Discharge—Official guardian.*

Notwithstanding a direction in a will that a legacy is to be paid to a legatee when she reaches the age of 18, the executor is not bound, in the absence of a provision that the infant's discharge shall be sufficient, to pay the legacy to her upon her attaining that age; but there is no reason for applying the rule where the legacy is in the hands of the court, no discharge being in that case required; and in a proper case an order will be made for payment out to the infant upon her attaining that age, with the privity of the official guardian.

Harcourt, K.C., for the executors.

Clute, J.] RE WATTERS. [Jan. 29.

Will—Revocation of by second marriage—Insurance money.

A policy of insurance was affected on the life of the deceased at the time a will was made under which the insurance money was claimed. Subsequently the deceased married again, the will being therefore revoked under sec. 20 of the Wills Act.

Held, that under such circumstances a marriage has the same effect in revoking a will and annulling a declaration of trust therein as if such declaration had been revoked under a subsequent will.

Grayson Smith, *C. W. Kerr* and *C. A. Moss*, for various parties.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] BANK OF LIVERPOOL *v.* HIGGINS. [Dec. 19, 1908.

Judgment recorded to bind lands—Effect of sale and release of portion of lands—Right of vendee to apportionment.

A judgment for debt and costs was registered to bind the lands of H. on Feb. 11, 1901. Then followed sales of different lots, the first by H. to S., and others by the trustee and cestui que trust to W. and P. in the order named. The last two conveyances contained covenants against encumbrances and the last purchaser discovered the judgment. B. did not register his conveyance until after the purchase by W. and P. An application for leave to issue execution under the statute, owing to change of parties and death, was opposed by B. and the order applied for having passed.

Held, allowing the appeal with costs, that P was entitled to have the judgment distributed over all the lots according to their value, and that he was entitled to contribution and that the creditor must lose the proportion which would have been borne by the lots conveyed to W. and P. and released by him from the effect of the judgment.

Roscoe, K.C., for appellant. *Robertson* and *Savary*, for respondent.

Full Court.] THE KING *v.* MACKASEY. [Dec. 19, 1908.

Intoxicating liquors—Effect of resolution of council granting license—Ministerial officer—Where license illegally granted.

C. D. made application for a license to sell intoxicating liquor in the city of Halifax under the provisions of the Liquor License Act, for the year 1908-1909. The application was investigated by the license inspector, and upon his report the city council granted the license applied for. Defendant, as agent of C. D., tendered the amount of the license fee and bond, but the inspector declined to deliver the license and caused defendant to be summoned and convicted for selling without license.

Held, 1. After the city council had authorized the issue of the license the signing of the same by the mayor and the inspector was a mere ministerial act, and that it did not lie with them, or either of them, to defeat the will of the council by refusing to sign or deliver the license, and that there was error in the conviction under the facts shewn.

2. Where the city council grants a license illegally, express power for the cancellation of the license is contained in the statute, but there is nothing in the scope of the statute to justify the officer entrusted with the formal duty of carrying out the council's instructions in saying that he has any control as to the question of license or no license.

Tobin, for defendant. *O'Hearn,* for informant.

Province of Manitoba.

KING'S BENCH.

Macdonald, J.] GRAHAM *v.* DREMEN. [Jan. 11.

Specific performance—Damages in lieu of—Implied warranty of title to land.

The plaintiff sold and conveyed to the defendant certain property and accepted an assignment by the defendant to him of an agreement for the purchase of certain lots from one Sesslu as payment of $450 on account of the purchase money of the property sold to the defendant. It turned out that the agreement under which defendant held the lots had been cancelled prior to the assignment by him and that he then no longer had any interest in the lots. The trial judge found, however, that the defendant had acted in perfect innocence and with the honest belief that he was still interested in the lands, he being a foreigner with a lack of understanding of the English language, also that the defendant had not expressly guaranteed the title to the lots or assured the plaintiff that the title was all right with any clear understanding of the meaning of what he was saying in answer to the plaintiff's questions.

Held, that, nevertheless, he had impliedly represented that he had the equity or interest in the lots which he assigned, and

that, as he had title and possession of the property sold to him by the plaintiff, the latter was entitled to recover the $450 as damages in lieu of specific performance.

Robinson and *Bowles*, for plaintiff. *Burbidge*, for defendant.

PONTON *v.* CITY OF WINNIPEG

In the note of this case on p. 77, line 10, from the foot, for "P. then tendered the money," read, "P. had tendered the money before the resolution was rescinded."

Province of British Columbia.

SUPREME COURT.

Full Court.] BROWN *v.* BROWN. [Jan. 20.

Divorce—Appeal—Jurisdiction of full court.

The full court of the Supreme Court of British Columbia possesses no jurisdiction to hear appeals, final or interlocutory, in divorce matters. See *Scott* v. *Scott* (1891) 4 B.C. 361.

Davis, K.C., for appellant. *Bodwell*, K.C., and *Killam*, for *respondent*.

Full Court.] ANGUS *v.* HEINZE. [Jan. 22.

Partition—Lands subject to agreement to convey—Agreement—Construction of—Taxation—Evasion of—Exemption from—Railway subsidy lands—B.C. Stat., 1896, *c.* 8.

There is a substantial distinction between a conveyance and an agreement to convey. Where, therefore, an agreement provided for a formal conveyance by one party to the other party of the latter's moiety, upon the latter's request,

Held, that provisions respecting partition of the property did not come into effect until the execution of such conveyance.

Held, also, that the question that the clause providing for the formal conveyance was merely a devise to escape taxation could be raised only in a proceeding by the Crown.

Bowser, K.C., and *Reid*, K.C., for appellants. *Pugh*, and *Marshall*, for respondents.

Full Court.] BARRY *v.* DESROSIERS. [Jan. 27.

Trespass—Encroachment—Proof of location of city lot—Authority of surveyor to determine.

The posts planted at the time of the survey of a city lot having been destroyed by fire,

Held, on appeal, that a surveyor could not determine the location of the lot by dividing up an apparent shortage among all the lots in the block.

Macdonell, for plaintiff, appellant. *Martin*, K.C., and *Craig*, for defendant, respondent.

Full Court.] GORDON *v.* HORNE. [Jan. 29.

Partnership.

Plaintiff and the two defendants Holland were real estate agents in partnership, but entered into certain investments on their own account (aside from the agency business) in the purchase of three lots, on account of which they paid down $294. Being unable to meet the succeeding calls when due, they invited defendant Horne into the transaction, he to pay 85% of the purchase money, and the remaining three to contribute 15%, the profits to be divided. Horne took over the agreements to purchase and eventually received a conveyance to him of the lots. There was a verbal agreement that if a sale could be effected before the second instalment of the purchase money became due, and if that sale netted a profit of over 15%, the old partnership should share equally with Horne in the profits. This sale was not made, but four months after the due date of the second instalment, Horne sold a half interest in the property.

Held, on appeal, per HUNTER, C.J., and CLEMENT, J., that Horne was a trustee for the partnership consisting of the plaintiff, himself and his two co-defendants.

Per IRVING, J.—That Horne was not called upon to account until he had been reimbursed the money he had put into the transaction.

A. D. Taylor, K.C., for plaintiff, appellant. *W. S. Deacon*, for defendants, respondents.

COUNTY COURT—VANCOUVER.

Grant, Co.J.] [Jan. 11.

IN RE NATURALIZATION OF FUKUICHI AHO.

Naturalization proceedings—Sufficiency of evidence—Right of court to investigate.

Held, that under the Naturalization Act, R.S.C. c. 77, the court has jurisdiction to investigate the grounds on which the notary, etc., grants an applicant for naturalization the certificate of fitness in form B; and if deemed insufficient, the court can require further evidence to be adduced. Before the official grants the certificate he must have before him the evidence of "two creditable natural-born Canadian subjects" as to residence, character, and intention of applicant, which evidence must be taken down in writing and filed in court.

Book Reviews.

Seaborne's Concise Manual of the law relating to Vendors and Purchasers of real property. By W. ARNOLD JOLLY, M.A., Lincoln's Inn, Barrister-at-law. 7th edition. 1908. London: Butterworth & Co., 11 and 12 Bell Yard, Temple Bar.

There is not much change in this work from the previous edition. Some new decisions are noted and a reference made to the Married Woman's Act of 1907. The author has also embodied fresh matter connected with the law as to restrictive covenants, constructive notice, the enforcement of specific performance and three recent authorities which tend to curtail the exercise by the vendor of his right of rescission.

Mews' Annual Digest for 1908. London: Sweet & Maxwell, Limited, 3 Chancery Lane; Stevens & Sons, Limited, 119 and 120 Chancery Lane, Law Publishers. 1909.

It needs not to say much of this book. It is the well-known compendium of the reported decisions of the Superior Courts in England with a selection from Scottish and Irish decisions together with a collection of the cases followed, distinguished, explained, commented on, over-ruled or questioned. A most useful matter for busy practitioners.

Lawyers' Reports Annotated, New Series, Book 15. BURDETT, A. RICH, HENRY P. FARNHAM, Editors. 1908. Rochester, N.Y.: The Lawyers' Co-operative Publishing Co.

This series is not only a most excellent collection of cases (and selection is the need of the day in the United States where decisions are so many), but it is also continuous volumes of texts books on every conceivable subject by writers of eminence and long experience. We cannot commend it too highly to our readers.

United States Decisions.

The owner of a cow at large in the public highway is held, in *Marsh* v. *Koons*, 78 Ohio St. 68, 84 N.E. 599, 16 L.R.A. (N.S.) 647, not to be liable in damages to a person injured by being thrown from her vehicle on account of her horse taking fright at the cow getting up when she attempted to drive around it.

Absence of a headlight on a dark night is held, in *Morrow* v. *Southern R. Co.* (N.C.) 61 S.E. 621, 16 L.R.A. (N.S.) 642, not to render negligent per se a failure to give signals for highway crossings with respect to the rights of a person walking on the track, near the crossing; although if he was where people are accustomed to walk, absence of headlight and signals may be considered by the jury as some evidence that the train was not carefully operated or proper warning given of its approach.

The liability of a merchant for negligent injuries to a pedestrian, inflicted by a licensed expressman with whom he contracted for the delivery of goods sold by him, at a certain price per week, is denied in *Burns* v. *Michigan Paint Co.*, 152 Mich. 613, 116 N.W. 182, 16 L.R.A.(N.S.) 816, where the latter was to exercise his own discretion as to the manner of delivery, and was at liberty to do similar work for others, although, when actually working for him, the merchant's sign was placed on the wagon.

The Living Age, Boston, U.S.A.—This excellent serial comes with unfailing regularity. Its selection of contents has been more markedly interesting lately even than before. Those of our readers who do not take it, would do well to examine it.