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PRINCIPLES OF CRIMINAL ANTHROPOLOGY.

This is an important and interesting subject. It has been a study for many years of Mr. Arthur Macdonald, of Washington, D.C., Honorary President of the Third International Congress of Criminal Anthropology of Europe. Anything he says about it is worthy of attention. He has recently brought to the notice of the public his thoughts on the subject and we now give to our readers his summary of the leading principles of criminal anthropology, or what might be called its platform:—

"Degrees of criminality should be estimated according to detriment to the community. From this point of view, international crime, or war, is by far the greatest of all crimes. History is mainly history of the abnormal, especially war or international crime, and one of the objects of criminal anthropology is to lessen and prevent war. Montaigne says: "It is more barbarous to kill a live man, than to roast and eat a dead one."

The greatest of all studies is man, which is based upon the individual, the unit of the social organism. If the study of civilized man is to become a science, it must depend upon investigation of large numbers of individuals, and the method should be the same for all classes, if we are to distinguish between the normal and abnormal.

The best method of study for criminal anthropology is that of the laboratory in connection with sociological data.

The thorough investigation of *one* human being with the means at the disposal of science, would make a volume. All facts about human beings are important from the scientific point of view, whether those facts be immediately available or not.

All that is diseased is abnormal, but not all that is abnormal is diseased; thus a hand with six fingers is abnormal, but not necessarily diseased.

When the normal acts in an unsuitable way, or at the wrong time or place, it may become abnormal. The fundamental conception of the abnormal is *excess* of the normal.

The difference in degree between the normal and abnormal can be so great as to result in a difference of kind: just as when two fluids reach a certain amount, a precipitate is formed which is very different from the ingredients from which it was deposited.

Abnormal man may be abnormal in the right direction, as genius man, talented man or statesman; or in the wrong direction, as criminal, pauper, or defective man. It is all *man*, and the study of these different classes might be called the anthropology of the living as distinguished from prehistoric anthropology.

Of all forms of abnormal humanity crime is nearest the normal; the study of criminals, therefore, is mainly the study of normal men, and knowledge thus gained may be generally applicable to the community as a whole. Therefore,

The prison and reformatory can serve as a humanitarian laboratory for the benefit of society. As the surroundings of the inmates are similar, conditions for scientific research are favourable.

As in machinery we first repair the parts out of order, so in society we first study the criminal, pauper, insane, feeble minded and other defectives, all of whom constitute about one per cent. of the community. But

Why should we allow those abnormals who constitute one per cent. of society to cause so much trouble and expense to the remaining ninety-nine per cent.? It is mainly because of neglecting the young, where study of man should begin. For

There is little hope of making the world better, if we do not seek the causes of social evils at their foundation. No evil can be *permanently* lessened without first finding its causes. There is probably no *one* cause of anything, but a chain of causes.

Drunkenness is not only one of the main causes of crime, but

one of the greatest enemies of humanity, because it brings suffering upon so many innocent people.

We can not be tempted to do wrong unless there is something in us to be tempted; that something is part of ourselves as distinguished from our environment; therefore, the comprehensive study of man requires investigation of both individual and his surroundings, for the environment may be abnormal rather than the man.

Cranks or mattoids who attempt the lives of prominent persons are very important solely on account of the enormous injury they can do to society. They, therefore, should be studied most thoroughly. Just as the physician studies his patient in order to treat him properly, so one should study the criminal.

The exhaustive investigation of a single criminal illustrates just how and by what steps both environment and inward nature lead to criminal acts.

Criminals, paupers and other defectives are social bacilli which require as thorough scientific investigation as the bacilli of physical disease.

No one should be held responsible for the first fifteen years of life, nor is any one accountable for the tendencies inherited from ancestors. As the die is usually cast before adult life arrives, responsibility is most difficult to determine, and is often a minimum quantity. Therefore, in judging human beings we should emphasize their excellencies rather than defects. As has been said, to know all is to forgive all; yet

Every person dangerous to property or life, whether insane criminal or defective, should be confined, but not necessarily punished.

The determinate sentence permits prisoners to be released, who are morally certain to return to crime. The indeterminate sentence affords the prisoner an opportunity to reform without exposing society to unnecessary dangers; but society has no right to permit prisoners to be released who will probably return to crime; for

Where it is a question between justice to the individual

or justice to the community, the community should have the benefit of the doubt. The prison should be a reformatory and the reformatory a school; the object of both should be to teach good mental, moral and physical habits; both should be distinctly *educational.* There should be a minimum temptation to do wrong and a maximum encouragement to do right.

Institutions for reforming human beings should have the conditions as similar as possible to surroundings outside, so that when inmates are released they may adapt themselves more easily to society and not become misfits.

Every one has the right to a proper bringing up; and the time has come when we should study a child with as much exactness as we investigate the chemical elements in a stone or measure the mountains on the moon.

One purpose of criminal anthropology is through knowledge gained by scientific study to protect the weak, especially the young *in advance,* before they have become tainted and fallen.

The treatment of young criminals should be the prototype for treatment of adults, and procedures against them should have as little publicity as possible.

Publication in newspapers of criminal details is an evil to society on account of the power of imitation. In addition it makes the criminal proud of his record, develops the morbid curiosity of the people, and it is especially the weak who are affected.

Place confidence in the so-called bad boy, awaken his ambition and teach him to do right for right's sake. Put the criminal upon his honour. A prisoner once said, "If they will not believe me when I tell the truth, I might as well tell lies."

Nothing will hinder development of the young more than the prospect of having plenty of money and no necessity to work. Idleness often leads to crime.

Increase of intellectual development is not necessarily connected with increase of morality, and education which trains the mind at the expense of the will is a questionable education.

To any observer of life, the impracticability of pessimism and

the advantages of optimism are evident. The longer we live, the more we appreciate the average honest man, as compared with the dishonest talented man.

Act as thou wouldst act, if all the consequences of thy act could be realized at the moment thou actest."

LAW REPORTING AND DIGESTING.

Through the courtesy of Mr. George Whitelock, Secretary of the American Bar Association, we have received the program presented at their meeting held in October last at the City of Washington. He sends also copies of various reports which then came up for consideration. They are all of interest. The one especially so to us at the present time is the report of the Committee on Law Reporting and Digesting. In a small way the same difficulties meet us here as confront the profession in the United States in this connection. The decisions of the Courts in the various provinces of the Dominion and of our Supreme Court require attention at the hands of every careful practitioner and counsel, and the number of these cases increases year by year. The series of reports known as the "Dominion Law Reports" meets present needs so far as Canada is concerned; but the volume of cases and the labour of reading and noting them becomes greater day by day and the profession must eventually realise the necessity of condensation and selection.

For light and help in this matter we cannot do better than reproduce the report presented to the American Bar Association giving the result of the thought and research of the eminent men who had this important matter in charge. It reads as follows:—

"For the American Bar the problem of reporting and digesting is a peculiarly difficult one. There is no other Bar that has to keep in touch with the decisions of so many courts. Neither the courts nor the lawyers of one state can safely ignore the course of legal decisions in other states of the union. The enterprise that has brought about the publication of the decisions

of the courts of all the states and of the federal courts in every district in one series of volumes has of itself, by increasing the accessibility, increased the need of access to the reports of the decisions of all th. states, and with the growth of the country and the lapse of time, the volume of the reported cases has become almost intolerable. There is dissatisfaction in the profession because of this burden, and this dissatisfaction has often been expressed in the reports of this committee. While recognizing the difficulties inherent in the situation, the committee has insisted upon the necessity of lessening the rate of increase in the volume of the reports, and that this may be done by discrimination in the publication of opinions and by shortening the opinions themselves. This Association cannot control either the courts or the publishers, but it can at least let it be known whether or not it is in favour of the existing plan of publishing all the opinions of the higher courts or of publishing only those which, in the judgment of competent reporters, are of real value in the statement and development of the law, and it may also be respectfully submitted to the courts, that in view of the increasing volume of reported cases, it is desirable that opinions that are to be reported should be as brief as is consistent with a clear statement of the facts and the legal principles applied to them and an expression of the controlling reasons for the decision. Discrimination and exclusion are the more important in the series of reports which is to serve the Bar of the whole country, and it is in this series that there is the least selection and that the avowed purpose is to publish all cases. So long as the law is built upon the authority of decided cases there is need for the publication of all the cases in which the law is developed and by which its principles are applied to new conditions, but there is no need, at least in a series intended for general use throughout the country, for reporting decisions that deal only with questions of fact or in which familiar principles are applied to ordinary states of fact. The citation of such cases is not helpful to the courts, nor does it tend to the thoughtful study of the law. The principles of law have been well set-

tled. They have been stated in ruling cases, in text books of recognized authority and of late in cyclopedias with references to the cases in which they have been declared and applied. The profession could well do without reports of any cases which do not in some way modify these statements of legal principles or furnish some substantial new illustration of the way in which they may be applied. It is not easy for the reporters to make the selection, but it can be done by good reporters and is worth the effort. It may seem to be against their interest to shorten their reports, but it is not, for if they do not make the effort, the system will break down with its own weight. Much can be done by the judges to avoid undue increase in the volume of the reports. On this point we may quote the language of a learned judge in New Jersey, in a recent address to the Lawyers' Club of Newark. Speaking of the American courts in general he says:—

"'The opinion of the judges are apt to read like lawyers' briefs or essays. They often read as if the judge had just looked up the law and thought it necessary to cite authorities for the most firmly settled propositions. The English opinions read as if the judge knew the existing state of decisions and assumed that everyone else did, and that it was his business to shew the necessary development from established principles and their application to the particular case. Their opinions are shorter and more directly to the point, based more upon the reason of the thing and rely less upon the multitude of precedents. We encumber our reports with the citations of case after case, repeating the decision of legal principles about which nobody has any doubt, with the risk of misleading counsel by slight variations in the forms of expression, and wasting time by the cumulative citation of cases where one authoritative case that settles the law is quite enough.'

'There is an increasing tendency to uniformity in the statutes of the various states. A comparison of the recent legislation of all the states will shew that to a very large extent,

statutes enacted in one state have been substantially adopted in the legislature of others, and this not merely in those matters in which special efforts have been made to bring about uniformity in legislation. The unity of the country in social and business affairs makes it necessary that business men as well as lawyers having anything more than a local practice, should be able readily to inform themselves of the laws of many states on a great number of subjects. There is already a tendency to uniformity of classification in the preparation of digests, and this tendency should be stimulated by the approval of this Association and accelerated by the conscious and well-directed efforts of editors and publishers and legislative commissions. Effective action on these matters cannot be taken without co-operation among the several states, and if the Association approves of and is desirous of taking effective measures for retarding the increase of the volume of the reports and of bringing about uniformity of classification and plan in the digests of the statutes of the several states, your committee would recommend that a special committee be appointed for the purpose, consisting of one member of each state."

The committee offered the following resolutions:

"1. That the increasing volume of the reported cases is a burden for which some relief must be found both in the selection of the opinions that are reported and in greater brevity in the opinions themselves.

"2. That it is desirable that there be substantial uniformity of plan and classification in digests of the statutes of the various states.

"3. That a committee be appointed consisting of one member from each state to consider these matters, and to confer with members of the Bar and with judges and reporters and to take such action as they may think best to bring about the desired results."

AMERICAN BAR ASSOCIATION.

The annual meeting of the American Bar Association held this year at Washington, D.C., on the 20th, 21st, and 22nd October, was, like that of last year in Montreal, notable for the distinguished men who took part in the proceedings. It was international in character also, as Rt. Hon. Sir Charles Fitzpatrick, P.C., G.C.M.G., Chief Justice of Canada, delivered one of the principal addresses. The Canadian Bar was represented by a greater number of delegates than had ever attended any meeting of the Association with, of course, the exception of the Montreal meeting of 1913. The Provincial Bar Associations of Alberta, Saskatchewan, Manitoba, Ontario and Quebec were represented as well as the Canadian Bar Association, among those in attendance being, Hon. Senator Lougheed, K.C., John C. F. Bown, K.C., Hon. C. W. Cross, Mr. O. M. Biggar (Alberta), N. McKenzie, K.C. (Saskatchewan), Mr. Theodore A. Hunt (Manitoba), F. M. Field, K.C., President of the Ontario Bar Association and Mr. Edward Gillis (Ontario), G. Desaulniers, K.C., and E. Fabre Surveyer, K.C. (Quebec). Sir James Aikins, K.C., M.P., President Canadian Bar Association, represented the Dominion Bar.

The proceedings began with a reception by the President of the United States, who welcomed the members and guests in his usual scholarly and felicitous manner.

His theme was "International Law," in the course of which he said:—

"My hope is that being stirred to the depths by the extraordinary circumstances of the times, we may recover something of a renewal of that vision of the law with which man may be supposed to have started out in the old days of the oracles, who communed with the intimations of divinity."

Ex-President Taft followed President Wilson by his address as President of the American Bar Association, touching upon the neutrality of the United States. He said in part:

"We are the principal nation not so related to the war that

both sides may really regard us as disinterested friends," said Mr. Taft, "It is our highest duty, and President Wilson makes plain his appreciation of this, not to destroy this great leverage for successful mediation, by ill-advised and premature judgments. We must hold our tongues to be useful to mankind."

Declaring that this nation should profit by charges and counter charges of treaty violations being made in Europe, Mr. Taft said: "Now, is the time to put ourselves in a position where we can fulfill to the letter every treaty we have entered into."

At the evening session on Tuesday, 20th October, Hon. Senator Elihu Root of New York, delivered a notable address and was honoured by the presence on the platform of Chief Justice White and the Associate Justices of the Supreme Court of the United States who gave a reception at the conclusion of Senator Root's address, in the Pan-American Union Building, justly claimed to be one of the world's most beautiful buildings.

The *Washington Herald* makes the following reference to these proceedings:—

"Senator Elihu Root, of New York, made a forceful attack upon methods of making laws in the United States and upon methods of administering justice in the courts in an address before the American Bar Association in Memorial Continental Hall last night. He thrilled his auditors with a plea to barristers and jurists to lend their influence toward simplification of law-making and law-administering methods that the people may gain the full benefit of the legislative and judicial branches of their government.

"William Howard Taft, President of the Association, introduced Senator Root 'not only as a great Secretary of War, a great Secretary of State, and a great Senator, but as the leader of the American Bar.' Senator Root spoke on the subject, 'The Layman's Criticism of the Lawyer,' discarding oratorical finery for the cool analytical argument of the Bar in driving home the points of his address. The meeting was attended by the members of the Supreme Court of the United States and the

spacious auditorium was filled with members of the Association and their ladies. After the meeting the members of the Supreme Court gave a reception in the building of the Pan-American Union. The reception marked the close of the first day of the Association convention. The convention was opened at a meeting in Memorial Continental Hall in the morning with former President Taft presiding and President Wilson as the chief speaker. The opening session was attended by the Chief Justice and Associate Justices of the Supreme Court, members of the Senate and House, representatives of the Diplomatic Corps, and, in fact, of all official Washington."

The attractive personality of the latest appointee to the United States Supreme Court, Mr. Justice McReynolds, drew a large audience to the meeting of the judicial section. His remarks were, in part, as follows:—

"When I accepted the invitation to address this body I was Attorney-General, and though since then I have been appointed to the bench, I have decided not to change my determination to speak to you. There are just two things which I want to suggest and they are: (1) Are our judges making themselves a sufficiently affirmative force? (2) Are our judges giving sufficient attention to public opinion? I am firmly persuaded that the highest duty of a judge is in exercising an affirmative force in putting into execution the will of the people. I believe a judge should be the most effective, positive and affirmative force in putting into execution the rule laid down by the legislative branch of the government. When judges fail to exercise this highest duty, the executive arm of the government is paralyzed and the will of the people negatived."

The section of Legal Education opened with an address characterized by erudition and elegance of diction delivered by Mr. Charles A. Boston of the New York Bar, President of that section.

During the interval for luncheon, the Canadians were assembled at the headquarters in the New Willard Hotel by the

two well-known Washington lawyers delegated to look after the guests of the Association, namely, Mr. Commissioner H. G. Macfarland and Mr. George Xavier McLanahan. These gentlemen proved charming hosts and an added pleasure was the company of Mrs. Macfarland during a two hours motor drive about Washington and environs and on the Potomac trip to Mount Vernon. Through the courtesy of the Washingtonians, the Canadians were extended the privileges of The Army and Navy Club, The Chevy Chase Club, The University Club, The Metropolitan Club, Cosmos Club, and National Press Club of Washington. At the luncheon the Canadians were greeted by the excellent hotel orchestra with Britain's Marching Song, "It's a long, long way to Tipperary." Applause and joining in the chorus by those familiar with the words drew an encore from the orchestra with drum effect that must have made every Briton thoroughly at home.

A reception by Sir Cecil Spring-Rice, British Ambassador to Washington, to the Canadians on the morning of the 21st was an interesting and much appreciated function not scheduled on the programme of the Association.

After leaving the Embassy, the Canadians were taken in automobiles from the New Willard Hotel to the Potomac Steamboat Landing where all became the guests of the lawyers of the District of Columbia for the excursion to Mount Vernon, the home of Washington, "The Father of His Country." Over a thousand ladies and gentlemen were of the party, and as each walked down the gang-plank, one of the Committee presented to each man a carnation and to each lady an American Beauty rose. Luncheon was served on the steamboat en route. Arriving at Mt. Vernon Landing several miles up the river, headed by President Taft, followed by the Canadian delegation, the party disembarked and proceeded first to a point in the grounds where an oak tree was planted to commemorate the occasion by Hon. Mr. Taft, who responded in a happy way to the exceedingly eloquent address of welcome given by ex-Governor Montague of Virginia, to whom the Canadians were presented. Both

speakers recalled interesting and characteristic incidents in the career of Washington and Mr. Taft, notwithstanding the heat of the day, handled the spade with such energy as to evoke applause and laughter. The great party later assembled in front of the Washington Homestead where a capital photograph was taken, Mr. Taft being the central figure and the Canadians gathered round about him. A pleasant hour was spent wandering through the old colonial mansion and about the lawns and gardens kept up, it is said, just as in Washington's time, and then a re-assembling for the return trip.

That evening in Memorial Hall, Sir Charles Fitzpatrick delivered the principal address of the meeting; his subject being "The Constitution of Canada" This afforded Sir Charles an opportunity of declaring, as he did with emphasis—not once but thrice—that Canada in this crisis in the affairs of the British Empire would contribute her last dollar, and, if need be, give her last man in behalf of the Empire. This sentiment was loudly applauded by the Canadians present and greeted with generous applause in all parts of the magnificent auditorium. Later that evening the hotel orchestra greeted the guests in Peacock Alley several times with "It's a long way to Tipperary," receiving well merited applause from those to whom it appealed.

Sir Charles Fitzpatrick is reported (in part) as follows by the *Washington Herald*:—

"The Dominion of Canada will spend not only its last dollar but will sacrifice its last man in the cause of England in the European war. This wonderful loyalty was born in the spirit that moves the machinery of the British Empire.

Addressing William Howard Taft, who presided as president of the Association, the Chief Justice of the United States, and Associate Justices of the Supreme Court and an assemblage of diplomats, members of Congress and jurists and barristers from all parts of the land, Sir Charles awakened salvos of applause when he admitted that the Empire's philosophy of politics may be wrong and its machinery of government faulty but

asserted that the spirit which is the foundation of government makes men glad to die in England's defence. He said:—

"'The German government, which in recent years has made a special effort to further colonial expansion, apparently has not discovered that there can be no colonial enterprise where the colonist is checked at every turn by official limitations,' declared Sir Charles. 'This may account for the fact that the German emigrant to-day selects the United States, Canada, or Australia as a field for his enterprise, rather than the German colonies in South Africa, where freedom to work out his career is not yet permitted.'

With 'The Constitution of Canada' as his subject, Sir Charles evoked applause by quoting from an editorial: 'There is not at the present moment any more effective institution in the world of political fabrics than the British Empire. Whatever its machinery lacks appears to be supplied by its spirit. The defects of its body are made up for by the unity of this spirit.'

"'The fact cannot be gainsaid that England, who does not begin to be as logical as Germany or as systematic as France in matters of government, has nevertheless the knack of making men step out of their own free will to die in her defence,' declared Sir Charles. 'She has the gift of keeping alive, across tumbling seas, round half a world, the undying bond that unites the heart to home. She has shewn herself indifferent to the possession of the taxing power over her colonies—but what matters it?

"'Those colonies willingly tax themselves to send her warships, and their sons seize their rifles to go to her aid. She has the wisdom so to train and guide the swarthy children of alien races, and even the foes of yesteryear, that they put their living bodies between England and England's enemies. She has a fearfully muddled theory of government, but her practice of government lays hold on the deepest things in the soul of man.

"'As we contemplate this wonder of an empire, which is an empire of the spirit, an empire whose philosophy of politics is

all wrong, but for which the costliest things within the gift of man are poured out without stint, we are moved to wonder whether this is a prophecy of the future. Will the states of coming days make more of the spirit and less of the machine? Will they reck less of constitutions and bills of rights and fabrics of government and more of the invisible things which touch the soul?''

This notable address, according to a press despatch from Washington, is likely to be issued as a public document by the United States Senate.

The concluding function was the banquet on Thursday evening in honour of the Chief Justice and Associate Justices of the Supreme Court, at which Hon. W. H. Taft presided. Over a thousand sat down at the tables, said to be the largest number ever assembled at a banquet in Washington. Other guests, in addition to those of the Canadians who stayed for this function, were the A.B.C. Ambassadors, who were guests of the Dominion of Canada for several weeks at Niagara Falls, during the Mexican Arbitration, and the male relatives of former Chief Justices of the United States. One of these gentlemen was Mr. Burwell K. Marshall, of Louisville, Kentucky, who spoke in laudatory terms of Sir Charles Fitzpatrick's address, and Colonel William Jay, counsellor at law of New York City, the great-grandson of the celebrated John Jay, the first Chief Justice of the United States who negotiated the Jay Treaty with England. Hon. Mr. Justice Riddell, in one of his happy addresses, makes mention of John Jay and this Treaty, pointing out that therein settlement of international disputes by arbitration is first proposed and that this treaty constitutes Chief Justice Jay's chief claim to fame notwithstanding the fact that he was burned in effigy on his return home and lost the chance of becoming President because the Treaty was thought too favourable to England. Both the descendants of the former Chief Justices Jay and Marshall spoke well, Colonel Jay's extracts from his ancestor's diary proving most interesting. ''Tipperary'' was rendered during the banquet, mingled with the War Songs of the Sixties which

have since been appropriated by the English speaking world. Speeches of eloquence and power marked the banquet, that of Chief Justice White recalling his splendid introduction of Lord Haldane at the Princess Theatre in Montreal in September, 1913.

RIGHTS OF ALIEN ENEMIES IN OUR COURTS.

A case reported in the *Times* of October 17, decided in England by Mr. Justice Bailhache, confirms the judgment of Mr. Justice Hodgins in the *Bassi Case* (ante page 538), the learned Judge finding that there was abundance of authority for the proposition that an alien enemy, if objection be taken by the defendant cannot sue as plaintiff in our courts while the state of hostilities, which makes him an alien enemy, lasts. On the other hand this judgment holds that the rule is confined to cases in which the alien enemy is plaintiff and that there is no rule of the common law which suspends an action in which an alien enemy is defendant or which prevents his appealing and conducting his defence.

In the English case (*Robinson* v. *Continental Insurance Company of Mannheim*) the defendants were a German Insurance Company who were sued for a loss under a policy of marine insurance. They applied for a stay of proceedings during the present war. His Lordship's judgment as reported in the *Times* is as follows:—

"In this case the defendant company apply for the postponement of the hearing of the action on the ground that the company is an alien enemy. The action is brought upon a policy of marine insurance effected on behalf of the plaintiffs, who are British subjects, with the defendant company. The policy was effected before the war. The loss was before the war and the pleadings were closed before the war. The war has had the effect of making the defendant company an alien enemy and the defendant company contends that that fact of itself entitles the

company to a postponement of the trial. The contention is that by the common law of England all actions between British subjects and alien enemies are suspended during the war, and further that an alien enemy cannot appear and cannot be heard in our courts during hostilities.

There is, I think, abundance of authority for the proposition that an alien enemy, if objection be taken by the defendant, cannot sue as plaintiff in our courts and cannot proceed with an action pending in these courts while the state of hostilities, which makes him an alien enemy, lasts. Whether he can sue or proceed with his action if no objection be taken by the defendant is perhaps open to doubt. See, for instance, the judgment of Lord Davey in *Janson* v. *Driefontein*, 18 Times Law Reports 796, [1902] A.C. 484, at p. 499. It is, I think, equally true that a defendant alien enemy cannot during the war prosecute a counterclaim. Does the converse hold good and does the same rule obtain when an alien enemy is defendant? If one considers the reason for the rule that an alien enemy cannot sue or prosecute his action during hostilities it would appear that on principle the rule ought to be confined to those cases where the alien enemy is plaintiff. I take it that the reason why an alien enemy when plaintiff cannot proceed with his action against a British subject during hostilities is founded upon the assumption that when two countries are at war all the subjects of each country are at war, and that it is contrary to public policy for the courts of this country to render any assistance to an alien enemy to enforce rights which, but for the war, he would be entitled to enforce to his own advantage and to the detriment of a subject of this country. But to hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy, and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief.

I know of no modern English authority on the point except a statement by Lord Davey in the *Driefontein* case, where, at page 499, he lays down three rules which he says are established in our common law, and expresses the third rule thus:—

"The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods were insured is suspended during the continuance of war and revived on the restoration of peace."

If this is a correct expression of the rule, it covers by its terms the case of an alien enemy defendant as well as an alien enemy plaintiff. It is not the decision of the House of Lords in that case, and is not therefore binding upon me, although, of course, it is a statement of the law entitled to great weight. In that case, however, the point did not arise for decision; moreover, the alien enemy there was the plaintiff and the British subject was the defendant, and I doubt whether Lord Davey contemplated the converse case. I observe that other members of the House, who took part in that decision, confine themselves to the statement that an alien enemy cannot sue while the war lasts. (See Lord Halsbury, p. 493; Lord Lindley at pp. 509 and 510.) In the 7th edition of Bacon's Abridgment, vol. 1, at p. 183, the law is thus stated:—

"The plea of alien enemy is a bar to a bill for relief in equity, as well as to an action at law; but it would seem not sustainable to a mere bill for discovery; for, as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery."

The statement of the rule by Lord Davey seems to me to be expressed in too wide terms. Mr. Raeburn, for the plaintiffs, was good enough to refer me to several American authorities. The law there appears to be clear that an alien enemy may be sued during the continuance of hostilities. There is an elaborate judgment of the Supreme Court of Missouri to that effect in *De Jarnette* v. *De Giverville*, 56 Missouri Reports 440, and in the case before the Supreme Court of the United States, *McVeigh* v. *United States*, 11 Wallace Reports 259. At page 267, Mr. Justice Swayne, in delivering the unanimous judgment of the court, says: "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use

all the means and appliances of defence''; and he quotes the passage from Bacon's Abridgment which I have already cited.

Fortified by the passage from the abridgment and by these American decisions and by my view of the reason for the rule, which forbids an alien enemy to sue, I am of opinion that the rule is confined to cases in which the alien enemy is plaintiff, and that war does not suspend an action against a defendant alien enemy.

The next question is, Can he appear and defend either personally or by counsel? I think he certainly can. To allow an action against an alien enemy to proceed and to refuse to allow him to appear and defend himself would be opposed to the fundamental principle of justice. No state of war could, in my view, demand or justify the condemnation by a Civil Court of a man unheard. The point came before the Supreme Court of the United States in the case just cited. The District Court had allowed an action to proceed against an alien enemy, but had struck out his claim and answer. Mr. Justice Swayne deals with the matter in these words: ''The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no locus standi in that forum. If assailed there, he would defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.'' I desire to adopt the language of the learned judge as my own, except that I am not such a convinced disciple of Rousseau as to be able to base my opinion upon the principles of the social compact to which Mr. Justice Swayne refers.

I have come to the conclusion that there is no rule of the common law which suspends an action in which an alien enemy is defendant, and no rule of the common law which prevents his appearing and conducting his defence.

In this case I understand that the presence of the alien enemy in this country at the trial is not necessary and is not con-

templated, and no difficulty arises such as might otherwise be created by the impossibility of his getting here, and no question arises in this case whether an express licence to come into this country is necessary or whether a licence would be implied from the fact of the process of the court, and I express no opinion upon these points. It may be that in this case the war has so hampered the defendants in the preparation of their case, in their witnesses, or in other ways, that it would be right to grant them a postponement on these grounds, and if any application is made to postpone the trial on grounds of that character it will be dealt with on its merits. I know nothing of the merits of this case, and it may be that the defence will succeed. In that case, a question would arise as to costs. I will hear argument about it if the point does arise, but as at present advised I do not think I ought to make any order which would entitle the defendants to payment of costs until after the war. I mention this point now because in considering my judgment it occurred to me as a possible difficulty in the way of allowing the action to proceed. I think, however, the difficulty, if it arises, is sufficiently met by suspending the defendants' right to issue execution."

SOME POINTS IN INTERNATIONAL LAW IN WAR TIME.

Although the Kaiser in the war he is now waging against civilization and freedom is a law unto himself, which means that he pays no respect to any laws, either human or divine, it is interesting to note what the Hague Peace Conference has settled as to the following subjects: War Contributions; Who is a Spy and Aerial Navigation.

They are thus referred to in our English contemporary, *The Law Times*:—

The occupation by the German army of Brussels and the imposition by Germany of a war contribution of eight millions sterling on that city render it of interest to draw attention to the effect of military occupation and the international law with respect to contributions. The forty-third article of the Hague Regulations declares: "The authority of the legitimate power

having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, so far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Taxes, dues, tolls, and other regular or special revenues may be collected and used, although under existing rules they must first be applied as far as possible to the administration of government on substantially the same scale as under the prior legal Government. Contributions are exacted by force as much as requisitions, which are levied in kind, with the advantage to the invader that they are never to be accounted for. The draft articles of the Declaration of Brussels sanctioned contributions, with the proviso that they should be levied by commanding officers only. The same limitation was imposed by the Hague Second Convention (arts. 49 and 51), whose rule provides that if besides the taxes mentioned the occupant levies other money contributions in the occupied territory, this can only be for military necessities or the administration of such territory. No contribution shall be collected except under a written order or under the responsibility of a commander-in-chief. This collection shall only take place as far as possible in accordance with the rules in existence and the assessment of taxes in force, and for every contribution a receipt shall be given to the person paying.

In a letter quoted by the *Standard* from a French private to his father, the writer says: "We reconnoitred the enemy's position, dressed as civilians, in a dogcart. We played the spy, but what of that? It is for France." In these words we have an admirable definition of the spy as distinguished from the reconnoitrer in uniform, which is legitimate. A spy is one who with disguise or other deception goes peaceably among the enemy forces to discover and report their condition. The Hague Conference (Convention, arts. 29-30) declared that "an individual can only be considered a spy if, acting clandestinely or on false pretences, he obtains or seeks to obtain information within the zone of operations of a belligerent with the intention of communicating it to the hostile party." Although captured spies are, as a general rule, liable to be hanged regardless of the fact that they are authorised by their commanders, the Hague Convention

requires a trial before punishment, even when they are taken in the act. Wellington employed spies constantly in Spain, and Wolseley frankly advocates them. Information about the enemy from some source is necessary, and reconnoitring in uniform which is permitted reveals only external conditions. The criminality of the spy is limited to the special expedition. After the spy has rejoined his army he ceases to be such, and, if subsequently captured, is to be treated as other prisoners of war. Messengers by balloons—and the same principle is, of course, applicable to all air vessels—have been recognised at the Hague Conference (second Hague Convention, art. 29) as a legitimate means of reconnaissance. Persons so travelling are to be regarded, when captured as prisoners of war, as legitimate aids to military operations.

The development of aerial navigation, which will, no doubt, profoundly affect the conditions of modern warfare and has already proved an important factor in the present war, may well direct attention to the conditions of aerial warfare. The whole question of balloon attacks was fully discussed in 1899, when a declaration was adopted at the first Hague Peace Conference, on the 29th July, 1899, prohibiting for a term of five years the launching of projectiles or explosives from balloons or other kinds of aerial vessels. The second Peace Conference on the 18th October, 1907, renewed this declaration, but only for a period extending to the termination of the third Peace Conference. It was ratified by Great Britain, but Germany, France, Italy, Russia, Spain, and Japan have all refused to sign it, and it is obviously of little, if any, value. The Institute of International Law, at its meetings at Madrid in 1911, adopted the principle that aerial warfare must not comprise greater danger to the person and property of the peaceful population than land or sea warfare. "There can be no doubt," writes Professor Oppenheim, "that the general principles laid down in the Declaration of St. Petersburg of 1868 in the two declarations adopted at the first Peace Conference concerning expanding bullets and projectiles diffusing asphyxiating or deleterious gases in the air, rules concerning land warfare, and the like, must find application as regards violence directed from air vessels."

BARBARIANS BY CHOICE.

It does not say much for modern civilization, not to speak of culture, when a prominent citizen of a great nation takes pride in its being a nation of barbarians. Such, however, is the sentiment of a retired general officer of the German army, Maj.-Gen. Von Disfurth, in an article contributed to the Hamburg *Nachrichten*. Although it is not nice reading for the twentieth century, his description of the mental attitude of the German people is well portrayed in his article and this mental attitude explains much that would be otherwise unintelligible, not to say incredible. The evidence unhappily is that the sentiments of this writer are largely those of the rest of his co-citizens. A people having this spirit are a festering sore in the community of nations, and though it would not be possible to blot Germany off the face of the earth, some radical cure must be found when the time comes. The article is as follows:—

"No object whatever can be served by taking any notice of the accusations of barbarity levelled against Germany by their foreign critics. We owe no explanations to any one. Whatever act committed by our troops for the purpose of discouraging, defeating and destroying the enemy is a brave act and fully justified. Germany stands the supreme arbiter of her own methods. It is no consequence whatever if all the monuments ever created, all the pictures ever painted, all the buildings ever erected by the great architects of the world be destroyed, if by their destruction we promoted Germany's victory. War is war. The ugliest stone placed to mark the burial of a German grenadier is a more glorious monument than all the cathedrals in Europe put together. They call us barbarians. What of it? We scorn them and their abuse. For my part, I hope that in this war we have merited the title barbarians. Let neutral peoples and our enemies cease their empty chatter, which may well be compared to the twitter of birds. Let them cease to talk of the cathedral of Rheims, and of all the churches and all the castles in France which have shared its fate. Our troops must achieve victory. What else matters?"

REVIEW OF CURRENT ENGLISH CASES.

INSURANCE (LIFE)—RE-INSURANCE—CONSTRUCTION OF POLICY—STATEMENTS OF ASSURED BASIS OF CONTRACT—SETTLEMENT OF CLAIM BY RE-INSURERS—LIABILITY OF REINSURERS.

Australian Widows Fund v. *National Mutual Life Association* (1914) A.C. 634. This was an appeal from the High Court of Australia. The action was on a policy of reinsurance effected in the following circumstances. The plaintiff had insured the life of a man named Moran, the policy containing a usual clause that certain written statements by Moran, as to his health, should be the basis of the policy which should be void if they were untrue. The defendants reinsured the risk which recited that the written statement of Moran was to be the basis of the contract. Moran died in 1909. The defendants informed the plaintiffs that they had reason to believe that Moran's statements were untrue and warned them that they would not acquiesce in a settlement. The plaintiffs, however, paid the £5,000 in settlement of the claim. The jury found that certain statements of Moran were untrue, and that he had been guilty of concealment and misrepresentation in obtaining the policy, but that the plaintiffs had acted reasonably and *bonâ fide*. The Court below held that in these circumstances the plaintiffs could not recover and the Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Dunedin, Shaw, Moulton and Parker) affirmed the decision, and the fact that by the terms of the policy sued on, it was provided that in the event of a claim the settlement was to be made by the plaintiffs, was held not to make any difference and could not alter the express words of the contract whereby the statements of Moran were declared to be the basis of the contract.

CONTRACT—ARBITRATION CLAUSE—ABORTIVE ARBITRATION PROCEEDINGS—DUTY OF COURT.

Cameron v. *Cuddy* (1914) A.C. 651. This was an appeal from the Supreme Court of Canada. The action was to recover the price agreed to be paid *inter alia* for certain timber limits, logs and shares, according to a schedule subject to a proviso that in case of deficiency a proportionate deduction should be made from the price of the value of such deficiency. A dispute having arisen as to the goods, a reference to arbitration took place and a general

award was made which was set aside on the ground that the amount of the deficiency had first to be ascertained before the matter could be submitted to the arbitrators, whose duty was confined to estimating the value thereof. This action was then brought and at the trial and the defendant offered evidence of the deficiency which the Court rejected, and judgment was given for the plaintiffs, which was affirmed by the Supreme Court as being mere matter of procedure with which that Court ought not to interfere. The Judicial Committee of the Privy Council (Lords Atkinson, Shaw, Moulton, and Parker) however, considered that the Courts below had erred, and that where, as in the case, an arbitration has proved abortive, it is the duty of the Court to ascertain the damages. They therefore held the rejection of the defendants' evidence was erroneous, and remitted the action to be dealt with in conformity with their Lordships' judgment.

RAILWAY—CARRIAGE OF GOODS — GOODS RECEIVED BY RAILWAY "SUBJECT TO GENERAL LIEN FOR ANY MONEYS DUE TO THEM FROM THE OWNERS OF SUCH GOODS UPON ANY ACCOUNT"—STOPPAGE IN TRANSITU—RIGHTS OF CONSIGNOR AS AGAINST RAILWAY.

United States Steel Products Co. v. *Great Western Ry.* (1914), 3 K.B. 567. The very reasonable and equitable judgment of Pickford, J. (1913), 3 K.B. 357 (noted ante vol. 49, p. 662), has failed to command the approval of the Court of Appeal (Lord Sumner, Kennedy, L.J., and Bray, J.). The question at issue turned upon the construction of a bill of lading whereby it was provided that the goods therein mentioned were received subject to the condition that they should be subject to a lien for money due for the carriage of and other charges upon such goods, etc., "also to a general lien for any other moneys due to them from the owners of such goods upon any account." The goods were consigned in America to buyers in England: while the right to stop in transitu still existed the purchasers became bankrupt, and the right was exercised. The carriers claimed against the vendors the right to a lien for £1171 due on the general account between them and the consignees, and the Court of Appeal hold that they are so entitled. The judgment appears to turn on the conclusion of the Court that the consignees were "the owners" of the goods. If the case goes farther, it would not be surprising if a different result were reached. So long as the right to stop in transit existed the con-

signors may not unreasonably be said to have been the potential "owners" and the bill of lading might well be construed to refer to the consignors or consignees according as the one or the other should ultimately prove to be de jure "owners." The decision appears to be distinctly inequitable and to involve a construction of the contract which the parties could hardly have contemplated, and which the Court should be slow to give effect to.

SHIP—CHARTER PARTY — FREIGHT PAYABLE PER CUBIC FATHOM MEASUREMENT—WRONG METHOD ADOPTED—COST OF REMEASUREMENT—LIABILITY OF CHARTERER.

Merryweather v. *Pearson* (1914), 3 K.B. 587. The question involved in this case turned upon the construction of a charter party which provided that the charterers would load a cargo of timber and that freight should be payable at a specified rate "per intaken piled fathom of 216 cubic feet." The ship was loaded but the measure was taken on an improper basis, and on the arrival of the ship at the port of discharge, the shipowners alleging that the bill of lading measurement was inaccurate, had the cargo remeasured on the correct basis and it was found to consist of a much larger number of fathoms than that mentioned in the bill of lading. Bailhache, J., who tried the action, held that it was the duty of the charterers to have had the cargo accurately measured at the port of lading, and not having done so they were liable to the owners for the cost of remeasurement.

INFANT — CONTRACT — MONEY LENT, FRAUDULENT REPRESENTATION OF INFANT AS TO HIS AGE—EQUITABLE RELIEF.

Leslie v. *Sheill* (1914), 3 K.B. 607. This was an appeal from a decision of Horridge, J. The action was against an infant for money lent on the misrepresentation of the infant that he was of age. Horridge, J., gave judgment for the plaintiffs on the ground of the fraud of the defendant, as entitling the plaintiffs to equitable relief; but the Court of Appeal (Lord Sumner, Kennedy, L.J., and Laurence, J.), reversed his judgment on the ground that the action was in substance an action of contract and the plea of infancy was a good answer to the action, and that the defendant was under no equitable liability to the plaintiff. The defendant was ordered to pay the costs of the issue as to fraud on which he failed.

RAILWAY—EXPROPRIATION OF LAND—COMPENSATION — SPECIAL ADAPTABILITY OF LAND.

Sidney v. *North Eastern Ry.* (1914), 3 K.B. 629. In this case the question was as to the proper basis of compensation for land expropriated for railway purposes. Part of the main line was laid upon land in which the company had only a leasehold interest. The lease being about to expire the company instituted proceedings to acquire it compulsorily. There were in the immediate neighbourhood two collieries from which the way to their port of shipment was over this particular piece of railway, and if on the expiry of the lease it had been offered for sale it is possible the collieries would have competed for it with the railway. On a case stated by an umpire appointed to fix compensation, a Divisional Court (Avory, Rowlatt, and Shearman, JJ.), held that the arbitrator was entitled to take into consideration the special adaptability of the land for railway purposes arising out of its nearness to the collieries and of the possible competition between the colliery owners and the railway for its ownership; but not the fact of the existence upon the land of an integral part of the railway's main line.

RESTRICTIVE COVENANT — COVENANT RESTRICTING USER OF LAND —COVENANT NOT RUNNING WITH THE LAND AT LAW—COVENANTEE HAVING NO ADJOINING LAND—PURCHASER WITH NOTICE OF RESTRICTION.

London County Council v. *Allen* (1914), 3 K.B. 642. This was an action to enforce a restrictive covenant made in the following circumstances. The owner of certain land including that now in question applied to the County Council under a statute in that behalf to lay out a new street on the land. The council gave its consent upon the owner giving a covenant not to build on that part of the land now in question without the council's consent, the object being to afford facilities to extend the proposed new street. The defendant purchased this plot with notice of the covenant and was proceeding to build on it without the council's consent and the action was brought to restrain him from so doing. The council owned no land for the benefit of which the covenant was imposed. The Court of Appeal (Buckley, Kennedy, and Scrutton, L.JJ.), held, overruling the judgment of Avory, J., that the plaintiffs in these circumstances were not entitled to enforce the covenant and that the doctrine

of *Tulk* v. *Moxhay*, 2 P.L. 774, does not apply where the covenantee is not in possession or or interested in the land for the benefit of which the restriction is imposed.

PRINCIPAL AND AGENT — FRAUDULENT MISREPRESENTATION — KNOWLEDGE OF AGENT NOT IMPUTED TO PRINCIPAL.

Wells v. *Smith* (1914), 3 K.B. 722. This was an action of deceit, the facts being that the defendant made a false statement to the plaintiff's agent, which the agent knew to be false, in order to induce the plaintiff, who did not know its untruth to act upon it. The agent communicated the statement to the plaintiff who relying on its truth, acted upon it to her damage; the representation being that a proposed tenant was a reputable person whereas she was the contrary. Scrutton, J., who tried the action held that the plaintiff was entitled to recover the damages awarded by the jury.

PERPETUITY—SETTLEMENT—TRUST TO HOLD FOR 21 YEARS FOLLOWED BY TRUST FOR SALE AT THE EXPIRATION OF 21 YEARS.

English v. *Cliff* (1914), 2 Ch. 376. It is a curious thing as Warrington, J., says, that in this case it should have to be determined for the first time whether a trust which arises at the expiration of a term of twenty-one years from the date of the deed, is a trust exceeding the period allowed by the rule against perpetuity, which, where there are no lives or life in being in question, is a gross term of twenty-one years. The instrument under which the question arose was a settlement dated May 13, 1892, whereby the settlor conveyed the estate to trustees in fee simple upon the trusts therein declared; and it was therein declared that the trustees or the survivor or other the trustees for the time being should stand possessed of the premises for twenty-one years upon trust to apply the rents and profits as therein mentioned including the payment of one annual sum on the 13th May and November in each year, and "at the expiration of the said term of twenty years" to sell the said premises as therein mentioned. On June 20, 1913, the trustees of the settlement contracted to sell the land to the defendant who objected that the power was void for remoteness. Warrington, J., held that the determination of the 21 years and the commencement of the trust for sale being coincident, the trust was not void for remoteness on the ground that it was limited to take

effect "at the expiration" of t. e term. He also held that according to the true construction of the settlement the term commenced at midnight on May 12, and therefore expired at midnight on May 12, 1913, and therefore the trust for sale was not void on the ground that it exceeded a term of twenty-one years from its creation.

WILL—CONSTRUCTION—GIFT IN REMAINDER TO CHILDREN AS A CLASS, BUT THE WHOLE TO ONE CHILD IF ONLY ONE LIVING—SURVIVAL OF MORE THAN ONE CHILD—CONTINGENCY.

In re Firth, Loveridge v. *Firth* (1914), 2 Ch. 386. A will was in question in this case, whereby the testator who died in 1886 bequeathed £4,000 to his son William in trust to invest and pay the income to the testator's daughter Harriet for her life and after her death to pay the fund to her children, and if she should have no children, which was the event which happened "then to pay over the proceeds to the children of William in equal shares or the whole to one child if there should be only one child living of the said William." William died in 1903 having had eleven children, ten of whom survived him. Two other children died, one in 1907, and the other in 1913. Harriet, the tenant for life, died a spinster in 1914. The question for decision was whether the surviving eight children took the fund, or whether the representatives of the deceased children were also entitled to participate. This depended on whether or not the eleven children took vested interests. Sargant, J., held that they did, subject to be divested only in the event of there being but one survivor, which event had not happened.

Correspondence.

ROYAL BANK OF CANADA v. *THE KING.*

Toronto, Nov. 17, 1914.

To the Editor, CANADA LAW JOURNAL:

SIR,—I notice that in your issues for September and November, Mr. C. B. Labatt and G. S. H.—whose identity it is not difficult to guess—have honoured Mr. J. S. Ewart, K.C., and myself by criticising certain comments which we have ventured to make upon the judgment of the Privy Council in the above case as reported [1913] A.C. 283. I shall leave Mr. Ewart to take care of himself, as he is very well able to do, but so far as I am attacked I would like to say a word or two in reply.

I shall not repeat the facts of the case which probably are very familiar to your readers, nor the somewhat extended way in which I ventured to comment upon it in the *Law Quarterly Review* (vol. 29, p. 288), but will simply say, as I have said elsewhere, that "the import of the decision seems to be that when the civil rights to be affected are civil rights in respect of a debt, in order that the provincial legislature may have jurisdiction to deal with that debt, it is necessary that both debtor and creditor, and all parties concerned should be within the local limits of the province; and that, if persons who are outside the province have rights to the debt in question, that will exclude the jurisdiction of the provincial legislature": and that "apart from this judgment it might have been supposed that a civil right in a province, or anywhere, is nothing else than a right to invoke the assistance of the Civil Courts of that province, or other place, to give effect to some claim, whether by way of action, or of defence to an action: and that so far as anyone has such a right, it is 'a civil right' in that province, or other place, whether he has, or has not a similar right, under the same set of facts, elsewhere or not; and that over a civil right in a Canadian province, the provincial legislature has plenary power saving always the power of the Dominion Parliament."

Now, in the first place, neither Mr. Labatt or G. S. H. answer my question—"What is a civil right except a right to invoke and set into operation the machinery of the Civil Courts, directly or indirectly, to gain some debt, or recover some other advantage, or to restrain some one who is endeavouring to do so?" I must say that I have never yet found anyone who can answer this question.

My position, therefore, is simply this: The lenders in Lon-

don so far as they had a right to sue the Royal Bank in Alberta had a civil right in Alberta, and in like manner so far as the Attorney-General of Alberta had the right to press his action against the Royal Bank in Alberta, he had a civil right in Alberta.

Now, the British North America Act gave the provincial legislature of Alberta power as plenary and ample as the Imperial parliament itself, in the plenitude of its power, possessed and could bestow, to make laws in relation to civil rights in the province. It, therefore, had plenary power to take away the civil right of the lenders in London, so far as it was a right to sue for the debt in question in Alberta, and to give to the Attorney-General of Alberta a civil right to sue the Royal Bank for a like amount in Alberta, just as much as if the lenders in London had assigned their claim to him, except that the provincial legislature could not interfere with the civil right of the lenders in London to sue the Royal Bank for the money in Montreal. The lenders in London had a civil right to recover the debt in Montreal; they also had a civil right to recover the debt in Alberta. They could sue for it in either jurisdiction. The Legislature of Alberta, I would have thought, were it not for the judgment of the Privy Council, had power to destroy, or transfer, or control in any way, the latter right, although they could not affect the former. It is right to remember that we are dealing with plenary powers conferred by the Constitution upon the legislature of what is, or will grow to be, a great country, and not dealing with powers delegated by statute to the town council of Little Pedlington.

I must say with all respect that the article of Mr. Labatt and the letter of G. S. H. seem to me to contain some very fine flowers of confused thinking. For example, Mr. Labatt says that I take the position "that the provincial legislatures have received plenary power to direct the provincial courts to recognize or refuse to recognize any description of civil rights." Maybe they have under their power over "the administration of justice in the province," but all I have contended for as to their power over "civil rights in the province," is that *if, and so far as* a civil right is a civil right in the province, the British North America Act has given the provincial legislature plenary power over it. Then Mr. Labatt seems to think that no one can have a civil right in a province unless he himself is domiciled in that province, for he says it is "almost too plain for argument that this clause" (meaning the clause of the British North America Act

giving the provincial legislature exclusive power over civil rights in the province) "simply declares that the scope of the legislative power extends to substantive rights according as the persons entitled to exercise them are or are not domiciled in the province at the time when the enactment effecting them is passed."

Again Mr. Labatt says: "In a case where the competency of a provincial legislature to pass a law in relation to a certain 'civil right' is the very question to be determined, it is difficult to see upon what principle of Constitutional law it can be successfully argued that the right can be brought within the scope of the law-making power by the mere process of enacting a statute which purports to modify or abolish [illegible]" I am sure that I never said any such thing. Let me again repeat that all I say is that *if* a civil right is a civil right in a province, the provincial legislature has plenary power over it. So we come back to the old question "what is a civil right in a province?"

Lastly, and most marvellous of all, Mr. Labatt contends that the theory that I have advanced would interfere with the appellate jurisdiction of the Supreme Court and of the Privy Council. This we are told "exhibits the unsoundness" of my doctrine "in the clearest possible light." We are told by Mr. Labatt that on review, the validity of a provincial statute affecting the rights of a non-resident will be determined "not with reference to the fact that the provincial legislature has undertaken to deal with his 'civil rights,' but with reference to what the Court itself regards as the proper construction of the qualifying phrase, 'in the province,' and to its opinion respecting the significance of the evidence set out on the record." All I can reply is—"Of course it will; but what has that got to do with the matter?"

Proceeding now to cull some flowers from G. S. H.'s letter, he first observes that it is a curious phenomenon that "astute and clear-minded men could ever have the slightest doubt about either the perfect justice or wisdom" of the Privy Council decision. Perfect justice and wisdom, however, are matters too high for me. All I can assume to discuss is law, not perfect justice or wisdom. Law may be, and ought to be, just and wise. But whether it is or is not, is a matter with which the lawyer as such has nothing to do, that is what the old philosopher Hobbes meant when he laid down the *dictum* so shocking to weak minds, that "no law can be unjust." In the same way I object to G. S. H. stating that I have discussed in any way what would, or would not be, "legitimate legislation." All I have concerned myself with is what would be constitutional legislation, which

may sometimes be anything but "legitimate," in the ordinary sense of that word.

G. S. H. thinks "that the man in the street" can better grasp the question between us if he imagines a state of facts and circumstances entirely different to those before the court in *The Royal Bank* v. *The King*. However, let me just point out that in the imaginary case which he supposes, Mr. A. B.'s agent in Edmonton would be able to quite truly say that he had no money when the demand was made by the Provincial Treasurer, and what is more important, that he owed no debt; but the Royal Bank was not in a position to say that it owed no debt. Mr. A. B. himself also would be able to say that he owed no debt, because the land had not yet been conveyed or a deed tendered to him. If the land had been conveyed or a deed of it tendered to A. B., and A. B. was owing the money to the vendor, then the vendor in Alberta might have a civil right of action in Alberta against A. B.; and over that right of action, as I contend, the legislature of Alberta would have plenary power to take it from the vendor, and give it to the Provincial Treasurer, and that without any prejudice to the right and power of the vendor to recover his debt from A. B. in Ontario, if A. B had assets in Ontario, and the vendor had a right of action against him in Ontario under the rules of procedure there prevailing. The Privy Council in no way deny that the lenders of the money in *Royal Bank* v. *The King* had a right of action in Alberta, but their judgment holds that because the lenders had also a right of action at Montreal arising out of the circumstances of the case, therefore, the Alberta legislature could not deal with their right of action, or in other words with their civil rights, in Alberta.

Lastly, G. S. H. says that I have not ventured to explain how the money in question could by any process known to constitutional law have been got out of the coffers of the Royal Bank in Montreal. I have not the least idea what this means, but undoubtedly the provincial treasurer of Alberta could recover the money from the Royal Bank, if he got judgment in the courts in Alberta, out of any assets which the Royal Bank might have in that province.

I am quite willing to let Mr. Labatt and G. S. H. have the last word; and I regret to have taken up so much of your space.

Yours, etc., A. H. F. LEFROY.

[We will give space to Mr. Labatt to reply to the learned gentlemen from whom he differs and that must close the discussion.—ED. C.L.J.]

REPORTS AND NOTES OF CASES.

Province of Quebec.

KING'S BENCH.

Gervais, J.] REX v. "THE STADIUM." [18 D.L.R. 85.

Sunday—Sports and amusements—Skating rink—Franchise to club under Quebec statute.

As section 16 of the Lord's Day Act, R.S.C. 1906, ch. 153, preserves in any province the provisions of any Act or law already in force there, an athletic institution which has acquired the rights and franchises granted by statute of the Province of Quebec to an athletic club prior to the federal Lord's Day Act including by implication the right to keep its skating rink open on Sunday, has the right to maintain and operate a public skating rink on Sunday if permitted to do so under municipal by-laws and ordinances.

Rinfret, K.C., for the appellant. *McGoun*, K.C., for the Crown.

Province of Manitoba.

COURT OF APPEAL.

Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A.] RE MUIR ESTATE. [18 D.L.R. 144.

Taxes—Succession duty—Property out of province.

1. A covenant in an agreement under seal for the sale of land, to pay the purchase money, creates a specialty debt and the document being in the Province of Manitoba and the money payable there, though the land is situate in another province, is deemed to be property subject to taxation under the Succession Duties Act, R.S.M. 1913, ch. 187.

Commissioner of Stamps v. *Hope*, [1891] A.C. 476; *Treasurer* v. *Pattin*, 22 O.L.R. 184, followed.

2. The maxim mobilia sequuntur personam being clearly excluded in the Manitoba Succession Duties Act, R.S.M. 1913, ch 187, the movable property of a deceased domiciled Manitoba citizen locally situate out of the province at the time of his death is subject to taxation under the act.

Rex v. *Lovitt*, [1912] A.C. 212; *Cotton* v. *The King*, 15 D.L.R. 283, [1914] A.C. 176, specially referred to.

W. R. Mulock, K.C., and *J. W. E. Armstrong*, for the executors. *R. B. Graham*, for the Provincial Treasurer of Manitoba.

Province of Saskatchewan.

SUPREME COURT.

Newlands, J.] [18 D.L.R. 3.

HOLMESTED v. ANNABLE.

Corporations and companies — Officers — Directors—Fiduciary relation—Liquidator—Receiver.

A liquidator under the Companies Winding-up Act, R.S.S. 1909, ch. 78, may legally sell his company's property to a director in the absence of a shewing that the fiduciary relationship between the company and its directors, which is primâ facie determined by sub-sec. 5 of sec. 7 of the Act, was actually kept in force.

Sub-sec. 5 of sec. 7 of the Companies Winding-up Act, R.S.S. 1909, ch. 78, under which all the powers of a company's directors cease (unless the company itself or its liquidator may otherwise determine) operates to cancel the fiduciary relationship previously existing between the company and its directors.

ANNOTATION ON ABOVE CASE IN DOMINION LAW REPORTS.

When receivers appointed.

An annotation on "When receivers may be appointed" imports a foreword on the distinction between "receivers" and "liquidators" and "managers." The term "liquidater" in the Imperial Act is in a limited sense construed to include a "receiver" under some circumstances: *Re English Bank of the River Plate*, [1892] 1 Ch. 391. A "receiver" means, a person who receives rents or other income, paying ascertained outgoings: but he does not manage the property in the sense of buying and selling or any-

thing of that kind; he merely takes the income and pays necessary outgoings, while a "manager" carries on the trade or business: *Re Manchester and Milford R. Co.*, 14 Ch.D. 645, at 652. A "receiver and manager" stands in the same position as a "receiver," but the former has a larger scope than the latter and is empowered to carry on the business of the company, whereas a "receiver" is merely authorized to take possession and protect the property which comes into his hands: *Manchester* v. *Milford R. Co.*, 14 Ch.D. 645; Parker & Clark on Company Law (1909), p. 282.

A "receiver" or a "receiver and manager" as an officer of the Court is appointed by the Court to take possession of certain property and to protect it for the benefit of the parties interested therein: Parker & Clark on Company Law (1909), p. 282. The appointment of a "receiver" is not a mere matter of discretion, but the party asking for such an appointment is, in a proper case, entitled *ex debito justitiae*: Parker & Clark on Company Law (1909), p. 283. Where a liquidator already in possession of property is, by the Court appointed receiver also, such appointment is a matter of discretion and the Court of Appeal will not, except under special circumstances, interfere with this discretion: *Giles* v. *Nuthall*, W. N. (1885), 51; Parker & Clark on Company Law (1909), p 283. A "receiver," or a "receiver and manager," appointed by the Court is not an agent, but a *principal;* when appointed out of Court he is an *agent* and not a principal: Riviere on Receivers and Managers (1912), p. 155, and cases there cited. A memorandum sent to tenants by a landlord directing them to pay their rents to a third party will not, of itself, constitute such third party a "receiver" of such rents or confer upon him any powers of a "receiver" or a power to distrain: *Ward* v. *Shaw* (1833), 2 Moore & Sc. 756; Riviere on Receivers and Managers (1912), p. 191. The first statutory powers of appointing a receiver conferred specially on mortgagees were created by Lord Cranworth's Act, Imp. Statute 23 & 24 Vict. ch. 145. A discussion of the provisions relating to receivers in that Act and in the Conveyancing Act 1881 will be found at pp. 193 to 200 of Riviere on Receivers and Managers (1912).

Where a receiver is appointed out of Court under any power in that behalf contained in any document, the powers of such receiver will depend on the document creating the power of appointment read with the appointment itself: Riviere on Receivers and Managers (1912), p 190.

Since the passage of the Imperial Judicature Act a receiver may be appointed, under sec. 25, sub-sec. 8 of the Act (ch. 66 of statutes 1873) in cases in which it shall appear to be "just and convenient" that such appointment be made, the power thus conferred enlarging that formerly possessed by a Court of Equity: *Anglo-Italian Bank* v. *Davies*, 9 Ch.D. 275.

This provision of the Judicature Act has been adopted in nearly all the provinces of Canada: See the Judicature Ordinance of the North West Territories, sec. 10, sub-sec. 8 (N.W.T. 1905, ch. 21); R.S.N.S. 1900, ch. 155, sec. 19, sub-sec. 9; Ont. Judicature Act of 1881, sec. 17, sub-sec. 8,

R.S.O. 1897, ch. 51, sec. 58, sub-sec. 9, 3 Geo. V. (Ont.), ch. 19, R.S.O. 1914, ch. 56; R.S.M. 1902, ch. 40, sec. 39, sub-sec. *o*; R.S.M. 1913, ch. 46; R.S.S. 1909, ch. 52, sec. 31, sub-sec. 8; Laws Declaratory Act, R.S.B.C. 1911, ch. 133, sec. 2, sub-sec. 29.

Although receivers are more readily appointed than before the passing of the Judicature Act, and certain inconvenient rules formerly observed have been relaxed, yet the principles on which the jurisdiction of Courts of Chancery rested are still applied: *Holmes* v. *Millage*, [1893] 1 Q.B. 551. The Ontario Judicature Act does not confer jurisdiction to appoint receivers in cases where previously no Court possessed power to do so: *O'Donnell* v. *Faulkner*, 1 O.L.R. 21. Such Act was intended to confer on all Courts that jurisdiction which, under the designation of equitable jurisdiction, was previously exercised by Courts of Chancery: *Re Asselin and Cleghorn*, 6 O.L.R. 170. And the power thus conferred is not an arbitrary or unregulative one: *Harris* v. *Beauchamp*, [1894] 1 Q.B. 801. Under the Judicature Act, the rule is that a receiver will be appointed whenever it is just and convenient; or where it is practicable and is required in the interest of justice: *Edwards* v. *Picard*, [1909] 2 K.B. 903. But a receiver will not be appointed unless the party requesting it makes out a *primâ facie* title to or interest in the property in dispute: *Leney & Son* v. *Collingham*, [1908] 1 K.B. 79; *Whitley* v. *Challis*, [1892] 1 Ch. 64; or unless the probabilities are that the appointment will be effectual and useful: *Edwards & Co.* v. *Picard*, [1909] 2 K.B. 903; *Wills* v. *Luff*, 38 Ch.D. 197; *Mercantile, etc., Trust Co.* v. *River Plate, etc., Co.*, [1892] 2 Ch. 303; *Re Knott End Railway Act*, [1901] 2 Ch. 8. And a receiver will not be appointed unless it is reasonably certain that benefit will follow therefrom. *Re Asselin and Cleghorn*, 6 O.L.R. 170. A receiver of the tolls of a company will be appointed at the suit of a city that has, under statutory authority, lent the company money in the form of city debentures, the city having redeemed the debentures and proceeded against the company to compel payment, or to foreclose its interest under its act of incorporation: *Brantford* v. *Grand River Nav. Co.*, 8 Gr. 246. The powers of the Courts in the several provinces of Canada in respect to the appointment of liquidators, receivers and managers are, in the main, now regulated by statute.

In mortgage cases.

Since the Judicature Act a receiver will be appointed of property which is subject to both a legal and equitable mortgage, although mixed, and the whole comprised in one security: *Pease* v. *Fletcher*, 1 Ch. D. 273. Without making a prior mortgagee, who has the legal title, a party to the proceedings, a receiver will be appointed at the instance of an equitable mortgagee where a mortgagor is in possession of encumbered property, irrespective of the sufficiency of the security: *Aikins* v. *Blain*, 13 Gr. 646. Likewise a receiver will be appointed where a mortgagee is prevented by the mortgagor from taking possession under his mortgage: *Truman* v. *Red-*

grave, 18 Ch. D. 547; or where a first mortgagee, in whom an equity of redemption is vested, has cut and removed timber from the land to a value greater than the amount due on his mortgage, a receiver will be appointed at the instance of a second mortgagee: *Steinhoff* v. *Brown*, 11 Gr. 114. On the question as to when a receiver of railway property will be appointed at the instance of bond or debenture holders, attention is called to a few cases: *Lee* v. *Victoria R. Co.*, 22 Gr. 110; *Grey* v. *Manitoba & N.W.R. Co.*, 11 Man. L.R. 42; *Allan* v. *Manitoba & N.W.R. Co.*, 10 Man. L.R. 106.

Estates of decedents and trust estates.

A receiver of an estate may be appointed where an executor has been guilty of mismanagement, or a breach of duty: *Re Beaird* (Ont.), 9 D. L.R. 842; *Meacham* v. *Draper*, 2 Gr. 316; or when necessary for the protection of an infant's interest in an estate: *Re Beaird, supra;* or where there is no one in charge of an estate, the executor residing without the jurisdiction and ignoring the Surrogate Court Order for an accounting: *Re Beaird, supra;* or where it is charged that an executor is guilty of maladministration, is insolvent and has made an assignment for the benefit of his creditors, notwithstanding maladministration is denied, and it is claimed that his insolvency was not the reason for the assignment: *Harrold* v. *Wallis*, 9 Gr. 443.

A receiver of a trust estate will be appointed if a trustee commits a breach of trust: *Grand Council Provincial Workmen's Association* v. *McPherson*, 8 D.L.R. 672; or where a trustee unreasonably refuses to bring an action for the benefit of a trust estate, which has nearly expired, and there is nothing to do but wind it up: *Garesche* v. *Garesche*, 4 B.C.R. 310. But a receiver will not be appointed on a general charge that an executor is committing waste on the property of an estate where no specific acts are shewn: *Sanders* v. *Christie*, 1 Gr. 137.

Receivers in equitable execution cases.

A receiver is frequently appointed at the instance of a judgment creditor in order to reach a debtor's equitable interest, not subject to the usual legal process.

A receiver of the salary of a school teacher not under contract with the government, may be appointed: *Fisher* v. *Cook*, 32 N.S.R. 226.

Province of British Columbia.

COURT OF APPEAL.

Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips. JJ.A.] [18 D.L.R. 109.

REX v. WALDON.

Constitutional Sunday laws—Dominion Lord's Day Act—Provincial power.

The Lord's Day Act, R.S.C. 1906, ch. 153, by the proviso in sec. 5, enables a province to reduce the scope or mitigate the severity of the general prohibition in respect of the topics mentioned therein, but does not clothe the province with power, either itself to deal generally with the matter of Sunday observance, or to confer such powers on municipalities so as to enlarge the scope of the Dominion Act; and a conviction under a municipal by-law so framed under the Municipal Act, R.S.B.C. 1911, ch. 170, cannot be sustained.

Rex v. *Waldon*, 14 D.L.R. 893, 22 Can. Cr. Cas. 122, affirmed.

Bodwell, K.C., for the appellant. *Woodworth*, for the respondent.

Obituary.

FIELD-MARSHAL EARL ROBERTS

OF KANDAHAR, PRETORIA AND WATERFORD; VISCOUNT ST. PIERRE, P.C., K.P., G.C.B., G.C.S.I., V.C., K.G., D.C.L., Ox. and Tor. Un., etc.

It is fitting in these days of the Empire's stress and its fight for liberty and freedom and to keep its plighted word, to record the death of Field-Marshal Frederick Sleigh Roberts, who died of pneumonia, contracted when visiting our Indian troops on the battle line on the border of France and Belgium. It was as he would have wished it to be: to die near the soldiers he loved so well. England's most illustrious General since the time of Wellington—one of the greatest of the sons of the Empire—

an exalted patriot—a Christian gentleman, *sans peur et sans reproche*, respected and loved by all, he was the idol of the army, and the object of its passionate and unswerving devotion. He died at Boulogne on November 14th in his eighty-third year.

Bench and Bar

JUDICIAL APPOINTMENTS.

Hon. Wilfrid B. Nantel of the City of Ottawa to be a member of the Board of Railway Commissioners under the provisions of the Railway Act, 1903, vice Hon. Michel E. Bernier, whose term of office has expired. (Oct. 20.)

James Gamble Wallace, K.C., to be judge of the County Court of the County of Oxford, vice Alexander Finkle, resigned.

THE LIVING AGE, of Boston, was never more indispensable or more up to date than now, through all its long career. It gives most important and timely articles from a long list of English magazines, reviews and journals. The articles dealing with one phase or another of the present world-wide war are especially important, and the weekly issue of THE LIVING AGE enables it to reproduce these articles while they are still fresh.

"The Blindfold Game," from the *Pall Mall Magazine*, describes graphically the operation and efficiency of that modern engine of war, the submarine, which many naval experts look upon as likely to put dreadnoughts and superdreadnoughts out of commission. "The 'Guiltless' German People," reprinted from *The Nineteenth Century*, gives facts to shew that the present war is not altogether the work of a military staff or an over-ambitious Kaiser, but that the German people are heart and soul in sympathy with it. And this is the result of the education that has been going on for years past. We strongly recommend this excellent serial to the attention of our readers.

ANALYTICAL INDEX