Canada Law Journal.

VOL. XLIX. TORONTO, MAY 1. No. 9

INHERITANCE TAXES UPON ESTATES OF NON-RESIDENTS.

A comparative study of the Inheritance Tax Laws of the civilized world has become, of recent years, a matter of importance to the legal profession, as well as to all interested in financial investments. The paper boundaries of States or neighboring countries have little meaning for the capitalist of to-day, when monster corporations take the world for their field of operation and gigantic fortunes extend their investments over entire continents.

While the mere taxing of inheritances is no novelty in legislation, yet within the United States such laws are the creation, roughly speaking, of the past twenty years. Representing as they do in many instances the views of first impression of legislators acting independently at places remote from each other, and unacquainted with this comparatively new form of taxation, they here and there display, as might be expected, both crudeness of conception and lack of harmony. Comparing the more modern with the earliest legislation, however, a steady and gratifying development is plainly apparent. This development is always in the direction of imposing progressive or graduated duties in place of the old flat rate of taxation, of favoring descendants and placing the heavier burdens on strangers and more distant relatives, of granting reasonable exemptions and fixing reasonable rates; and in an increasing deference paid to the rights of non-resident investors and a recognition of the duties of comity towards sister States. But some novel tendencies, less encouraging, obtrude themselves upon our notice, such as the actual or suggested employment of inheritance taxes for the purpose of limiting or preventing the transmission of great

accumulations of property, or of confiscating for the State all inheritances beyond a permitted amount.

This might tempt the student to digress so far as to consider whether laws of this general character are really in the public interest or whether they are purely socialistic and a distinct discouragement to the saving habits of a people; but any such consideration would be idle. This class of legislation is not a peculiar product of American democracy, whose aim is sometimes said to be to tax the rich out of existence, but is as firmly established in Europe as on this Continent. Indeed, it took its rise in Europe. So far as socialism (whatever the term may in these days mean) is concerned, the most monarchical country in Continental Europe is more prolific of legislation of a so-called socialistic tendency than any State in the American Union. Nor is Great Britain far behind.

In defence of these laws it may be said that there is no natural right by claim of which a human being should be permitted to influence the ownership of real or personal property for one instant after his death; that the sanction permitting him to designate the next possessor, or designating it for him, is merely a rule adopted by the public in order to obviate the inconvenience and disorder of property being left from time to time open to continual seizure, upon the death of its owner, by any chance finder; and that the community may with justice impose such tax upon the succession to ownership as it deems desirable: *Mager* v. *Grima*, 8 How. U. S. 490; *U. S.* v. *Perkins*, 163 U. S. 625. Whatever the reason advanced, it is at this day clear that these laws are too well established to be successfully opposed as unjust or unconstitutional. They are also too important. From taxes of this nature Great Britain derives ninety million dollars a year, or one fifth of her total revenue. Similarly, France collects over fifty million dollars, and the German Empire an even larger amount.

Thirty-eight States of the American Union, as well as Hawaii and Porto Rico, now possess Inheritance Tax Laws; every Canadian Province may also be included. In the operation of these

laws, the ancient maxim "mobilia sequuntur personam" has been, to a large extent and in most jurisdictions, set aside. It is still the common or statute law in most, if not all, of the United States that personal property is transmitted and bequeathed by will, and is descendable by inheritance on intestacy, according to the law of the domicile and not that of the situs; yet the rule has grown up in modern times that State legislatures have the power to deal with and tax the personal, as well as the real, property of non-residents, if actually and physically within their jurisdiction, and it is generally felt that such property, by reason of enjoying the protection of the local law, ought to pay its share towards the expense of the local government. The tax, however, is held to be not directly upon the property, but upon the succession: *Irdman* v. *Martinez*, 184 U. S. 578; *Magoun* v. *Illinois Bank*, 170 U. S. 283; *Moore* v. *Ruckgaber*, 184 U.S. 593; 104 Fed. Rep. 947; *U. S.* v. *Jenkin*, 8 Fed. Rep. 873; *U. S.* v. *Hunnewell*, 13 Fed. Rep. 617; *U. S.* v. *Morris*, 27 Fed. Rep. 341.

A general family resemblance is borne by all this class of legislation. Thus, a common feature is the imposition of the tax, upon the death of an owner, (a) upon all real and personal property belonging to his estate and situated within the jurisdiction imposing the tax; and this irrespective of whether the deceased owner was domiciled within or without the jurisdiction; the tax being in this case based upon the physical presence of the property within the jurisdiction; (b) in the case of a resident domiciled within the jurisdiction, upon all personal property of the estate wherever situated; i.e., whether within or without the jurisdiction; (c) upon stock in corporations; this stock is ordinarily taxed in the State where the late owner was domiciled; but very frequently is taxable as well in the State where the corporation is incorporated, since this stock is very commonly deemed property situated in both States: it may even be taxed also in the State where the corporation owns any property or does any business or where the certificates of ownership happen to be found. There may thus be, in this case, double

or treble taxation. However great the hardship or natural injustice of this repeated taxation of the same property, the Supreme Court of the United States has held it legal: *Blackburn* v. *Miller,* 188 U. S. 189. The State of the corporation usually holds the corporation itself responsible for the collection of this tax under a penalty. The same rule obtains with regard to registered bonds of corporations. They are invariably taxed in the State of domicile; but not infrequently also in the State of incorporation, as well as in the State where they are physically found.

As an indication of the practical result of the present system, let us assume a very common case—that of a resident of the State of New York, who dies leaving an estate invested principally in the stock of one or two well known railroads and of large industrial corporations. This State has since recanted many of its legislative heresies, but the ill effects are still widely felt. Administration of the estate is, of course, taken out in New York, the jurisdiction of domicile; yet it will be found that five or six States have to be dealt with by the personal representatives, in place of one. Thus New York, the State of domicile, first imposes and collects the full tax upon the entire estate. Until a recent amendment, it allowed the estate no deduction whatever for any other inheritance taxes which may be demanded in other States. But before the administrator can deal with this stock, he must present his credentials and have it transferred to him upon the books of the Company. The latter will not permit the transfer until satisfied that all collectible inheritance taxes have been paid, since the statute law makes it responsible for the payment. The administrator may then discover that an American transcontinental railroad holds charters from perhaps three, four or five different States, although nothing of this appears on the stock certificates; thus the Wabash Railroad Company is incorporated under the laws of Ohio, Indiana, Michigan, Illinois and Missouri. This frequently gives rise to difficulties of great practical importance to the estate of the foreign investor. One might conjure up further complications should

the taxing authorities of different States rule differently on the subject of domicile, which lies at the very threshold of the enquiry, and is often one of difficulty. With all these jurisdictions must the unlucky administrator run the gauntlet, being compelled, in some cases, to apply for ancillary administration in various States for no other reason than the settlement and payment of the inheritance tax of the particular State in question. In many States, it is the practice to require the foreign executor or administrator to file a complete inventory of the estate, as well as certified copies of the original probate records, before official consent is given to the transfer of the stock. This may involve an expense of no small amount, apart from the tax itself. Yet the executor is helpless, since non-compliance with the exactions of State officials entails inability to transfer the stock. In the case of some of the large trust corporations, it will be found that the corporation itself sometimes adds another court to the already sufficient number by demanding certified copies of the will and letters, and by itself independently determining the regularity of the probate proceedings, the power of the personal representatives to sell and the propriety of the transfer. However arbitrary and unauthorized this may be, the condition exists, and the delays in transfer occasioned thereby may, in a falling or panicky stock market, result in serious loss to the estate.

These admitted evils, and the distinct discouragement they offer to the investment of foreign capital in the United States have been often pointed out. Quite recently the U. S. Consul at Birmingham made this the subject of a remonstrance to the Department of Commerce and Labor, and his statement of many cases of hardship coming under his official notice will be found in the Consular Reports. But the subject is not one of Federal jurisdiction. At the present time, there exists no Federal Statute taxing inheritances, this form of taxation being properly considered by the Federal Government as a war measure solely. Such a tax was in force, however, from 1862 to 1872; and again from 1898 to 1902. It may be resorted to at any time: *Knowlton* v. *Moore*, 178 U. S. 41.

The general features of the legislation are the same in all these statutes. There is found a distinction made between direct descendants and near relatives on the one hand, and collaterals on the other: the former being in some cases untaxed, and in all others visited with a much lighter tax than in the case of more distant relatives. The favored class of direct inheritances nearly always includes father, mother, husband, wife, child (including adopted child) and lineal descendants, and some States also admit brothers and sisters, the wife of a son or the husband of a daughter. Thirteen States exempt direct inheritances and tax only collaterals. Small inheritances are usually exempt.

On direct inheritances, a liberal exemption will generally be found allowed, sometimes as much as $10,000; beyond which the tax is fixed at a small percentage. On collaterals, the exemption is frequently $500, and the rate of taxation is five per cent., or more. The tax is, as a rule, determined on the amount of the inheritance considered by itself and not by the size of the entire estate.

As already indicated, it is apparent that the general application of the above principles or grounds of taxation must frequently result in double or treble taxation on the same bonds or stock. This has so far been recognized that some States (as Connecticut) retaliate where bonds and stocks of outside or foreign corporations owned by its citizens are taxed by the State of organization, by imposing a similar burden upon corporations of the offending State; and three States (New York, Massachusetts and Kansas) give credit for taxes paid in another State where such State reciprocates. As a rule, the taxing State takes into account only that proportion of the corporation's property which is actually within its jurisdiction.

Without adverting to the peculiarities of legislation in the fifty Commonwealths which make up the American Union, two wealthy States may be mentioned as representative, first, of unprogressive, and, secondly, of advanced ideas in relation to inheritance taxation. Illinois is an example of the less progres-

sive State. While its treatment of near relatives is not severe, its exemption in the case of non-relatives is only $500, and its rate of taxation is according to a scale increasing sharply with the amount taxed. Thus, the transfer is taxed three per cent. up to $10,000; four per cent. up to $20,000; five per cent. up to $50,000; six per cent. up to $100,000, and ten per cent. above $100,000. The State claims from non-residents a tax not only upon shares of corporations incorporated in Illinois, but also upon shares of corporations, no matter where incorporated, which may own property within that State; and also upon registered bonds, although held by non-residents. These rates were exceeded, however, by the State of Washington, which formerly assumed to tax all sums passing to collateral relatives or strangers of the blood, who are aliens not residing in the United States, twenty-five per cent. upon their inheritances. The Supreme Court of the State held this remarkable statute invalid. It is paralleled by the Quebec amendment of 1907 imposing an additional tax of five per cent. upon inheritances passing to non-residents; which was wisely repealed three years later.

On the other hand, Pennsylvania enjoys the distinction of having always possessed a moderate inheritance tax law. No tax whatever is imposed upon direct inheritances; nor does the State tax stock in Pennsylvania corporations where such stock is owned by the estate of a non-resident; nor does it tax securities for money which may be physically within the State at the time of the owner's death. The principle that personal property follows the domicile of the owner is wisely adhered to (Coleman's Estate, 151 Penna. 4). As a result of these moderate laws, some of the largest corporations in the country make their home in the State, and capital feels reasonably safe there. Fifteen States, among them Delaware, Maryland and Virginia, exempt direct inheritances. Massachusetts exempts bonds and certificates of stock of foreign corporations found within the State, and taxes non-resident decedents upon real estate within Massachusetts only.

Any attempt at a review of the specific provisions of the various State Statutes, must be necessarily brief and imperfect.

In New York the earliest statute (of 1885) did not apply to transfers of property made in the case of a non-resident: *Matter of Euston*, 113 N. Y. 174; *Matter of Dingman*, 66 App. Div. 228; but by the amendment of 1887, ch. 713, in effect June 25th, 1887, these estates were taxed. The Act of 1892, in effect May 1st, 1892, expressly imposed a tax upon the transfer of all property within the State belonging to a non-resident, and eliminated the former requirement that a non-resident should own real property within the State in order to supply a basis for the jurisdiction. Prior to 1909, the exemption on all transfers to non-relatives extended to $500; where this value was exceeded, the tax was 5 per cent. upon the whole amount. Up to the date of the last amendment, transfers to certain near relatives were exempt to the extent of $10,000; beyond that amount the tax was one per cent.

By a subsequent amendment (ch. 706, Laws of 1910) the exemption to non-relatives was reduced to $100; where the property exceeded that value, the tax was imposed at 5 per cent. as a "primary rate." The exemption upon transfers to near relatives was cut down to $500. If the amount exceeded $500, one per cent. was fixed as a "primary rate." The following exception was made: if a transfer of $5,000 or less was made to a father, mother, widow or minor child, the exemption then extended to that sum, and the further rates of tax were levied only upon the excess: the benefit of this exception, however, did not extend to a brother, sister, wife or widow of a son.

The above rates of tax imposed in New York by the Act of 1910 (known as the Hughes Act) were denominated by the Statute as "primary rates," and whenever the amount of property transferred in any of the foregoing cases exceeded $25,000 over and above the exemptions enumerated, the rate of taxation in all cases was as follows:

Upon all amounts in excess of the said $25,000 and up to and including the sum of $100,000, twice the primary rates: Upon

all amounts in excess of the said $100,000 and up to and including the sum of $500,000, three times the primary rates: Upon all amounts in excess of the said $500,000 and up to and including the sum of $1,000,000, four times the primary rates: Upon all amounts in excess of the said $1,000,000, five times the primary rates.

This short lived Statute had its value. It represented the unwise greed of the legislature, and exemplified all the worst features of tax legislation of this character. It overlooked the fact that domicile is always a matter of choice, and that wealth soon leaves a domicile where it is subjected to taxation which it deems excessive. The Statute was designed to increase the State's revenue, which, from inheritance taxes, then amounted to eight and one half million dollars. The loss in revenue the first year of its enactment was two million dollars. Four hundred million dollars of capital were forthwith withdrawn from investment in the State, and five thousand seven hundred safe deposit boxes were hurriedly emptied and surrendered. The New York Chamber of Commerce was moved to formally advocate the repeal of the obnoxious law. Other results were, that owners of large capital organized incorporations to act as holding companies. Cases were known where legatees formally renounced their legacies in order to escape the heavy tax, being subsequently compensated out of the estate.

So well recognized were the evils brought about by this unwise Statute, that in July, 1911, it was radically modified by the Harte Act (N. Y. Laws 1911, Ch. 732), which reduced the maximum rate of taxation from 25 per cent. to 8 per cent., and on direct bequests from 5 per cent. to 4 per cent.; and increased the exemptions five-fold. The new law exempted bequests to direct heirs and near relatives up to $5,000 and bequests to collaterals up to $1,000. The old rate of one per cent. to direct heirs and five per cent. to collateral relatives was restored, and was not increased unless the property exceeded $50,000; on any amount above that sum up to $250,000 the rates were two per

cent. and six per cent. respectively; on any amount above $250,000 and not exceeding $1,000,000 the rates were three per cent. and seven per cent. respectively; and on amounts above $1,000,000, four per cent. and eight per cent. respectively. The tax is imposed upon the amount of each bequest, and is not upon the entire estate.

More important even than this reduction in rates was the abolition of the double taxation of non-residents upon property formerly taxable both in New York State and in the State of the decedent's domicile. Thus, shares of stock in New York corporations, whatever the domicile, were formerly subject to taxation, but are now exempted, if taxed in the State of domicile; and the same applies in the case of non-residents to personal property in the shape of money, deposits in banks, shares of stock, bonds, notes, credits, evidences of debt, and other intangible securities which may at the date of the death of the non-resident be found physically within the State. This would apparently be now the only subject of double taxation; since in the case of a person domiciled in England movable property would seem to be subject to estate duty even if its situs was out of Great Britain. In Germany, however, the estate would be entitled to deduct the tax paid in the foreign jurisdiction of the situs. Lands will still, of course, be taxed; and so will such tangible personal property as household goods, wares, and merchandise located in the State. It is to the credit of the Legislature of this State that it has now adopted the honest policy of taxing only such property as has an actual situs in the State. This is in accordance with the recommendation of the 1910 Conference of the International Tax Association. The provision which aims to abrogate the evil of double taxation is modelled upon the Massachusetts Statute, which provides that taxes upon the stock of Massachusetts corporations owned by the estate of a non-resident upon which a tax has been paid in the State of domicile, will be reduced by the amount of such payment, provided that by the laws of the domicile a similar exemption is granted. An equivalent provision will be found in the Statutes of Connecticut, Michigan and Maine. In Vermont, where the

stock has been legally taxed in another State, only such tax will be imposed as will make the entire tax, both within and without Vermont, equal to five per cent.

A feature of interest is the frank avowal heard in many quarters that inheritance taxes may and should be employed to reduce "swollen" fortunes and to prevent their transmission beyond one generation. The National Assembly of France has more than once debated propositions to increase all inheritance taxes to accomplish this purpose, and to abolish all intestate inheritance except between very close relatives. The same subject was discussed not long ago by the Illinois Bar Association, a committee of which reported in favor of an amendment to the law of descent and distribution, limiting the amount which any person might take by inheritance or bequest, the balance to go to the State. It is plain that by imposing each higher rate of taxation only on the excess above the amount subject to the next lower rate, small or moderate estates would not be unduly diminished, while an absolute limit could be placed upon inheritances. Within the United States constitutional guarantees requiring that direct taxes shall be apportioned and indirect taxes uniform would prevent the entire property of a citizen being taken from him by legislation; but, on his death, no such protection is afforded his estate. The tax is not imposed upon property, but upon the right of succession. Each State may concede or refuse to concede such a right. It may declare that the property of all decedents belongs to the State, or it may impose any terms for allowing the claims of next-of-kin, heir or devisee: it may legally confiscate as much of the estate as it desires. Such a state of affairs was considered by the Supreme Court some dozen years ago, and dealt with as follows:—

"The grave consequences which it is asserted must arise in the future, if the right to levy a progressive tax be recognized, involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise where an arbitrary and confiscatory exaction is imposed, bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and

fundamental principles for the protection of the individual, even though there be no express authority in the constitution to do so. (*Knowlton* v. *Moore*, 178 U.S. 41.)"

The natural right of an alien to inherit would be, if possible, still more precarious. The opinion in *Mager* v. *Grima, supra,* states:—

"Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee; and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day real property devised to an alien is liable to escheat."

At the same time, it is not in the United States that confiscatory legislation, under the guise of inheritance taxes, need be feared. While so-called leaders of the people have advocated the reduction or confiscation of "swollen fortunes," no move in the direction of such legislation has yet been made, or would be likely to find any support. The rates of inheritance taxation imposed generally throughout the United States compare favorably with the exactions of European countries.

Thus, in Great Britain, the Finance Act of 1894, as amended by the Act of 1907, imposed an "estate duty" of one per cent. upon estates between £100 and £500 in value, while large estates exceeding £750,000 paid from ten to fifteen per cent. Beyond £1,000,000, the assessment for estate duties is ten per cent. for the first million and eleven per cent. for the next half million; and increasing by one per cent. for each half million beyond the first million, the final rate is, for an estate exceeding three million pounds sterling, ten per cent. upon the first million and fifteen per cent. upon the balance. Nor were these the only taxes upon inheritance, since the Act also imposed a "legacy duty" upon personal property, and a "succession duty" on real estate passing to collateral heirs, graduated in accordance with the relationship of the decedent and the heir, and varying from three per cent. for brothers and sisters to ten per cent. for distant relatives and strangers in blood. These legacy and succession taxes apply nominally to direct heirs also, at the rate of one per cent.; but payment of estate duty appears to release

direct heirs from payment of legacy or succession duty. The exemptions are £100 in the case of estate duty, and £1,000 in the case of legacy or succession duty. To estimate somewhat roughly the severity of this taxation, it would seem that any portion of an estate exceeding £3,000,000 in value passing to a distant relative on intestacy, or by will to a stranger in blood, will pay the government about twenty-three per cent. Under similar circumstances, the same estate in France would be assessed over twenty per cent.; while in Germany, although direct descendants of the decedent are exempted from taxation, the rates are so sharply progressive that inheritances exceeding one million marks ($250,000) passing to distant relatives, are mulcted twenty-five per cent. No such severe taxation can be found within the United States, nor anything approaching it.

The New York State Conference on Taxation, held at Utica January 12th and 13th, 1911, after long debate, approved and adopted general principles of inheritance taxation.

These principles are to tax real estate and tangible personal property only in the State where they are situated; and to tax all tangible personalty only at the domicile of the decedent. The Conference favored, in the case of lineal descendants, moderate graded taxation with liberal exemptions; and smaller exemptions, with reasonably increased and graded rates, on all bequests to collaterals.

The New York Tax Reform Association subsequently approved these principles and added the further suggestion that the rate of taxation upon each bequest should be governed by the size of such bequest, and not by the amount of the whole estate.

In discussions upon the general subject of exemptions, it has been also suggested that considerations of public policy ought to exempt certain classes of property which are in no sense incomproducing. Thus, collections of antique paintings, ancient tapestries, curios, relics and heirlooms; sculptures, ancient or modern; bronzes; collections of ancient coins and libraries form a species of property which it is not in the interest of the public to sub-

ject to an inheritance tax. Such tax offers a distinct discouragement to the collection or retention of art objects, which it is yet in the interest of the general culture and education of a community to have collected and preserved. It is readily seen that collections of this nature are not usually made with any view of profit, since their value is extremely variable and uncertain; but a more substantial reason exists in the occasional high values placed upon such curios, coupled with the difficulty of finding an immediate purchaser. Thus, the devisee of valuable heirlooms, such as ancestral portraits by old masters must often, at present, either sell the bequest to raise the money necessary to pay the inheritance tax upon it or forego the bequest.

The model Inheritance Tax Law, adopted by the National Tax Association, at their Annual Conference in Milwaukee, 1910, contained a clause exempting libraries, paintings, curios, relics and similar bequests where bequeathed to educational or scientific institutions. But this does not go far enough. The public value of collections of art objects has been recently recognized in the action of Congress in removing all import duties on works of art more than twenty years old.

On the other hand, a prominent banker recently removed a valuable collection of paintings, antiques and curios from the National Gallery and elsewhere in London to New York upon the ground that the estate duty imposed by the British Law was much more excessive than that imposed by the State of New York. Even in the latter State, until this recommended amendment of the law is made, collectors of art objects must bequeath them to public institutions if they wish to escape burdening their next of kin with impositions so heavy as to compel a sale of the bequest to meet them. It is clear that no duty should be levied upon art objects or upon articles which have merely an educational value. The entire community benefits in the preservation of such objects and their collection should be everywhere distinctly encouraged.

New York. W. SETON GORDON.

THE BANISHMENT OF THE RICH.

It used to be said that the Vice-President of the United States was of necessity an inconspicuous personage whose duties consisted in presiding over the Senate and nothing more, unless in the few cases when he was called upon to fill the presidential chair by reason of the rare but still all too frequent removal of the President by assassination. The Democratic Vice-President, Thomas R. Marshall, however, within the few weeks since his inauguration, has contrived to draw the attention of the country to him by his recently published views upon the duties, dangers and probable fate of rich men resident in the Republic.

Mr. Roosevelt, during his seven years as President, did, it is true, say many bitter things concerning rich men, or "malefactors of great wealth," as he was fond of calling them; and on more than one occasion, he frankly advocated reducing their "swollen fortunes" (another of his happy expressions which has passed into history) by various forms of financial bloodletting through cunningly devised taxation. The country at large, however, suspecting that he was himself not averse to accepting financial assistance for party purposes from the classes he denounced, was disposed to look upon his threats as mere rhetorical mouthings; and it is certain that he personally, while in office, made no move to give them practical effect.

Vice-President Marshall, in a speech delivered at the National Democratic Club in New York on April 12th, declared that there exists a feeling throughout the masses of voters in the United States that such immense fortunes as have been accumulated since the Civil War constitute a menace to the country, and that the people would yet discover a means to reduce these fortunes by taxation, unless rich men mended their ways.

Some few days later, in Washington, he repeated his warnings and again stated that "the right to inherit and the right to devise are neither inherent nor constitutional (i.e., necessarily protected by the Constitution) but on the contrary, they are simply privileges given by the state to its citizens"; and he pro-

ceeded, "men of judgment have expressed to me the opinion that were a vote to be taken on the proposition that all estates over $100,000 revert to the state upon the death of the owner—the $100,000 being exempt—it would be carried two to one."

There is no doubt that it would. And herein lies the danger of the position, not alone to men of wealth, but to the entire community. Laws relating to Wills and Intestacy are within the legislative power of the individual states; and any state Legislature may repeal its Wills Act, as well as abolish or alter legislative provisions for the devolution of estates upon intestacy. Both the Federal Government and individual state Governments may increase Inheritance Taxes to an extent which would practically confiscate all large fortunes; there is no constitutional impediment. But is it to the public interest to do so?

It is undeniably true that there exists among large masses of the people profound dissatisfaction with the existing distribution of wealth in the Republic. That "no man can in a lifetime honestly accumulate a million dollars" expresses a belief generally held; and in the public mind the corollary follows that all estates greater than this have been dishonestly acquired. "The Trusts" and "Wall Street" are all thieves together: such is the belief of the majority of voters.

It must not be overlooked that we are dealing not with facts that actually exist; but with what the mass of voters, rightly or wrongly, believe. It is their belief, possibly consciously or unconsciously coloured by a selfish wish to possess themselves of the accumulated wealth of others, that tells at the ballot-box.

The Federal Income Tax is said to be drawn so as to exempt all incomes under $5,000 per annum; and it is estimated that there are only 400,000 people in the United States who will be unable to escape taxation under it. Of course it is popular; since this small number are to be taxed for the benefit of the many. Such a law, if submitted generally to the voters of the country, would be sure to be carried not only two to one, but one hundred to one.

The man on the street has not the education, training or time to deal with questions of this magnitude, and will be generally found to acquire his opinions from the public press. It is a cheering fact that the press of the United States, taken as a whole, is conducted by men of signal ability. It represents the brains, conservatism and judgment of the people at large; and on this important question it has not yet spoken. The men who write for the press are fully alive to the fact that great accumulations of capital are essential to the successful conduct of the gigantic business operations of modern times; that the day of the small manufacturer has passed, never to return; and that the contemplated reduction of the United States tariff, which will bring the American manufacturer, for the first time in fifty years, face to face with the great manufacturers of the world, and will open American markets to the competition of their powerful rivals in England and Germany, renders it more than ever necessary that great accumulations of money should still remain largely in individual hands. The capitalist, the captain of industry, the mill-owner, the money king, may have his faults, but the wage-earner cannot yet, it would seem, subsist without his aid. To drive him out of the country by threats of robbing him of his wealth would leave the country in a sorry plight.

Such hasty action need hardly be apprehended, notwithstanding the grave warning of a man high in political office who knows the American people well, and whose views of their sentiments and purpose are entitled to the deepest respect. To accept it literally would be to suspect a great, free and just people of harbouring an unjust design to drive from its shores its most successful and valuable citizens for no crime other than their success. The revocation of the Edict of Nantes drove to England in thousands the Huguenot hand-workers whose skill in their various crafts established her primacy as a manufacturing nation. No modern State will commit a similar blunder.

STATUTE OF LIMITATIONS AND MORTGAGES.

The case of *Noble* v. *Noble*, 27 O.L.R. 342, can hardly be said to have been satisfactorily disposed of. It was tried by Mulock, C.J.E., who gave judgment for the defendants, which was reversed by a Divisional Court, (Boyd, C., Riddell, and Sutherland, JJ.), whose judgment has in turn been reversed by a majority of the Court of Appeal (Garrow, Maclaren, and Magee, JJ.A., Meredith, J.A., dissenting). There are thus an equal number of Judges in favor of each party to the litigation, but those who speak last prevail. There appeared to be practically no dispute as to the facts, and the case was narrowed down eventually to a bare question of law which may be shortly stated thus: A being owner of the land in question subject to an outstanding mortgage let B into possession as tenant at will. B acquired a title by possession as against A but not as against the mortgagee, whose mortgage was kept alive by payments from A. A, after B had acquired title by possession against him as regards the equity of redemption, paid off the mortgage and took and registered a certificate of discharge. In these circumstances is A entitled to recover possession from B, the mortgage being overdue? The Court of Appeal have decided that he is not, and the court declined to decide whether or not A on the principle of *Brown* v. *McLean*, 18 Ont. 533, is entitled to a lien in respect of the money paid by him on the mortgage. With all due respect to the Court of Appeal we do not think that this can be reasonably said to be a preventing of multiplicity of suits within the meaning of the Judicature Act. All necessary parties were before the court for determining their rights in the matters in question, and after a lengthy litigation they are told by the court that in order to settle their rights it will be necessary for them to begin another litigation, as far as we are able to see, without any substantial reason. Even under the old Comman Law Procedure Act judges were accustomed to say "never mind the pleadings, let us have the facts and we can then make the pleadings suit them." Here, all the facts were before the court, but after an expensive litigation the rights of the parties

in the matter in controversy are virtually left undetermined. We think that such a state of things is hard to justify, and it is disappointing to find that it is still possible to exist under our supposed improved methods of procedure.

If the disposition of the case be unsatisfactory in this view, it appears to us equally so in regard to the point actually decided—in that it appears to fail to give due effect to the legal right of the mortgagee which was admittedly unaffected by the Statute of Limitations. The operation of a certificate of discharge of a mortgage is, according to the Registry Act, to be that of a conveyance of the estate. If the mortgagee had conveyed the land to a stranger the latter would have had, beyond question, the legal title to the land, and the mortgage being in default, he would have had the legal right to possession. If a stranger should unwarily take a discharge of the mortgage which he pays off instead of a conveyance from the mortgagee he is not to be presumed to have cleared the estate of an incumbrance for the benefit of some one else, but as was decided in *Brown* v. *McLean*, 18 Ont. 533; *Abell* v. *Morrison*, 19 Ont. 669, he is equitably entitled to treat the mortgage as a subsisting incumbrance, and to be subrogated to the rights of the mortgagee.

When the mortgagor in *Noble* v. *Noble* was barred of his equity of redemption under the Statute of Limitations, he had at all events the same rights as any other stranger to the estate, and when he paid off the mortgage debt he was, though barred as mortgagor of his equity of redemption, nevertheless entitled to step into the shoes of the mortgagee, and for the Court to treat his payment of the mortgage as merely having the effect of the removal of an incumbrance, is not, we think, giving due effect to the Registry Act. If it be true that a stranger paying off a mortgage is not entitled to the rights of the mortgagee as held in *Noble* v. *Noble*, then it seems to us the rights of the mortgagee are impaired, and he cannot sell or assign his security so as to give his vendee or assignee his title, and though the Statute of Limitations purports to protect his title, it is, by the decision in *Noble* v. *Noble*, found really not to do so. The tak-

ing of a certificate of discharge in lieu of a conveyance is confessedly a matter of no importance as regards the substantial rights of the parties: *Brown* v. *McLean; Abell* v. *Morrison, supra,* and yet in the case of *Noble* v. *Noble* it is made the ground for depriving a party of his rights.

The decision of the Court of Appeal appears to us to run counter to prior decisions and the true meaning of both the Statute of Limitations and the Registry Act.

As we understand the cases, there is a wide difference between the rights of a mortgagee who acquires his mortgage before any adverse possession has begun against his mortgagor; and one who acquires his mortgage after an adverse possession has begun against his mortgagor. In the former case the rights of a mortgagee are saved by the Statute of Limitations for ten years after the last payment received under his mortgage from a person entitled and liable to pay. But where an adverse possession as against the mortgagor had begun at the time a mortgage is made, then, the Statute of Limitations having begun to run, it is not stopped by the giving of a mortgage, nor is a new starting point thereby created, but the mortgagee is in no better position than any other alienee of the mortgagor would be. That we take to be the result of *Thornton* v. *France* (1897), 2 Q.B. 143, and *McVity* v. *Trenouth*, 9 O.L.R. 105, 36 S.C.R. 455, although it is true this last case was ultimately reversed (1908) A.C. 60, as in the opinion of the Judicial Committee of the Privy Council, the Statute of Limitations did not begin to run, owing to the peculiar circumstances of that case, until the giving of the mortgage.

In *Noble v. Noble* the plaintiff purchased the land in question in February, 1895, and on the same day gave the mortgage for part of the purchase money. The defendant's predecessor in title (a son of the mortgagor) was let into possession as tenant at will in April, 1895, and in April, 1896, the statute began to run as against the mortgagor, but not as against the mortgagee. In 1906 the mortgagor's title as against his son and

those claiming under him was barred by the Statute of Limitations, but the mortgage being duly kept alive by payments on account, was paid off by the mortgagor in 1908, and a certificate of discharge was then given, and registered in 1911. Though the defendant had acquired a title against the owner of the equity of redemption, he had not acquired a title as against the mortgagee. This is conceded by all the members of the court.

The true legal position of the matter would therefore appear to be this, the defendant had acquired or extinguished the mortgagor's right of redemption by virtue of his possession as against the mortgagor, which would possibly entitle him to redeem and thus acquire an absolute estate. But the mortgagor who had thus lost his right of redemption nevertheless paid off the mortgage, he was therefore in the position of a stranger paying off an incumbrance in such circumstances as would entitle him notwithstanding he accepted a discharge of the mortgage, nevertheless to claim that it was a subsisting incumbrance: *Brown* v. *McLean*, supra. The mortgagor had then in effect ceased to be mortgagor, and had, in fact, become the mortgagee with all the rights incident to that position, and the mortgage being in default he was entitled to recover possession, but that right to possession would be as mortgagee and should not be held to oust the right of the defendant to redeem by virtue of his possessory title as against the mortgagor qua mortgagor. It is only by working the matter out in this way that we think that due effect can be given to all the provisions of the Statute of Limitations in favour of mortgagees and adverse occupants.

GRAY V. WILLCOCKS.

By the Hon. Mr. Justice Riddell, L.H.D., LL.D

In the account of the case, *Gray* v. *Willcocks*, in the January number of this journal (49 C.L.J. 28) it was not noted that it was the first case in which the decision of the judges of the Court of King's Bench in Upper Canada was reported in the press.

In the issue of *The Oracle*, published at York (Toronto), January 18, 1806, being No. 39 of Volume XV. (total number 767) is found the following:

"The judges of the Court of King's Bench gave their opinion last Monday on the question mooted in the preceding term: Whether lands and tenements holden in free and common soccage could for the payment of debts be sold under an execution of the court.

Mr. Justice Powell being of opinion that the writ ought to issue, and Mr. Thorpe against it, the plaintiff took nothing by his motion. We understand that an appeal is intended to the King and Council. As the question excited much anxiety, as well in the landed as in the commercial interest, a number of the most respectable persons in the town and its vicinity attended to hear the judgment of the court, and Mr. Justice Thorpe, on delivering his sentiments entered into the consideration of Soccage Tenures, and the exposition of the statutes in a manner which afforded the highest gratification to every admirer of the English language and law.

Mr. Attorney-General and Mr. Solicitor-General were counsel for the writs issuing for the sale of lands. Mr. Weekes and Mr. Stewart against it. We understand that the case will be reported by a Gentleman of the Bar."

The case in the Judicial Committee has never been reported, and I owe the report to the Registrar of the Privy Council. It is subjoined:

"At The Council Chamber, Whitehall,

The 9th of February, 1809.

By The Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations.

Present: Master of the Rolls, Sir William Scott, Sir Evan Nepean, Bart., Mr. Dundas.*

Committee report on the appeal of John Gray, Esq., against William Willcocks, Esq.

YOUR MAJESTY having been pleased by Your Order in Council of the 16th November last to refer unto this Committee the humble Petition and Appeal of John Gray, Esquire, of Upper Canada, against William Willcocks, Esquire, setting forth, that the said William Willcocks being indebted to the Appellant in the sum of £500, he on or about the 26th day of September, 1800, entered into a bond to the Appellant in the penal sum of £1,000 conditioned for the payment of £500 and interest at the time and in the manner therein mentioned and at the same time he executed a Warrant of Attorney authorizing certain Attornies

*The Master of the Rolls was Sir William Grant, a Scotsman, educated at Aberdeen. Born in 1752, he was called to the Bar at Lincoln's Inn in 1774; next year he emigrated to Quebec, where he commanded a body of volunteers during the siege by Arnold and Montgomery. He was created Attorney-General of Canada in 1776, but returned to England in 1779. There he became somewhat prominent in Parliament: he was appointed Solicitor-General and knighted in 1799, member of the Privy Council and Master of the Rolls in 1801. This office he continued to fill till 1817, when he resigned, dying in 1832. Powell tells us that it was his belief, that Grant's return to England made an opportunity for a lawyer in Quebec that induced him (Powell) to come to Canada in 1779, although he had not yet been called to the Bar.

Sir William Scott, afterwards Lord Stowell, was an elder brother of Lord Elden. Born in 1745, he became an advocate at Doctor's Commons in 1779, and was called to the Bar the following year; he was knighted and created King's Advocate-General in 1788, and in 1798 made Judge of the Admiralty, and sworn of the Privy Council. In 1821, he was created a Peer; resigning his judgeship in 1828, he survived till 1836.

Sir Evan Nepean, was the well-known Secretary of the Admiralty, "a hard-working official." Born in 1751, he became successively a clerk in the navy, a purser, secretary to an Admiral, and Under-Secretary of State, Commissioner of the Privy Seal, Under-Secretary of War and Secretary of the Admiralty. Created a Baronet in 1802, he became Chief Secretary for Ireland in 1804, and the same year a Lord of the Admiralty. At the time of this judgment, he does not seem to have held any office of emolument.

Mr. Dundas was not the first Viscount Melville, Henry Dundas, the well-known friend of Pitt, but his only son, who became the second Viscount Melville. Born in 1771, he became a member of the Ministry formed by the Duke of Portland, and was sworn of the Privy Council in 1807. He continued in active political life, much of the time in office, till 1830, and died in 1851.

therein named to enter up judgment against him on the said bond; That in Hilary Term in the 44th year of Your Majesty's reign judgment was entered up and docqueted against the said William Willcocks in Your Majesty's Court of King's Bench for the Province of Upper Canada, and a writ of Fieri Facias having issued thereon in Easter Term following the Sheriff returned nulla bona to such writ: That in the same Easter Term the Appellant apprehending himself to be intituled by virtue of the Act of the 5 of His late Majesty, Geo. 2, ch. 7, whereby houses, lands, negroes and other hereditaments and real estate situate within the British plantations in America belonging to any person indebted are made liable to and chargeable with all just debts and demands whatsoever owing by any person to His Majesty or of any of His Majesty's subjects, to have a writ of execution against the lands and tenements of the said William Willcocks, applied to the said Court of King's Bench for a Rule to shew cause why such writ should not issue, which Rule was accordingly granted by the court, but the same was upon argument afterwards discharged; That the Appellant having appealed to the Court of Appeals of the said Province from the said Order of the said Court of King's Bench refusing to award the said writ of execution against the lands and tenements of the said William Willcocks, the same came on to be heard before the said Court on the 13th day of April last when that court was pleased to affirm the judgment of the Court of King's Bench, from which judgment of the Court of Appeals the Appellant prayed leave to appeal to Your Majesty in Council, which was granted to him on the usual terms, and the Appellant humbly prays that the said judgment may be reversed or for other relief in the premises; the Lords of the Committee in obedience to Your Majesty's said Order of Reference this day took the said Petition and Appeal into consideration, and having heard Counsel on both sides thereupon, their Lordships do agree humbly to report as their opinion to Your Majesty that the judgment of the Court of King's Bench for the said Province entered up in Hilary Term in the 44th year of Your Majesty's reign and also the judgment of the Court of Appeals of the said Province of the 13th of April last, should be reversed and that the cause should be remitted back to the said Court of King's Bench in Upper Canada in order that a writ of execution may be awarded to the Appellants against the lands and tenements of the Respondent."

The order of the King in Council, appears from the following report:—

"AT THE COURT AT THE QUEEN'S PALACE.

The 15th of February, 1809.

Present: The King's Most Excellent Majesty,† Lord Chancellor, Lord Chamberlain, Lord President, Lord Privy Seal, Duke of Montrose, Lord Steward, Earl of Liverpool, Lord Mulgrave, Viscount Castlereagh, Mr. Secretary Canning.

WHEREAS there was this day read at the Board a Report from the Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations, etc., dated the 9th of this Instant in the Words following, viz.:

[Report of Committee copied and inserted.]

HIS MAJESTY having taken the said report into consideration, was pleased by and with the advice of His Privy Council to approve thereof, and to order, as it is hereby ordered, that the same be duly and punctually complied with, and carried into execution; Whereof the Governor or Lieutenant-Governor of the Province of Upper Canada for the time being, and all others whom it may concern, are to take notice and govern themselves accordingly."

Mr. Justice Thorpe was persona grata with the Radical party; and was, not long after, cashiered by the Lieutenant-Governor, Francis Gore, by the direction of the Colonial Secretary. This was in November, 1807. Mr. Justice Powell subsequently became Chief Justice of Upper Canada, and survived until 1831.

WILLIAM RENWICK RIDDELL.

†The Lord Chancellor at the time was Lord Eldon; Viscount Castlereagh was the noted Castlereagh so much cursed by patriotic Irishmen. Mr. Secretary Canning was the Canning. He was at the time Foreign Secretary, but was not wholly satisfied with the policy of the government. The trouble became acute later on in 1809. Canning fought a duel with Castlereagh and resigned September, 1809.

REVIEW OF CURRENT ENGLISH C ES.

COMPANY—MEETING—POLL—PROXIES TO BE LODGED 48 HOURS BEFORE MEETING "OR ADJOURNED MEETING"—POLL FIXED FOR FUTURE DAY—NO ADJOURNMENT OF MEETING.

Shaw v. *Taiti* (1913) 1 Ch. 292. At a general meeting of a company a poll was appointed to be held at a future day, but no adjournment of the meeting to that time took place. By the articles proxies might be lodged 48 hours before a meeting or "adjourned meeting." The question in the case was whether proxies lodged in the interim 48 hours before the poll were valid. Eady, J., held they were not and that the mere postponement of the poll was not an adjournment ad hoc of the meeting, within the meaning of the articles, but that the original meeting continued for the purpose of the poll and no fresh proxies could be lodged in the interval.

FORFEITURE—WILL—CONSTRUCTION—DETERMINABLE LIFE INTEREST—RECEIVING ORDER—DISCHARGE OF RECEIVING ORDER.

In re Laye, Turnbull v. *Laye* (1913) 1 Ch. 298. The question in this case was whether or not a forfeiture had taken place. By a will property was given in trust for a son of the testator "until he should die or have his affairs liquidated by arrangement or composition" or do or suffer anything whereby the income, or part thereof, would, if belonging absolutely to him, "become payable to some other person." A receiving order in bankruptcy was made against the son 9th December, 1910, but his creditors having accepted a scheme for payment of their debts in full on 24th February, 1911, the receiving order was discharged.—The trustees alleging that on 3rd January, 1911, income had become due, applied to the court to determine whether in the circumstances a forfeiture had taken place, and Eve, J., decided that if income had in fact become payable while the receiving order was in force, a forfeiture had taken place; but he did not decide whether if no income had become payable while the receiving order was in force, the same result would follow. An inquiry was therefore directed, if desired.

SETTLEMENT BY WILL—CONSTRUCTION—TRUST BY REFERENCE—SEVERAL TRUST FUNDS—HOTCHPOT CLAUSE.

In re Wood, Wodehouse v. *Wood* (1913) 1 Ch. 303. The facts in this case were that a testator had by his will given three separate trust funds for his three children respectively for life, with remainder to their respective issue as they should respectively appoint, and in default of appointment to their respective children in equal shares with a hotchpot clause; and in each case he gave the fund over on failure of the express trusts to his other children and their issue successively by reference to the trusts expressly declared in favour of such children and their issue concerning the fund given in trust for them in the first instance. In the events which happened a grandchild of the testator became entitled to one fund by appointment, and to a share in another fund in default of appointment; and Neville, J., held that she was entitled to take her share in the unappointed fund without bringing into hotchpot the appointed fund; and he held that there is no general rule of construction that where a fund is settled subject to a hotchpot clause, and by the same instrument a second fund is settled by reference to the trusts of the first, that there is any implied intention to make the hotchpot clause applicable to both funds; but in every case it is a question of construction upon the whole instrument.

CHARITY—GIFT FOR SCHOOL—FAILURE OF PARTICULAR OBJECT—CY-PRÈS.

In re Wilson Tweniyman v. *Simpson* (1913) 1 Ch. 314. The facts in this case were as follows: A testator gave personal property "the interest to be given to a schoolmaster as part of his salary. The school and his house to be erected by voluntary subscriptions from the landowners and proprietors of the parish of Aikton, and the school and house to be placed on a hill near to the gate that divided Biglands and Wampool Commons . . . The master to teach five days in a week and six hours each day, Saturday and Sunday excepted; to be able to instruct the pupils in Latin and Greek, and all the elementary parts of mathematics, both pure and mixed; the Wampool scholars to go free, the rest to pay 2s. 6d. each at midsummer and Christmas as quarter pence." No school had, in fact, been established as the testator anticipated, and there was evidence that there was no prospect of any such school ever being established at or in

the neighbourhood where the testator contemplated it being built. In these circumstances Parker, J., held that the trust had failed as no general charitable intention could be inferred, and the particular object intended could not be carried out. He, however, gave the Attorney-General a limited time to decide whether or not he would take an inquiry whether, and how far, the directions of the will could be carried out.

SETTLEMENT—POWER TO APPOINT MONEY—WILL—TRUSTS OF WILL DECLARED BY REFERENCE TO TRUSTS OF SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY.

In re Beaumont Bradshaw v. *Packer* (1913) 1 Ch. 325. In this case the effect of a trust by reference was also in question. By a settlement made on the marriage of Mabel Packer she was empowered to appoint that the trustees of the settlement should raise out of the settled funds any sums not exceeding £2,000 to be paid to her for her separate use. The settlement contained a covenant by her to settle after acquired property of the value of £200 or upwards. The father of Mrs. Packer, who died in her lifetime, gave her a fourth of his residue and directed his trustees to hold her share upon the same trusts and with and subject to the same powers, including the powers of investment "as are in her marriage settlement contained in respect to the funds thereby settled." In these circumstances Farwell, L.J., held that Mrs. Packer was entitled to appoint £2,000 to be raised out of her share of the residue, but that the £2,000 would be subject to the covenant to settle after acquired property.

INFANT—MAINTENANCE—MAINTENANCE CLAUSE CEASING ON MARRIAGE—INTERVAL BETWEEN MARRIAGE AND TWENTY-ONE—INCOME ON PROSPECTIVE SHARE ACCRUING BEFORE MARRIAGE.

In re Cooper Cooper v. *Cooper* (1913) 1 Ch. 350. In this case a lady was entitled to a share under h father's will, the trustees being directed to hold it and the accumulations during her minority and then to pay the income to her for life, and after her death to hold the capital for her issue. There was a provision authorising maintenance out of income of share during minority or until marriage. She married before attaining twenty-one. Between the date of her marriage and attaining twenty-one income accrued and the question was whether the

trustees were bound to accumulate that interest and add it to the capital or whether they might apply it to the maintenance of the lady during the interval between her marriage and her attaining her majority. Farwell, L.J., held that they might, and that the maintenance clause did not shew a "contrary intention" so as to exclude s. 43 of the Conveyancing Act, 1881.

ADMINISTRATION — CREDITORS' ACTION — REPRESENTATIVES OF DECEASED EXECUTOR—TRUSTEE—DEVASTAVIT—PAYMENTS TO BENEFICIARIES SIX YEARS BEFORE ACTION—STATUTE OF LIMITATIONS—TRUSTEE ACT, 1888, (51-52 VICT., C. 59) S. 1 (3); S. 8—(10 EDW. 7. C. 34, S. 47 ONT.).

In re Blow, Governors of Bartholomew's Hospital v. *Camb-den* (1913) 1 Ch. 358. This case serves to deal a somewhat unexpected blow to the rights of trustees to plead the Statute of Limitations. The action was by creditors for the administration of the estate of a deceased person, the defendants being the surviving executor and the representatives of a deceased executor, and the beneficiaries to whom the estate had been distributed; the plaintiffs claiming as lessors. The estate of the deceased had been distributed among the beneficiaries more than six years before action without any provision being made to meet future liabilities under the lease except that the executors took a covenant from the beneficiaries to indemnify them against claims under the lease. The executors pleaded the Statute of Limitations, 51-52 Vict., c. 59 (see 10 Edw. VII., c. 34, s. 47 (Ont.)). Warrington, J., who tried the action, held that the Trustee Limitation Act did not apply (1) because the action was not one to recover money, (2) that if it were, the claim sought to be recovered was not one to which "no existing Statute of Limitation" applied.—With all due deference to the learned judge, it appears to us he has taken too narrow a view of the Act, and that the reasons he has assigned are inconclusive, and for our part we prefer the view expressed by Moulton, L.J., in *Lacons* v. *Woomall* (1907) 2 K.B. 350, 364, from which the learned judge dissents.

TRADE UNION—EXPULSION OF MEMBER—TRADE UNION ACT, 1871, (34-35 VICT. C. 31) SS. 4, 6, 13—(R.S.C. C. 125, S. 4)—TRADE DISPUTES ACT, 1906 (6 EDW. VII. C. 47) S. 4—PARTIES.

Parr v. *Lancashire & Cheshire Miners' Federation* (1913) 1 Ch. 366. The committee of a trade union passed a resolution to

expel the plaintiff, one of its members, from the union; and the present action was brought against the union and its president, vice-president, treasurer and secretary to restrain the union and its officers from wrongfully expelling him from the union. —The defendants pleaded that the act complained of was a tortious act done in furtherance of a trade dispute and therefore not actionable under the Trade Disputes Act, 1906, s. 4, but Neville, J., held that the Trade Disputes Act, 1906, did not apply to the case of a plaintiff suing in respect of a breach of his contractual rights. The plaintiff also sought to restrain the defendants from applying the funds of the union to illegal purposes. The officials claimed that they did not represent the association and that the Executive Committee and the trustees should have been made defendants; but Neville, J., held that the officials made defendants sufficiently represented the association for the purposes of the action. We may remark that there is always a difficulty in suing such organizations owing to the fact that they are not corporations.

WILL—CONSTRUCTION—REMAINDER "TO MY NEAREST MALE HEIR" —"MY NEAREST AND ELDEST MALE RELATIVE"—NO MALE HEIR—HEIRESS AT LAW—INTESTACY.

In re Watkins Maybery v. *Lightfoot* (1913) 1 Ch. 376. This was an appeal from the decision of Joyce, J. (1912) 2 Ch. 430 (noted ante vol. 48, p. 693) in which the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Hamilton, L.JJ.) have affirmed the judgment of Joyce, J., but not on the ground relied on by him, but entirely on the construction which they placed on the will, the particulars of which the reporter considers it unnecessary to record.

INFANT—CONTRACT—"NECESSARIES"—EDUCATION AND INSTRUCTION—EXECUTING CONTRACT—PART PERFORMANCE.

In *Roberts v. Gray* (1913) 1 K.B. 520, the plaintiff is the celebrated billiard player, and the action was to enforce a contract made with the defendant, an infant of nineteen, whereby it was agreed that the defendant and his father should accompany the plaintiff on a tour of the world for eighteen months and give exhibitions of billiard playing, the plaintiff to pay all expenses, and all receipts, prizes and testimonials received by either party on the tour to be equally divided between the plain-

tiff and defendant. The plaintiff, with a view to carrying out his part of the contract, expended much time and trouble and incurred liabilities in making arrangements for billiard matches. Disputes having arisen as to the kind of balls to be used the defendant repudiated the contract. The action was tried by Lord Alverstone, C.J., who gave judgment for the plaintiff for £1,500; and the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Hamilton, L.JJ.) affirmed his decision. The Court of Appeal being of the opinion that the contract, having regard to the position of the parties, was a contract for necessaries.—Education in the art of billiard playing as a means of earning a living, coming, as the court held, within the definition of necessaries for which an infant can make a binding contract.

SALE OF GOODS—C.I.F. CONTRACT—NONINSURANCE OF GOODS—SAFE ARRIVAL OF GOODS AT DESTINATION—DELIVERY—BREACH OF CONTRACT.

Orient Co. v. *Brekke* (1913) 1 K.B. 531. The plaintiffs contracted with the defendants for the sale of a quantity of walnuts at a price to cover cort, insurance and freight. The goods were sent from Bordeaux and arrived safely at their destination in England; the plaintiffs had, however, omitted to insure them, as required by the contract. The defendants refused to accept them on the ground that they had not been insured. The case was tried in the Mayor's Court and judgment given in favour of the plaintiffs, but the Divisional Court (Lush, and Rowlatt, JJ.) held that, by reason of the omission to insure, there had been no delivery in accordance with the contract, and therefore the plaintiffs were not entitled to recover.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B.C.] IN RE BRITISH COLUMBIA FISHERIES. [Feb. 18.

Railway belt, British Columbia—Tidal Waters—Rights of Province and Dominion—Jurisdiction—Fish as ferœ naturæ.

Held, 1. In respect of waters within the "Railway Belt" of British Columbia, which are tidal, it is not competent to the Legislature of British Columbia to authorize the Government of the province to grant, by way of lease, license or otherwise, the exclusive right of taking fish which, as ferœ naturæ, are the property of nobody until caught. The public right to take such fish being subject to the exclusive control of the Dominion Parliament, it is immaterial whether the bedts of tidal waters passed or did not pass to the Dominion in virtue of the transfer of the "Railway Belt."

2. As to waters within the "Railway Belt which, although non-tidal, are in fact navigable the Legislature of British Columbia is likewise incompetent to make such grants.

3. It is not competent to the Legislature of British Columbia to authorize the Government of the province to grant, in the open sea within a marine league of the coast of that province, by way of lease, license or otherwise, the exclusive right of taking such fish (ferœ naturæ).

4. In so far as concerns the authority of the Legislature of British Columbia to authorize the government of the province to grant, by way of lease, license or otherwise, the exclusive right to take such fish (ferœ naturæ), in tidal waters, there is no difference between the open sea within a marine league of the coast of the province and the gulfs, bays, channels, arms of the sea and estuaries of the rivers within the province or lying between the province and the United States of America.

5. Per FITZPATRICK, C.J. and DAVIES, IDINGTON, DUFF and BRODEUR, JJ. (ANGLIN, J., expressing no opinion on the point): —The beneficial ownership of the beds of navigable non-tidal waters within the "Railway Belt" in British Columbia, which

were vested in the Crown in the right of that province, at the time of the transfer of the "Railway Belt lands" to the Dominion of Canada, passed to the Dominion in virtue of the transfer.

Atwater, K.C., and *Newcombe*, K.C., for the Attorney-General of Canada. *Lafleur*, K.C. and *H. A. Maclean*, K.C., for the Attorney-General of British Columbia. *Wallace Nesbitt*, K.C., *Aimé Geoffrion*, K.C., *E. Payly*, K.C., and *C. C. Robinson*, for the Attorneys-General of Ontario, New Brunswick and Manitoba. *S. B. Woods*, K.C., for the Attorneys-General of Saskatchewan and Alberta.

Que.] CITY OF MONTREAL v. LAYTON. [Feb. 18.

Construction of statute—Quebec Public Health Act—R.S.Q. 1909, art. 3913—Inspection of food—Duty of Health officers—Quality of food—Condemnation—Seizure—Notice—Effect of action by health officers—Controlling power of courts—Evidence—Injunction—Appeal—Jurisdiction—Question in controversy.

Held, 1. Per FITZPATRICK, C.J.:—In the province of Quebec, in order to constitute a valid seizure of movable property there must be something done by competent authority which has the effect of dispossessing the person proceeded against of the property; notice thereof must be given; an inventory made and a guardian appointed. Where these formalities have not been observed, there can be no valid seizure: *Brook* v. *Booker*, 41 Can. S.C.R. 331, referred to.

2. Per FITZPATRICK, C.J.:—Extaordinary powers, conferred by stature, authorizing interference with private property must be exercised in such a manner that the rights of the owners may not be disregarded: *Bonanza Creek Hydraulic Concession* v. *The King*, 40 Can. S.C.R. 281, and *Riopel* v. *City of Montreal*, 44 Can. S.C.R. 579, referred to.

3. Per FITZPATRICK, C.J., and DAVIES and IDINGTON, JJ.:—The authority conferred upon health officers by the Quebec Public Health Act, respecting the condemnation, seizure and disposal of food, as being deleterious to the public health, is not final and conclusive in its effect, but it is to be exercised subject to the superintending power, orders and control of the Superior Court and the judges thereof.

4. Per ANGLIN and BRODEUR, JJ.:—The protection afforded by the provisions of the Quebec Public Health Act, cannot be invoked in favour of proceedings taken by a food inspector who has acted without exercising his independent judgment in regard to the condemnation of food as deleterious to the public health, but merely for the purpose of carrying out instructions received by him from municipal officials.

In the result, the finding of the trial judge, that the food in question was fit for human consumption (Q.R. 39, S.C. 520), being supported by evidence, was not disturbed, and the effect of the judgment appealed from (1 D.L.R. 160), was affirmed with a variation of the order making absolute the injunction against the defendant interfering therewith.

Appeal dismissed with costs.

Atwater, K.C., and *Aimé Geoffrion*, K.C., for appellant. *Dale-Harris*, for respondents.

Alta.] CROSS v. CARSTAIRS. [Feb. 21.

Appeal—Jurisdiction — Provincial election — Alberta Controverted Elections Act—Preliminary objections—Judicial proceeding—Final judgment.

Held, 1. Per DAVIES, IDINGTON and ANGLIN, JJ., that under the provisions of the Alberta Controverted Elections Act, the judgment of the Supreme Court of the province in proceedings to set aside an election to the Legislature is final and no appeal lies therefrom to the Supreme Court of Canada.

2. Per DUFF, J., that a proceeding under said Act to question the validity of an election is not a "judicial proceeding" within the contemplation of section 2(*c*) of the Supreme Court Act in respect of which an appeal lies to the Supreme Court of Canada.

Per BRODEUR, J., that the judgment of the Supreme Court of Alberta on appeal from the decision of a judge on preliminary objections filed under the Controverted Elections Act, is not a "final judgment" from which an appeal lies to the Supreme Court of Canada.

Appeal quashed with costs.

Ewart, K.C., for the motion. *Lafleur*, K.C., and *O. M. Biggar*, contra.

N.S.] [April 7.

HALIFAX & SOUTH WESTERN RY. CO. v. SCHWARTZ.

Statute—Construction—Railway company—Right of way—Combustible materials.

Chapter 91, section 9, of the Revised Statutes of Nova Scotia, 1900, provides that "where railways pass through woods, the railway company shall clean from off the sides of the roadway the combustible material by careful burning at a safe time or otherwise."

Held, that this provision is imperative and obliges the company at all times to keep its right of way so clear of combustible material that it will not be a source of danger from fire. Clearing it at certain periods only is not a compliance with such provision.

DUFF, J., dissented on the ground that it was not proved that the fire in this case originated on the right of way.

Judgment appealed from (46 N.S. Rep. 20), affirmed. Appeal dismissed with costs.

Mellish, K.C., for appellants. *W. J. O'Hearn,* for respondent.

Province of Manitoba.

COURT OF APPEAL.

RE TAYLOR AND CANADIAN NORTHERN RY. CO.

(9 D.L.R. 695.)

Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A.] [March 17.

Eminent domain—Rights of owner—Value at what time—Railway Act (Can.).

The exception of arbitrations then "pending" from the amendment made by 8 and 9 Edw. VII. (Can.) ch. 32, to the Railway Act, R.S.C. 1906, ch. 37, as to the time in relation to which the value of property expropriated is to be fixed where title is not acquired by the railway within a year from the date of depositing the plans, does not apply so as to exclude the ap-

plication of the amending Act, unless the arbitrators had taken office before the statute took effect after having been sworn in under sec. 197; so where, prior to the amending statute (1909), an order had been made appointing arbitrators, but one of them declined the appointment and a new arbitrator was not appointed until after the passing of the amending Act, the "arbitration" was not "pending" when the latter Act was passed.

Robinson v. *C.N.R. Co.*, 17 Man. L.R. 583, referred to.

A. B. Hudson, and *H. V. Hudson*, for Taylor. *P. A. Macdonald*, for the Canadian Northern Ry. Co.

GADSDEN v. BENNETTO (No. 2).

(9 D.L.R. 719.)

Howell, C.J.M, Perdue, Cameron and Haggart, JJ.A.] [March 17.

Fraud and deceit—Sale of shares—Secret profit on purchase by directors—Fiduciary relation—Officer purchasing stock from shareholder.

Held 1. When officers or directors of a company combine to dispose of all its property, the holding and disposal of which were the sole objects for which the company had been incorporated, under terms by which they would make a secret profit for themselves, the acquisition by them of shares at prices much below their real value, obtained from various shareholders by suppressing the real terms of the offer received for the company's property, is a fraud upon such shareholders in respect of which the court will grant them relief.

Gadsden v. *Bennetto*, 5 D.L.R. 529, reversed; *Hyatt* v. *Allen*, 8 D.L.R. 79, applied; *Percival v. Wright*, [1902] 2 Ch. 421, distinguished; *Carpenter* v. *Darnworth*, 52 Barb. (N.Y.) 581, distinguished.

2. Where directors of a landholding company passed a resolution appointing three of themselves as a committee to bring in a proposal for disposing of the whole of their lands and also of the corporate shares in the company, the responsibility of the members of the committee acting upon such resolution is more extensive than the ordinary duties devolving upon company directors; and, on any proposal of purchase being received by them which involved the acquisition of the land forming the

entire assets of the company, the committee were under a duty to the shareholders whose rights as such would, on completion of the sale, be limited to a reimbursement, pro rata, out of the purchase money, to make full disclosure to them as well as to the company, as represented by its directors and officers, of the terms of the offer. (*Per* Perdue, J.)

A. B. Hudson, for plaintiff. *Fullerton,* K.C., and *J. P. Foley,* for defendants.

KING'S BENCH.

THE KING *v.* WILLIS.

(9 D.L.R. 646.)

Galt, J.] [March 20.

Trial—Criminal prosecution — Alleged confession — Opening case.

Counsel for the Crown in a criminal prosecution may not, in opening the case to the jury, disclose the facts relied upon as constituting a confession by the accused until the court has decided that the evidence is admissible.

H. P. Blackwood, for the Crown. *C. H. Locke,* and *J. F. Davidson,* for prisoners.

Province of British Columbia

COURT OF APPEAL.

LAURSEN *v.* MCKINNON (No. 2.)

(9 D.L.R. 758.)

Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A.] [January 7.

Appeal—Extension of time—Notice of appeal—Courts—Rules of decision—Stare decisis—Re-enacted statutes—Construction of—Final judgment prior to fixing amount of damages—Time for appeal.

Held, 1. The British Columbia Court of Appeal has no power to extend the time within which notice of appeal should be given on an appeal to that court.

2. Interpretations of statutory language which have long been accepted, though their correctness may be open to doubt, will not ordinarily be disturbed, particularly where there is not an interference with a positive right.

Hamilton v. *Baker*, *"The Sara,"* 58 L.J.Adm. 57, 14 A.C. 209, 221, 222, considered.

3. Where a statute has been re-enacted, a construction given to the former statute by the courts ought to be adopted or at least it is a circumstance to which weight must be given.

4. Where a final judgment is to be perfected by the insertion of the amount of damages to be ascertained by the registrar, the time to appeal will run from the date of the judgment itself and not from the date when the judgment was finally perfected by inserting the amount of damages.

Bodwell, K.C., and *Ritchie*, K.C., for appellant. *L. G. McPhillips*, K.C., for respondent.

Book Reviews.

Principles of the Criminal Law with table of offences and their punishments, and Statutes. By SEYMOUR F. HARRIS, B.C.L., M.A. Twelfth edition by CHARLES L. ATTENBOROUGH, Barrister-at-law. London: Stevens & Haynes, law publishers, Bell Yard.

As all our readers know, this is a concise exposition of the nature of crime, the various offences punishable by the English law, the law of criminal procedure and the law of summary conviction. It is only necessary to tell the profession that there is a new edition of this standard work, for he who does not know "Harris" argues himself unknown. The last edition was published in 1908. Over eight important acts have since then been enacted by parliament, and are treated in this new edition. This is all that need be said.

Statute Law Making in the United States. By CHESTER LLOYD JONES, Associate Professor of Political Science in the University of Wisconsin. The Boston Book Company. 1912.

Of the slovenly work done in the world there is nothing much more remarkable than that done by Legislatures. An immense amount of time and money would be saved if competent persons

were employed in the various Legislatures of the Anglo-Saxon world to draft bills. This is especially true in new territories, but also applies to older settled ones. Mr. Jones has done good work by an intelligent discussion of this subject, and expresses his views clearly. The more ignorant a member of Parliament is, using that term in its wider sense, the more competent he thinks he is to frame a statute. It is necessary in new countries to have legislation of a novel character to meet new requirements, and whilst this should be done with boldness, it should also be done with extreme caution with due regard to precedents and examination of all existing legislation affecting the subject. As Mr. Jones says, "Bills are often drafted by men who have not made any attempt to see the proposed measures in the perspective of the general law of the state. As a consequence we have a mass of ill-considered statutes which, by their indefiniteness and failure to observe constitutional limitations, throw upon the courts a burden of interpretation which forces them frequently to resort to judicial legislation and to declare the statutes void. Popular prejudice is aroused against the judges who, because laws well intentioned but poorly drawn are declared void, are charged with being an obstruction to needed social advance. The blame which should fall upon the careless draftsman of the law too often is shifted to the court. But even if the bill stand the test of constitutionality, if it is not well drawn, it fails to accomplish its purpose."

Even in such of our legislatures as have a parliamentary draftsman—under whatever name he may be called—the legislature itself limits the scope of his usefulness: first, by not giving him a free hand in drafting or revising and, secondly, by introducing amendments intended to meet some special point raised in the legislature and which amendments are hurriedly passed without referring them to the officer whose knowledge is wanted at this stage more than at the first.

It seems strange that a little more money is not spent in obtaining the services of competent men to prepare the material for the legislative mill and that, when such men are occasionally obtained, the fullest use is not made of them.

The Law Quarterly Review.. January. Edited by Rt. Hon. Sir Frederick Pollock, Bart., D.C.L., LL.D. London: Stevens & Sons, Limited, 119 and 120 Chancery Lane.

This great English law review contains its usual interesting notes on a variety of subjects. The other matter is:—A further

discussion on contingent remainders in connection with the case of *Whitby* v. *Mitchell*—Vested remainder or executory devise—When will the English courts follow a foreign grant of probate or administration?—Locus regit actum and wills of foreigners in France—The super tax—Indictments for adultery and incest before 1650—The rescission of executory contracts for partial failure in performance—The universities and the legislature—Book reviews, etc.

Bench and Bar

Many tender enquiries have been made during the past few years as to what has happened to the promised revision of the statutes of the Province of Ontario. We may naturally expect that this long delay will give us a very much better result than we have had in the past, and we have reason to hope that this will be the case. It is said that it will not be a mere piecing together of odds and ends of sections, but rather something more like what the name implies. This might be expected from the capacity of those who have the matter in charge and from the time devoted to the work. We understand that all the material has been carefully revised and only awaits its being appropriately sorted out and located. It is said that further time will be taken to do this carefully, as well as to correct any minor errors that may have crept in, and so it is hoped that at the close of this year the profession of Ontario may have in their libraries the "Revised Statutes of Ontario, 1914," for it was apparently thought desirable to avoid the so-called unlucky figures 1913, or for some other reason refer to the later year.