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MARRIAGE LAWS OF THE DOMINION.

VOID AND VOIDABLE MARRIAGES—CONSTITUTIONAL LAW—POWERS OF PROVINCIAL COURTS.

A recent case (*Peppiatt* v. *Peppiatt*, 30 D.L.R. 1), decided by the Appellate Division of the Supreme Court of Ontario, brings again to the notice of the profession the unsatisfactory condition of the marriage laws of this Dominion.

In the case above referred to the plaintiff alleged that she, being then under 18 years of age, went through a form of marriage to the defendant in January, 1913, without the consent required by the Marriage Act, R.S.O. 1914, ch. 148, and that the parties had not cohabited and lived together after the ceremony. The trial Judge refused to make any findings on the facts, but as no defence had been filed, and the defendant did not appear, the argument on the appeal proceeded as if the facts were as alleged.

The trial Judge was of opinion that neither inherently, nor by the Judicature Act, nor yet by the Marriage Act, has the Supreme Court of Ontario power to avoid or annul a marriage, or to declare it avoidable or annullable, and that sec. 36 of the Marriage Act is *ultra vires* the Ontario Legislature; but as Boyd, C., has expressed a contrary opinion in *Lawless* v. *Chamberlain*, 18 O.R. 296, he held that he was precluded from giving effect to his opinion and so referred the case.

The conclusion reached by the appellate judges was that the Judicature Act conferred jurisdiction to declare the invalidity of invalid marriages, and that sec. 36 of the Marriage Act was, therefore, unnecessary for that purpose, but gave no reasons for this opinion, and the action was dismissed on the ground that the Marriage Act did not make consent essential to the validity of the marriage of minors.

This judgment and the subject of void and voidable marriages

and the constitutional questions involved are ably discussed by Mr. Alfred B. Morine, K.C., in an annotation to the above case in the last number of the Dominion Law Reports as follows:—

I. The Question Involved.

The trial Judge said:—"The main question involved in this case is whether the legislature of this province exceeded its power in enacting sec. 36 of the Marriage Act," and he was of opinion that it did. The Divisional Court, because of the interpretation it placed upon the Act as to the consequenec of non-consent, did not expressly give judgment on the constitutional question thus raised by the trial Judge. But, inasmuch as it did not express any doubt as to the constitutionality of the section, and asserted jurisdictior under the Judicature Act, it impliedly did not agree with the trial Judge's opinion. Meredith, C.J.O., expressed the opinion that, apart from authority (*Marriage* case, 7 D.L.R. 629), sec. 15 of the Marriage Act, requiring consent to the marriage of minors, being in the nature of a restriction upon personal capacity to contract marriage, might be *ultra vires* the legislature, upon the ground, apparently, that status or capacity is part of the "Marriage and Divorce" jurisdiction of Parliament (sub-sec. 16, sec. 91, B.N.A. Act 1867). As a decision on this point was expressly avoided, the opinion of the Chief Justice may be treated as personal. The implication to be drawn from the judgment of the Divisional Court seems, therefore, to be, that the legislature can confer jurisdiction to make a decree of nullity, and inasmuch as the other Judges expressed a general consent to the judgment of Meredith, C.J.O., it is fair to assume that they individually also hold the view that sec. 15 of the Marriage Act is *ultra vires* the legislature.

II. The Power to Confer Jurisdiction.

In cases regarding nullity decided before *Peppiatt* v. *Peppiatt*, a distinction does not appear to have been made between jurisdiction to hear and determine actions for declaration of nullity, and the grounds upon which jurisdiction, if any existed, should be exercised; or between the power of legislatures to confer jurisdiction to hear and determine actions, and to enact laws affecting the validity of marriages. "Jurisdiction is a dignity which a man hath by power to do justice in causes of complaint made before him" (Termes de la Ley). In the exercise of that dignity he does justice according to the law applicable to the complaint. It is submitted that provincial legislatures may confer jurisdiction upon Courts to hear matters within the exclusive legislative jurisdiction of Parliament:—

"The constitution of provincial Courts includes the power to determine the jurisdiction of the Court, and places that jurisdiction beyond the control of the Dominion Parliament." Per Meredith, C.J. (Quebec), *Valin* v. *Langlois*, 5 Q.L.R. 1.

"The jurisdiction of Parliament to legislate as regards the jurisdiction of the provincial Courts is, I consider, excluded by sub-sec. 14, sec. 92, B.N.A. Act, inasmuch as the constitution, maintenance and organization of provincial Courts plainly includes the power to define the jurisdiction of such

Courts, territorially as well as in other respects." Per Strong, J., in *Re County Courts of B.C.*, 21 Can. S.C.R. 446.

It is submitted that jurisdiction to deal with a matter and the grounds upon which it shall be dealt with are severable, and that the former may be conferred by the legislature though the latter be within the exclusive authority of Parliament.

III. A Review of the Decisions.

Before considering the various questions that *Peppiatt* v. *Peppiatt* gives rise to, it is well to recall certain judgments in Ontario Courts. In *Lawless* v. *Chamberlain* (1889), 18 O.R. 296, a declaration of nullity was sought on the ground that the plaintiff had consented to the ceremony of marriage under duress. The action was dismissed on the ground that the proof fell short of the allegations, but Boyd, C., held that under the Judicature Act, and also by the inherent jurisdiction of the Court, he had power to make the decree. He said that the Chancery Courts in England had such jurisdiction, though they had not exercised it except during the Cromwellian period. In *T.* v. *B.* (1907), 15 O.L.R. 224, Boyd, C., denied the jurisdiction of the Supreme Court to make a decree of nullity because of the impotency of one of the parties, on the ground that for such a cause a marriage was voidable only, not void *ab initio*, and that Ecclesiastical Courts only had jurisdiction in such a matter in England. A Divisional Court followed this judgment in *Leakim* v. *Leakim* (1912) 6 D.L.R. 875. In *A.* v. *B.* (1909), 23 O.L.R. 261, a declaration of nullity was sought on the ground that one of the parties was insane when the form of marriage was gone through. Insanity was found as a fact by Clute, J., but he held that, while a section of the Judicature Act (now sec. 16 (*b*)) gave the Court power to make declaratory judgments where no consequential relief was claimed, it did not enlarge the jurisdiction of the Court, and that the Court had never had power to declare the nullity of a marriage ceremony. In *Hallman* v. *Hallman*, 5 O.W.N. 976; *Prowd* v. *Spence*, 10 D.L.R. 215, and a number of other actions, Lennox, J., has expressed his agreement with the judgment of Clute, J., as to jurisdiction, and so has Middleton, J., in *Reid* v. *Aull* (1914), 32 O.L.R. 68. In *May* v. *May* (1908), 22 O.L.R. 559, a Divisional Court refused a decree of nullity of a ceremony of marriage of parties within the prohibited degrees, saying that the jurisdiction to decree nullity had been exclusively exercised by Ecclesiastical Courts in England, and had not been introduced here by the Judicature Act.

IV. No Interpretation Given.

It should be noted that none of the preceding cases involved an interpretation of the Marriage Act. They are of value only in this connection in relation to the question of the jurisdiction of the Supreme Court to entertain suits for nullity. *Lawless* v. *Chamberlain* and *T.* v. *B.* both mention the question of inherent jurisdiction, the first to affirm, the second to deny. A learned writer (Holmested on Matrimonial Jurisdiction, at p. 8), says that the decrees sought in these cases were both in relation to voidable marriages, neither void *ab initio*, and, therefore, that *T.* v. *B.* "looks very

like a distinct retreat from the position taken up in *Lawless* v. *Chamberlain.*" We suggest that in *Lawless* v. *Chamberlain* the marriage was treated by Boyd, C., as void *ab initio*, on the ground that without free consent there could be no contract, or, as the Judge expressed it, "*consensus, non concubitus, facit matrimonium,*" while in *T.* v. *B.* the marriage was voidable only.

"It has been debated whether a marriage brought about by duress is void *de facto* as well as *de jure*, so that it does not need the sentence of any Court to pronounce it invalid, or whether it is voidable only. The better opinion would seem to be that it is voidable only. Want of consent (by the principals themselves) may be purged away. A contract void *ab initio* cannot be ratified." Eversley, p. 68.

"The term 'voidable' implies an option to the parties to treat the relationship as binding or not binding. Until set aside it is valid for all civil purposes. When set aside it is rendered void from the beginning. The distinction between void and voidable arose because the temporal Courts prohibited the spiritual Courts from bastardizing the issue of voidable marriages after the death of one of the parties. The jurisdiction in suits for nullity of voidable marriages belonged exclusively to Ecclesiastical Courts." Eversley, p. 59.

It must be confessed, however, that, as Boyd, C., expressed in *Lawless* v. *Chamberlain*, the opinion that under sec. 28 of the Judicature Act, 1897, the Supreme Court had jurisdiction and power to declare the nullity of a void marriage because no other jurisdiction to do so existed, it is difficult to see why he did not on that ground consider voidable marriages as well as void ceremonies within the jurisdiction and power of the Supreme Court. The King's Ecclesiastical Law as to voidable marriages is part of the common law of England (see *per* Tyndall, C.J., in *Reg.* v. *Millis*, 10 Cl. & F. 534, at 671), and, therefore, part of the common law of this province, and, while in England that law would be applicable only by Ecclesiastical Courts, it would seem to be applicable here by the Supreme Court, if the interpretation placed on sec. 28 of the Judicature Act, 1897, by Boyd, C., were correct. But we cannot assent to this interpretation of sec. 28 of the Judicature Act, 1897, which reads as follows:—

"The High Court shall have the like jurisdiction and power as the Court of Chancery in England possessed on the 10th of June, 1857, as a Court of Equity, to administer justice in all cases in which there existed no adequate remedy at law."

Boyd, C., referred to this section in *Lawless* v. *Chamberlain* as though it gave jurisdiction in all cases in which there existed no other adequate remedy. It does not seem as though this section means more than this, that the High Court shall apply those powers which English Chancery Courts exercised prior to 1857 where common law Courts gave no relief. But the Ecclesiastical Courts were common law Courts, and could give relief where nullity was claimed, so that equity had nothing to do with the matter. (*Per* Dr. Lushington, in the Consistory Court of London, in *B.* v. *M.*, 2 Rob. Ecc. Cas. 580). If there was an "adequate remedy at law" in England, prior to 1857, the section in question gave no power to the High Court here.

V. Confusion of Nullity with Divorce.

Meredith, C.J.C.P., says:—"The conflict of judicial opinion in the Courts of this province has been over the question whether the Courts have the power to decree that *sort of divorce* which follows a finding that the marriage was not a valid one, or to pronounce a declaratory decree as to the validity or invalidity of the marriage."

Speaking of declaration of *nullity* generally as *divorce* does not aid clear thinking on this subject. "Marriage may mean either the acts, agreement or ceremony by which two persons enter into wedlock, or their subsequent relation created thereby:" (Cyc., vol. 26, p. 825).

Suits for nullity apply to the former, not to the latter; they pray the Court to decree "that the *ceremony* of marriage is null and void." (Brown and Watts on Divorce, 8th ed., p. 426.) Suits for divorce pray the Court to decree that "The said marriage may be dissolved"; for judicial separation, "That the plaintiff may be separated from the defendant."

"There can be no adultery if there be no marriage, and it is always held both here and in common law that the first point to be proved in divorce cases is the marriage, which the other party may contest; and if he does not, the form of the sentence in such cases pronounces that there has been a true and lawful marriage as well as a violation of it." (See Sir Wm. Scott, in *Guest* v. *Shepley*, 2 Hagg. Con. R. 321, in Consistory Court of London.)

A claim for nullity denies that there ever was a valid marriage; for dissolution, or judicial separation, asserts an existing and valid marriage as the very basis of the proceedings. As to void marriages, a learned writer says:—"Civil disabilities, *e.g.*, prior marriage, want of age, idiocy, prohibited degrees, make the contract void *ab initio*, not merely voidable; these do not dissolve a contract already made, but they render the parties incapable of contracting at all; and any union formed between the parties is meretricious, and not matrimonial. A marriage is termed void when it is good for no legal purpose; and its invalidity may be maintained in any proceeding, in any Court between any parties, whether in the lifetime or after the death of the supposed husband or wife, and whether the question arises directly or collaterally." Eversely, p. 59.

A voidable marriage, however, is valid for all civil purposes until a declaration of nullity has been made by a competent Court. Nevertheless, such a declaration is not a divorce, for the ceremony is declared void *ab initio* (Eversley, p. 59).

VI. The Questions for Solution.

Peppiatt v. *Peppiatt* presents two main questions for solution: (1) Has the Supreme Court jurisdiction to make a decree of nullity? (2) Is the consent of parents made essential to a valid marriage of minors by the Marriage Act? Jurisdiction may be inherent or under the Judicature Act; or it may be that jurisdiction exists only by virtue of the Marriage Act, and so is confined to the specific cause therein set forth—lack of the consent to the marriage of minors prescribed by the Act. Whether jurisdiction exists inherently or is asserted under provincial legislation, the constitutional issue is presented—has the provincial legislature power to enact the Marriage

Act, for, if jurisdiction be inherent, that Act, if *intra vires*, may limit the jurisdiction by implication, and, if *ultra vires*, jurisdiction is left as it was: whereas, if there be no inherent jurisdiction, the Judicature Act may have conferred and the Marriage Act have limited it, or the Judicature Act may not have conferred it, and the only jurisdiction may be under the Marriage Act.

The trial Judge in *Peppiatt* v. *Peppiatt* said that, as he held the opinion, in opposition to the judgment of Boyd, C. (*Lawless* v. *Chamberlain*), that no jurisdiction existed, he made no findings as to the facts, but referred the question of jurisdiction to the Divisional Court. That Court asserted that the Judicature Act gave jurisdiction, but, unfortunately, gave no reasons for its finding. That omission was regrettable, in view of the opinions expressed on the point in the cases cited above. With deference, it is submitted that the jurisdiction of the Court should have been exhaustively discussed and established before any interpretation was placed on the provisions of the Marriage Act as to consent, for without such jurisdiction the Court manifestly had no right to interpret the Act; and also, because if there be jurisdiction outside the Marriage Act, it is important that its extent should be known; does it extend, for instance, to the power to annul voidable marriages as well as to declare the nullity of ceremonies void because of civil impediments?

VII. Inherent Chancery Jurisdiction.

Upon the point of the inherent jurisdiction of Chancery Courts to deal with actions for nullity, Boyd, C., in *Lawless* v. *Chamberlain*, referred approvingly to certain judgments by Kent, Sanford and Walworth, respectively Chancellors of New York State. Carefully examined, they do not much strengthen the proposition that such jurisdiction exists here, except possibly as to marriages void *ab initio*. In *W.* v. *W.* (1820), 4 Johns Ch. R. 343, a declaration was sought that a marriage with a lunatic was void. Jurisdiction was asserted by Kent, C., on the ground that as the Court had authority over lunatics, and by statute to grant divorces for certain causes, it also had power to declare nullity, because no other Court had it. Incidentally he admitted that Chancery Courts in England had never exercised such a power, but he gave as a reason the fact that Ecclesiastical Courts which had the power existed there. In *F.* v. *G.* (1825), Hopk. Ch. 541, a decree of nullity was sought because the marriage had been brought about by abduction, terror and fraud and Sanford, C., granted the decree on the ground that a Court of Chancery had power to vacate all contracts induced by fraud, and why not this? He admitted that this was a new application of an old principle as to fraud, vitiating all contracts, and that there was no precedent in England for such a decree by a Court of Chancery. But in *B.* v. *B.* (1825), Hopk. Ch. 628, a case not mentioned by Boyd, C., a decree of nullity on the ground of the impotency of one of the parties was refused by Sanford, C., who said that for such a canonical disability a marriage was voidable only, that the English Chancery Courts had never exercised jurisdiction over such a matter, that the powers of English Ecclesiastical Courts had not been conferred on any Courts in New York State, and that "this

Court has no power to dissolve a marriage for impotence. We have," he said, "no judicature authorised to determine by a substantive and effectual sentence that marriages are legal or illegal." In *P.* v. *P.* (1831), 2 Paige Ch. 501, Chancellor Walworth held that by virtue of a local statute he had power to grant a divorce *a mensa et thoro*, and, in referring to the decisions of Kent and Sanford, he pointed out, that, while they had asserted jurisdiction as to marriages void *ab initio*, Sanford, C., had denied it as to voidable marriages, which distinction he approved. As to marriages void *ab initio*, Chancellor Walworth said:—"That part of the common law of England which rendered a marriage void . . . was undoubtedly brought to this colony, and formed part of the common law of this country. . . . When the rights of the parties existed independently of any peculiar remedies which were entrusted to the exclusive cognizance of a particular Court, it was competent for the Superior Courts of the colony to administer such relief as was consistent with their ordinary forms of proceedings in other cases. . . . As the right to dissolve a marriage merely voidable could only be exercised by the aid of the Ecclesiastical Courts in England, and no such Court was ever organized here . . . it may reasonably be presumed that the right did not exist. Such a jurisdiction cannot now be exercised here by any Court without the direct or implied sanction of the legislature."

If, therefore, the marriage in *Laudess* v. *Chamberlain* was voidable only, not void *ab initio*, the American cases cited by Boyd, C., were really opposed to his decision, which gives point to our suggestion that he treated the marriage as void, not voidable.

VIII. Jurisdiction under Judicature Act.

There has been much discussion upon the question whether that section which is now 16 (*b*) of the Judicature Act, 1914, confers jurisdiction to declare the nullity of marriage ceremonies. The majority of the Judges who have discussed the matter say "No," but the Divisional Court apparently said "Yes" in *Peppiatt* v. *Peppiatt*. The section is as follows:—

"No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

In *Reid* v. *Aull* (1914), 32 O.L.R. 68, a declaration of nullity was sought on the ground that the marriage ceremony had been procured by fraud, and was performed while the plaintiff was under the influence of intoxicating drink. Middleton, J., dismissed the action, on the intervention of the Attorney-General, on the ground that the Court had no jurisdiction. He held that the opinion expressed by Boyd, C., in *L.* v. *C.*, had been overruled by a Divisional Court in *May* v. *May*, 22 O.L.R. 559, but examined the subject independently, and came to the conclusion that no part of the jurisdiction exercised by Ecclesiastical Courts in England had been given in any way to the Supreme Court here. He made no distinction between void and voidable marriages, and, as to sec. 16 (*b*) of the Judicature Act, said that "the power to make declaratory decrees is not to be exercised in respect of matters over which the Court has no general jurisdiction," citing *Barraclough*

v. *Brown*, [1897] A.C. 615. But in the case last cited, which was an action to recover certain penalties, Lord Davey gave the fact that a statute expressly conferred jurisdiction on another tribunal as a reason for holding that a section similar to 16 (*b*) did not extend the jurisdiction of the Court, a reason which does not apply here in nullity proceedings, and he also pointed out that the rule was made in England by a committee of Judges, who could not be held to have power to extend the jurisdiction given by Parliament, whereas here the section in question is a part of the Judicature Act. Nevertheless, as other sections of the Act expressly deal with jurisdiction, it is perhaps proper to read sec. 16 (*b*) as if it were expressly qualified, *at the conclusion of the section*, by the addition of the words "in the exercise of its jurisdiction." The English rule and the Ontario section are precisely similar, and should be given the same meaning:—"The rules were made to carry out the Act, not to enlarge it" (*per* Brett, L.J., in *Longman* v. *East*, 3 C.P.D. 152-156).

IX. Jurisdiction Exists as to Void Marriages.

It is submitted, however, that as the Supreme Court undeniably had and exercised the right to declare the nullity of void marriage ceremonies when the question arose either directly or collaterally (Eversley, p. 59), but in practice did not, prior to sec. 16 (*b*), make declarations "in the air," that is, where no consequential relief was sought (*Langdale* v. *Briggs*, 8 DeG. M. & G. 391), the effect of sec. 16 (*b*) may be to warrant declarations of nullity in relation to void ceremonies of marriage where the proceedings are for declarations merely, and no consequential relief is sought. This would not be the effect in relation to voidable marriages, since other Courts exercised no jurisdiction in relation to them, directly or indirectly, but treated them as valid until an Ecclesiastical Court had declared them otherwise. The effect of sec. 16 (*b*) may be, therefore, to warrant the exercise of an existing jurisdiction in a class of actions not previously entertained in practice; that is to say, may warrant declarations of nullity as to void ceremonies, but not as to voidable marriages. Meredith, C.J.C.P., says, in *Peppiatt* v. *Peppiatt*, "There being no power to avoid or annul a marriage, there can be no power to declare it avoidable or annullable," but in that case the Court was not asked, as already pointed out, to annul or avoid a marriage, or to declare it annullable or avoidable, but merely to declare that the ceremony was in fact null and void; therefore, a declaration of right was all that was required.

X. Power of the Legislature.

As to the jurisdiction of the legislature to enact the Marriage Act, Meredith, C.J.C.P., says:—"My conclusions are that the provincial legislation in question is *ultra vires*, and that this Court has no power under it, nor has it power otherwise, to consider the matters in question in this action."

The Divisional Court asserted jurisdiction, under the Judicature Act, to make a declaration of nullity, and did not question the constitutionality of the Marriage Act in that respect, but Meredith, C.J.O., expressed doubt as to the right of the legislature to enact sec. 15 of the Marriage Act, con-

sidering that it affected the capacity of persons to marry, and, therefore, might fall under "Marriage," within the jurisdiction of Parliament. But parental consent is a part of the form or ceremony or marriage (*Sottomayor* v. *DeBarros* (1877), 3 P.D. 1, 7), and "the exclusive power to make laws relating to the solemnization of marriage in the province . . . enables the provincial legislature to enact conditions as to solemnization which may affect the validity of the contract." (*Marriage* case, 7 D.L.R. 629.)

"Where a power falls within the legitimate meaning of any class of subjects reserved to the local legislatures by sec. 92 of the B.N.A. Act, 1867, the control of those bodies is as exclusive, full and absolute as that of the Dominion Parliament over matters within its jurisdiction. (Lefroy, Canada's Federal System, 181, citing *Bank of Toronto* v. *Lambe* (1887), 12 A.C., at p. 586).

Can it successfully be maintained that to enact that a minor shall not be married without parental consent is an interference with the status or capacity of the minor; it is not saying that he is not capable of marriage, but that parental consent shall be obtained? It would be quite as forcible to say that the provision that no person shall be married without banns or license is an interference with the capacity of parties, and exclusively within "marriage," and, therefore, *ultra vires* the legislature.

Meredith, C.J.C.P., says:—"If the words 'solemnization of marriage' (in the B.N.A. Act, 1867) be given the extremest width of meaning, or if they be given the meaning of the religious ceremony which in 1867 in Canada was essential to marriage, they cannot come near giving any kind of warrant to the legislature of this province to enact the legislation now in question. Solemnization covers the ceremonial or form by which the marriage may be effected; it cannot affect the capacity of the man or woman to marry. Nor can it afford any justification for the creation of a Court to consider any question of the validity of the marriage with a view to any judgment directly respecting it. . . . Whenever the interpretation of any Court is needed to sever any kind of a marriage tie, that Court must be a divorce Court."

In considering the foregoing extract, it is worth while pointing out once more that sec. 36 of the Marriage Act does not purport to give "power to sever any kind of a marriage tie," but merely to declare, in respect of a very limited class of cases, that no tie was ever created. In its widest meaning "solemnization" plainly includes preliminaries leading up to it (*Sottomayor* v. *DeBarros* (1877), 3 P.D. 1, 7); in its narrowest sense, that of the celebrating ceremony—it could be made to amount to the same thing, by providing that the latter should not be valid unless certain preliminaries took place.

XI. Interpretation of the Marriage Act.

In considering the interpretation which should be placed on secs. 15 and 36 of the Marriage Act, certain admitted principles should be borne in mind, such as:—"The law assumes a favourable attitude towards the marriage state . . . the presumption of law is clearly in its favour."

"The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive. . . . Mere irregularity in the form of the

marriage ceremony is not fatal to the validity of the marriage." (*Catteral* v. *Catterall*, 1 Rob. Ecc. Cas. 580.)

"Directions as to the manner, and even prohibition under a penalty other than nullity, do not necessarily imply a nullity." *Per* Lord Blackburn, *Lauderdale Peerage*, 10 A.C. 748.

"Unless the statute expressly declares a marriage contracted without the necessary consent (of parents) a nullity, it is to be construed as only directory in this respect. (26 Cyc. 835.)

"All such requisites as banns, etc., are formal, and a marriage is void only when their deficiency is known to both parties to the ceremony." (Brown and Watts, 101.)

"Prohibitory words have never been held to create a nullity, unless that nullity is declared in the Act. (Brown and Watts, 102.)

"The consent of parents has been held to be directory only, and its want does not render the marriage celebrated without it invalid." (*Rex* v. *Birmingham*, 8 B. & C. 29.)

The last-mentioned case was relied upon by the Divisional Court in deciding *Peppiatt* v. *Peppiatt*. The judgment in *Rex* v. *Birmingham* was based on the change in the statute law made by 4 Geo. IV. ch. 76. Lord Tenterden, C.J., said, in effect, that 26 Geo. II. ch. 33, sec. 11, had expressly enacted that such a marriage as this was void for lack of the father's consent, the husband being a minor, but that it had been repealed by 3 Geo. IV. ch. 35, sec. 1, because it had been productive of great evils, and then 4 Geo. IV. ch. 76, sec. 14, in requiring parental consent to the marriages of minors, did not say that without it they should be null and void, while sec. 22, in enumerating the causes which made ceremonies void, did not include lack of parental consent. Therefore, he held the marriage valid. It should be remarked also that the Court was dealing with the interpretation of a provision applicable to all marriages of minors, with or without consummation, and in which the legitimacy of children might be involved. It does not appear that the decision in *Rex* v. *Birmingham* is applicable to the circumstances set forth in sec. 36 of the Marriage Act. No such changes have taken place in provincial as in English legislation; in the Marriage Act the marriage of minors not followed by consummation is dealt with. The legitimacy of children cannot be at stake in such cases.

XII. The Sections to be Interpreted.

Sections 15, 19, 21 and 36 of the Marriage Act read (in part) as follows:—

"15. (1) Where either of the parties to an intended marriage not a widower or a widow is under the age of eighteen years, the consent of the father, if living, or, if he is dead, of the mother, if living, or of a guardian, if any has been duly appointed, *shall be required* before the license is issued, or before the proclamation of the intention of the parties to intermarry is made."

"19. (1) Before a license or certificate is issued, one of the parties to the intended marriage shall personally make an affidavit, Form 3, before the issuer or deputy issuer, which shall state (certain things set forth)."

"21. (1) Where the person having authority to issue the license or certificate has personal knowledge that the facts are not as required, by sec. 15,

he shall not issue the license or certificate; and if he has reason to believe or suspect that the facts are not as so required he shall, before issuing the license or certificate, require further evidence to his satisfaction in addition to this affidavit prescribed by sec. 19."

"36. (1) Where a form of marriage has been or is gone through between persons either of whom is under the age of eighteen years, without the consent required by sec. 15, in the case of a license, or where, without a similar consent in fact, such form of marriage has been or is gone through between such persons after a proclamation of their intention to intermarry, the Supreme Court, notwithstanding that a license or certificate was granted or that such proclamation was made and that the ceremony was performed by a person authorized by law to solemnize marriage shall have jurisdiction and power in an action brought by either party who was at the time of the ceremony under the age of eighteen years, to declare and adjudge that a valid marriage was not effected or entered into;

"Provided that such persons have not after the ceremony cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of nineteen years."

"(2) Nothing in this section shall affect the excepted cases mentioned in section 16 or apply where after the ceremony there has occurred that which if a valid marriage had taken place would have been a consummation thereof."

"(3) The Supreme Court shall not be bound to grant relief in the cases provided for by this section where carnal intercourse has taken place between the parties before the ceremony."

The Divisional Court, in *Peppiatt* v. *Peppiatt*, held that the provision in sec. 15, that "the consent of the father, etc., shall be required," meant "required by the issuer of the license," because by sec. 19 it is specified that an affidavit shall be made of the facts necessary to satisfy the issuer as to consent, and by sec. 21 the issuer is empowered to refuse a license if he has personal knowledge that consent has not been given, or to "require further evidence." But surely it cannot reasonably be maintained that it is the failure of an issuer to require a consent, not the marriage of minors without consent, which is a violation of sec. 15. For instance, if a penalty by fine or imprisonment were provided for a breach of sec. 15, would it be imposed on the issuer for failure to require the consent, or on the minor for failure to procure it? Sec. 19 says "the issuer may refuse a license if he has personal knowledge that the facts are not as required in sec. 15." Does that mean "if he has not required the consent," or "if the consent has not been given"? If the latter, is it not plain that sec. 15 means that the consent shall be necessary before a license is issued? Was sec. 15 enacted by the legislature as a direction to the issuers of marriage licenses as to their personal duty, or as imposing a condition upon minors to procure parental consent, or both? According to the interpretation by the Divisional Court, sec. 15 would be fully complied with if the issuer of licenses "required" a consent even if none were in fact given, the mere requisition would be sufficient without compliance; in fact, the judgment has made the section comparatively useless, for no penalty follows the infraction. Sec. 15 (2) says:—"No license shall be issued without the production of the consent,"

not "without the issuer requiring a consent." If, then, a document purporting to be a license is issued, without consent having been given, is it, in law, a license, or is it merely a *"scrap of paper"?* In *Mather* v. *Ney*, 3 M. & S. 265, it was held that a publication of banns by false names was no publication at all; may not a license given in violation of the Marriage Act be regarded as no license at all? Finally, sec. 36 says that if a marriage has been performed "without the consent required by Sec. 15," not "without a consent being required,"the Supreme Court shall have jurisdiction to adjudge that a valid marriage was not effected. Does not this conclusively prove that consent is the thing made essential by sec. 15, not that the issuer of licenses shall require something to be done?

XIII. Is the Consent Essential?

If the consent prescribed by sec. 15 of the Marriage Act be not given before the ceremony, is the ceremony void *ab initio*, or voidable, and does sec. 36 impose a duty or confer a discretion on the Supreme Court? On behalf of the Attorney-General, it was submitted to the Divisional Court that, while the Marriage Act did not expressly enact that invalidity should result from a breach of sec. 15, discretion was conferred on the Court by sec. 36 as to a limited class of cases. To this Meredith, C.J.O., replies that if sec. 36 enabled the Court to declare the invalidity of all marriages in violation of sec. 15, the argument that invalidity results would be stronger. It is difficult to assent to this line of reasoning, which amounts to this, that the power of the Court is less actual because it is limited to a specific class of cases. An exactly opposite contention would not be without force. To enact that all ceremonies of marriage of minors without the prescribed consent were invalid, no matter what the consequences had been, would surely require much more explicit language than to authorize a Court to say that marriage ceremonies not followed by cohabitation were null and void. It was careful deliberation apparently which induced the legislature to confine the Court's power to a limited class, with regard to the public conscience as to such matters, and to the sad results of more drastic legislation in England which had been repealed.

No notice would seem to have been taken of sec. 35 of the Marriage Act by the Divisional Court in considering the meaning of the Marriage Act. That section reads as follows:—

"Every marriage . . . between persons not under a legal disqualification shall, after three years from the time of the solemnization thereof . . . or upon the death of either party before the expiry of such time, be deemed a valid marriage . . . notwithstanding . . . any irregularity or insufficiency in the issue of the license."

Does not the plain implication arise from these words that within the time named a marriage without a license properly procured shall be deemed invalid?

Nor did the Divisional Court have regard, apparently, to sub-sec. 3 of sec. 36, which provides:—

"The Supreme Court shall not be bound to grant relief in the cases pro-

vided for by this section where carnal intercourse has taken place between the parties before the ceremony."

Surely it is impossible to escape the conclusion from these words, that where no such intercourse had occurred, the Supreme Court "is bound to grant the relief provided for"? The suggestion, for the Attorney-General, that sec. 36 clothes the Court with a merely discretionary power can hardly be acceded to. Within the defined circumstances, an obligation, not a discretion, is imposed upon the Court. Where an Act says that a Court "may" do a certain thing for the general benefit, or for a class of persons specifically pointed out, "words of permission are obligatory" (*Russell* v. *Russell*, [1895] P. 315; *Rex* v. *Havering*, 5 B. & Ald. 691), and "the power ought to be exercised" (*Julius* v. *Oxford*), 5 App. Cas. 214).

XIV. Marriages are Not Void.

Finally, we suggest that marriages of minors in violation of sec. 15 of the Marriage Act are not void, that is to say, are not invalid as, of course, as in the case of persons legally disqualified; but those which fall within the limitations set forth in sec. 36 are voidable within three years, or before the death of one of the parties within that period, or if legal proceedings have been taken during that period to question the marriage.

They are not void because (1) the Act does not expressly make them so; (2) they cannot be questioned after a limited time; (3) they cannot be declared null if the parties have had carnal intercourse before or cohabitation after the ceremony; (4) they can only be questioned by one of the parties. A limited portion of them are voidable because (1) with regard to them the Supreme Court is bound to declare that they were not effected or entered into if they are questioned by one of the parties to them within the prescribed period; and (2) because until the Supreme Court has made such a declaration they are good to all intents and purposes. The second proviso to sec. 35, which provides that nothing shall make "valid" an otherwise invalid marriage if either of the parties have "contracted marriage according to law" within the time limited for questioning marriages, seems to imply that marriages in violation of the Marriage Act are invalid, but probably the correct interpretation of the proviso is, that the period of limitation prescribed for questioning marriages does not apply if either party has "contracted matrimony according to law" within it. In a declaration under sec. 36, the Supreme Court would probably declare the marriage void *ab initio*, as Ecclesiastical Courts in England do in reference to voidable marriages. If it be the right view that the Supreme Court has no jurisdiction inherently or under sec. 16 (*b*) of the Judicature Act to hear and determine as to voidable marriages, it follows that sec. 36 of the Marriage Act confers the only jurisdiction the Court possesses to deal with violations of sec. 15, such as *Peppiatt* v. *Peppiatt* presented. That may be the answer to the remark of Meredith, C.J.O., that the Court had under the Judicature Act the jurisdiction conferred by the Marriage Act, if the latter rendered invalid the marriages defined by sec. 36. Under the Judicature Act the Supreme Court may have power as to void ceremonies, and under the Marriage Act as to ceremonies voidable under the Act.

XV. Conclusions.

The following conclusions are suggested with deference:—

1. The Supreme Court of Ontario has jurisdiction inherently to declare the nullity of void ceremonies, and sec. 16 (*b*) of the Judicature Act, 1914, authorizes such declarations of nullity even where no consequential relief is or could be claimed.

2. No Court in Ontario has inherent jurisdiction in relation to voidable marriages and consequently decrees as to them are not authorized by sec. 16(*b*) of the Judicature Act, 1914.

3. The legislature of Ontario has the constitutional power to confer jurisdiction upon the Supreme Court of the province to hear and determine actions for declarations as to both void and voidable marriages; and, therefore, the provisions of the Judicature Act and the Marriage Act, in this regard, are *intra vires*.

4. The common law of England as to void and voidable marriages (except as to jurisdiction to hear actions in relation to voidable marriages) is in force in Ontario, and, if jurisdiction were conferred by the legislature, the remedies pursued in England, as to voidable as well as to void marriages, could be applied here.

5. Section 15 of the Marriage Act does not make the prescribed consent essential to a valid marriage of minors, but, by the combined effect of secs. 35 and 36 a limited class of ceremonies may, within a stated time, be declared non-effective, *ab initio*. Sections 35 and 36 are *intra vires* the legislature of Ontario.

These suggestions are made with deference. The subject is of great interest and very complicated. The very difficult question as to the constitutional powers of Parliament and legislature respectively ought to be set at rest by some proper proceeding to test it. The jurisdiction of the provincial Courts should be placed beyond dispute. It is not creditable that it should be possible to say with great show of reason, as a majority of Judges who have discussed the matter have said, that there is no existing jurisdiction in the Courts of Ontario to deal with any proceedings for nullity, no matter how sad the circumstances may be.

MATRIMONIAL JURISDICTION.

A learned correspondent takes exception to our observations on p. 343 as to the want of matrimonial jurisdiction in the Supreme Court of Ontario. He says that the English Courts of law and equity, which had the like jurisdiction to that of our Supreme Court of Ontario, did declare marriages null and void.

We may concede that when the question of marriage incidentally arose in the course of an action in those Courts, they did decide the question as a matter of fact relevant to the issue to be

tried; and so may the Supreme Court of Ontario in like cases do the same. But such a decision, adverse to a marriage, would not be in any way equivalent to the sentence of a matrimonial Court judicially annulling the marriage; and we doubt even whether the judgment of a common law or equity Court could be set up as *res judicata* in a matrimonial Court. A *de facto* marriage can, as we understand the law, only be annulled by the judicial sentence of a competent Court and the only Court competent to pronounce the sentence, according to English law, is a Court having matrimonial jurisdiction. Our correspondent suggests that the solution of the matter is that the annulment of a void marriage is impossible, because, as he contends, all that the Court can do is to say that the marriage never took place; but with all due deference to our learned friend, we may point out that many marriages that are liable to a sentence of nullity may nevertheless by reason of neither party taking any action to annul the marriage in the other's lifetime become unimpeachable. For instance, impotence of either party at the time of the marriage ceremony taking place is a ground of nullity, but if neither party took proceedings to impeach the marriage then, after the death of either party, such a marriage would become unimpeachable. Formerly in England, and still in Ontario, a marriage within prohibited degrees might also, though liable to a sentence of nullity in the lifetime of the parties, become unimpeachable after the death of either party; see *Hodgins* v. *McNeil*, 9 Gr. 505, and so also in the case of a marriage procured by duress.

We may observe in conclusion that the authority of the Court to pronounce declaratory judgments appears to be clearly confined to matters within its jurisdiction, as was judicially decided in *Reid* v. *Aull*, 32 O.L.R. 68, and cannot by any reasonable construction be extended to matters as to which it has no jurisdiction. Can anyone, for example, believe that the Supreme Court of Ontario could declare that a plaintiff was entitled to the rank of a peer of the United Kingdom and to a seat in the House of Lords, or that, if it presumed to make any such declaration, its judgment would have any more value as a judicial sentence than a piece of waste paper?

NOTES FROM THE ENGLISH INNS OF COURT.

The commencement of the English legal year has been heralded by certain important judicial changes. Sir Walter Phillimore has resigned his high office of Lord Justice of Appeal. One of the most courteous and conscientious of our judges, he carries with him the good wishes of the entire profession, and the hope is expressed that he will become an active member of the Judicial Committee of the Privy Council. A man of great learning he did not confine his activities to the law, finding time, in the midst of his judicial work to be twice mayor of the Royal Borough of Kensington. His place in the Court of Appeal has been taken by Mr. Justice Scrutton, one of our leading commercial lawyers who, when at the bar, made charter parties and bills of lading subjects of special study.

From Outer Bar to Bench.

To him as Judge of the High Court there succeeds Henry M'Gardie, Esq., barrister-at-law. Than this there has been no more popular appointment for a long time. Called to the Bar in 1894, Mr. M'Cardie rapidly acquired a large junior practice. He never "took silk" but he took a lion's share of the practice of the Courts. No *cause celébre* within recent years was complete without him; and although he was probably opposed in the course of his career to nearly every member of the bar, he made no enemies amongst them. To have M'Cardie against you was to be up against a man who not only knew the game but who played it according to the rules. Nay more, he would go out of his way to help an opponent. On one occasion he was for the defendant in a complicated libel case. Counsel for the plaintiff had made a slip in his pleading, a slip which, if taken advantage of, might have imperilled the plaintiff's case. Instead of taking the advantage thus presented to him, our latest Judge sent a private note to his learned friend to point out the mistake. This is but a single instance from amongst many chivalrous actions. Small wonder then, that the profession rejoice at the preferment of this member of the Junior Bar. Junior Counsel to the Treasury

are generally promoted to the Bench, but since the appointment of Mr. Justice Mathew, all his Majesty's Judges have first been King's Counsel.

Separation of Juries in Civil Cases.

In a case reported in the October number of the Law Reports (*Fanshaw* v. *Knowles* (1916) 2 K.B. 538) the question whether a jury trying a civil action may separate after the summing up but before verdict found was considered by the Court of Appeal. It is passing strange that there should be any doubt about such a matter in the year 1916, but that there is (or was) some doubt is proved by the fact that the Lord Chief Justice took occasion to go into the history of the law as to separation of juries. What happened in the case mentioned was this. The Judge, having summed up, left the Court. The jury retired to consider their verdict. Presently they informed the Judge's Associate that they were agreed on two points but not on a third. They then separated for the night. When the Court resumed next day the foreman announced that they were agreed on all points, and a verdict was given accordingly. Upon judgment being given, the losing party sought to set it aside on the ground that the jury should have deliberated in private and without separating. It was contended that the well known rule applied to criminal cases was also applicable in civil Courts and that once a jury is charged, they must remain alone and together until verdict found. The Court of Appeal, however, held that the rule that any separation of the jury after the judge's summing-up in a criminal case invalidates their verdict does not apply to civil cases. The verdict therefore stood.

When the Jury is not Allowed to Separate.

It is only in cases of aggravated crime that juries are not allowed to separate. Upon a trial for murder, for instance, if it lasts for more than a day the jury become the guests of the High Sheriff. He entertains them at a hotel and has been known, on occasion, to take them to the theatre of an evening. So long as they are kept away from all possible risk of being "got at" by the

friends of the prisoner there seems to be no reason why they should not be provided with innocent amusement.

Should Trial by Jury in Civil Cases be Abolished?

Every now and then it is suggested that trial by jury in civil cases ought to be abolished. It is a point upon which there is great divergence of opinion. Although theoretically the right to have a jury is absolute in *nisi prius* cases, in practice although a jury has been summoned the parties often agree to try before a judge alone. On the other hand, it sometimes happens that when a non-jury case comes into Court, the judge intimates that he would like to have a jury and adjourns the case in order that one shall be summoned.

The "right to a jury" has, of course, existed from time immemorial, and those who would answer the question—Shall the right be abolished? in the affirmative ought to be asked whether they can suggest a better tribunal. A distinguished professor of mathematics at Cambridge refused to vote for the abolition of compulsory Greek until the abolitionists were able to shew that there was a subject of equal educational value ready to hand. So those who would leave everything in every case to the decision of a judge alone must be prepared to shew that questions of fact are better decided by a judge in every case than by a jury.

Should Lawyers Act as Jurymen?

That mere lawyers should not act in the capacity of jurors as judges of fact, appears to have been long since recognised by the legislature.

By the Juries Act, 1870, the following are amongst the persons who are exempt from jury service: "Sergeants, barristers-at-law, certificated conveyancers, and special pleaders if actually practising; attorneys, solicitors and proctors, if actually practising and having taken out their annual certificates, and their managing clerks, and notaries public in actual practice." This does not mean that such persons *may* not serve as jurymen; it only means that they need not. Occasionally the name of a man entitled to exemption is entered, by inadvertence, on the jury list. He may

then be summoned to attend, and if he does not plead exemption he will be placed in the box to try cases with eleven other good and true men. When entering the Lord Chief Justice's Court last term the writer was surprised to see one of his learned friends duly installed as foreman of the jury. True, he was only a member of the Chancery Bar—a man who had probably never addressed a jury in his life; but if he had been recognised by counsel on either side it is most probable that exception would have been taken to his acting as a juror.

A Barrister as a Juror.

After verdict found, this lawyer-juror was asked to describe his experiences. "The action," he said, "was brought to recover damages for the negligent driving of a motor lorry. We found a verdict for the plaintiff; but (and this is the part of his recital which should interest the advocate) if counsel for the defendant had called no witnesses we should most certainly have found for the defendant, as we were all agreed, at the close of the plaintiff's evidence, that he had no case. As it was, however, a witness called on the part of the defendant caused us to alter our view."

The Fees of Juries.

Those who serve as special juries receive the sum of 1 guinea apiece for each cause submitted to them. A mere common jury, however, is paid the miserable sum of 1 guinea *pour tout potage*. This sum they divide amongst them. Probably the usher, who acts as paymaster, gets such a large "rake-off" that there is little left to divide.

The Office of Juror as an Office of Profit.

Time was when to be a special juror was to hold an office of profit and emolument! Before the days of continuous sittings in London, the Court of King's Bench might be closed for a considerable time—all the Judges being away on circuit. If a London case were to be tried expeditiously, it became necessary to secure a local venue, and the parties, for the sake of convenience, would agree upon an assize town close to the metropolis. Croydon was

often selected for the purpose. The writer heard of one jury which heard no less than 70 causes at the Croydon Assizes, e. rning the substantial sum of 70 guineas apiece. The establishment of continuous sitting in London has, however, much reduced the assize work in the Home Counties. The modern juror seldom gets anything like adequate compensation for loss of a day's work, which attendance at Court must necessarily entail.

Who Pays the Jury?

The jury must be paid in hard cash before they leave the box, the fees being found by the solicitor to the litigant at whose instance the jury was summoned. The writer recalls one such where a difficulty in finding the money was fraught with remarkable consequences. The plaintiff's solicitor, who had come from London, was called upon to pay 12 guineas to a jury in a northern assize town. His cause had been unsuccessful, and his client had been ordered to pay costs. The Court rose late. It was past banking hours. Not having the ready money, the solicitor sought to borrow it from his professional opponent, who was a local man. There was ill-feeling between the two, and the northern practitioner refused to accommodate his London "friend," who was put to great straits to find the money. But he found it. The jury were paid and discharged. The London solicitor returned to town with rage in his heart—to bide his time.

The Sequel.

Later on, the defendant's solicitor prepared his bill of costs. It was a heavy bill, the hearing having lasted several days. He, or his London agent, appeared in due course before the taxing master to have it taxed. His opponent opened the proceedings b saying, "I take a preliminary objection to this taxation. My client owes the defendant nothing."

"How is that?" enquired the taxing master.

"It is quite simple and quite unanswerable," responded the solicitor, sure of his ground. "The defendant's solicitor omitted to take out his practising certificate during the time material to these proceedings. Consequently, his client cannot recover costs against mine!"

The bomb so dropped in this legal camp was no "dud." It burst and with full effect. The taxing master upheld the objection, and the solicitor who refused to lend £12 12s. 0d. to a professional brother was amply punished.

The curious may find the authority for the proposition relied on in Halsbury's Laws of England, vol. 26, p. 720, where it says: "The successful party to any litigation cannot recover any costs or disbursements from the opposite party if the solicitor acting for him was uncertificated, although the actual steps taken by the solicitor on his client's behalf are not invalid."

Temple, Oct. 19, 1916. W. VALENTINE BALL.

At a hearing before a Commissioner appointed under a Commission to investigate certain alleged offences in the Province of Manitoba, the Commissioner, who happened to be a Judge of the Supreme Court of that Province, committed some witnesses for contempt of court for statements published in certain newspapers. In this he clearly exceeded his jurisdiction. It is old law that only a Judge who is a Judge of a court of Record has power to commit for contempt of court unless such power is given by statute. Certainly a Commissioner who is not sitting as a Judge and who is not holding a court cannot have any such power except under legislative authority, which was not given, it is said, in this case. We are not surprised, therefore, to hear that these prisoners were subsequently discharged from custody on the ground that the Commissioner had no such jurisdiction as claimed by him. This objectionable practice of appointing Judges to hold commissions of a general character and taking them away from their proper sphere of duty is not one to be commended, and is a parent of many harmful results.

REVIEW OF CURRENT ENGLISH CASES.

CONTRACT—SALE OF GOODS—CUSTOM OF TRADE—REASONABLENESS.

Produce Brokers v. *Olymphia Oil Cake Co.* (1916) 2 K.B. 296. This was a motion to set aside the award of arbitrators which was based on an alleged custom of the oil trade, whereby in the case of a contract of resale in the printed form of the Incorporated Oil Seed Association, the buyers impliedly agreed to accept the original seller's appropriation if passed on without delay, provided it was valid at the time it was made, even though, at the time of being passed on, the appropriation might, apart from the custom, be invalid by reason, for example, that the goods had been lost at sea. The award in question found that at the time of the appropriation of the goods in question being passed on, the goods had in fact been lost at sea, but that by reason of the custom above referred to, the appropriation was effectual. The Divisional Court, Horridge and Rowlatt, JJ., held that the validity of the custom in question depended on whether or not it was reasonable, and they held that it was reasonable and therefore valid and binding on the parties to the contract in question.

LANDLORD AND TENANT—COVENANT FOR QUIET ENJOYMENT—NUISANCE BY ANOTHER TENANT OF SAME LESSOR—INJUNCTION—LIABILITY OF COMMON LESSOR—DEROGATION FROM GRANT.

Malzy v. *Eichholz* (1916) 2 K.B. 308. This was an action to restrain a nuisance by carrying on a noisy trade. The plaintiff and defendant Castiglione were both lessees of adjoining premises from the defendant Eichholz. The plaintiff's lease contained a covenant by Eichholz for quiet enjoyment, and Castiglione's lease contained a covenant on his part not to carry on his business so as to be an annoyance to Eichholz or his tenants. Castiglione had granted leave to one Dent to carry on mock auctions on part of Castiglione's premises, which was carried on noisily and attracted crowds and interfered with the plaintiff's enjoyment of his premises. The plaintiff claimed that the defendant Eichholz was obliged to take steps to prevent his tenant Castiglione from so using his premises. The action was tried by Darling, J., with a jury, and in answer to questions the jury found that Dent's business was conducted so as to be a nuisance to the plaintiff with

Castiglione's authority, and with Eichholz's knowledge and assent, and Eichholz had not taken all reasonable steps or made all reasonable efforts to stop the nuisance to the plaintiff. Darling, J., on these findings gave judgment for the plaintiff for the damages assessed: but the Court of Appeal (Cozens-Hardy, M.R., Pickford, L.J., and Neville, J.) held that the plaintiff had no cause of action against his landlord Eichholz, that there was no evidence to warrant the finding that what was done by Dent was done with his assent, and that he was under no legal obligation to the plaintiff to take legal steps against Castiglione or Dent for the plaintiff's protection, and, therefore, as against Eichholz, the action was dismissed. The defendant Castiglione did not appeal.

COPYRIGHT—JOINT OWNERS—INFRINGEMENT BY ONE CO-OWNER—INJUNCTION—COPYRIGHT ACT (1-2 GEO V. CH. 46) S. 1(2), S. 2(1).

Cescuisky v. *Routledge* (1916) 2 K.B. 325. In this case the plaintiff and defendants were co-owners of the copyright of a certain book, and the action was brought to restrain the defendants from publishing an infringement of that copyright. Rowlatt, J., finding that the work sought to be restrained was an infringement of the joint copyright, granted an injunction as asked.

PAYMENT INTO COURT—ACTION OF NEGLIGENCE—DENIAL OF LIABILITY—NEGLIGENCE ADMITTED—(ONT. RULE 310).

Munday v. *London County Council* (1916) 2 K.B. 331, the Court of Appeal (Lord Reading, C.J., Warrington, L.J., and Scrutton, J.) have affirmed the decision of the Divisional Court in this case (1916) 1 K.B. 159, (noted *ante* p. 188).

CHARTER PARTY—CONSTRUCTION—COMMANDEER.

Capel v. *Soulidi* (1916) 2 K.B. 365, the Court of Appeal (Lord Reading, C.J., Warrington, L.J., and Lush, J.) have affirmed the decision of Atkin, J., in this case (1916) 1 K.B. 439 (noted *ante* p. 215).

NUISANCE—HIGHWAY—SHEEP STRAYING ON HIGHWAY—DAMAGE TO VEHICLE USING HIGHWAY.

Heath's Garage v. *Hodges* (1916) 2 K.B. 370. This was an appeal from the decision of the Divisional Court (1916) 1 K.B.

206 (noted *ante* p. 188). The plaintiff's claim being for damages to a vehicle owing to its having come into collision with a sheep of the defendant straying on the highway. The Divisional Court held that the defendant was not liable, and the Court of Appeal (Lord Cozens-Hardy, M.R., Pickford, L.J., and Neville, J.) have affirmed the decision.

CRIMINAL LAW—RECEIVING GOODS KNOWING THEM TO BE STOLEN —POSSESSION OR CONTROL—NEGOTIATOR FOR SALE OF STOLEN GOODS.

The King v. *Watson*, (1916) 2 K.B. 385. The appellant in this case was indicted and convicted for receiving goods knowing them to be stolen. The evidence shewed that he had been in communication with two other persons who had possession of the stolen goods, and that he had endeavoured to negotiate a sale thereof to some third person. The jury found that he was guilty of "being a negotiator and in the full knowledge that the goods were stolen." This was interpreted by the Judge at the trial as a verdict of guilty, but the Court of Criminal Appeal (Lord Reading, C.J., Scrutton and Shearman, JJ.) held that the conviction must be quashed because there was no evidence that the goods in question had ever been in the active control or possession of the applicant, and, under an indictment as principal, he could not be convicted as an accessory after the fact.

PRIZE COURT—BRITISH VESSEL— ENEMY CARGO SHIPPED BEFORE WAR—INTERRUPTION OF VOYAGE—SEIZURE IN PORT AFTER DECLARATION OF WAR—CLAIM OF SHIPOWNERS FOR FREIGHT.

The Juno (1916) P. 169. The facts in this case were that a British vessel shortly before the outbreak of the war with Germany left Bristol with a cargo destined for Germany and put into Swansea to load other cargo. Whilst there, and after the outbreak of the war, the cargo intended for Germany was seized as prize. The shipowners claimed to be allowed freight in respect thereof. Evans, P.P.D., held that they were entitled to some allowance for freight, and he lays down the principles on which the allowance should be estimated.

WILL—SETTLED ESTATE—POWER OF APPOINTMENT—FRAUD ON POWER.

Tharp v. *Tharp* (1916) 2 Ch. 205. This was an appeal from the decision of Neville, J. (1916) 1 Ch. 142 (noted *ante* p. 191) in which the parties came to an agreement.

CONFLICT OF LAWS—LEX LOCI CONTRACTUS—LEX SITUS—FOREIGN IMMOVEABLES—EQUITABLE CHARGE—LEGAL MORTGAGE—INSOLVENCY OF MORTGAGOR.

In re Smith Lawrence v. *Kitson* (1916) 2 Ch. 206. This was a creditor's action for the administration of the estate of a deceased person who had died insolvent, in which an application was made for an order directing the trustees of the estate to execute a legal mortgage to secure certain debts contracted in the following circumstances. The testator was resident in England and obtained from his sisters loans amounting to £2,000 with which he agreed to charge certain estates owned by him in the Island of Dominica, on which he agreed to execute a legal mortgage. He died leaving his estates in Dominica to trustees without having executed any legal mortgage. The equitable charge was insufficient according to the laws of Dominica to charge the land there, and it was contended on behalf of unsecured creditors of the testator that the contract must be construed according to the *lex situs*, and that it was void: but Eve, J., who heard the application, held that the contract must be construed according to the law of England, and that the applicants were entitled to have the trustees execute a legal mortgage to secure the loan, as claimed.

CONTRACT—SPECIFIC PERFORMANCE—LEASE—NAME OF PROPOSED LESSEE—CONTRACT BY AGENT—AGENT NOT LIABLE AS CONTRACTING PARTY—RIGHT OF UNDISCLOSED PRINCIPAL TO SUE—STATUTE OF FRAUDS, 29 Car. 2, c. 31, s. 4—(R.S.O.c. 102, s. 5).

Lovesy v. *Palmer* (1916) 2 Ch. 233. This was an action for the specific performance of a contract to grant a lease. The contract was made by one Harraway, who was the plaintiff's agent, to grant the lease to a company to be formed, but the plaintiff was Harraway's sole principal. The defendants denied that there was any concluded contract, and also relied on the Statute of Frauds. Harraway registered a company styled "the C. T.—Limited," and the plaintiff put forward that company as the Company to take the lease. The contract was alleged to be contained in certain correspondence which had passed between the defendant's solicitors and Harraway in which the principal was referred to as his "client" or "clients." Younger, J., who tried the action, held that as Harraway was not himself personally bound by the contract, the plaintiff, even if he were his principal, not being named in the contract, could not sue upon it, because

in such circumstances it was an insufficient memorandum within the Statute of Frauds. The learned Judge came to the conclusion that Romer, J., must have been of the opinion in *Filby* v. *Hounsell*, (1896) 2 Ch. 737, that the agent there was personally liable on the contract, although he considered that he was not warranted in that conclusion. But, assuming that he thought it was unnecessary that the agent should be personally bound by the contract, then he considered his decision was opposed to *Rossiter* v. *Miller*, 3 App. Cas. 1124, which he considered governed the case. The action therefore failed.

PRINCIPAL AND AGENT — UNDISCLOSED PRINCIPAL — ACTION AGAINST AGENT ALONE—EXAMINATION FOR DISCOVERY—INQUIRY AS TO NAME OF ALLEGED PRINCIPAL.

Sebright v. *Hanbury* (1916) 2 Ch. 246. This was an action for specific performance of a contract for the sale of pictures. The plaintiff sought to examine the defendant as to whether in making the contract he was acting as agent for an undisclosed principal, and he sought to amend his pleadings by setting up the alleged agency of the defendant. The question, as Younger, J., put it, was whether an amendment ought to be made, or interrogatories allowed, the object of which is not to support the existing proceedings, or to make them regular and effective against the present defendant, but to secure for the plaintiff some other person liable under the contract in substitution for, and not jointly with the present defendant; and he came to the conclusion that it would be entirely contrary to the practice to accede to such an application.

LANDLORD AND TENANT—DEMISE OF BUSINESS PREMISES—RESERVATION OF PASSAGEWAY BENEATH DEMISED PREMISES—ALTERATION IN USER OF PASSAGEWAY BY LANDLORD—QUIET ENJOYMENT—TEMPORARY ANNOYANCE TO TENANT.

Phelps v. *London* (1916) 2 Ch. 255. This was an action by a tenant against his landlords to restrain the defendants from using a passageway beneath the demised premises to the annoyance of the plaintiff. In the lease to the plaintiff made by the defendants of certain business premises in the city of London, the defendants reserved a passageway beneath the premises; at the time of the lease this passageway was floored with concrete and the walls thereof were faced with glazed brick. Seventeen years after the granting of the lease and during the term, the defendants removed the floor of the passage and the tie girders which supported the

floor in order to make a cartway for the removal of materials and debris from other premises of the defendants to which the passageway led. In so doing some annoyance was caused to the plaintiff. The action was tried by Peterson, J., who held that the plaintiff was not entitled to the relief claimed, as there was no express or implied covenant by the defendants to keep the passageway in the same condition it was at the time of the making of the lease, and not to change the mode of using the passageway, and that by the terms of the lease the property in half the north wall and the floor of the passageway had been reserved by the defendants who were not guilty of any trespass in removing the floor of the passageway, or the girders from the north wall, and that its stability was not affected, and the annoyance being temporary did not constitute any breach of the covenant for quiet enjoyment. But it was conceded that the south wall of the passage had not been reserved and the removal of steel girders from that wall constituted a trespass for which the plaintiff was entitled to relief.

COMPANY—PARTLY PAID SHARES—SHARES HELD IN TRUST—COMPANY NOT BOUND TO RECOGNIZE TRUST—ACTUAL NOTICE OF TRUST—LOAN BY COMPANY TO TRUSTEE OF SHARES—COMPANIES ACT (8 Edw. 7, c. 69, s. 27)—(R.S.O., c. 178, s. 72)—(R.S.C., c. 79, s. 217).

Mackereth v. *Wigan C. & I. Co.* (1916) 2 Ch. 293. By the articles of association of the defendant company it was provided "no person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or recognise any equitable contingent or future or partial interest in any share or interest in any fractional part of a share or (except as by these presents otherwise expressly provided) any other right in respect of any share except an absolute right to the entirety thereof in the registered holder thereof." Another article provided that the company shall have a first and paramount charge on all the shares (not being fully paid up shares) registered in the name of a member (whether solely or jointly with others) for all moneys due to the company from him or his estate, either alone or jointly with any other person, whether a member or not, and whether such moneys were presently payable or not: s. 27 of the Companies Act, 1908, provides that no notice of any trust shall be entered on the register, or be receivable by the registrar. The defendant company having actual notice that one James Hodgson jointly with other persons was trustee of certain shares

of the company, employed Hodgson as their agent and he gave a bond to the company to secure any future indebtedness by him as agent. Having become indebted to the company Hodgson charged his interest in the shares held by him as one of the trustees. The company, having recovered judgment against Hodgson, claimed to retain the whole of the dividends on the shares held in trust, and subsequently sold the shares and claimed to retain the debt due by Hodgson out of the proceeds. Hodgson having ceased to be a trustee, the plaintiffs, as the present trustees of the shares, brought the present action against the company for wrongfully dealing with the dividends and shares, and it was held by Paterson, J., who tried the action, that the articles, and s. 27 of the Statute, do not protect the company which in face of notice that the shareholder is not the beneficial owner makes advances, or gives credit to such shareholder, so as to enable the company to charge the shares in respect of such credit or advances to the prejudice of the beneficiaries, and the company was accordingly ordered to account for the dividends and proceeds of shares applied on Hodgson's indebtedness.

SETTLEMENT — CONSTRUCTION — INFANT — MAINTENANCE — CLAUSE LIMITING TRUSTEE'S DISCRETION—FATHER'S RIGHTS —REPUGNANCY—PUBLIC POLICY.

In re Borwick, *Woodman* v. *Borwick* (1916) 2 Ch. 304. This was an application by an infant for an allowance for maintenance in the following circumstances: Under a voluntary settlement made by the infant's maternal grandfather he was entitled to a large amount of stock in a company contingently on his attaining twenty-one, and the trustees were empowered at their discretion to apply part of the income not exceeding £500 per annum for the maintenance, education or advancement of the infant, but no part of the income was to be applied for the benefit of the infant while he was in the custody or control of his father, or while his father should have "anything to do with his education or bringing up." The annual income of the settled fund was £1,400; the infant was living with his father whose annual income was £340, and the father was unwilling to part with the custody or control of the infant, and no question as to the fitness of the father for the care of the infant was raised. Eve, J., who heard the application, held that the clause limiting the trustees' discretion was valid, and could not be disregarded either as being repugnant to the interest given by the settlement, or as being against public policy, as an attempt to interfere with the father's parental rights over his child. The application therefore failed.

LICENSE TO USE WALL—SUBSEQUENT LEASE OF WALL—REFUSAL OF LESSEE TO PERMIT USE OF WALL BY LICENSEE—LICENSEE'S RIGHT OF ACTION AGAINST LICENSOR—INTEREST IN LAND.

King v. *Allen* (1916) 2 A.C. 54. This was an appeal to the House of Lords (Lords Buckmaster, L.C., Loreburn and Atkinson) from the Irish Court of Appeal. The case was a simple one. King, being the owner of a building, gave to the plaintiffs a licence to use the wall for advertising purposes at a rent of £12 per annum; he subsequently leased the building without any reservation of the right of the licensees, and the lessees refused to permit the licensee to continue to use the wall, who brought the present action against King, their licensor, for breach of the agreement. Judgment having been given in the Court below for the plaintiffs, the defendant appealed, contending that the licence gave the plaintiffs an interest in land which was unaffected by the lease, but their Lordships agreed with the Court below and dismissed the appeal, holding that the licence did not create any interest in land, but was a mere personal agreement, which the defendant had, unfortunately and unintentionally, deprived himself of the means of making good.

PRACTICE—SERVICE OUT OF JURISDICTION—WRIT ISSUED AGAINST TWO DEFENDANTS BOTH OUT OF THE JURISDICTION—ACCEPTANCE OF SERVICE BY ONE DEFENDANT—SERVICE OF CONCURRENT WRIT ON THE OTHER DEFENDANT—SETTING ASIDE SERVICE, RULE 64—(Ont. Rule 25 (*a*)).

Russell v. *Cayzer* (1916) 2 A.C. 298. This was an appeal from an order setting aside the service of the writ of summons out of the jurisdiction. The plaintiffs issued a writ of summons against two Scotch companies to recover damages for the loss of certain goods. One of the companies accepted service of the writ by their solicitors in England, and the plaintiff then obtained leave to serve a concurrent writ on the other company as being a necessary party to an action properly brought against the co-defendant, under Rule 64(*g*), (Ont. Rule 25(*g*)). An application was then made by the company served with the concurrent writ to set aside the service. Rowlatt, J., refused the application, but the Court of Appeal reversed his decision, and the House of Lords (Lords Haldane, Sumner, Parmoor and Wrenbury) have affirmed the Court of Appeal). As their Lordships point out, the action could not be properly brought against either company in England; and the mere fact that one of the companies chose to submit to the jurisdiction of the English Court could not give the Court jurisdiction over the other company. Lord Wrenbury expressed the doubt whether the writ ought to have been issued at all without leave, both defendants being styled therein as "of Glasgow in Scotland."

ALIEN ENEMY—LIMITED COMPANY REGISTERED IN ENGLAND—SHARE CAPITAL HELD BY ALIEN ENEMIES—TRADING WITH THE ENEMY—RIGHT TO SUE—AUTHORITY OF SECRETARY OF COMPANY TO INSTITUTE ACTION.

Daimler Co. v. *Continental Tyre & R. Co.* (1916) 2 A.C. 307. This is an important decision concerning the right of action during war of an English company whose shares were held by alien enemies. The plaintiff company was a registered English company, the whole of the shares of which (except one) were held by Germans, and all the directors of the company were also Germans resident in Germany. The one share was registered in the name of the secretary who was born in Germany but was resident and naturalized in England. After the outbreak of the war with Germany the secretary instituted an action in the name of the company to recover a trade debt due by the defendant. After service of a specially indorsed writ the plaintiff company applied for judgment. The Master gave leave to sign judgment and his order was affirmed by a Judge in Chambers, and by the Court of Appeal (1915) 1 K.B. 893 (note *ante* vol. 51, p. 327). The House of Lords (Lords Halsbury, Mersey, Kinnear, Atkinson, Shaw, Parker, Sumner and Parmoor) were unanimous that the action could not be maintained, and must be struck out as irregular: (*a*) because the directors could not lawfully give directions to institute the action, being all alien enemies, and (*b*) because the secretary had no authority to institute the action. Lords Atkinson, Parker, Mersey, Kinnear and Sumner were also of the opinion that, even if the action had been properly instituted, leave to defend ought to have been given, as the circumstances were such as to require investigation.—Lord Halsbury thought the company was in substance a hostile partnership and as such incapable of suing, but Lords Shaw, Parker, Mersey and Parmoor were of the contrary opinion and considered that, notwithstanding the majority of the shares were held by alien enemies, the company was not necessarily an enemy company, or a company of an enemy character, and that such a company would not be debarred from suing during war merely because its shareholders were alien enemies: but that by properly authorised agents it might carry on the business of the company, and bring actions, although, pending the war, it could not pay any dividends to alien enemy shareholders. The judgment of Lord Parker will be found to contain a convenient summary of the law regarding the status of English companies during war, and how far they are affected by having, or being under the control of, enemy shareholders.

Correspondence

CODES AND COMMON LAW.

To the Editor, Toronto, Nov. 1, 1916.
CANADA LAW JOURNAL:

Dear Sir,- Those who have been accustomed to the common law are naturally averse to setting out on a voyage of discovery into the unknown (to them) fields of codified law. There are those, however, who have strong views that the time has come for a change from the old, and to them somewhat sacred system which prevails in England and its dependencies.

A professional journal might be supposed to favour the system which would be liked best by the great majority of its readers; but it also owes a duty to the public to advocate such changes as may be expected to conduce to the cheapening of law and to expediting the settlement of disputes. This duty your journal has always recognised, and has advocated many desirable reforms.

The profession may well be proud to remember, as the fact is, that legal reforms have almost universally been initiated by lawyers, much to the detriment of the profession from a financial point of view. You may yourselves rightly claim to have in your columns suggested many things in the direction indicated which have worked to the advantage of the public.

The majority of your readers probably would not favour a code system of law, but it may be that the time has come when something of that sort should take the place of the present system which certainly has many disadvantages. Whilst these days are not the time to discuss this matter, it may be that among many changes which will come after the war the code system may come to the front. Codification, it may be remarked, is not an entirely new thing, as a beginning was made when the criminal laws were brought into a code, and statutes affecting matters common to the whole Dominion have been passed which are in the nature of codes.

CONSTANT READER.

[There will be much to be done in the way of legal transformations, notably in that nebulous branch of it called International law, when the war is over; then perhaps the subject of our correspondent's letter will receive attention. In the meantime, some of our subscribers will, possibly, give their views on the subject, to be discussed later, and these will be kept safely till the time for discussion comes.—ED. *C.L.J.*]

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Exch.] PIGGOTT & SONS v. THE KING. [June 19.

Crown—Negligence—Injury to "property on public work"—Jurisdiction—R.S.C. 1906, c. 140, s. 20 (b), (c).

To make the Crown liable under sub-sec. c. of sec. 20 of the Exchequer Court Act, R.S.C. 1906, ch 140, for injury to property, such property must be on a public work when injured. *Chamberlin* v. *The King* (40 Can. S.C.R. 350), and *Paul* v. *The King* (38 Can. S.C.R. 126), followed.

Injury to property by an explosion of dynamite on property adjoining a public work is not damage to property injuriously affected by the construction of a public work under sec 20 (*b*) of the Act.

Appeal dismissed with costs.

W. L. Scott, for appellants. *Newcombe*, K.C., for respondent.

Ont.] CAMPBELL v. DOUGLAS. [Oct. 10.

Sale of land—Consideration—Exchange of properties—Mortgage—Indemnity to vendor—Evidence.

In 1912, D. advanced money to P. who conveyed to him certain properties including one on LeBreton street. In 1913, P. entered into an agreement with C. to exchange the LeBreton street property for lots on Lisgar street, which was carried out by conveyances between C. and D. In his deed C. stated that the consideration was "an exchange of lands and $1" and conveyed the lands on Lisgar street subject to certain mortgages, the description being followed by the words "the assumption of which mortgages is part of the consideration herein." C. was obliged to pay these mortgages and brought suit against D. to recover the amount so paid.

Held, affirming the judgment of the Appellate Division, (34 Ont. L.R. 580), that the case was not within the rule of equity whereby the purchaser of an equity of redemption may be obliged

to indemnify his vendor against liability on the mortgage. *Small* v. *Thompson* (28 S.C.R. 217), distinguished.

Held also, that parol evidence was properly received to shew the relations between P. and D.; that D. received the conveyance from C. merely as P.'s nominee and held it afterwards only as security for his advances to P.; that he never claimed to be owner and never went into possession except as P's agent; and that he was not a purchaser of the property but only a mortgagee.

Appeal dismissed with costs.

J. R. Osborne, for the appellant.

EXCHEQUER COURT OF CANADA.

Cassels, J.] [October 2.

THE KING *v.* CHARLES H. CAHAN AND THE EASTERN TRUST COMPANY.

Expropriation—Compensation—Amount offered in information in excess of just compensation as established by the evidence—Binding effect of offer where no amendment of information asked.

Held, that where the Crown in expropriation proceedings, and under the terms of the Expropriation Act, offers a definite sum as compensation by the information and when there is no request to amend the information, and counsel for the Crown at the trial adheres to such offer, is is not for the Court to reduce the same, notwithstanding that the evidence may establish a smaller sum as to proper amount of compensation.

Reporter's Note: See the case of *Likely* v. *The King*, 32 S.C.R. 47.

T. S. Rogers, K.C., and *J. A. McDonald*, K.C., for Crown. *H. Mellish*, K.C., for defendants.

Book Reviews.

Estoppel and the Substantive Law: or, principles of keeping faith and finality, by ARTHUR CASPERSZ, B.A. (Oxon), Barrister-at-law, Advocate of the High Court, Calcutta. 4th edition: Calcutta, 1915. Canada Law Book Co., 84 Bay St., Toronto.

This excellent work is divided into two parts. (I) The doctrine of changed situations. (II) The conclusiveness of judg-

ments, decrees and orders. These parts are divided into appropriate subheadings.

The doctrine of estoppel requires careful study, and the profession evidently appreciates the effort of Mr. Caspersz to throw additional light thereupon, and as he truly says "without estoppel the courts of law could not do their work." This remark is perhaps more applicable in a new country like India and our own than to the mother land.

The work is that of a trained scholar and a thorough lawyer and his style is luminous and interesting. The book, though of general usefulness and applicable to English law has also reference to the law of our Indian Empire. Its subject matter is possibly, for certain reasons not necessary to discuss, of more importance there than some other parts of Greater Britain; and consequently the prevalence of the subject there results in discussions which are valuable to us here.

There are several standard works on the law of Estoppel, but none of them evince more careful research, logical argument and masterly treatment than does the book before us.

It is scarcely necessary when a law book has reached its fourth edition to go into any critical analysis of its contents; all we need to do is to remind our readers that a fourth edition has been issued, and where to find it.

Bench and Bar

Judicial Appointments in Canada.

Hon. Mr. Justice McKeown to be Chief Justice of the King's Bench Division of the Supreme Court of New Brunswick.

Mr. Justice Oswald Crocket, of the Supreme Court of New Brunswick, to be Judge of the Provincial Divorce Court in place of Mr. Justice McKeown, appointed Chief Justice.

W. B. Chandler, K.C., of Moncton, in the Province of New Brunswick, to be a Judge of the King's Bench Division of the Supreme Court of that province, *visa* Mr. Justice McKeown, appointed Chief Justice.

John Joseph Coughlin, of the City of Stratford, in the Province of Ontario, barrister at law, to be Junior Judge of the County Court of the County of Kent in said Province vice John Lawrence Dowlin.

Judicial Changes in England.

The following judicial changes have taken place in the English Bench: Lord Justice Phillimore has resigned his position as Lord Justice of Appeal, after twenty years' service on the Bench, and is succeeded by Sir T. E. Scrutton, formerly a Judge of the King's Bench Division. Mr. H. A. McCardie of the outer Bar has been appointed to the King's Bench Division to fill the vacancy caused by the promotion of Mr. Justice Scrutton.

We gladly welcome back to the ranks of the Ontario Bar Mr. Alfred B. Morine, K.C., who is also a member of the Newfoundland and Nova Scotia Bars. He is now one of the consulting editors of the Dominion Law Reports, so favourably known all through Canada. An interesting and instructive article from his pen appears in another place in this journal on the subject of our marriage laws.

Obituary.

Major Charles A. Moss, K.C.

A brilliant legal career ended when Major Charles A. Moss, of Toronto, succumbed to wounds, received in action, in the hospital at Rouen.

Major Moss was born in Toronto 43 years ago. His father, the late Sir Charles Moss, was Chief Justice of Ontario at his death, and his uncle, Hon. Thomas Moss, had occupied the same exalted position in the judiciary. Like father and uncle, the son and nephew had the logical, resourceful mind of the trained lawyer. But he was as admirable in heart as in head. He had the courteous urbanity of his father and his uncle, and his untimely and lamented death was a personal shock to a host of friends, both in and out of the profession.

Major Moss attended the Model Grammar School for his elementary education, and in 1885 entered Upper Canada College. He matriculated while head boy in 1890, and graduated from the University of Toronto in 1894. Following an honour course at the Ontario Law School, he was called to the Bar in 1897, and in the years that followed was a partner in the well-known firm of Aylesworth, Moss, Wright & Thompson.

Major Moss became an effective counsel and pleader in the

law Courts. His manner was excellent, and his matter lost nothing in his clear, concise arguments. He recognized the dignity of the Bench, but remembered the rights of the Bar, and his clients' interests did not suffer in his hands. A fellow counsel pays him this tribute: "He was fair to his opponent, but tenacious and vigilant on his client's behalf. The even temper of his family seldom, if ever, deserted him, but he never receded from a position if he believed that he was right."

He was elected a Bencher of the Law Society of Upper Canada in 1911, and was among the leaders when re-elected in 1915. He supported Mr. Rowell, K.C., as leader of the Ontario Liberal Opposition in 1914, and was a candidate, and although unsuccessful in the Northeast Riding of the City of Toronto, he had many more friends after the campaign than he had before: an unusual experience perhaps in politics.

Major Moss' physical fitness was fully equal to his mental capacity. In his day he was a football player of prowess, and when he indulged in tennis, racquets and golf, distinguished himself in characteristic fashion.

When the war cloud burst, and a world found itself in conflict, he felt that his duty called him to the field, not that he loved war, but because he was devoted to liberty. He went to England as a major, but in order to reach the firing line quickly, crossed the channel as a captain. He fought a good fight, and died for his ideals.

He is survived by his widow, a daughter of Mr. Justice Britton.

At a memorial service held in St. James Cathedral were a number of judges, lawyers, citizens and personal friends. It was there said: "His loss is a great loss to this Province. We can ill spare such precious lives. We can only hope that their lives will convey the inspiration to the rising generation, and they, dying, recreate Canada."

C. H. Ritchie, K.C.

Charles H. Ritchie, K.C., who died on the 3rd October, was a man well known for many years as a leader of the Toronto Bar and the head of the firm of Ritchie, Ludwig and Ballantyne. The esteem in which he was held by the profession throughout Ontario is shewn by the fact that he was elected as a Bencher for four successive terms and was consequently an *ex-officio* member at the time of his death.

On more than one occasion he refused a judgeship, and, as

is well known, he was offered and declined the Chief Justiceship of the Common Pleas when Sir William Meredith became Chief Justice of Ontario after the lamented death of Sir Charles Moss. These evidences, however, of the rank which he held in the profession are not needed to establish his sterling worth as a lawyer and a man in the minds of the many men of all ranks and callings who held "Charlie Ritchie" in high esteem and affection. A sound lawyer, an able negotiator, a strenuous, but always a fair and courteous opponent, a steadfast and warm-hearted friend, his memory will long remain green among those who knew him. To those who were privileged to meet him in the intimacy of his home, it is well known how grievously he will be missed in the sacred relations of the family hearth.

War Notes.

LAWYERS AT THE FRONT.

KILLED, OR DIED IN SERVICE.
(Not previously mentioned).

Thomas Crosthwaite, Private, Princess Pat's. Member of the firm of Gauld Langs & Crosthwaite, Hamilton, Ont. Killed Sept. 14, 1916.

E. L. Howell, Barrister, Winnipeg, Captain.

Ernest Pinkham, of Calgary, Alberta, Captain.

A. J. Kitto, of the firm of Tupper, Kitto & Wightman, Vancouver, B.C.; Lieutenant.

R. M. Thompson, Lieut.-Col., commanding 97th Highlanders of Winnipeg. Member of the firm of Thompson, Jameson & McWilliams.

G. W. Jameson, of Winnipeg, Barrister, of the same firm; Captain.

John Geddes, of Winnipeg, of the same firm; Captain.

C. S. Jameson, Winnipeg, Student.

J. E. Reynolds, Winnipeg, Private, Student.

A. J. Anderson, Winnipeg, Lieutenant, Student.

George Clemens Ellis, Private, Toronto; Third Year Student. Killed June, 1916.

Gerald Edward Blake, Lieutenant, Toronto; Second Year Student. Killed 23rd July, 1916.

Oswald Wetherald Grant, Toronto; First Year Student. Killed June, 1916.

Thomas Herbert Sneath, Lieutenant, Toronto; First Year Student. Killed Sept., 1916.

William Douglas Bell, Lieutenant, St. Thomas; Third Year Student. Killed Sept., 1916.

William Hartley Willard, Lieutenant, Toronto; First Year Student. Killed Sept., 1916.

Robert Gordon Hamilton, Lieutenant, Toronto; First Year Student. Killed Sept., 1916.

John McDonald Mowat, Major, Vancouver, B.C.; Barrister. Killed Oct., 1916.

Arthur Edward McLaughlin, Major, Bowmanville; Barrister. Killed Oct., 1916.

James Henry Oldham, Captain, Toronto; Barrister. Killed Oct., 1916.

Charles Alexander Moss, K.C., Major, Toronto. Died of wounds, Oct., 1916.

Charles Gordon Mortimer, Lieutenant, Vancouver, B.C.; Barrister. Killed Oct., 1916.

Norman Ewart Towers, Lieutenant, Port Arthur; Barrister. Killed, 1916.

Arthur Lawrence McGovern, Captain, Port Arthur; Barrister. Killed, 1916.

Hugh Ethelred McCarthy Ince, Captain, Toronto; First Year Student. Killed Nov. 4, 1916.

Ernest Francis Appelbe, Captain; Barrister. Died in military service.

Edward Joseph Kylie, Captain, Toronto; First Year Student. Died in military service.

John G. Hay, Lieutenant, Toronto; Barrister. Died of wounds Nov., 1916.

Geoffrey Allan Snow, (son of A. J. Russell Snow, K.C., Toronto); Lieutenant, 92nd Batt., Student. Killed in action at Courcelette, France, Sept. 26 1916.

John Redmond Meredith, Barrister (son of Sir William Meredith, Chief Justice of Ontario), Major, 95th Battalion. Died suddenly in London, November 25.

It seems impossible to get a complete and accurate list of those of the profession who have fallen in this fight for freedom. We do the best we can. We should be greatly obliged if our readers would kindly send us all the information they can, so that we may, as far as possible, get a complete list of our brothers who have been killed or died in service. We think we may safely say that no class of the community has given so freely of life and limb to king and country as has the legal profession.

TO THOSE WHO MOURN.

The following beautiful lines (not heretofore published so far as we know), will be appreciated by those mothers and wives who have so bravely and loyally given their best and dearest in the cause of freedom and of righteousness :

SOME DAY.

Some day fresh grass will creep along the Belgian lanes,
Some day the flowers will open to the May,
And on the grave of my brave soldier boy the grass will grow—
But not to-day.

Some day the birds will build their nests again round Lille,
And on the dunes again will children play,
Some day kind time will lay her hand upon my aching heart—
But not to-day.

Some day the Widows of Lorraine will cease to weep,
And from the ashes of those ruins grey
Will rise a city fashioned by the love of all the world—
But not to-day.

Some day the soldiers will come back again from France
And England will be hung with banners gay,
And I shall see them marching past—the comrades of my boy—
But not to-day.

Some day—that golden some day which the future holds—
When trumpets blow and angels line the way,
My soldier boy will come to meet me, down the glittering ranks,
And he will say:

"Welcome brave mother heart, the day at last has dawned!
The parting and the pain have passed away!"
Yes—I shall see, my ears shall hear, my heart grow young
Upon that Day.

Flotsam and Jetsam.

We are glad to see th t Lord Halsbury has entered on his ninety-second year with apparently undiminished vigour. "Quite recently," says a contributor to the *Westminster Gazette*, "I met him, a sturdy, unbent figure, walking in London streets." "It might be argued," he continues, "that the arduous pursuit of the law tends to longevity, were not the other explanation possible that only men of uncommon physique attain to the first eminence in the law. Lord Halsbury impresses one with the idea that were there a vacancy in the Lord Chancellorship to-morrow he would feel himself physically capable of returning to that not too arduous post." We are doubtful about the "not too arduous." We have the impression that the occupant of the Woolsack has plenty to occupy his time, and in these days of special responsibility the Lord Chancellor's burden is not likely to be light. But out of office, and apart from political activities, Lord Halsbury has found a highly useful field for his energies, as anyone will realise who takes down Vol. 1. of the Laws of England and looks at the portrait which forms the frontispiece. And it is understood that an equally important and onerous task is at the present time in his hands.—*Solicitors' Journal*

We are told by an official French communique that a letter was found on a German captured in the fighting south of Ypres which contains the following suggestive remarks, the advice being evidently given to some friend who might come in contact with our men from Canada:—'You should take care about the Canadians whom the English have brought here. They jump suddenly into a trench and bayonet five or six or cut their heads off. God keep you safe under the shadow of His wings."

THE LIVING AGE. Boston, Mass., U.S.A.—This standard monthly magazine continues its useful work of collecting together and giving to its very numerous readers, so far as its pages will permit, the cream of the literature of the day. It gives us also one or more serial stories of high class fiction. Having read it for so many years, we should consider it a very great loss if we were deprived of it. We recommend it to our readers.