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THE QUORUM OF THE COURT IN BANCO.

By Hon. Mr. Justice Russell.

The remarks that follow will have reference to the Province of Nova Scotia. How far they are applicable to other jurisdictions the writer will not presume to say. Furthermore, they are offered in no dogmatic spirit. It may be that they present only a one-sided view of the question discussed and that when, if ever, the other side is presented the author may be obliged to change his opinion.

The rule made under the authority of the Judicature Act provides that four judges shall constitute a quorum to decide all matters requiring to be heard by the court *in banco*, but if the attendance of four judges at any time cannot be obtained, owing to absence illness or other cause, sufficient in the estimation of the judges present, three shall constitute a quorum. (Order LVIII. Rule 7).

Until quite recently this rule has governed the judges of the Supreme Court. On rare occasions it has happened that five judges have been present, and once, within the recollection of the present writer, an extra chair has been brought in and six judges have attended. It has never been considered that the rule was violated by the attendance of a greater number than four, but there are good reasons why the Court *in banco* should consist of an even number of judges.

Let us consider first the case of a plaintiff appealing from the decision of the trial judge. The defendant has succeeded in the court below. There are five judges sitting on the appeal, two of them agree with the trial judge. Three of them decide for the plaintiff. That decision for the plaintiff is final so far as the Nova Scotia Court is concerned. If no appeal lies, the plaintiff is finally successful. He has beaten the defendant, although he had no more judges supporting his views than the defendant had. The burden should be upon the plaintiff, and

yet the plaintiff is allowed to succeed in spite of the fact that the defendant had as many judges in his favour as the plaintiff had. If the case is appealable the burden of instituting the appeal is thrown upon the defendant, which again is an injustice to him inasmuch as the plaintiff, who had only three judges in his favour while the defendant had the same number, should be obliged to handle the labouring oar.

It is urged that if there are only four judges sitting on the appeal the court may be equally divided and the result will be that the decision of the trial judge will be affirmed. Just so, and that is exactly what ought to happen in such a case. The plaintiff who has failed to convince the trial judge should not succeeed on his appeal unless he can convince the majority of an even numbered court that the decision of the trial judge was erroneous.

Now let us suppose it is the defendant who appeals to the court of five judges. The plaintiff has succeeded in the court below. The defendant in order to reverse his judgment must secure three of the judges of the appeal court. It is not claimed that there is any injustice here. Each party has convinced the same number of judges, and the defendant has rightly succeeded. The presence of the fifth judge has not resulted in any injustice. Suppose there are only four judges present. The defendant appeals. He must secure the judgment of three of the four, and that is just what ought to happen in order to his success. Two of the judges who have heard the case support the plaintiff's claim and three support the defendant, who is thus ultimately successful. Again it is urged that the court may be equally divided. If so the defendant will fail on his appeal, and so he should. Three of the judges who have have heard the case have, under those conditions, supported the plaintiff's claim and only two have supported the defendant. It it right that the plaintiff should succeed and the defendant should lose.

The result is that in the case of a defendant appealing no injustice can be done by a quorum of five judges and that full justice can also be done by a court composed of the statutory quorum of four. But in the case of a plaintiff appealing the

defendant may suffer a substantial injustice by departure from the rule and the disregard of its manifest intention.

The recent departure from the practice followed in former years is due to a wholly unjustifiable sensitiveness to shallow and baseless criticism. The writer can recall conditions when a dominant personality on the Bench could carry with him the convictions of enough of his associates to make an equal division of the court a very rare occurrence. There was greater unanimity, but the greater unanimity may have connoted greater injustice. Cases were parcelled out among the judges, one assigned to one and another to another. These were the conditions of a former century. They were the conditions of a date so far distant in the past that they can be referred to with an inoffensive freedom. There was not frequently a dissenting judge. The late Chief Justice Weatherbe, when delivering one of his earliest dissenting opinions, jocosely called attention to the fact that he had been appointed to succeed ex-judge Lewis Morris Wilkins, who, as he did not say but as his hearers well knew, was the "dissenting judge" of the court of which he was a member. If among the judges at present composing the court there is less unanimity than in former days, it is because the suitor gets the benefit of the greater independence of the members of the court and their greater individual energy and research. So far from its being a reproach to a court that its conclusions are not unanimous, it should be taken as *prima facie* evidence of a more careful and thorough individual application and industry than where the conclusions arrived at by one are unanimously acquisced in by the rest.

One of the strongest objections to the insistence upon a quorum of five judges has not yet been dealt with. It is frequently the case that not more than six judges are available for work. One or more may be "indisposed" or even seriously ill. One may have been granted leave of absence for the enjoyment of a well-earned sabbatic year. A vacancy may have occurred which the government of the day cannot conveniently fill. This is a condition of things which has occurred under every government of Canada so far back as my memory carries. It is one that reflects no discredit on any government or on either or any party.

The available number of judges capable of actual work has so frequently been reduced to six, and even a smaller number, that it has for years past under all governments become the rule rather than the exception that we have only six working judges available, and the number has frequently been reduced below this standard. One of these six is detailed for Admiralty cases or Divorce cases, or Chambers work, including the trial without a jury of causes that ought to be heard and which cannot, without injustice and suffering to one or other of the suitors, await the regular sessions of the court in April or October. The consequence of this is that, unless the Chambers judge will consent to form a member of the quorum, the five remaining judges must attend day in and day out the three terms from November to March.

There is no time afforded to any one of them to study the cases argued and give them close and mature consideration, until the term is ended. Factums accumulate until the impressions gained from the argument lose their freshness. The outlines become less distinct. Contentions hastily and imperfectly noted are imperfectly or inaccurately recalled. The labor of revivi-impression is less perfect than that created by the argument. With the statutory quorum of four, under normal conditions, the judge who has heard an argument will always have an opporuntity to consider its merits soon after it has been presented and before the facts of the case have been forgotten or the lines of the argument have become blurred. One of the manuscript books of the late Chief Justice Sir William Young has come by some lucky accident into the hands of the writer. It contains a carefully prepared programme for the December term 1878. It is assumed that the court will sit fifty four days, which are equivalent to nine periods of six days each. The programme then proceeds to divide the work among the six judges of the court in such manner as to provide a quorum of four judges for every day of the anticipated nine weeks of the term.

This quorum has been considered satisfactory ever since by every succeeding Chief Justice and I have never known it to be criticised or objected to until the recent innovation was adopted.

There must be two sides to every question I suppose, but for the reasons given I submit that it will be a happy day for the judges of the Supreme Court, when we shall be able to say in the words of James Russell Lowell:

"We sail by stars the elder seamen knew."

POWERS OF OFFICIAL GUARDIAN ON SETTLEMENT OF ACTION BY INFANTS.

Frequently in these days of motor car accidents one is obliged to attend before a Judge, with counsel for the Official Guardian, and for other parties, to obtain the approval of the Court in respect to a proposed settlement of an action for damages, in which an infant is the Plaintiff. This modern example of the exercise of an ancient power of the Court sometimes presents features which seem somewhat inconsistent. The Judge, if he is not to give a merely blind approval, must inquire into the propriety of the settlement. The infant may have suffered severe injuries, but inquiry into the evidence may shew that he is unlikely to succeed at the trial. No one can intelligently approve or disapprove of a proposed settlement without going into the merits of the action. If the Judge should believe it to the infant's advantage to accept a proposed settlement because he would not succeed at a trial, what is his duty?

The power of the Court to intervene to safeguard the rights of infants of its own volition is not based on guardianship nor on wardship. By 12 Chas. 11 Cap. 24, the powers of the Court of Wards and Liveries were abolished. While the parent is alive the Court is not the infant's guardian. The true basis of the Court's jurisdiction in this respect is pointed out in Butler v. Freeman Amb. 301. In this case, where it was held to be contempt to marry a ward of the Court without leave even although the father of the infant be living, Lord Hardwicke, Chan. says: "This is the first offence which has come before me since the late statute. The Plaintiff's father is alive and nobody can have the guardianship of him by reason of the patris potentia, consequently this Court has not; and so this Court cannot interfere. But this Court does not act on the foot of guardianship or wardship; the latter is totally taken away by the statute

Car. II, and without claiming the former, and disclaiming the latter, has a general right, delegated by the Crown as pater patriae, to interfere in particular cases, for the benefit of such who are incapable to protect themselves.''

The inability of infants to protect themselves cannot be set up in our Ontario Courts, where they are represented by the Official Guardian.

It is not hard to imagine a case where the solicitor, who has issued the Writ on behalf of the infant by its next friend, may be very anxious to accept a sum which may appear very inadequate in comparison with the injuries sustained by the infant, because he may have discovered evidence which renders his chances of success at the trial very remote. Under such circumstances, the Official Guardian may approve of the settlement. Counsel appear before a Judge to obtain the approval of the Court, and find the Court unwilling to approve, because of the meagerness of the amount offered. But if the Court forces disclosure of the facts it may find that the infant is entitled to nothing, on the evidence. The Court's intervention on behalf of the infant may prove detrimental to the infant.

The exercise of this ancient power of the Court seems to force the Judge into the position of advocate for the infant. In a recent case the Court was dubious as to whether the proposed settlement was adequate. Counsel for the Plaintiff could not very well say in the presence of his opponents that he would be glad to get anything at all after perusing the evidence.

When there is an officer of the Court appointed to protect the interests of all infants, would it not be well to allow him to decide finally whether or not a proposed settlement is adequate without further proceedings.

JUDGES AND POLITICS.

These two words do not seem to go well together and that which is indicated by them should, as a rule, be kept in separate compartments, and only be used together on special occasions.

Much adverse criticism was recently raised by the action of Lord Justice Carson in taking part in a debate in the House of Lords on the Irish situation. Few would deny him

that privilege under the circumstances and in view of his loyalty to the Crown in the distressful days that have passed since the Great War began. But from a theoretical point of view there is as usual, much to be said on both sides as to the wisdom or propriety of judges appearing in the political arena. And much more has been said on such occasions by those who have held judicial positions as well as by those who have criticised them for taking part in such discussions.

These criticisms in dealing with the historical setting of the subject have been compelled to admit that in England there has been a much wider latitude taken by and allowed to judges sitting in the House of Lords than has been generally supposed. Such great judges as Lord Hardwicke, Lord Mansfield, Lord Thurlow, and Lord Eldon exercised a powerful influence in the field of politics in their days. In later years Lord Cairns, who in Feb., 1866, became the second Chancery Lord Justice, early the next year was sitting as a Peer in the House of Lords; and as such is said to have made twenty-four speeches on the Reform Bill when that measure came before the Upper House. A long list might be given of other distinguished members of the Bench who, when they became Peers of the realm, expressed their views in the House of Lords on public questions with the same freedom as those who had no judicial duties to perform.

One of our Exchanges calls attention to the fact that so clear a thinker and eminent a writer as Lord Macaulay was not horrified at the idea of the "combining of a political and a judicial calling." He said that, far from wishing to cut off judges from political life, he would like to see them in the House of Commons in greater numbers. He would, he said, throw open the door to all the judges. It is noteworthy that the House of Commons agreed with his views by the large majority of 224 to 123.

We are not, however, prepared to accept the proposition that what may be done with propriety in old England can safely and wisely be done in the outlying units of our Empire. We have often seen in this Dominion unseemly clashes and unedifying spectacles resulting from the "combining of political and judicial callings." We do not desire to enlarge upon the

reasons underlying the differences but they will readily occur to any thinking mind. Some of them are akin to those which account for our unwillingness to accede to the desire of those who would seek to deprive us of our right of appeal to the foot of the throne. The subject is an interesting one, and perhaps some of our readers would like to discuss it in their own way.

THE RELATIONS BETWEEN THE BRITISH DOMINION OF VIRGINIA AND THE DOMINION OF CANADA.

This subject was first referred to in a paper read by Dr. J. Murray Clark, K.C., of Toronto, at Harvard University in 1919, under the title "Whence came the Common law into Canada." Our reference to it appears in 56 C.L.J. 281. Dr. Clark deals with some aspects of the same subject in a paper read by him at Annapolis Royal, Nova Scotia, in August of last year, on the occasion of the celebration of the 200th anniversary of the establishment of the first British Court of Judicature to sit in any part of what is now Canada. As to this Mr. Clark calls attention to a remark of Mr. A. H. Lefroy (a brother Journalist of ours), Professor of Constitutional Law and Jurisprudence in the University of Toronto, in which he points out that a Court of Judicature is the symbol and indeed the embodiment of the reign of law in any country.

Want of space prevents more than a passing reference to Dr. Clark's paper, which a leader of the Virginia has characterised as "a great and scholarly address fraught with special significance to the day in which we live." Some passages, however, we extract as of special interest in this country. We quote as follows:—

"Dr. Bruce, one of the ablest of the historians of Virginia, points out how closely Virginia approached the system of the Mother Country and that not even the revolution could efface on our continent the mighty work which England had done through the growth of Virginia and the other American communities. He points out that her general principles of law and government, her standards of morality, her canons of literary taste, and her practical conservative spirit, have been too deeply

stamped upon all those communities for a political revolution to diminish their influence, and he contends that American independence has really led to the most glorious of all England's triumphs. He points out that, as a separate nationality, 'the United States has drawn a very large proportion of its citizens from the various countries situate on the European continent, and differing very radically in the charac... of these peoples. Transferred to America, these immigrants were destined to see their children grow up almost as deeply affected by the spirit of the fundamental institutions of England, as represented in the general framework of the American system, as if they were of the purest Anglo-Saxon stock.' His conclusion is well worth quoting: 'From this point of view, the foundation of Jamestown is the greatest of all events in the modern history of the Anglo-Saxon race and one of the greatest in the history of the world. From this point of view also the conditions prevailing in colonial Virginia—the foremost and most powerful of all the British dependencies of that day, and the one which adopted the English principles and ideas most thoroughly and was most successful in assimilating them, becomes of supreme interest; for from these conditions was to spring the characteristic spirit of one of the greatest modern nationalities; and from these conditions was to arise a permanent guarantee that, whatever might be the fate of England herself, the Anglo-Saxon conception of social order, political freedom, individual liberty, and private morality, should not perish from the face of the earth.' ''

And again:—

''The first Parliament of Upper Canada (now Ontario) which met in pursuance of the Imeprial Statute of 1791 (known as the Constitutional Act), at Newark (now Niagara), enacted that in all matters of property and civil rights resort should be had to the laws of England (as they stood on the 15th October, 1792), This must be qualified by the important exception, not expressed by the Legislature but implied by the Courts, of such English laws as are clearly not applicable to the state of things existing in the Province. The principle was well stated by Chief Justice Sir John Beverley Robinson, to whom I shall presently refer. That first Parliament also provided for appeals to His Majesty

in Council. The appeal is now to the Judicial Committee of the Privy Council, which has rendered, and will, I hope, continue to render signal service not only to Canada and the Empire but also to the whole civilized world. That august tribunal has not only to deal with the Common Law of England, brought from England to Virginia and via Virginia to Nova Scotia, but with many other systems of law, such as the Civil Law in force in Quebec, the Roman Dutch Law in parts of South Africa, and many other laws. This illustrates the genius of the British Empire, whose unity is not based on a dull and deadly uniformity, but is enriched by a most diversified variety. Those who brought to Ontario the noble traditions of British Virginia took their due part in passing this wise legislation of the Parliament of 1792, and their descendants are still influential in maintaining British traditions.

The first educationalist in the Province of Ontario, indeed at one time the only educationalist, was the Reverend Dr. John Stuart, a grandson of Governor Dinwiddie of Virginia. He had a good deal to do with the training of two Chief Justices—Chief Justice Stuart of Quebec, and Sir John Beverley Robinson, the first Chief Justice of the Ontario Court of Appeal, who referred to Dr. Stuart as his spiritual father. Professor A. H. Young, of the University of Toronto, has rendered good service by making scholarly investigations of the records of Dr. Stuart, many of whose descendants, including Sir Campbell Stuart, did splendid work in the Great War. Men of science are busy investigating the beginnings of civilization. Much more important, it seems to me, is it to study the beginnings of the history of our own country.

Sir John Beverley Robinson was the son of a Virginia lawyer. He became Attorney General when he was twenty-one, but after achieving this distinction, decided to study law in London, at Lincoln's Inn. So that it can be truly said that he brought to the administration of justice in Ontario the traditions of Virginia as well as the traditions of the English Courts. He acted as Chief Justice for 33 years. In all that time only five of his decisions were questioned by appeal to the Judicial Committee of the Privy Council, and in every case the judgment of Chief Jus-

tice Robinson was sustained. His judgments as published in our Law Reports are enduring monuments of his learning, legal acumen, and sound judgment.

What has happened to the Common Law since it was brought from England to Virginia, and via Virginia to Nova Scotia, constitutes, I think, a solid ground for sane optimism as to the future. For 'our Lady of the Common Law' now rules in all of the United States except Louisiana, and in all of Canada except Quebec.

In considering the significance of this it is well to bear in mind the statement of Savigny that 'law must be regarded as a product of the entire history of a people. It is not a thing that can be made at will or ever has been so made; it is an organic growth which comes into being by virtue of an inward necessity, and continues to develop in the same way from within by the operation of natural forces.' Part of the laws so brought to Virginia were the principles of the Great Charter, which are the common heritage of England, Canada, and the United States. To this is largely due the important, indeed unique, fact that along the three thousand miles of boundary between the United States of America and Canada there has been uninterrupted peace for over a hundred years. For a part of these hundred years all was not Canadian boundary, as a hundred years ago Canada consisted of Lower Canada, now Quebec, and Upper Canada, now Ontario; but wherever the boundary was from time to time, it was always during the whole century British boundary. As it is their common glory, the British Empire and the United States are therefore fully justified in pointing the war-weary and war-sick nations to the hundred years of peace along the whole of the three thousand miles of the Canadian boundary as an object lesson for study and imitation. Canadians understand the people of the United States better than the people of the Mother Country do, and should therefore be the interpreters of the United States to the British Empire, and for similar reasons, the interpreters of the British Empire to the United States.''

He concludes as follows:—

''A Greek Scholar recently proved that most of the fallacies

now being advocated, and causing extensive mischief in Canada, England, and the United States, had been put into the mouths of demagogues by Aristophanes. The demagogues and sophists caused the destruction of the Athenian Commonwealth, but their fallacies will, in both the British Empire and the United States, be defeated by the enlightenment of public opinion. In this illumination, 'the gladsome light of Jurisprudence' will be a potent factor. When concluding his lectures to the Law Schools of the United States, Sir Frederick Pollock, her most learned Knight, nobly said:

'Remember that our Lady the Common Law is not a taskmistress, but a bountiful sovereign whose service is freedom. The destinies of the English-speaking world are bound up with her fortunes and her migrations, and its conquests are justified by her works.'

While one, as in duty bound, praises 'our Lady the Common Law,' yet I would not utter one word of criticism or disparagement of the Civil Law which is undoubtedly one of the greatest achievements of the human intellect. It must be remembered that the Civil Law rules not only in France, Scotland, and on the banks of the St. Lawrence, but elsewhere over millions, tens of millions, of men, and in all cases not by reason of imperial power, but by the imperial power of reason, if one may once again so paraphrase the famous saying of Portalis:

'Non ratione imperii, sed imperio rationis.'

Truly peace hath her victories no less renowned than War, and Napoleon's Code will be remembered, and in some places reverenced and obeyed, long after his battles are forgotten.

In the fullness of time the day came when Virginia as part of the United States, and Canada as part of the British Empire, fought under the great Frenchman, Field-Marshal Foch, in a common cause. The sons of Canada and Virginia were tested in the fiery trials of the Great War, and proved faithful and true to the highest ideals. Many of the sons of Canada and Virginia, yea, and of the sons of all parts of the British Empire and the United States and of our Allies, gladly laid down their bright young lives, 'their fairest gift of a lover's devotion,' to the sacred cause of liberty. Of them we may use the immortal words

of Pericles, spoken long years ago in praise of the fallen heroes of Athens:

'But each one, man by man, has won imperishable praise, each has gained a glorious grave—not that sepulchre of earth wherein they lie, but the living tomb of everlasting remembrance wherein their glory is enshrined, remembrance that will live on the lips, that will blossom in the deeds of their countrymen the world over. For the whole earth is the sepulchre of heroes; monuments may rise and tablets be set up to them in their own land; but on far-off shores there is an abiding memorial that no pen or chisel has traced; it is graven, not on stone or brass, but on the living heart of humanity. Take these men, then, for your ensamples. Like them, remember that prosperity can be only for the free, that freedom is the sure possession of those alone who have courage to defend it.'

Without stinting our admiration and love for noble France, we can say, indeed we must say, that the world's best hopes rest upon the solidarity and co-operation of the English-speaking Peoples. The United States and the British Empire will, in the future, we may confidently hope, render nobler and still more noble service to the cause of Liberty, Justice, Peace, and Civilization, to Learning, by which alone Democracy can be saved from its pernicious, nay, its deadly enemies, the demagogues; to Science, which knows no national boundaries; and to Humanity, which is above all nations.''

THE LAW OF PRIMOGENITURE ON TRIAL.

As we go to press it is announced by cable, that a radical change is likely to be made in England in the time-honoured law of Primogeniture.

Amongst the ignorant and unthinking a change from the old established order of things is too often looked upon as desirable, simply because it is a change. Others imagine that, because there are some hardships, these must be remedied. The world knows of no human law which has ever been, or ever will be perfect, so long as its inhabitants remain as they are. The old maxim ''Humanum est errare'' is fundamental, and accepted by every philosopher since Adam and Eve lost Paradise. It is.

of course, equally true that many great and beneficent changes for the betterment of our race have been made since then; the only question, therefore, is as to whether the change now suggested, whilst it may remedy some hardships, will not introduce others which will more than counterbalance the benefits which it is claimed will ensue. The best that humanitarians and legislators can attain to is to do the most good to the greatest number. May it not be that in the long run this proposed change will, to some extent, tend to weaken rather than strengthen the fibre and virility of the race. It is a true saying that "Hard cases make bad Law," and it may be true that Law, which gives the bulk of a man's property to an eldest son may seem unfair to younger ones, but there is another side to the question.

It is, perhaps, impossible to speak with any certainty as to the effect of the abolition of the law of primogeniture on the national character, and it may not be much of a factor after all; but it may reasonably be argued that it must have some influence.

At present the eldest son, in cases of intestacy, inherits the father's real estate. The eldest son as a rule stays on the land as the head of the family, realising, almost necessarily, something of the responsibility of such a position. This position enables him to lend a helping hand to a younger or a needy member of the family who is going out into the world to seek his fortune. The eldest son remains at home and is, or should be, a steadying force, upholding the traditions of his forefathers as to family life, an institution which has largely made England what it is to-day. He keeps the family together, thus recognising the importance of the habit of home life, without which people drift from their moorings, lose the steadying influence of religion, and acquire the idle, frivolous and demoralizing habits so characteristic of the present day.

Now, as to the younger sons. As to these we must look ahead a few years. Are they after all to be pitied? As a rule quite the reverse. We merely quote history, when we say that nearly all those who have brought glory to the Empire abroad or become famous at home have been younger sons, who have had to make their own way in the world. The same principle

applies somewhat differently in other stations in life. Let us take one illustration only. Was the poor lad, who left Scotland to make a living abroad on the inhospitable shores of Labrador, who eventually amassed an immense fortune, lived a life of national usefulness, and died as Baron Strathcona and Mount Royal, to be pitied? If this "noble army" had stayed at home, each living on a few divided acres, eaking out a bare subsistence, we might indeed pity them. We all know about these things, and the lesson is obvious. It *is* best for the younger ones to go out and get to work. They really get a "better chance" than the home boy. They take it, and they, and the family that grows up around them are glad and want no pity. The youngest son in a large family who writes this believes in primogeniture.

As no the details of the proposed Act, which goes by the name of the Law of Property Act, have come to us, it is impossible to criticise it. It will, of course, be fully discussed in our legal exchanges and thus give us much interesting information.

RIOTS.

In these days when the newspapers tell us almost daily of riotous proceedings more or less serious in some part of the world, far or near, happily not in our own country, it will be handy to have a definition of what a riot really is, not what it is occasionally supposed to be, but what the law means by the expression. A legal correspondent of The Times in a recent issue deals with this and some kindred offences. We cannot do better than quote his words as follows:—

"In a case heard by Mr. Justice Shearman a few weeks ago the plaintiff successfully claimed compensation from the Receiver of Metropolitan Police—out of public funds, in other words—because a considerable part of the woodwork of a derelict and dilapidated house was used as fuel for bonfires in the Peace Night festivities of June 28, 1919, and on the evidence before him the Judge came to the conclusion that there had been a "riot" in the legal sense of that term. He appears to have arrived at that decision with some hesitation, and owners of property should by no means draw from his finding the conclusion that any and every merry-making in which damage may be done

will entitle them to compensation under the Riot (Damages) Act, 1886.

The term 'riot' includes two distinct offences. To constitute a riot at Common Law, which was the offence proved in the case referred to, there are five necessary elements:—

(1) A number of persons, three at least; (2) common purpose; (3) execution or conception of the common purpose; (4) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. (See *Field* v. *Receiver of Metropolitan Police*, 23 The Times L.R. 736; [1907] 2 K.B., 853.)

If any one of these five elements is absent it is not a riot. If they are present it is a riot, whether the common purpose in itself be lawful or unlawful, unless the case is one where the law authorizes the use of force, as, for example, if a number of persons collect for the purpose of suppressing a riot actually in progress. It may further be observed that the common purpose must be of a private character, such as forcing a particular employer to give better conditions to his workpeople, or the removal of obstructions to an alleged right of way. If the common purpose be of a public character, such as to compel the Government to change its policy, or to destroy all rights of private property, the offence is not riot, by high treason by 'levying war.'

It is one the question of violence causing alarm that claims for damages for riot are apt to break down: for on occasions of public rejoicing a crowd may become noisy and even destructive and yet remain perfectly good tempered, so that no reasonable person would be alarmed at their demonstrations.

Riot at Common Law is a misdemeanour, punishable by fine and/or imprisonment. Under section 1 of the Riot Act, 1714, riot in certain circumstances is made a felony; this felonious rioting was originally a capital offence, but is now punishable by penal servitude for life or any less term. To constitute the offence there must be at least twelve persons 'riotously and

tumultously assembled together to the disturbance of the public peace'; they must continue riotously and tumultously together for one hour after the proclamation in the King's name (commonly called 'The Riot Act') ordering them to disperse has been read by a Justice of the Peace or other authorized person.

Demolition of houses or other buildings by rioters is also a statutory felony punishable with penal servitude for life, whether the riot be at common law or under the Riot Act, and for damage not amounting to demolition seven years' imprisonment may be awarded.

Such, in its broad outlines, is the English law as to riot. But persons contemplating the execution of a common purpose may be guilty of two lesser offences, which are deserving of a passing notice. The mere assembling together of a number of persons in circumstances calculated to endanger the public peace is an "unlawful assembly" punishable as a common law misdemeanour with fine and/or imprisonment. Intermediate between unlawful assembly and riot is the offence of 'rout.' An unlawful assembly becomes a rout when a motion is made towards the execution of the common purpose: it is a riot, complete except for the execution of the purpose.

The four stages of the rioter's progress may be made clear by an illustration. At 6 p.m. A, B, and C meet and arm themselves with axes and crowbars and say, 'We will go and smash D's new factory.' That is an unlawful assembly; it remains an unlawful assembly during the preparatory process of filling themselves with Dutch courage and Government ale at the nearest publichouse. But when, at 7 p.m., they start to walk to D.'s premises to carry out their design it becomes a rout, and continues a rout through the intermediate calls for fresh supplies of Dutch courage. Arriving at D.'s factory at 8 p.m., the first blow is struck and, assuming their demeanour shows an intention to resist interference by force and is calculated to alarm even one reasonably courageous person, the rout has become a common law riot. By 9 p.m. nine other men have joined in the destruction. A magistrate may now 'read the Riot Act,' and at 10 p.m. the 12 rioters, if they are still making merry with D's property, become statutory rioters and guilty

of felony. But if one has by that time thought discretion the better part of valour, the other 11 cannot be charged with the felony."

LEGISLATION PROHIBITING THE EMPLOYMENT OF ALIENS.

The Supreme Court of Canada having been asked by the Governor in Council of Canada for an opinion as to the validity of the legislation of the Province of British Columbia on the above subject, has set forth the views of the various Judges of that Court on various points that came up for discussion. These opinions will appear in the report of the case in the Supreme Court reports. We trust the Government has got what it wanted in the first finding, though with dissent from two voices. As to other points—*quot homines, tot sententiæ.*

Speaking generally and without enquiring whether this reference and the findings thereon are of a Court of final jurisdiction, how refreshing it would be if the judgments of such a Court were, and were stated to be, pronouncements of the Court, free from the cloudings and mystifications attending the examination of numerous dissenting and dubitante opinions ushered in by the heading "Per." This doubting and disagreeing habit has become all too common with certain of the Judges of our Supreme Court. What is wanted is the law on the subject; not the views of one or other of the members of the Court. These might be dealt with before the Judges come into Court to pronounce the judgment of the Court.

The head note of the report as to this reference will be much as follows:—

"The Legislature of British Columbia in 1921 passed an Act (11 Geo. V. c. 49) purporting to 'validate and confirm (an) Orders in Council' which provided that 'in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith.'"

It was held that the legislature of British Columbia had no authority to enact this legislation. Idington, J., and Brodeur,

J., *contra* as to the part relating to Chinese.

Per Davies, C.J., and Anglin and Mignault, JJ.—This legislation is *ultra vires* the provincial legislation, as it establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament conferred by s. 91, s.s. 25 of the B.N.A. Act, in regard to "naturalization and aliens." *Union Colliery Co.* v. *Bryden* ([1899] A.C. 580), followed.

Per Idington, J.—Under section 109 of the B.N.A. Act, made applicable to the Province of British Columbia when brought into the Dominion, it was enacted that "all lands, mines, minerals and royalties belonging to the provinces" shall remain the property of these provinces; the mode of administration of any of these properties by the province is subject to the will of the legislature as the administration of a private property to the will of its owner; and as a private owner would have the right to stipulate in a contract the same conditions as those contained in the above statute, this legislation is *intra vires* of the province.

Per Duff, J.—The provincial statute would be *intra vires* of the provincial legislature as it is enacted in the exercise of its control over its public assets and of its power of appropriation which is equivalent to property; and sections 102 to 126 of the B.N.A. Act exclude from Dominion control any power of appropriation over the subjects assigned to the provinces; but, as part of this legislation is repugnant to the "Japanese Treaty Act" and as the whole provincial statute views Japanese and Chinese as constituting a single group, it must be treated as inoperative *in toto*, since it cannot take effect according to its term. *Bryden's* case (*supra cit.*), distinguished.

Per Brodeur, J.—In its legislation, the Legislature of British Columbia deals with its own Crown lands and enacts that a certain class of persons, whether British subjects or not, will not be permitted, by reason of racial descent, to work on those lands; this is a question of internal management which, according to c. 92, ss. 5 of the B.N.A. Act, is within the competence of the local authority.

The Japanese Treaty, made in 1911, between England and Japan, was sanctioned and declared to have the force of law

in Canada by a Dominion statute enacted under the powers conferred by s. 132 of the B.N.A. Act (3 & 4 Geo. V. c. 27). Paragraph 3 of article 1 of the treaty states that the subjects of the high contracting parties "shall in all that relates to the pursuit of their industries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects of citizens of the most favoured nation."

It was held by Davies, C.J., and Duff and Brodeur, JJ., that the provincial statute of 1921, as to its part relating to Japanese, is *ultra vires* of the legislature of the province as being in conflict with the Japanese Treaty. Idington, J., *contra*.

LAW OF DIVORCE IN CANADA.

By C. S. McKee, of the Toronto Bar.

(*Continued from April issue*)

1. Neither party an infant, insane, intoxicated, or impotent —obviously no question arises.

2. One party only an infant, insane, intoxicated, or impotent. If the other party has knowledge of the incapacity, then it would appear that no action should lie at the instance of that party. In the case of insanity an action should lie at the instance of the Crown, and the Criminal Code should provide punishment for the guilty party. If the party with full capacity marries in ignorance but later learns of the incapacity of the other, then in cases of insanity and impotency actions should lie at the instance of the former, provided the necessary action is taken within a reasonable time of the receipt of the knowledge. Actions by the incapacitated person are the same as in the next class, except that a person knowing of his or her impotency should not be allowed to plead it as a ground of nullity, but should if he or she married in ignorance of it.

3. Both parties, infants, insane, intoxicated, or impotent.

(a) Infants—action tenable by guardians while infancy exists or by either party acting within a reasonable time of coming of age.

(b) Insane persons—action tenable by Crown, by committee, or by either party acting within a reasonable time of ceasing to be under the incapacity.

(c) Intoxicated persons—action tenable by either party acting within a reasonable time of ceasing to be intoxicated.

(d) Impotent persons—a person who marries knowing him or herself to be impotent should of course not be permitted to plead the other party's impotency as a ground for nullity.

The remarks above in regard to form apply to cases of consanguinity and bigamy.

The grounds additional to the above recommended by both majority and minority report of the British Commission on Divorce in 1912 were:

1. Unsoundness of mind less than insanity not apparent at the time of the ceremony, and provided intercourse has ceased after the situation became apparent, and action is started within a reasonable time.

2. Epilepsy and recurrent insanity—as in 1.

3. Venereal disease in a communicable form, and the fact not disclosed at the time of marriage—as in 1.

4. Woman pregnant at the time of her marriage, her condition being due to intercourse with a person other than her husband, and such condition being undisclosed by her to her husband who is ignorant of the fact.

5. Refusal without reasonable cause to permit of intercourse where there has been no intercourse at all.

In passing, it might be noted that adultery, etc., on the part of the plaintiff is no defence in actions of declarations of nullity.

Residence less than domicile is sufficient to give jurisdiction for declaration of nullity—as noticed as the end of the chapter on Provinces with Divorce Courts.

The question of jurisdiction in suits for declarations of nullity is of sufficient importance, and so far as Ontario and Quebec are concerned is still in a sufficiently unsatisfactory state, to warrant a more complete investigation than that made above when considering the question of infancy. Where Provincial Courts have jurisdiction over divorce, they have also jurisdiction over annulment, the one having in all cases been established with the other.

The first case in Ontario in which the question of jurisdiction appears to have been discussed was *Lawless* v. *Chamberlain* (1889), 18 O.R. 296. This was an action for annulment on grounds of duress and infancy. In dismissing the action on the

merits. Boyd C. said, at p. 297: " . . If the alleged marriage has been procured by fraud or duress in such wise that it is *void ab initio*, judgment of nullity may be given by the Court." Mr. Holmested, in his book Matrimonial Jurisdiction in Ontario and Quebec questions at some length the soundness of the reasons given for the judgment. The next case of importance was *T.* v. *B.*, (1907), 15 O.L.R. 224, where the same Judge decided that the Court had not jurisdiction, drawing a fine and rather doubtful distinction between the two cases. In *May* v. *May*, (1909), 22 O.L.R. 559, an attempt was made to obtain a declartion of nullity on grounds of consanguinity; the trial Judge held himself bound by *Lawless* v. *Chamberlain* in regard to jurisdiction, but on appeal this was overruled. In *A.* v. *B.*, 23 O.L.R. 231, it was also held that the Courts did not have jurisdiction. Clute J., here pointed out that the power to make a declaratory judgment did not enable the Court to do so in cases in which it had no jurisdiction over the subject matter in controversy. There is certainly no inherent jurisdiction over the question of annulment; when Upper Canada was given self government it was given power to establish Courts and confer on them jurisdiction; this jurisdiction it proceeded to define by reference to the Common Law and Chancery Courts in England, none of which at the dates referred to had jurisdiction over the subject in question, this then being in the hands of the Ecclesiastical Courts. Middleton J., took the same view in the *Reid* v. *Aull*, 19 D.L.R. 309, 32 O.L.R. 68; but in *Peppiatt* v. *Peppiatt*, 30 D.L.R. 1, 36 O.L.R. 427, the Appellate Division overruled all these cases, and decided that under the power to make declaratory judgments, R.S.O., ch. 56, sec. 16 (b), the Court had jurisdiction. This last decision will hold until it is overruled by a higher Court, but that it is sound law appears to be most doubtful, as if the theory were pressed to its logical conclusions there would be few if any parts of the field of purely Dominion matters which the Provinces could not invade. It would appear that the Court in a recognition of what was desirable as distinct from what existed had pushed a technicality to its limit, if not beyond.

In Quebec, under the French regime, marriage was under the jurisdiction of the French Ecclesiastical Courts; but with the conquest, these Courts, as did all other Church Courts, ceased to have any official status; and such jurisdiction was not conferred on any new Court. True, the Code Civil (ch. 4) en-

acted before Confederation gives grounds for annulment, but it does not confer jurisdiction on any Court—admitted an anomalous state of affairs, and a rather doubtful one in view of the opinion of the Judges in *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956, as to the impossibility of a statute existing without a Court to enforce it; when this particular part of the Code was adopted, the Ecclesiatsical Courts could enforce its provisions; their jurisdiction was abolished—*ipso facto* the Civil Court, one would think, obtained jurisdiction. Without, as it would appear, any legal sanction whatever, the Judges of Quebec have chosen to give a legal sanction to the decrees of Roman Catholic Bishops, the latter making declarations of nullity which are enforced by the Civil Court. True, such a practice would be perfectly correct in regard to purely spiritual affairs distinctly within the realm of the church, as it would for example in regard to the rules of a trade union *qua* union, but is distinctly incorrect in matters where civil rights are in question. The attempts of the Roman Catholic Church to have annulled marriages between Catholics celebrated by a Protestant minister are clearly beyond their authority until such an enactment is put on the Provincial Statute Book. This was recognised in the *Hebert* case in so far as lack of jurisdiction on the part of the R. C. Bishop was concerned, but it was apparently not even questioned as to the jurisdiction of the Civil Court itself. The matter appears to have been cleared up at last by the *Tremblay Marriage* case, decided by the Privy Council in 1921, 58 D.L.R. 29, [1921] 1 A.C. 702, 27 Rev. Leg. 209.

5. Grounds for Divorce.

In considering the grounds on which, in Canada, an application may be made for a divorce, it should be kept in mind that the Roman Catholic Church holds strictly to the theory of the indissolubility of a properly celebrated and consummated marriage, and does not recognise divorce on any ground.

Divorce, as pointed out by Senator Gowan in 1888 during the discussion which arose on the proposal to establish a Divorce Court, is not only a question of the effect on the parties themselves, but of the effect in relation to morals and good order—in short upon the well-being of the community. "Divorce has been substantially recognised as a matter involving the happiness and morality of society, and consequently to be treated in the spirit of the moralist as well as of the jurist." (Bourinot's Parliamentary Procedure, 4th ed., p. 627.) The position of the

State in regard to the grounds for divorce is summed up in the Minority Report of the British Royal Commission of 1912 as follows: ". . . It (the State) has a concern of its own in the peace of the community, the welfare of the family, the rearing of healthy children, and the training of good citizens, which renders it imperative that the making and breaking of marriage contracts should be treated as matters of public importance touching the commonwealth itself, and not as merely private transactions only affecting the parties." Dicey in Conflict of Laws points out that the doctrine maintained by the Courts of a country in regard to divorce depends on the view entertained in regard to the nature of divorce, and summarises these views under the heading of contractual, penal, and status theories. That the right to rescind the marriage contract much as one rescinds any other contract has not been recognised is apparent to any thinking person; divorce is but rarely looked upon as punishment for a crime—in fact in cases of lunacy, such a view is out of the question; rather divorce is the extinction by the State of a status—the status of husband and wife—the discontinuance of which is expedient for the purpose of giving relief to the person injured.

The grounds for divorce recognised before the Reformation by the Ecclesiastical Courts were very numerous, but the decree, it should be remembered, was one of annulment rather than of divorce as understood to-day. The grounds were: error as to person, error as to condition, vow of chastity on entering religious order before marriage, consanguinity, crime, disparity of worship, duress, preceding marriage, public decorum in being solemnly betrothed to another, madness, affinity, clandestinity, impotency, and rape. After the Reformation the grounds for divorce were limited to consanguinity, previous marriage, corporeal imbecility, and mental incapacity. In England during the period of divorce by Private Acts of Parliament, of the two hundred and forty-nine Acts passed only four were in favor of wives, the first being that of a Mrs. Addison in 1801; all of the remainder were granted to the husband on account of the wife's adultery; in two of the four cases, the adultery was incestuous; in the third there was profligacy, deceit, abandonment, and gross injury; in the fourth, there was bigamy. The Act of 1857 (Imp.), ch. 85, practically adopted the former parliamentary practice in regard to grounds for divorce. Under this Act a man

may obtain a divorce on the ground of his wife's adultery; but a woman to get a divorce must prove (sec. 27):

1. Incestuous adultery, *i.e.*, within the degrees prohibited for marriage on account of consanguinity or affinity, or 2. Bigamy and adultery, or 3. Rape, or 4. Sodomy or bestiality, or 5. Adultery coupled with (a) such cruelty as without adultery would entitle her to a divorce *a mensa et thoro,* which has been defined as such conduct as makes it unsafe, having regard to risk of life, limb, or health, bodily or mental, for one married person to continue to live with another; or (b) desertion without reasonable excuse for two years or upwards, which in practice has included wilful refusal to permit of marital intercourse without reasonable excuse.

In Canada the British law is in force in British Columbia, Alberta, Saskatchewan, and Manitoba; it being necessary in these Provinces for a wife to prove as above, it might be expected that in cases of mere adultery women would resort to parliamentary divorce which does not recognise any disparity between the sexes, but in practice this has not occurred. The grounds provided by the New Brunswick and Prince Edward Island statutes are: 1. Frigidity or impotence, 2. Adultery, 3. Consanguinity. In Nova Scotia, the Act provides that marriages may be declared null and void for: 1. Impotency, 2. Adultery, 3. Cruelty, 4. Consanguinity.

The Parliament of Canada of course can grant divorces on any grounds it sees fit, but as a matter of policy and good morals it is universally recognised that the power should not be exercised arbitrarily and without cause but only for

> ". . . . Such a deed
> As from the body of contraction plucks
> The very soul. . . ." (Hamlet, act 3, scene 4.)

The practice has been for Parliament to place both sexes on an equality in regard to divorce; this means that a wife can obtain a divorce on the ground of a simple act of adultery on the part of her husband without having to prove any of the additional grounds required to be proved in England and in Provinces following English law. The grounds now recognised by Parliament are: 1. Adultery—alone, or accompanied with desertion, cruelty, desertion and cruelty, or bigamy; 2, bigamy; 3, incestuous adultery; 4, rape; 5, sodomy and unnatural offences; 6, bestiality; 7, malformation at time of marriage; 8, impotency;

9, nullity of marriage owing to fraud when there has been no consummation by cohabitation; 10, refusal of sexual intercourse.

In regard to adultery, it is not necessary in order to succeed to prove the actual fact of adultery; in nearly every case the fact is inferred from the proof of circumstances which shew the opportunity for the act, and which lead to the conclusion that it occurred, *e.g.*, travel together and registration as man and wife and occupation of the same room, or the visiting of a brothel, unless very clear evidence is given that adultery did not in fact occur. The evidence of a woman of loose character with whom the act is said to have occurred will be very closely scrutinised; and the evidence of the husband or wife alone is not sufficient unless corroborated by another witness or by strong circumstantial evidence, and particularly so where the fact is sought to be proved by admission. Proof that the respondent has contracted venereal disease not from the applicant is sufficient evidence of adultery; and in the *Browning* case, [1911] P. 161, 80 L.J. (P.) 74, it was held that it is sufficient for a wife to prove that she was infected by the husband, it being then for him to prove that he acquired the disease otherwise than by adultery. Proof of venereal disease must be by medical testimony.

The cases where bigamy is pleaded usually arise in connection with so-called American divorces. This subject necessitates a return to the question of jurisdiction. It has already been observed that domicile is an essential according to English law to establish jurisdiction; and that with the exception of desertion by the husband, a wife can not acquire a domicile separate from that of her husband. The American State laws do not recognise this principle to the same extent; in many of them, a wife can acquire a domicile separate from that of her husband, and that by a very short residence. Moreover, most of the States grant divorces for causes not recognised in Canada. As a result, cases are constantly occurring of wives deserting their husbands, taking up for the necessary time what in reality is only a temporary residence in one of the States, frequently Nevada, and then getting there a divorce on grounds which are not recognised in Canada as sufficient; with the result that in one State even of the American union she may be regarded as divorced, while in another and in Canada she is not so regarded. This result of different laws in the United States is often held up to ridicule, and quite properly so, as the situation is as absurd as it is

unjust; but, at the same time, it should be remembered that a similar situation has existed for years in regard to divorces granted by Scottish Courts to English wives, and by the Courts of New South Wales to wives from other parts of Australia. A remarriage after such an American divorce is bigamous, and affords in Canada a ground for divorce. The recognised English law on the matter is stated by Dicey as follows, at pp. 381, *et seq.*: "The Courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings, even though the ground for divorce is not recognised in the country of domicile at the time of the marriage or in the country of which the parties are subjects. The leading case on the point is *Bater* v. *Bater*, [1906] P. 209, 75 L.J. (P.) 60: "The husband and wife were British subjects domiciled in England; after their marriage the husband acquired a domicile in New York; the wife obtained in New York a divorce on grounds recognised there, but not so recognised in England; the divorce was held to be valid." Dicey goes on to explain that the Courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings, with the exception that the Courts of a foreign country where the parties are not domiciled have jurisdiction for English purposes to dissolve a marriage, if the divorce granted by such Courts would be held valid by the Courts of the country where at the time of the proceedings the parties were domiciled. The leading case here is *Armytage* v. *The Att'y-Gen'l*, [1906] P. 135, 75 L.J. (P.) 42: The husband was domiciled in New York; his wife obtained a divorce in South Dakota; the New York Courts treat this as a valid divorce; it is therefore treated as valid by the English Court. As already explained in the chapter on jurisdiction in Provinces with Divorce Courts, a party can not for purposes of divorce give a Court otherwise without jurisdiction the right to try the action. At one time it would appear that this was not so—see *Stevens* v. *Fisk* (1885), Cam. Cas. 392, but the principle is certainly followed at Ottawa in regard to applications by men who have previously ill-advisedly consented to the jurisdiction of the American Courts — see the *Campbell* case of 1914 and the *Gordon* case of 1921. It might be pointed out before leaving the question of foreign divorces that in *J.* v. *C.*

(1917), 33 D.L.R. 151, 38 O.L.R. 481, affirmed 39 O.L.R. 571, it was held that a divorce granted by a foreign Court being a judgment affecting the status of the parties, stands upon the same footing as a judgment *in rem*, and can therefore not be set aside in this country even on the grounds of fraud by a person not a party to the proceedings in which the judgment was pronounced. One logical and beneficial result of this decision is that men marrying Canadian women who have obtained invalid divorces in the U.S.A. must either support them or bring an action for annulment on the ground of a previous marriage; they can not in an action for non-support or alimony set up as a defence the divorce. Canadian Courts, once jurisdiction has been shewn, will not open a foreign divorce unless it is shewn that there has been fraud, *e.g.*, no notice to the respondent. Also, it has been held that a foreign divorce to be good must be absolute, *e.g.*, no restriction imposed on the guilty party in regard to not marrying again; but the foreign Court can say that neither party can re-marry for a certain time, this being regarded not as the imposition of a disability, but as the fixing of a time from and after which the dissolution shall be regarded as complete. Lastly, it has been held in Ontario that even if the foreign divorce is one not recognised in Canada, yet the party invoking the jurisdiction is bound by it. *Swaizie* v. *Swaizie* (1899), 31 O.R. 81; 31 O.R. 324: American divorce with alimony given payable out of husband's Ontario lands; this action was one for the alimony; defence was invalidity of the American divorce; held that he had invoked the American jurisdiction and was bound by it. In *Re Banks* (1918), 42 O.L.R. 64, a wife set up the invalidity of a divorce she had obtained in Chicago in claiming her husband's insurance; held she had invoked the jurisdiction and was bound by it. The test has never been made as to whether these last two decisions would hold in the case of a party realising that they had secured a divorce which was not recognised in Canada suing for a divorce in Canada, on say the ground of adultery which the other party had committed subsequently to the invalid American divorce; the natural defence would seem to be to plead the latter divorce; yet it hardly would seem reasonable or just that the plaintiff should be debarred from pleading its invalidity and therefore the adultery.

The subjects of impotency, fraud, and refusal from the first to have sexual intercourse have been dealt with in the chapter on annulment of marriage. The first cases granted on the latter ground were in 1919, and its adoption indicates the tendency of Parliament to grant relief on grounds generally recognised in England as sufficient to warrant a declaration of nullity. In England, if the refusal results from incompetence, a decree of nullity may be had. If it is simply wilful and without reasonable cause and there has been no intercourse, the Court has regarded the refusal as rebuttable evidence of incompetence, and if there has been intercourse as evidence of desertion. In the cases which have come before Parliament, the refusal had existed from the first, and had been wilful. The English Divorce Court has held that mere wilful refusal to have intercourse is not in itself sufficient ground for divorce—*Napier* v. *Napier*, [1915] P. 184, 84 L.J. (P.) 177, overruling *Dickinson* v. *Dickinson*, [1913] P. 198, 82 L.J. (P.) 121. The Court merely draws the inference of incapacity from the persistent refusal to consummate—*M.* v. *M.* (1906), 22 Times L.R. 719—and of course the inference may be rebutted, and mere refusal of itself is not a ground for divorce.

An investigation of the grounds for divorce throughout the British Empire shews the following as existing in addition to those already recognised by the Parliament of Canada:

(Report of the Royal Commission on Divorce and Matrimonial Causes—1912—England.)

1. Desertion, wilful—Scotland, 4 years; South African Provinces, as low as 18 months—Natal; Australia, 3 to 5 years; New Zealand, 5 years.

2. Imprisonment, either frequently or for long period—South Africa, Australia.

3. Habitual drunkenness, usually coupled with neglect of duty or cruelty—Australia, New Zealand.

4. Cruelty—Australia.

5. Insanity, confinement—New Zealand, 10 years; West Australia, 5 years.

6. Long absence—Cape Colony.

The following summary of grounds for divorce in the United States is taken from the Report on Marriage and Divorce of the Bureau of the Census 1867-1916 (South Carolina does not permit

of divorce on any ground, leaving 49 States for which to be accounted, including the Indian Territory):

	No. of States where divorce allowed.	Annulment.
Desertion—Abandonment or desertion	46	
Refusal by wife to move to State with husband—Tennessee	1	
Cruelty—Extreme cruelty	36	
Attempt to take life of other party to divorce	3	
Violence endangering life	7	
Indignities and defamation	9	
Sexual immorality—Adultery	49	
Crime against nature whether with man or beast—Alabama	1	
Lewd conduct indicating unchasteness without actual proof of adultery—Kentucky	1	
Loathsome disease, contracted before or after marriage—Kentucky	1	
Intemperance—Habitual drunkenness	39	
Habitual use of drugs	4	
Neglect of responsibilities—Neglect to provide	17	
Neglect of duty	8	
Defects of disposition—Violent temper	2	
Intolerant religious belief	2	
Crime—Conviction or imprisonment	41	
Fugitive from justice	2	
Previous divorce in another States	3	
Misconduct	2	
Vagrancy	2	
Voluntary separation	3	
Civil death, treated as so for crime—Rhode Island	1	
Presumption of death	2	
Causes deemed sufficient by the Court—Washington	1	

Lack of real consent to marriage—Duress or force	4	19
Fraud	8	19
Incapacity to contract marriage—Mental	8	26
Want of age..	1	27
Personal unfitness to contract marriage—		
Impotency	37	18
Pregnancy	15	
Illicit carnal intercourse by wife before marriage	3	
Illegality of marriage—Bigamy	12	25
Consanguinity	4	22

Several States do not recognise annulment on any of the above grounds, while several recognise it on as many as eight. In New York and the District of Columbia, the only recognised ground for divorce is adultery, although both allow annulment of marriages on several other grounds. On the basis of number of grounds for divorce, Kentucky leads with 15; Tennessee, Rhode Island and Washington are next with 12, and Pennsylvania, Georgia and Mississippi next with 11.

(To be continued in June issue)

Review of Current English Cases

By CECIL CARRICK, Barrister-at-Law.

Landlord and tenant—Covenant against sub-letting.

Freeman v. *Evans* (1922), 1 Ch. 36. (Court of Appeal). A lease contained a provision against the tenant sub-letting without the previous license in writing of the landlords. The tenant gave notice to his sub-tenants terminating their tenancy, and subsequently cancelled it upon the sub-tenants submitting to an increased rent. It was held that the notice to quit and its subsequent withdrawal created, as between the tenant and his sub-tenants, a new tenancy. This constituted a breach of the covenant against underletting in the lease, and the landlords recovered possession of the whole of the premises.

Constitutional law—Legislative power of Dominion of Canada—Combines and Fair Prices Act (1919)—Property and civil rights.

In re The Board of Commerce Act (1919) *and The Combines and Fair Prices Act* (1919). 1922 1 A.C. 191. This was an appeal from the Supreme Court of Canada. The Combines and Fair Prices Act, enacted by the Parliament of Canada in 1919, authorised the Board of Commerce, created by another Statute of that year, to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the Provinces as that Board might consider to be detrimental to the public interests; also to restrict accumulation of food, clothing and fuel beyond the amount reasonably required, in the case of a private person, for his household, and in the case of a trader, for his business; and to require the surplus to be offered for sale at fair prices. It was held that the Acts were *ultra vires* the Dominion Legislature since they interferred seriously with property and civil rights in the Provinces, and were not passed in any highly exceptional circumstances, such as war or famine, which might render trade combinations and hoarding subjects within the general power given by s. 91 of the British North America Act, 1867. The power of the Dominion Parliament to pass these Acts was not aided by the ancillary provisions attaching criminal consequences to any breach, because the matter did not by its nature belong to the domain of criminal jurisprudence. Circumstances are conceivable, however, such as those of war or famine when the peace, order and good government of the Dominion might be imperilled under conditions so exceptional that they might require legislation of a character in reality beyond anything provided for by the enumerated heads in either s. 92 or s. 91 of the British North America Act.

Arbitration—Award—Finality.

Attorney-General for Manitoba (appellant) and Kelly and Others (respondents), Privy Council, 1922, 1 A.C. 268. This was an appeal from the Court of Appeal of Manitoba. By a consent judgment, sums to be debited and credited in respect to a claim for monies improperly paid under a building contract, and for damages, were to be determined by two appraïs-

ers; and any matter upon which they differed was to be referred to a named umpire whose decision was to be final; and the Manitoba Arbitration Act was not to apply. Upon the defendants moving to set aside or vary the award made it was held that when there is difference of opinion between the parties as to the authority conferred on an umpire, the decision rests ultimately with the Court, but in other respects, in the absence of statutory provisions, where there is no error apparent on the face of the award, it cannot be questioned either on the facts or on the law, unless the umpire himself states that he has made a mistake of law or fact, leaving it to the Court to review his decision.

Constitutional law of Canada—Disallowance of Provincial Act—Accrued title.

Wilson and Others (*appellants*) *and Esquimalt and Nanaimo Railway Company* (1922), 1 A.C. 202 (Privy Council). This was an appeal from the Court of Appeal of British Columbia. By s. 56 of the British North America Act, the Governor-General in Council may disallow an Act passed by a Provincial Legislature within one year after receipt of a copy, as provided for, and such disallowance shall annul the act from and after the day of its signification. The defendants, in this action (appellants), had received a Crown grant of land in the Province of British Columbia in virtue of an Act passed by the Legislature of that Province. This Act was subsequently disallowed. The plaintiff (respondent) claimed under a grant from the Dominion Government in settlement of a dispute, and contended that the disallowance of the Act invalidated the title of the defendants. It was held that as to private rights completely constituted, and founded upon transactions entirely past and closed, the disallowance of a Provincial statute is inoperative.

Negligence—Public park—Poisonous shrub—Child eating poisonous berries.

Corporation of the City of Glasgow (*appellants*) *and Taylor* (*respondent*) 1922, 1 A.C. 44, (House of Lords.) This was an appeal from an interlocutor of the Second Division of the Court of Session in Scotland, recalling an interlocutor of the

Lord Ordinary. A shrub bearing poisonous berries of a tempting appearance was grown by the defenders (*appellants*) in an enclosed piece of ground, to which access was had by a gate which could be easily opened by small children. The pursuer's child, aged seven, ate some of the berries and died. In an action for damages the Lord Ordinary held that these facts disclosed no cause of action and dismissed the case. The Second Division recalled the interlocutor of the Lord Ordinary, and approved an issue for the trial of the action. Held, on appeal, that *Cooke* v. *Midland Great Western Railway Company of Ireland* (1909 A.C. 229) applied and that "the presence in a frequented place of some object of attraction, tempting a child to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness of the object of peril."

Contempt of Court—Circular letter commenting on judgment — Misrepresentation of effect — Motion for injunction.

Dunn v. *Bevan, Brodie* v. *Bevan* (1922), Ch. 276. Sargant, J.:—The plaintiffs in an action brought by members of a trade union against the officers of the union, issued a circular letter, after judgment had been given in the action, containing misleading comments on the judgment. The defendants thereupon moved for an injunction restraining the plaintiffs from distributing the circular. It was held that this was an attempt to have the issue of the circular treated as a contempt of Court, and the plaintiffs punished by granting an injunction against them, and by making them pay the costs.

There are only two kinds of contempt which can arise from conduct of this nature, viz.—first, scandalizing the Court by making attacks upon the Judge who presided at the trial; and, secondly, doing something which interferes in some way with the administration of justice. There is no third class of contempt consisting in a misrepresentation of the judgment of the Court, and of the proceedings in Court, for the purpose of injuring one of the parties. Judgment having been given in the action, the proceedings were ended, and there could be no interference with the administration of justice. The remedy must be sought in the ordinary law of libel.

Will—Construction—Residuary gift—Charitable purposes —Discretion of executor as to objects and purposes.

Hales v. *Attorney-General* (1922), 1 Ch. 287, Eve, J.:—In her will a testatrix left in blank the name of her residuary legatee. By a codicil she desired that the residue of her estate be "applied for charitable purposes, as I may in writing direct, or to be retained by my executor for such objects and such purposes as he may in his discretion select, and to be at his own disposal." No written directions were given as to the charities to be benefited. Two questions arose, viz., was there a good charitable trust declared, and if not, did the executor take the residue beneficially, or as a trustee for the next of kin? It was held that there was no good charitable trust, because the executor had a discretion under which he might devote the residue to purposes not of a charitable nature. It was further held that the executor held as trustee for the next of kin, because there was no direct gift to him. He took in a representative capacity by virtue of his office.

Will—Testamentary power of appointment—Covenant to appoint in a particular way—Covenant not to revoke appointment — Will exercising power in accordance with covenant—Subsequent will revoking appointment.

Winckley v. *Winterton* (1922), 1 Ch. 292. Russell, J.:—The donee of a special testamentary power of appointment covenanted by deed to appoint to her son out of a trust fund not less than £4,000, and not to revoke that appointment. She executed a will making such appointment, but afterwards executed another will, revoking the first, by which she appointed a sum of less than £4,000.

It was held that the deed of covenant had no legal operation at all. The donee of a special testamentary power of appointment cannot validly covenant to appoint by will in a particular way. Such a power is in the nature of a fiduciary power to be exercised by the appointor's will only; so that up to the last moment of his life he may deal with the funds having regard to the circumstances then affecting the various objects of the power. It is not a proper discharge of the donee's duty to fetter his fiduciary discretion by a covenant executed beforehand. Such a power may, no doubt, be validly released; or

.ne donee may validly covenant not to exercise the power. But in such a case the objects of the power, if they acquire any benefit in the property, do so under trusts in default of appointment. They derive their benefit from the donor of the power, not as a result of any pretended discretion of the donee exercised under the fetter of an antecedent bargain entered into by him, and in reality depriving him of any discretion at all. *In re Evered* (1910), 2 Ch. 147, can be thus distinguished from this case, in that the benefits secured to the three sons by the covenant to abstain from appointing in a certain manner, flowed from the trusts in default of appointment declared by the donor of the power.

Fatal Accidents Act—Damages—Pension to widow in consequence of death of deceased to be taken into account in assessing damages.

Baker v. *Dalgleish Steam Shipping Company* (1922), 1 K.B. 361 (Court of Appeal). This action was brought by the widow of the deceased, under the Fatal Accidents Act, as a test action for a decision as to whether in assessing the damages the fact that the plaintiff in receiving a pension from the Crown as a result of the death is to be taken into account. Scrutton, L.J., at p. 371 succintly summarises the rights of a claimant under Lord Campbell's Act. It was held that any pecuniary advantage the widow has received from the death must be set off against her probable loss. This is clear if she receives such advantage as of legal right. The same principle applies to voluntary benefits conferred in consequence of the death. Less weight will be given to voluntary contributions than to those made under legal obligation. Still less weight will be given to voluntary contributions in instalments, and still less if the contributor announces he will reduce his contribution by the amount of compensation obtained from the wrongdoer who caused the death.

Contract — Debt payable abroad in foreign currency—Action in England to recover—Depreciation of foreign currency—Payment abroad after action brought—Discharge of debt.

Societe des Hotels le Touquet Paris, Plage v. *Cummings* (1922), 1 K.B. 451 (Court of Appeal). The defendant, an English

lady, having in 1914 contracted in France a debt to the plaintiffs of frs. 18,035, undertook to pay that sum to them in France in French money before the end of that year. She did not pay the money within the time specified. In 1919, by which date the value of the French franc as expressed in English currency had heavily fallen, the plaintiff sued her in England claiming the amount of sterling which would have been the equivalent of frs. 18,035 in 1914. While the action was pending the defendant paid in French money the sum of frs. 18,035 to the plaintiff's hotel manager, who did not know the amount of the debt, and gave a receipt as for money deposited with him, not intending to accept it in full satisfaction. The defendant then pleaded that after action brought she had satisfied the plaintiffs' claim by payment. Two questions arose; first, as to whether the plaintiffs were entitled to payment of the amount of sterling claimed or simply to frs. 18,035; second, as to whether the payment made and retained was accord and satisfaction so as to be a defence to the action. It was held that the debt, being payable in France in French currency, did not cease to be a French debt by reason of its being sued for in England, and as, if the action had been brought in France, the payment made would have been a good discharge of the debt notwithstanding the depreciation of the French franc since the date the money became due, that payment must equally be a good discharge of the debt for the purposes of this action. It was further held that though where money is not paid on the precise day on which it ought to have been paid in performance of a promise the claim is for both the debt and damages for non-payment, and to satisfy the plaintiff's right of action once vested, there must be an accord and satisfaction, which there was not in this case, yet if the debt is paid the damages are merely nominal.

Lawyers' Lyrics.

The following verses have nothing to do with law, but they have to do with a very prominent and beloved member of our Bar of long ago—G. W. Wicksteed, Q.C., Law Clerk of the House of Commons, the tried and trusted friend and adviser of all the leaders of the various Governments since before Confederation and onwards. We like to keep alive the memory of a remarkable man who at the age of 94 wrote lines so full of poetic fancy —and reproduced now, in these days when lawyers' wives and daughters are in the forefront in patriotic and philanthropic work, so bravely and patiently taken up by them in those sad and stirring days, and at a time when we welcome to our ranks members of the fair sex to help the other lawyers in the fight for right against wrong.

The occasion was the opening of an Old Men's Home in Ottawa, started by the wife of a well known Q.C. in 1892:—

Dear ladies, fair and wise and kind
By whose benevolent aid
The scheme to help our pleasant home
A great success was made.

And you, good fellow-citizens,
Who patronized our ball
And danced to give us warmth and light,
We thank you each and all.

We joyed to think our quondam mayor
Would give his help, but then,
Of course, good city fathers must
Be friends of eldermen.

Your choice of secretary, too,
Augmented our delight,
And boded good, for well we knew
Waldo would do the right.

And pondering who might best express
Our gushing gratitude,
We tried to find a city bard
With love for us imbued.

There's one who holds a lyric lamp
To light his fellow man,
And one who bears the warlike name
Of a great Scottish clan.

Both good, but young, so not with us
To sympathize inclined,
And therefore we decided on
The oldest we could find.

He's old and so in sympathy
With us is strong and true,
And in desire to help our home
He tries to rival you.

And being so and feeling thus,
He thanks you for himself and us.

G. W. W.

Bench and Bar

Bar Association Meetings

We have been asked to again remind our readers, especially those on the Western Side of the North American Hemisphere, that the great Bar Association of the United States is to hold its annual meeting this year at San Francisco, on August 9th, 10th and 11th. In the forty-four years of the Association's existence, this is the first time it has met in California. The only time it ever came to the Pacific Coast was in 1908, when the convention was held in Seattle. In view of the recent Limitation of Armaments Conference at Washington and its bearing upon the interests of the United States, "in the region of the Pacific," to use the apt phrase of Secretary Hughes, this convention promises to be of more than ordinary importance. Many distinguished lawyers will be in attendance, and unusually important matters will be considered, both in addresses and debates. Secretary of State Charles Evans Hughes has been invited to deliver the annual address. The significance of this is obvious. Elihu Root, Mr. Chief Justice Taft and many other leaders of the bar will be in attendance. Lord Shaw, one of the most distinguished law lords of Great Britain, who comes to the meeting of the Canadian Bar Association, will be the guest of the American Bar Association,

representing the British Bar. As usual, the National Conference of Commissioners on Unif m State Laws will meet during the week preceeding the session of the Association.

Court Dress for Women

It has been decided what women barristers shall wear in Court. A committee of Judges and Benchers have settled the delicate question for them. Settled it delicately too; for instead of saying "must" they have merely "expressed a wish" that the dress shall conform to the following rules:—

(1) Ordinary barrister's wigs should be worn and should completely cover and conceal the hair. (2) Ordinary barrister's gowns should be worn. (3) Dresses should be plain, black or very dark, high to the neck, with long sleeves, and not shorter than the gown, with high, plain white collar and barrister's bands; or plain coats and skirts may be worn, black or very dark, not shorter than the gown, with plain white shirts and high collars and barrister's bands.

Having been asked so nicely, women barristers should find no reason for rebelling. All hope of seeing the Court turned into a flower-garden seems to have disappeared.

Barrister wigs are of course never worn in Canada nowadays; but would they not be a desirable addition to the costume of lady Barristers? They would be becoming, and we really mean this. Moreover it is important in a business way. Just fancy what an advantage our sisters would have with a jury over an opposing Council of the other sex. Haply we might have a hairless cocoanut with a shiny crown to exhibit! Jurymen moreover would cease to grumble at being called away from business and still think life worth living as they gaze on the awesome, but enticing setting of a pretty face.

Appointments

David A. Macdonald, of Vancouver, B.C., to be a Justice of the Supreme Court of the Province of British Columbia, vice Mr. Justice Clement, deceased. (May 13).

Obituary.

Mr. Justice Clement, of the Supreme Court of British Columbia, died suddenly at Vancouver on the 3rd instant. He was born in Vienna, Ont., in 1858.