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EDITOR:
HENRY O'BRIEN, K.C.

ASSISTANT EDITORS:
A. H. O'BRIEN, M.A., AND C. B. LABATT

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ONTARIO BAR ASSOCIATION.

The Ontario Bar Association held its Annual Meeting in Toronto on 11th and 12th instant.

This gathering was a representative one and of much interest, notwithstanding the fact that the great war naturally engrosses so much attention, and not the least amongst the members of the legal profession who have loyally responded to the call of their King, the Fountain of Justice. In consequence of the absence of so many at their military duties, attendance was not quite as large as usual.

A number of prominent members of the Bar from distant parts of the Dominion were present, and took part in the deliberations. In addition, several eloquent speakers and well-known jurists from distant places delivered addresses.

But we cannot in this number do more than give the opening address of the President of the Association, Mr. W. J. McWhinney, K.C. It is both excellent and instructive.

After the transaction of some routine business, Mr. J. E. Farewell, K.C., of Whitby, gave a "Country County Crown Attorney's Random Reminiscences," in his own happy style. He was followed by a paper on Legal History by Lieut-Col. Ponton, K.C., of Belleville. Some of the leading members of the Association and their guests were then entertained at luncheon by the Benchers of the Law Society of Upper Canada.

The afternoon was taken up with a scholarly address by the Hon. Simeon E. Baldwin, the well-known Professor of Yale University, the subject being, "Charlemagne as a Legislator." A paper was also read by Professor R. W. Lee, Dean of McGill Law Faculty, Montreal, on "The Uniformity of Law in the British Empire." Addresses were also delivered by Hon. Mr. Justice Masten and Sir James Aikens, K.C., of Winnipeg.

In the evening the annual banquet was held, a brilliant affair, presided over by the President, at which some excellent speeches were delivered and a pleasant evening spent.

The further matters that came before the Association were a report on Legal Ethics by F. M. Field, K.C., of Cobourg, a report on Law Reform by Mr. M. H. Ludwig, K.C., of Toronto, and a report on Legislation by E. J. Hearn, K.C.

Mr. J. E. Farewell, K.C., of Whitby, was elected President of the Association for the ensuing year.

The following is the address delivered by the retiring President, Mr. McWhinney, K.C., and above referred to:—

"I do not propose to repeat what has been so well stated by my predecessors as to the influence this Association might wield if more actively supported by its members and by the profession generally. One-third only of the practising barristers of the province are members of the Association. To effect such reforms in the laws of the province and their administration as we may deem necessary or expedient, the Provincial Cabinet and the representatives of the people in the Legislature must be impressed with the importance of our Association. To give due weight to our suggestions and recommendations our body must be developed and strengthened by the addition of every available active member.

The past session of the Legislature was for sufficient reasons confined strictly to urgent and non-contentious business, but with an Attorney-General young, active, progressive, and in full sympathy with our aims, as Hon. Mr. Lucas has shewn himself to be, we may confidently look forward to the future for full and prompt consideration and adoption of our recommendations.

The calamity forced on the Empire by a designing nation in the form of a cruel, relentless war, has not only proved the Empire one in reality lasting and enduring, but as a whole prepared to make illimitable sacrifices to uphold the honour and birthright of nations.

The majesty of the law, which recognizes the rights of individuals, even although expressed on a scrap of paper, is being

exemplified as equally powerful in enforcing conventions between nations.

In this magnificent and historic undertaking no profession has shone forth more brilliantly than that of the law. Everywhere, from coast to coast, and markedly in this province, has the lawyer been foremost in enlisting, recruiting, training, fighting and subscribing without regard to prospective benefit or the furtherance of his professional career. At the call of duty he thrust aside the life of comfort, ease and lucrative living and assumed the burdens of state and vicissitudes of military life This, however, is only the heroic side of this titanic death struggle of nations. There are other features in which the lawyer and his trained mind must play a vital part. The time will come when there will be work for giants, for men skilled in the finesse of negotiations, because it will not be a mere dictating of terms to a conquered people as to what is fair and capable of fulfilment, but instead, a world remodelling on lines acceptable to many peoples of different national ambitions, religions and tongues. Babylon being rebuilt on a "world peace" basis heralding the millenium and a new socialistic dynasty, which we are pleased to term democracy. The lawyer will figure prominently in the councils which will solve the bases of this "world peace," but even then the labours will have but begun. The rehabilitating of the peoples of the earth, the resettling of the refugees of nations, the directing and transplanting of returned armies into domestic channels of business and enterprise fitting to their various needs and grades of usefulness, the establishing of communities on the open plains of the colonies, expansive and productive, to meet the needs of millions, and the guiding and instructing of these will be the crowning life work of the lawyer of the present day or of the near future. His vision and imagination should be thus directed.

Would it not be fitting that this Association resolve that we who remain shall preserve in so far as we can the professional interests of those brave comrades at the front and enlisting, and when we act as counsel in their stead that we shall see their names are associated as counsel in the causes in which we represent them?

The economy of habits produced by the sacrifices to war and

its very onerous burdens, coupled with the need for existence, will produce a more economic distribution of the necessaries of life, and—let us hope—a more rational pace of living.

As in the past, so shall the members of our profession again shine in the Halls of Fame when International Law shall be reconstructed so as to forever obliterate the scrap of paper libel on the conventions of nations.

Permit me to refer briefly to matters appertaining more particularly to this Association and its labours. At your last Annual Meeting many matters were referred to the Council, and these have been carefully weighed by it and its various committees, the reports of which have been printed and will be placed before you for consideration. Amongst these were the raising of funds for a Machine Gun and for Belgian Relief, and I am pleased to report that your Council succeeded, with your kind assistance, in furnishing a Colt Machine Gun, which was presented and accepted by the Militia Department and is now in use with an Overseas Battalion, and $1,000.00 was presented to and graciously acknowledged by the Central Executive of Relief Work for Victims of the War in Belgium, and in addition I am pleased to report that a surplus of $300.00 was presented to the 81st Battalion in which our Treasurer and other members of this Association are prominent officers.

It is due to the Committee on Legal Ethics and especially to the draftsmen, to refer to the draft Code of Ehtics which you have received for consideration. In comparison with other codes you will find it unique in its conception of our duty, its simplicity and its comprehensiveness, and I trust it will receive your favourable consideration, and if adopted, that it will be printed and distributed with the Annual Report, and I would suggest that the Solicitor's Oath of Office be included in the report, lest in our race for wealth we forget the more noble pursuit of honour and a life well spent in maintaining the traditions of our profession.

The student-at-law is to-day confined in obtaining his educational qualification to what he may acquire from practice in an office and the lectures in our Provincial Law School, but such has been the rapid development of our province and its resources,

the increase of our national wealth and the advancement of our colleges and universities, that the time has come to consider seriously if the Law School is keeping pace with these advancements, and whether it is not imperative that instead of depending on lectures by those actively engaged in practice, sometimes selected without due care to fitness and the time at their disposal, there should not be a remodelling of the system, and by greater liberality a higher and more professional status in lectures attained, leaving the practice side only to the lectures of those engaged in active practice. It has been several times hinted that unless this be accomplished the Law School will become merely a school for the teaching of practice and law faculties will of necessity be established in our universities. Distinguished scholars on law subjects secured by proper remuneration as lecturers in our present Law School, serving the province as a whole, is surely more economic than the continuance of the present system and the establishment of law faculties in the different universities, and is the better method of developing a system equal to the present needs of the student. Lectures could then be arranged so that students could devote half of the day to office practice instead of attending lectures to meet the convenience of lecturer-practitioners, or some better arrangement might be devised by the Principal of the Law School.

It is stated that the judges and lawyers of the old school are gone, and no doubt the Bench thinks so of the lawyers and the lawyers so of the Bench, nevertheless it should be observed that the respect of the lawyer for the Bench of this province is generally well maintained.

This was recognized recently by the Hon. Mr. Justice Masten when the profession paid tribute to his many excellent qualities on the occasion of his first appearance on the Bench.

You will, I believe, agree with me that this reference to practitioners and their engagements, to adjournments of cases and the exigencies arising which make adjournments unavoidable, that there is a new era of more liberal treatment of the profession in this respect in sight. The Judges, no doubt, well know that counsel are not always to blame and that often they shield the

clients as well as the solicitors, and that personal considerations enter into these exigencies which are not properly explainable in Court. While deprecating any wilful carelessness causing delay or the hindrance of other litigants in a prompt hearing of their causes, the profession will welcome more reasonable consideration of their mishaps and inconveniences, many of which arise from our rapid growth, enlarged social, fraternal and charitable engagements, and the increased burden of overhead expenses necessitating too many different undertakings by the individual. Ontario stands first I should say in the facilities afforded citizens for prompt despatch of business in its courts, but even this praiseworthy attainment can be carried to the extreme.

This is a business age, and business exigencies prevail, and in the main our Judges and lawyers are business men as distinguished from legal technical controversialists, and are expected to know and apply business principles in preference to merely establishing precedents.

The successful lawyer of to-day keeps his clients out of court unless the stake is worth while and the merits on his side. The speculator litigant as well as the legal ambulance chaser are few and much discouraged.

Our rapid development and increase of wealth have increased our national and provincial expenditures, and an extensive grist of legislation is annually placed upon our statute books. Different bodies, called alliances, unions, associations and societies, are ever on the trail of the law makers and administrators, to the point almost of persecution, so that no longer do our political leaders lead the people. Our administrators are content to estimate the will of the people and to carry it into effect. The people, therefore, are largely responsible for prevailing conditions and the military unpreparedness of the Empire, as also for the superabundant chapters and sections and sub-sections of our statute books and the ever-increasing burden on the administrators of the law and the lawyer. In so far, therefore, as human efforts can keep pace, reduction by simplification or consolidation of our statute law is essential or a greatly increased tariff should be provided to enable the lawyer to keep abreast with the burden

cast upon him. Notwithstanding the efforts made to reduce law reports, there is still room for improvement by the omission of many cases not involving any new principle. Let us have only one set of Dominion Reports and one for each province, and let the issue of these be in the control of the Law Society, and furnished by the Law Society to all its members.

The Law Society might well consider the adding to its labours of a fraternal compulsory life insurance branch, with a standard policy insuring each member for at least $1,000 at a fixed minimum rate, the fees therefor to be included in the annual dues, with the privilege to members to take more, not exceeding $5,000, and the benefits to be for the wife or female dependents of members.

There should be some protection to mortgagors against the stringent provisions in printed forms of mortgages adopted by certain corporations and by some members of the profession. This subject was recently referred to by the Hon. Mr. Justice Middleton and by the press, and is worthy of your consideration. Borrowers do not, as a rule, consult their solicitors, and the form is accepted as the usual and necessary form to obtain the loan.

The Mechanics' Lien Law is in much need of remodelling, and this should engage your earnest attention, and the time has come when this Association should have a properly paid official to devote the necessary time to these and other similar reforms promoted from time to time by this Association.

It may be that we can with advantage consider a consolidation of our Committees on Law Reform and Legislation, because in practice they have both been covering the same grounds. I would suggest one committee working in two sections, the first studying and presenting matters for law reform, the second drafting bills for Parliament and the legislature, so that our labour may not be in vain.

Certain reforms in Osgoode Hall, its offices and officers, are under consideration, but any suggestions so far have not been communicated to your Council, although the profession is the most interested. You are invited to make suggestions through

the Secretary, as the Council will, no doubt, be consulted before any changes are actually made.

The system of filing of papers in the Central Office, when a matter is finally disposed of, is generally understood to prevail, but this is not carried out. There should be one place for all such filings, as also for all exhibits not returned, and all officials, Referees and Masters included, should be required to conform thereto. The clerk in charge of such a filing system should see to it that all exhibits are returned to the solicitor for the party who filed the same.

The Master-in-Ordinary's Department has recently been reconstructed, and all salaried Official Referees brought in as part thereof and under special control, so that all mortgages, mechanics' liens, winding-up of companies, and other references will be assigned or distributed among the different officers, and all fees shall be payable in law stamps.

The venerable Senior Taxing Officer should be relieved of all formal and ordinary taxations and clerical work, and retained as senior and consulting taxing officer. An assistant should be carefully selected and properly remunerated to take on the burdens of this office, the importance of which, to the lawyer as well as to the client, has not been fully appreciated. A competent officer in these days cannot be secured at present remuneration.

The amendment of Rules of Practice is as you know, within the jurisdiction of the Judges. The profession is not consulted nor heard thereon, and at times the interests of the public and the profession are not sufficiently considered. It has been suggested that a commission should be appointed for this work, composed of three Judges, three Benchers and three members of this Association, with the Law Clerk as a permanent secretary and responsible for the drafting of proposed amendments.

For some time it has been well known that the members of the profession do not give to the selection of Benchers the consideration it deserves, and are apt to mark the ballot more from the list of past Benchers than from a knowledge of their fitness or whether they have been an acquisition to the Law Society.

Too frequently the honour is accepted without the responsibility. A number of your officers are Benchers and among the most active and useful. It is not out of place for me, as retiring President, to suggest that the President of this Association should be ex-officio a Bencher. The two bodies work in harmony, and in this way each would be more conversant with the matters in hand and the needs of the other.

The Canadian Bar Association has been formed, and its object is to standardize the commercial laws of the different provinces. I am confident this Association will lend a helping hand. Insurance policies and statutory conditions of different branches of insurance should be uniform, and this applies equally to the Companies Acts, partnership, conditional sales, and many other Acts, and this Association should recognize the labours of Sir James Aikins in bringing into existence that Association with the objects aimed at.

I cannot close without referring to many losses sustained by this Association during the past year. Two of our most valued officers and members, Messrs. A. E. H. Creswicke, K.C., of Barrie, and J. J. Drew, K.C., of Guelph, were suddenly called from their labour. Their exceptional ability and genuine good-fellowship makes the loss more keenly felt, and I am sure the Council acted in accord with your feelings and that of the profession in general in extending sympathy and condolences by resolutions to the widows and members of their families.

Many of our officers, members and the sons of many others have fought, are fighting and enlisting in the cause of world freedom. Here, too, we have sustained grievous and irreparable loss, but our loss and suffering are incomparable with that of the Belgians, French and Serbs, whose lives, homes and ambitions have been ruthlessly and wantonly sacrificed with a frightfulness devoid of civilization, religion or humanity.

While the rivers, fields and mountains have been strewn with the dead and drenched with blood, our loved ones, and their blood, we have done wonders and poured out our millions. We have proven our loyalty and devotion to the Motherland, to humanity and to freedom. These were not doubted. Some things are in-

tolerable, worse even than bloody war, and we will pay the price. Our sons on the battlefields of Flanders and France shall be avenged. We, the unprepared, have found ourselves, a nation, ready and willing to fight for life and the liberty of other nations and to fight again. The stake is worth it, and we shall conquer, and, dying, live again a greater and united people."

The President towards the close of the meeting when "Womans Suffrage" came up, struck out boldly in its favor and asserted it was never intended that by mere incident of form at birth any distinction in civil rights should prevail and only brute force had brought about such a condition. Let us be men and not cowards and afford our sisters all the rights we as men enjoy, and by whole, not by half measures, as in the past.

HAS AN ACCUSED PERSON THE RIGHT TO MAKE A STATEMENT AT HIS TRIAL WITHOUT BEING SWORN OR SUBJECT TO CROSS-EXAMINATION?

A divergence of judicial opinion appears to exist in Canada as to the right of an accused person to make a statement during his trial without being sworn or subjected to cross-examination, since the passing of s. 4(1), Canada Evidence Act, R.S.C., c. 145, which provides that "Every person charged with an offence . . . shall be a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person."

Until this enactment, an accused person was not a competent witness in his own defence, but he had a right, if not out of course of the common law,* at least long established by judicial opinion and practice to make an unsworn statement during his trial.

In the recent case of *Rex* v. *Krafchenko*, 22 Can. Cr. Cas., p. 277, Chief Justice Mathers, after discussing various decisions o

*Halsbury seems to regard the statement not on oath as a common law right. Vide Halsbury's Laws of England, vol. 9, p. 402, par. 771.

the point (hereafter noted), concludes that the effect of the Canada Evidence Act in making an accused person a competent witness in his own defence was to abrogate his former privilege of making an unsworn statement.

The only other judicial opinion expressed upon this question was in the case of *Rex* v. *Aho*, 8 Can. Cr. Cas., p. 453, in which Chief Justice Hunter and Mr. Justice Duff, of the Supreme Court of British Columbia (the latter now a distinguished member of the Bench of the Supreme Court of Canada), observed (arguendo), that "A prisoner can make a statement." This observation not being a considered opinion, Chief Justice Mathers did not think that he could rely upon it. The dictum was, however, recently followed in a case before the Honourable Mr. Justice Gregory, of the Supreme Court of British Columbia, who, feeling bound by it and knowing of two other cases where the unsworn statement had been allowed, ruled accordingly in favour of the prisoner.

The history of the practice of allowing an accused person to make an unsworn statement on his trial is traced by Mr. Justice Stephens in the case of *Reg.* v. *Doherty*, 16 Cox Cr. Cas., p. 306, at pp. 309 and 310. Explaining to the jury the grounds upon which he had permitted the prisoner to address the Court, although defended by counsel, he said:—

"Down to the year 1837 prisoners were not allowed, in cases of felony, to be defended by counsel, although they might have counsel to cross-examine witnesses. The effect of that course was that a prisoner was obliged, in the nature of the case, to speak for himself.

"The Prisoner's Counsel Act was passed in 1837 and this declared that a prisoner had a right to make a full defence by counsel and accordingly that has since been done.

"It has been considered by some of the Judges that the effect of the Act is to take away from the prisoner any right to make any statement on his own account. I do not think that this is the effect of the Act and I think so for various reasons, but there is

one to which I attach much importance. This reason is that in trials for high treason prisoners were not allowed to be defended by counsel, and it was only by an Act passed in the reign of William III., afterwards supplemented by an Act passed in the beginning of the reign of Queen Anne, that prisoners were allowed to be defended by counsel, to ask a prisoner, after his it was the practice, as can be seen by anyone who looks into the state trials at the time when the prisoners were by statute allowed to be defended by counsel, to ask a prisoner, after his counsel had addressed the jury on his behalf, whether he wished to say anything himself, and prisoners either did make statements or abstained from doing so as they thought fit.

"In the famous case of the Cato Street Conspiracy, Thistlewood and several others, after they had been defended by counsel and before the Judge summed up the case were asked whether they wished to add anything to what their counsel had said, and at least one of the prisoners availed himself of the privilege." (Note: see the case of Thistlewood, 33 St. Trials, 894: Four of the other prisoners, namely, Brunt, Ings, Davidson and Tidd, addressed the jury after two speeches by their counsel, Mr. Curwood and Mr. Adolphus.)

"I do not think that was done in the case of the trial of Frost, the Chartist, for high treason at a later period, nor in the few cases of high treason which have since been tried." (Note: In the trial of Collins for high treason, *R.* v. *Collins* (1832), 5 C. & P. 305, after prisoner's counsel had addressed the jury, Bosanquet, J., informed the prisoner that if in addition to what had been said by his counsel he wished to say anything he was at liberty to do so, and the prisoner made a statement of considerable length.) "But it was certainly the practice in England down to the Cato Street Conspiracy trial that prisoners were allowed in cases of high treason to make statements, and I cannot see why the Act of 1837, the Prisoner's Counsel Act, should be regarded as taking from the prisoners the right to make a statement in cases of felony, while a similar

Act does not take away the right in cases of high treason. That was one of the principal reasons that influenced me in taking the course I did yesterday in this trial in allowing the prisoner to make the statement he made to you."

It is evident that Baron Alderson had the same view of the origin of the practice, for in *Reg.* v. *Malings*, 8 C. & P. 242, where he allowed the prisoner, though defended by counsel, to make an unsworn statement, he said:—

"On trials for high treason the prisoner is always allowed to make his own statement after his counsel has addressed the jury."

The difference of opinion as to the effect of the Prisoner's Counsel Act, to which Mr. Justice Stephens referred, is reflected in several cases which followed the passage of the Act: Notably, *Reg.* v. *Boucher* (1837), 8 C. & P. 141; *Reg.* v. *Beard* (1837), 8 C. & P. 142; *Reg.* v. *Burrows et al.* (1838), 2 M. & Rob. 124; *Reg.* v. *Rider* (1838), 8 C. & P. 539; *Reg.* v. *Teste*, 4 Jurist. (N.S.) 244; *Reg.* v. *Taylor* (1859), 1 F. & F. 534. In all of these cases the prisoner was refused the privilege of making an unsworn statement. Collected and briefly summarized, the grounds upon which the making of the statement was denied appear to be these: That the rules which had been established with respect to the conduct of cases by counsel precluded the right of a prisoner to make a statement to the jury himself in addition to the address of his counsel; that allowing such a statement would lead to prisoners being examined on their own behalf without the sanction of an oath and then a speech commenting upon their statements; and that the Prisoner's Counsel Act could only be meant to put prisoners in the same situation with reference to felonies as they were in before when defended by counsel in cases of misdemeanour, and that in those cases the defendant could not be allowed the privilege of two statements, one by himself and another by his counsel.

On the other hand, the prisoner was held to be entitled to make an unsworn statement in the following cases: *R.* v. *Malings*

(1838), 8 C. & P. 242; *R.* v. *Walklings* (1838), 8 C. & P. 243; *R.* v. *Dyer* (1844), 1 Cox Cr. Cas. 113; *R.* v. *Williams* (1846), 1 Cox Cr. Cas. 363; *R.* v. *Manzano* (1860), 2 F. & F. 64; *R.* v. *Stephens* (1871), 11 Cox Cr. Cas. 669; *R.* v. *Hull and Smith* (Yorkshire Assizes at Leeds, February 3, 1880; see Archibald on Criminal Pleading, 24th ed., p. 221, and Warburton's Leading Cases on Criminal Law, 4th ed., p. 513); *R.* v. *Blades* (Yorkshire Summer Assizes at Leeds, August 2, 1880; see Archibald on Criminal Pleading, 24th ed., p. 221); *R.* v. *Everett* (1882), 97 C.C.C. (Sessions Papers) 333; *R.* v. *Shimmin* (1882), 15 Cox Cr. C. 122; *R.* v. *Dahle* (1884), 98 C.C.C. 543; *R.* v. *Ross* (1884), 100 C.C.C. 29; *R.* v. *Perry* (1884), 100 C.C.C. 506; *R.* v. *Masters* (1885), 50 J.P. 104; *R.* v. *Millhouse* (1885), 15 Cox Cr. C. 622; *R.* v. *Nally* (1885), 102 C.C.C. 342; *R.* v. *Cummingham* (1885), 102 C.C.C. 154; *R.* v. *Reiglehuth* (1886), 103 C.C.C. 461; *R.* v. *Doherty* (1886), 16 Cox Cr. Cas. 306; *R.* v. *Teasel* (Norwich Summer Assizes, July, 1889; see Warburton's L. Cas., 4th ed., p. 515); *R.* v. *Maybrick* (Liverpool Assizes, August, 1889; see Phipson on Evidence, 2nd ed., p. 38).

It must be observed that in the cases of *R.* v. *Walklings* (supra) and *R.* v. *Manzano* (supra), the statement was allowed by Baron Gurney and Baron Martin respectively with some hesitation and doubt as to the wisdom of the practice.

On November 26, 1881, the majority of the Judges of the High Court of Justice of England passed a resolution disapproving of the practice of counsel for prisoners stating to the jury matters which they had been told in their instructions, on the authority of the prisoner, as being alleged existing facts, but which they did not propose to prove in evidence; and at that time the question of the propriety of laying down a rule as to the practice of allowing defended prisoners to address a jury before the summing up of the Judge was discussed, but adjourned for further consideration.

The following year, in *Reg.* v. *Shimmin* (supra), Mr. Justice Cave stated that a prisoner, whether he were defended by coun-

sel or not, was entitled to make an unsworn statement, if he chose to do so, at the conclusion of his counsel's address, but subject to this: that what he said would be treated as additional facts laid before the Court and as entitling the prosecution to a reply. This was the rule of the practice, he said, now approved of by the Judges of the High Court.

It is apparent then that an accused person always had the right to make an unsworn statement, the difference of opinion prevailing on the question for a time owing to the passage of the Prisoner's Counsel Act being definitely settled in favour of the prisoner by the English Judges in 1881.

In 1898 the English Criminal Evidence Act was passed. It made an accused person a competent witness in his own defence and by section 1(h) it provided that "Nothing in this Act shall affect . . . any right of the person charged to make a statement without being sworn." This express provision prevented any question arising as to whether the new right conferred upon an accused person had abolished his former privilege to make an unsworn statement.

No such saving clause, however, appears in the Canada Evidence Act, and Chief Justice Mathers of Manitoba has expressed the opinion as to the effect of this Act on the right of a prisoner to make an unsworn statement indicated above.

With great deference to the opinion of Chief Justice Mathers, I have, nevertheless, concluded from my research on the question that the Canada Evidence Act does not do away with the right which an accused person had, up to that time, enjoyed to make an unsworn statement at his trial if he wished, and that the Canada Evidence Act had no greater effect upon this existing right than the Prisoner's Counsel Act did when it was passed. The saving clause in the English Criminal Evidence Act appears to me to have been inserted ex abundanti cautela.

"In Acts of Parliament it has sometimes, ex abundanti cautela, been thought necessary specially to reserve rights," observes Hardcastle, 2nd ed., at p. 125. "For instance, in certain

Acts regulating the law of bankruptcy, the privilege of freedom from arrest belonging to peers of Parliament was specially reserved. But this special reservation was unnecessary for, said Lord Hatherley, in *Duke of Northumberland* v. *Morris* (1870), L.R. 4 H.L. 661, 671, "It is not because, ex majori cautela, several Acts of Parliament have thought it necessary specially to reserve that privilege that it is held to be abolished and annihilated in every other Act of Parliament in which it is not expressly reserved."

The view which I take of the construction of the Canada Evidence Act appears to be in accordance with well established rules of construction. At p. 123 of Hardcastle it is observed:—

"*In re Cuno* (1883), 43 Ch. D. 12. 17. Bowen, L.J., said: 'In the construction of statutes you must not construe the words so as to take away rights which already existed before the statute was passed unless you have plain words which indicate that such was the intention of the legislature.'"

And at p. 124:—

"Therefore, rights, whether public or private, are not to be taken away or even hampered by mere implication from the language used in a statute, unless as Fry, J., said in *Mayor, etc., of Yarmouth* v. *Simmons* (1878), 10 Ch. D. 518, 527, 'the legislature clearly and distinctly authorize the doing of something which is physically inconsistent with the continuance of an existing right.'"

Hardcatle continues:—

"In *Gray* v. *R.* (1844), 11 Cl. & F. 427, the question arose whether the right of a person tried for felony to challenge peremptorily twenty of the jurors summoned to try him extended to a new felony created by the Treason Felony Act, 1842. It was held that it did. 'A prisoner,' said Tyndall, C.J., at p. 480, 'is not to be deprived by implication of a right of so much importance to him given by common law and enjoyed for many centuries, unless such implication is absolutely necessary for the interpretation of the statute.'"

This dictum of Tyndall, C.J., was cited with approval by the Judicial Committee in giving judgment in *Levinger* v. *R.* (1870), L.R. 3 P.C. 282, 289, a case in which a similar point was raised.

Chief Justice Mathers appears, if I may with deference say so, to have overlooked the fact that the privilege of an accused person to make an unsworn statement was in its origin given to him, not because he was unable to be called as a witness in his own defence, but because he was not allowed to have a counsel to speak for him. If any Act at all could be looked upon as taking away the prisoner's right to make an unsworn statement, surely it was the Prisoner's Counsel Act, and the law has long been settled in favour of the prisoner on that point. All that the Canada Evidence Act does is to give the prisoner a new right which is not necessarily inconsistent with the continuance of his former right, and this right, in my view, can only be abolished by express language.

Mr. Justice Phillimore seems to have been of the opinion that the English Criminal Evidence Act, 1898, did not in any case disturb the prisoner's right to make an unsworn statement. In the case of *Rex* v. *Pope* (1902), 18 Times L.R., p. 717, where he allowed a prisoner who was defended by counsel to make a statement to the jury without being sworn, the following summary of his address appears at p. 718:—

"In the course of his summing up Mr. Justice Phillimore pointed out to the jury that 70 years ago prisoners were not entitled to have counsel to represent them, and made whatever statement they could to the jury on their own behalf. The law was then changed, and prisoners were allowed to retain counsel for their defence, and the learned Judges at that time decided that the prisoners still retained their right to make a statement to the jury. Since the passing of the Criminal Evidence Act, 1898, a prisoner could go into the witness-box and give evidence on his own behalf if he wished to do so. This further right, in his opinion, did not do away with the former privilege; and he, therefore, allowed the prisoner to make his statement and fol-

lowed the practice laid down by Mr. Justice Stephen as to the time when it should be made."

While it has no practical bearing upon the construction of the statute, I may say that I examined the Hansard Report of the debates in Committee and in the House on the provisions of the Canada Evidence Act at the time of its passage and in no place do I find that the effect of s. 4(1) upon the right of a prisoner to make an unsworn statement was considered or even alluded to. It appears to have been entirely overlooked.

As to the time when the statement should be made.—As observed in Russell on Crimes, 7th ed., at p. 2001: "There has been a divergence of practice as to the time when an unsworn statement should be made by a prisoner defended by counsel. Before the Criminal Evidence Act, 1898, the majority of the Judges considered that the statement should be made *after* the address of the prisoner's counsel when no witnesses were to be called for the defence. The practice now most generally adopted is for the prisoner to make his statement *before* counsel for the prosecution sums up his case and before the speech of counsel for the defence: *R.* v. *Sheriff*, 20 Cox 334; *R.* v. *Pope*, 18 T.L.R. 717; following on this point, *R.* v. *Doherty*, 16 Cox 306."

Evidence on oath and unsworn statement not alternative rights.—If the view which I take of the effect of the Canada Evidence Act be right, it follows that this Act was not intended to deprive the prisoner of any advantage he might gain by making a statement not on oath as before the Act. The accused may, it is apprehended, still make an unsworn statement and may also give evidence on his own behalf under oath. They are not alternative rights, but the accused is to enjoy both. This view is expressed by the learned editors of the Justice of the Peace (1900), vol. 64, pp. 322-3, of the state of the law in England and it is submitted that it is also a correct statement of the law in Canada. But if the accused desire to make an unsworn statement in addition to giving testimony under oath, the latter should precede the former, otherwise the unsworn statement

might be made use of to restrict the right of cross-examination on the sworn evidence. The opinion of the editors of the Justice of the Peace is that the making of the unsworn statement ought in such circumtances to be postponed until just before the reply for the prosecution, and this appears to be a practical view.

As to comment on statement and right of reply.—It is said at least in two cases, *Reg.* v. *Malings* (*supra*), and *R.* v. *Dyer*, 1 Cox Cr. Cas. 113, that counsel for the accused in his address to the jury has the right to comment upon the prisoner's statement.

There are also rulings that the making of the unsworn statement gives the prosecution a reply (*R.* v. *Doherty, supra, R.* v. *Shimmin, supra*, and *R.* v. *Reiglehuth, supra*), though to call a prisoner as a sole witness for the defence does not in itself give the prosecution a reply—this in England only because of a special provision in the Criminal Evidence Act.

Semble: The statement should be limited to facts.—It also appears that the unsworn statement of the accused when he is defended should be limited to facts and not extend to argument: see *R.* v. *Everett*, 97 C.C.C. 333; *R.* v. *Millhouse* (supra). This ruling appears to be in accordance with the observations of Lord Ellenborough in the case of *R.* v. *White* (1811), 3 Camp. 98, and of Chief Justice Abbott in *R.* v. *Parkins* (1824), 1 C. & P. 548.

Quare: Whether statement should be allowed if prisoner call witness.—There is a difference of opinion as to whether the prisoner should have a right to make an unsworn statement where he calls witnesses. In *Reg.* v. *Millhouse* (1885), 15 Cox Cr. Cas. 622, Coleridge, C.J., refused to extend the privilege to a case where an accused person proposed to call a witness. But it appears from the report of Carrington & Payne in *R.* v. *Malings* (supra), one of the first cases after the passage of the Prisoner's Counsel Act, in which the prisoner was allowed to make a statement not on oath, that "He (the prisoner) also called witnesses." And this practice was followed in the case of *R.* v. *Maybrick*, Liverpool Assizes, August, 1889 (referred to in Phipson on Evidence, 2nd ed., p. 38). Certainly it is clear upon reference to

the old state trials that in treason cases the right of the accused to make a statement not on oath seems to have been regarded as cumulative upon his right to call witnesses. If the practice in treason cases constitute a good precedent for the right of a prisoner to make an unsworn statement at his trial, as the English Judges seemed to think, is there any valid reason why it should not be further accepted as authority for allowing the prisoner to make an unsworn statement, even where he calls witnesses?

Ottawa. CHARLES PERCY PLAXTON.

LORD ALVERSTONE.

On December the 15th, 1915, Viscount Alverstone, who for thirteen years had been Lord Chief Justice of England, died in his 73rd year. Although, as said in one of the English legal periodicals, he was "neither a great advocate or a great lawyer, he was a great personality and filled his high office with ability and dignity," and it goes without saying that no man who has attained that exalted position could be otherwise than a man of conspicuous ability.

The name of Lord Alverstone is better known in this country than that of any other English judge, inasmuch as he was one of the Arbitrators, who sat as judges, to adjudicate upon the dispute between Great Britain and the United States as to the Alaskan boundary. In a former issue of this journal (1904, vol. 40, p. 3) we had occasion to deal fully with that important international dispute and Lord Alverstone's connection with it, and need not again refer to the subject.

Lord Alverstone was a fine and typical specimen of a manly English gentleman. He took a good place at Cambridge, but perhaps was better known there as an all-round athlete, winning for Cambridge the one-mile and two-mile races of his day, and being President of the M.C.C. and of the Surrey County Cricket Club; he was, moreover, proficient in other sports.

The profession here will remember with pleasure that he was

a great personal friend of the well-beloved leader of the Canadian Bar, Mr. Christopher Robinson; and, as such, on the death of the latter (see ante 1906, vol. 42, p. 155), wrote a most appreciative letter of his Canadian friend, with whom he was associated in connection with the Behring Sea Arbitration, as well as being one of the counsel in the Alaska Arbitration.

Lord Alverstone (Richard Everard Webster) was born in December, 1842, being the second son of Thomas Webster, K.C., of Sandown, Isle of Wight. He was called to the Bar in 1868, took silk in 1878, and was elected a Bencher in 1881. In 1885 he was appointed Attorney-General in Lord Salisbury's first Government, and became Sir Richard Webster in 1885. He went to the House of Lords in 1900, in which year he succeeded Lord Russell of Killowen as Lord Chief Justice of England. He resigned that position, with the rank of Viscount, in October, 1913, owing to failing health.

Our English letter gives some interesting incidents connected with the career of this distinguished man.

NOTES FROM THE ENGLISH INNS OF COURT.

It is not necessary to explain to our readers the meaning of this title. It is well that we should have from our own correspondent some of the *on dits* and chit chat from that historic centre which for centuries has been the place from which has emanated the outcome of the application of the great Common Law of England (changed from time to time by legislation) to the ever-varying circumstances and conditions connected with the administration of justice in the Motherland and her overseas dominions and dependencies.

Our London correspondent appropriately begins his Notes by the following reference to

The Late Lord Alverstone.

Much has been said and written about the great Chief Justice who has just passed away, after a long and trying illness. One or two of his personal characteristics may, however, be briefly

recorded. On the Bench and at the Bar he had enormous capacity for work. When he was Attorney-General, the Law Officers were allowed to take private practice; and even when his chambers were full of Treasury briefs, Webster did not neglect his numerous clients. To do so he had to break through certain time-honoured customs. Thus, the consultation before action is generally held at counsel's chambers in the Temple or "outside the Court" at 10 a.m. Sir Richard Webster was often so busy that he was compelled to choose his own time and place. "Consultation at Hornton Lodge, Kensington, at 6.30 a.m.," was often the message sent by his clerk to the city solicitor who had retained the Attorney-General as leader in a cause!

Webster had a marvellous power of availing himself of the work of others. He used to boast that he nearly always had "seven devils." Sometimes he had many more. These were the men who noted his briefs and drafted his opinion. When he attained the dignity of the Bench, he was necessarily deprived of this anonymous assistance; but he got through his work all the same with marvellous rapidity. He had a wonderful memory. It was he who tried the notorious Dr. Crippen. One who was present in Court told the writer that "the Chief" summed up that case for two hours and told the long and complex story to the jury without a single glance at his notes!

The War and the English Bar.

The Bar of England has been seriously affected by the war Some 1,200 of its members have left to serve their King and country in one capacity or another; some, alas! never to return. The very junior Bar has practically disappeared. One sees but few "new wigs" in the Courts; the lectures for students are attended for the most part by coloured men from our colonies and dependencies. On the various circuits much of the gaiety has disappeared. Indeed, in some cases, all social functions at the Bar mess have been postponed *sine die*. Nor have the senior members of the profession failed to do their share. Many have joined the Anti-Air Craft Corps, as members of which they take part in the defence of London by night, and carry on their practice

(somewhat sleepily) by day. Others have thrown up lucrative practices to assist in the various government departments; while not a few "silks" have got commissions in the Navy. Indeed, when the question, "Which of the professions (apart from the services) has taken a leading part in the greatest war in history," comes to be asked, the gentlemen of the long robe need not fear the answer.

No New Silks in War Time.

The decision of the Lord Chancellor not to create any more new "Silks" during the war was not unexpected and is generally approved. The theory is that, by refusing to allow any more juniors to pass within the Bar, the field will be kept open for those who are now serving with the forces. Those of the legal profession who by reason of age or infirmity have been compelled to remain behind are loyally endéavouring to second the effort of the Lord Chancellor to protect the interests of those who are upholding the honour of the profession abroad. But the task of keeping a practice together for an absent friend is one of great difficulty. Unlike a solicitor or a doctor, the advocate cannot, in the nature of things, have a partner. His is a personal connection. If he absents himself from his chambers and the Courts—howsoever good his reason for doing so—his clients must employ other counsel, and he may be forgotten. With all the goodwill in the world, neither his fellow barristers (who "devil" his briefs in his absence) nor the solicitors can be certain of keeping his practice together, for, after all, it is the lay client who must finally decide who is to hold the brief. There is, however, one consolation for those who have made these great sacrifices. The legal profession is a close box. The Lord Chancellor has much patronage. The man who has thrown aside his wig and gown may feel sure that, when peace is restored, the Keeper of the King's Conscience will remember the claims of him who answered the call of duty in the hour of his country's need.

1 Brick Court, Temple, London. W. V. Ball.

REVIEW OF CURRENT ENGLISH CASES.

LIBEL — PUBLICATION — COMMUNICATION POSTED IN OPEN ENVELOPE.

Huth v. *Huth* (1915) 3 K.B. 32. This was an action brought by four children against their father for an alleged libel contained in a communication sent to the plaintiff's mother by the defendant in an open envelope. The only evidence of publication offered by the plaintiff appears to have been the fact that the butler at the house where the plaintiffs were living with their mother had, out of curiosity, taken the communication out of the envelope and read it, and had then restored it to the envelope and placed it on the breakfast table. Darling, J., who tried the action, dismissed it on two grounds: (1) that there was no evidence of publication; and (2) that the communication was not, in fact, libellous. The Court of Appeal (Lord Reading, C.J., Eady, L.J., and Bray, J.) agreed with him on the first ground and expressed no opinion on the second.

CHARTER PARTY—CONSTRUCTION—PENALTY CLAUSE—LIMITATION OF LIABILITY.

Wall v. *Rederiaktiebolaget Luggerde* (1915) 3 K.B. 66. In this case the construction of a clause in a charter party was in question. The clause provided "Penalty for non-performance of this agreement proved damages not exceeding estimated amount of freight," and the question the Court was called on to determine was, whether this clause amounted to a limitation of liability, or whether the party complaining of a breach might, notwithstanding its terms, recover the actual damages sustained, although they exceeded the estimated amount of freight. Bailhache, J., who tried the action, held that the clause in question was merely the usual penalty clause "writ large," because "proved damages" is all that the party claiming to enforce the penalty could recover under the statute 8-9 W. 3, c. 11 (see Ont. Jud. Act, s. 125), and if the plaintiff sued for the penalty, the amount of it would be limited by the clause; but he held that the plaintiff was not bound to sue for the penalty, but might bring an action, as in this case, for breach of the covenant, in which he might recover the damages actually sustained, although they exceeded in amount the estimated freight.

WORKMAN'S COMPENSATION FOR INJURY—NOTICE OF ACCIDENT—OMISSION TO GIVE NOTICE—WORKMEN'S COMPENSATION ACT, 1906 (6 EDW.7 c. 58), s. 2 (1*a*)—(R.S.O. c. 146, s. 13 (5)).

Miller v. *Richardson* (1915) 3 K.B. 76. In this case the plaintiff met with an accident on June 26, 1914, which resulted in the loss of an eye. No notice of the accident was given to the employer until July 6. There was no evidence adduced on which the Judge could find that the employer was not prejudiced in his defence by the want of notice, and he, therefore, dismissed the case. On appeal the Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.) held that, in the absence of an express finding, that the employer had not been prejudiced, the want of a notice was a bar, and the appeal of the workman was dismissed.

ARBITRATION—STAYING ACTION—ARBITRATION CLAUSE IN CONTRACT—ACTION FOR FRAUDULENTLY INDUCING PLAINTIFF TO ENTER INTO CONTRACT—ARBITRATION ACT, 1889 (52-53 VICT. c. 49), s. 4—(R.S.O. c. 65, s. 8).

Monro v. *Bognor* (1915) 3 K.B. 167. This was an action for fraudulently inducing the plaintiff to enter into a contract. The contract contained an arbitration clause, and the defendants applied to stay the action under the Arbitration Act, 1889, s. 4 (see R.S.O. c. 65, s. 8). Coleridge, J., granted the application; but the Court of Appeal (Pickford and Bankes, L.JJ.) reversed his order, on the ground that the Act did not apply. The contract itself being in dispute, it was not within the scope of the submission.

SHIP—SEAMAN—WAGES—DETENTION OF VESSEL BY ENEMY—IMPRISONMENT OF CREW—LOSS OF SHIP—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. c. 60), s. 158.

Beal v. *Horlock* (1915) 3 K.B. 203. This was an action by the wife of a British seaman for the allotment of wages. The seaman was one of the crew of a British vessel which was in a German port when war commenced, and which had been ever since detained by the enemy, and the crew imprisoned. The action was tried by Rowlatt, J., who, in these circumstances, held that the service of the seaman was not terminated by "loss of the ship," within s. 158 of the Merchant Shipping Act, 1894, and that, therefore, he continued to be entitled to wages.

LANDLORD AND TENANT—AGRICULTURAL LAND—IMPLIED DUTY OF TENANT TO CULTIVATE—BREACH OF DUTY BY TENANT—MEASURE OF DAMAGES.

Williams v. *Lewis* (1915) 3 K.B. 493. This was an action by a landlord against a tenant of agricultural land to recover damages for breach of duty by tenant to cultivate the demised premises. The lease was by parol, and there were no special stipulations as to cultivation. The plaintiff claimed that the defendant had neglected to cultivate the land in a proper manner. Bray, J., who tried the action, held that the defendant's common law duty, when unaffected by any express agreement, is to cultivate the land in a good and husbandlike manner according to the custom of the country, but that he is not further bound to deliver up the land at the end of the tenancy in a clean and proper condition, properly tilled and manured, nor is he necessarily bound or entitled to leave the land in the same condition as when he took it, provided he has down to the end of his time continued to farm in a good and husbandlike manner according to the custom of the country. Where that duty has been neglected, the measure of damages is the amount of the injury to the reversion occasioned by the breach, and that is to be ascertained by estimating the loss of rent probably occasioned thereby.

ATTACHMENT OF DEBT—"DEBT"—FEES PAYABLE BY NATIONAL INSURANCE COMMITTEE TO PANEL DOCTOR.

O'Driscoli v. *Manchester Insurance Committee* (1915) 3 K.B. 499. The Court of Appeal (Eady, Phillimore and Bankes, JJ.) have affirmed the decision of Rowlatt, J. (1915) 1 K.B. 811 (noted ante vol. 51, p. 325), to the effect that the fees payable to a panel doctor under the Insurance Act are attachable

MALICIOUS PROSECUTION—REASONABLE AND PROBABLE CAUSE—CORROBORATION—QUESTION FOR JURY—QUESTION FOR JUDGE—FIAT OF ATTORNEY-GENERAL.

Bradshaw v. *Waterlow* (1915) 3 K.B. 527. This was an action for malicious prosecution, which had been instituted by the defendant against the plaintiff on the evidence of one who admitted himself to be an accomplice. The prosecution had been instituted on the fiat of the Attorney-General, and it was not shewn that the facts had not been fairly laid before him. The plaintiff contended that the plaintiff was not justified in prosecuting without corroborative evidence strictly implicating the plaintiff.

Bray, J., who tried the action, refused to leave it to the jury to say whether or not the plaintiff had made proper inquiries, and held that, in the absence of any evidence that the facts had not been fairly laid before the Attorney-General, his fiat was conclusive as to there having been reasonable and probable cause; and the Court of Appeal (Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.) upheld his decision on both points.

CONTRACT—ILLEGALITY—NEWSPAPER PROFESSING TO GIVE PUBLIC HONEST ADVICE—BRIBE TO NEWSPAPER TO SUPPRESS COMMENT—RESTRAINT OF TRADE—PUBLIC POLICY.

Neville v. *Dominion of Canada News Co.* (1915) 3 K.B. 556. In this case the plaintiff was the director of a land company in Canada. The defendants were the proprietors of a weekly newspaper, which professed to give honest advice to persons intending to buy land in Canada. The defendants owed the plaintiff £1,490, and the plaintiff agreed to accept £750 in satisfaction, provided the defendants refrained from publishing in any publication published by them any comment upon the plaintiff's land company, its directors, business or land, or upon any company with which the defendants had notice the plaintiff's company was connected or concerned. The defendants paid £550, and thereafter, as alleged, violated the agreement above-mentioned, and this action was brought to recover the balance of the £1,490. Atkin, J., who tried the action, without invoking the doctrine of restraint of trade, held that the contract was illegal as being against public policy, inasmuch as it would preclude the newspaper from commenting on fraudulent schemes with which the plaintiff or his company might be connected. On an appeal by the plaintiff, the Court of Appeal (Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.) affirmed the decision, both on the ground taken by Atkin, J., and also because the contract was void as being in restraint of trade.

Reports and Notes of Cases.

Province of Ontario

SUPREME COURT—APPEAL DIVISION.

Meredith, C.J.O. Garrow, Maclaren, Magee, and Hodgins, JJ.A.] [24 D.L.R. 475.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

1. *Schools—School board—Validity of resolution—Selection of teachers—Ultra vires.*

Resolutions of a "separate school" board purporting to delegate to the chairman of the board power to discharge, select and engage teachers, are *ultra vires*.

2. *Constitutional law—Separate schools—Abridgment of constitutional right—Interfering with use of French language.*

Regulation No. 17 (of 1912 and 1913) of the Department of Education for Ontario providing *inter alia* the manner of conducting schools in districts where the scholars or a majority of them were French-speaking Canadians and making it compulsory that teachers in such schools should understand the English language does not infringe any constitutional right which the supporters of such schools have under the B.N.A. Act.

Mackell v. Ottawa Separate School Trustees, 18 D.L.R. 456, referred to.

N. A. Belcourt, K.C., *A. C. McMaster*, and *J. H. Fraser*, for appellants. *McGregor Young*, K.C., for the Minister of Education.

ANNOTATION ON ABOVE CASE FROM D.L.R.

We have here an outcome of the bi-lingual controversy which has agitated the Province of Ontario to some considerable extent during the last few years. We may or may not approve of the spirit which seems to animate a large section of the English-speaking inhabitants of the province with respect to the free enjoyment of the use of their own language by those who are French-speaking. We may or may not agree with the framers of the Report of the Commission on Schools in Prescott and Russell of 1897 (p. 17), where it says:—

"As was stated in our former report, when all classes of the French people are not only willing but desirous that their children shall learn the English language, they, at the same time, wish them to retain the use of their own language, and there is no reason why they should not do so. To prove the knowledge of both languages is an advantage to them, and their use of the English language instead of their own, if such a change should ever take place, must be brought about by the operation of the same influences which are making it all over the continent the language of other nationalities as tenacious of their native tongue as the French. It is a change that cannot be forced. To attempt to deprive a people of the use of their native tongue, would be as unwise as it would be unjust, even if it were possible."

Primâ facie to seek to interfere in any way by compulsion with the free use and maintenance by French-speaking Canadians of their own language—a noble language, as Garrow, J., very truly calls it—has an unduly drastic and German flavour to those who have within their breasts the true spirit of British freedom, which certainly does not seek to deny to others the same liberty which Englishmen, Irishmen, and Scotchmen claim for themselves. With all this, however, we have nothing to do here, any more than the Court had, or than the Judicial Committee of the Privy Council will have when the case reaches them, as we understand it is destined to do. Here, we are concerned only with the dry legal question involved in the principal case, which essentially, and put in its concisest form, seems to be this:—

Does clause 3(1) of Regulation 17 of 1912, and 1913, made by the Minister of Education, prejudicially affect any right or privilege with respect to denominational schools which French-speaking Roman Catholics in Ontario, had by law in the Union in 1867?

The clause in question reads as follows: "3. Subject in the case of each school to the direction and approval of the chief inspector, the following modifications shall be made in the course of the study of the public and separate schools: (1) When necessary in the case of French-speaking pupils, French may be used as the language of instruction and communication, but such use of French shall not be continued beyond form 1, excepting that, on the approval of the chief inspector, it may also be used as the language of instruction and communication of pupils beyond form 1, who are unable to speak and understand the English language."

It is contended by the defendants that this Regulation, under the pretence of regulating, actually prohibits, perhaps not immediately, but ultimately, in all Separate Schools, the use of the French language as a means of instruction, and that it imposes an inspection which is different from the inspection to which the Separate Schools were subjected at the time of Confederation. For our present purposes, we will assume that this is so. There also seems no doubt whatever that the right to teach in the French language in the Roman Catholic Separate Schools of Ontario, was enjoyed, not only without opposition, but with the co-operation and assist-

ance of the Department of Education, given in various ways, as, for example, by the granting of certificates to teachers to teach exclusively in French, and by the establishment and maintenance of French schools and French-English schools, the latter both before and after Confederation.

It is strange what ambiguity may underlie apparently simple words in a statute. We have an example in that clause of sec. 92 of the Federation Act, which we may hope is shortly to receive its quietus at the hands of the Judicial Committee, where provincial legislatures are given exclusive power to make laws in relation to "the incorporation of companies *with provincial objects.*" So, with regard to sub-sec. 1 of sec. 93, which enacts that in and for each province the legislature may exclusively make laws in relation to education, subject to this, that—"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have *by law* in the province at the time of Union."

A right which such persons had by law at the time of Union might conceivably mean some right which they actually exercised at that time, and which was not in itself illegal. Such an interpretation would make mere surplusage of the additional words "or practice," which are added after the words "by law" in the section of the Manitoba Act which corresponds to sec. 93 of the B.N.A. Act; and the judgment of the Privy Council in *City of Winnipeg* v. *Barrett*, [1892] A.C. 445, at 452-3, seems to preclude the contention, that that is the meaning, because, dealing with the section of the Manitoba Act, they say: "It is not, perhaps, very easy to define precisely the meaning of such an expression as 'having a right or privilege by practice,' but the object of the enactment is tolerably clear. Evidently the word 'practice' is not to be considered as equivalent to 'custom having the force of law.'"

The implication, therefore, seems clearly to be that the words "right or privilege by law" in sub-sec. 1, of sec. 93 of the Federation Act, must at least mean a right by "custom having the force of law," and not merely an actual practice which was not at the time positively illegal.

It might, also, if the matter was coming up for the first time be contended that the words "have by law" in that sub-section were not meant to qualify the words "right or privilege" at all, but were intended to qualify only the words, "denominational schools;" so that it would be as though the sub-section read—"Any right or privilege with respect to such denominational schools as any class of persons have by law in the province at the Union." But the construction which the Privy Council have placed upon the clause in *City of Winnipeg* v. *Barrett*, *supra*, and in *Brophy* v. *Attorney-General of Manitoba*, [1895] A.C. 202, seems quite to preclude such a contention now.

There is, however, another contention which is not specifically dealt with in the judgments, either of Lennox, J., or of the Appellate Division, although no doubt it was duly considered by their Lordships. It is this:

In the Ontario Sessional Papers for 1890 (vol. XXII. pt. 2, No. 7), we read as follows:—

"THE EXAMINATION AND TRAINING OF TEACHERS, 1851."

"At a meeting of the Council of Public Instruction, April 25th, at which the Rev. Henry James Grasett, A.M., Chairman *pro tempore*, James Scott Howard, Esq., the Rev. John Jennings, and the Rev. Adam Lillie were present, the following minute was adopted:—

"In reference to the programme of the examination and classification of teachers, and the letter of the secretary of the Board of Public Instruction for the County of Essex, submitted to the council as regards the granting of a certificate to a French teacher, who is not conversant with the English grammar, it was,

"*Ordered*, that there be added to that programme the following:—

"8. In regard to teachers of French or German, that a knowledge of French or German grammar be substituted for a knowledge of English grammar, and that the certificate to the teachers be limited accordingly.

Ordered further, that the above be communicated to the several County Boards of Public Instruction in Upper Canada."

This Order in Council, it would appear, was in full force and effect at Confederation. Now, assuming that this Order in Council can be construed as authoritatively and generally recognizing the eligibility as teachers of those who spoke only French, and no English (which would certainly be putting a strained construction upon it), it might perhaps be contended that Roman Catholic French-speaking Separate Schools had a right by law at Confederation, that their teachers should not be objected to because they could, or did, only teach in French. Supposing the B.N.A. Act was passed in this year of grace instead of having been passed in 1867, and supposing that in conferring upon the provincial legislatures exclusive power to make laws in relation to procedure in civil matters in the provincial Courts, it had added—"subject to the following provision that nothing in any such law shall prejudicially affect any right or privilege which any persons have by law in respect to procedure in the provincial Courts at the Union,"—it could scarcely be contended that the rights as to procedure which exist under the Judicature Rules of Court, made by the Judges, were not rights existing by law; for the rules, being made by the Judges under the authority of the Judicature Act, have the force of statute. So, it might be, perhaps, successfully contended that the *regulation* made in 1851 by the Council of Public Instruction, duly authorized by law in that behalf, had the effect of statute.

Nevertheless, however much our sympathies may be with them in their fight for their own language, it seems clear that this would not avail the defendants in this action. What sub-sec. 1, of sec. 93, preserves to the defendants is "any right or privilege with respect to denominational *schools*." But, surely, a school is only denominational in respect to its religious teaching; and it is a fact that so far as the course pursued during the time devoted to religious instruction goes, the Public School

Regulations, including clause 3(1) of regulation 17 of 1912 and 1913, have no application whatever. This being so, it would not seem that it prejudices the defendants at all in respect to any right or privilege which they had at Confederation *qua* denominational schools.

The defendants, also, it seems, seek to find a right or privilege existing by law at Confederation to use their own French language in their Separate Schools, in that clause which the 2nd and 3rd Charters of Henry III. added to Magna Charta. (1) The famous clause in Magna Charta runs—"No freeman shall be arrested or detained in prison, or disseised of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." The two Charters of Henry III. add after the words "disseised of his freehold," the words "or of his liberties or *free customs*."(1) The suggestion is that French-speaking Roman Catholic Canadians in Ontario had at the Union, a free custom to teach in French in their Separate Schools in the province—and that it was thus a right or privilege existing by law by virtue of the above Charters. And if "liberties and free customs" mean what Mr. Taswell Langmead says the words mean, in his Constitutional History, (4th ed., p. 138), namely, "such franchises or free customs as belong to a man of his *free birthright*," possibly the contention might hold good.

. . . . . .

But Thomson on Magna Charta (p. 186), says: "Free customs are liberties enjoyed by custom or usage, which in its legal sense signifies a law not written but established by long use, and the consent of ancestry. The antiquity of a custom should be so great, as that the memory of man cannot shew its contrary, and legal memory is with the first year of King Richard I., 1189." In the same way McKechnie on Magna Charta (p. 445) says it probably refers to such rights as those of levying tolls and tallages.

The defendants, also, it would appear, rely upon section VIII. of the Quebec Act, 1774, which provides that the religious Orders and Communities in Quebec may continue to "hold and enjoy their property and possessions, together with all customs and usages relative therto, *and all other civil rights*." Quebec, at that time, of course, included what is now Ontario, and although it certainly would seem to be going a long way to contend that a right to use the French language as the medium for instruction in the Roman Catholic Separate Schools was a custom or usage relative to their property or possessions, one does not feel so sure that it may not be held to have been a civil right enjoyed by them at that time. The Courts would surely have protected them in the enjoyment of such right, unless and until interfered with by lawful authority; and I have never been able to make out what a civil right is, except a right which the Courts will protect. If, therefore, that section of the Quebec Act is to be con-

(1) Curiously enough in reproducing this clause in R.S.O. 1897, ch. 322, no reference is made to the Charters of Henry III., where alone the words which are material to our present purpose are to be found.

sidered as having been still in force at the time of the Union in 1867, as to which I do not desire to be considered as expressing an opinion, the defendants might seem to have a case here.

There is one more point I would like to refer to very briefly. Meredith, C.J.O., says in his judgment in the principal case, that even if it had been shewn that by the terms of the treaty which resulted in the cession of Quebec to Great Britain, the right to use the French language in the Separate Schools of the province was guaranteed by treaty to the French-speaking people of the ceded territory, the B.N.A. Act would have abrogated those rights, except in so far, if at all, as they are granted by it. As appears on the face of it, the *dictum* is *obiter*, and, with great deference, I would submit that in the first place, the B.N.A. Act does not purport to interfere with any treaties and that, therefore, treaties with foreign States must be taken to be incorporated with it, and if necessary, to limit its operation: *Regina* v. *Wilson* (1878), 3 Q.B.D. 432. Moreover, statutes which affect status or personal privileges must be expressed in clear, unambiguous language: Hals. Laws of England, vol. 27, pp. 149, 151, 154. The only reference to treaties in the B.N.A. Act is in section 132 which expressly gives the Parliament and Government of Canada all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

In the second place, I submit, no legislative jurisdiction conferred upon either the Dominion parliament or the provincial legislature empowers them to abrogate the provisions of an Imperial treaty existing at Confederation. It is true that the French-speaking Canadians after the cession became Canadian British subjects, and as such subject to the powers of Canadian legislatures. But the Treaty of Cession was not made with the French Canadians; it was made with the French King and the French nation, and any Act of a Canadian legislature purporting to affect it would, I submit, be void for extra-territoriality.

It will be seen by the case the judgment in which follows this annotation that the position of the Roman Catholic Separate Schools in this province has, since the principal case, again come up in *Board of Separate School Trustees, Ottawa* v. *City of Ottawa*, before Chief Justice R. M. Meredith, who gave judgment of November 18th last. The question there, as will be seen, was whether the Ontario Act, 5 Geo. V. ch. 45, providing for the suspension of the powers of the Ottawa Roman Catholic School Board was *intra vires* or not. The judgment upholds the Act, and speaks for itself. Special attention, however, may be called to the generalized conclusion at which the learned Chief Justice arrives, where he says:—

"The right and privilege which the Separate Schools Act conferred when the Imperial enactment" (*sc.* the B.N.A. Act) "became law, and which the Separate Schools Acts have ever since conferred, and still confer, was, and is, a right to separation,—separate public schools of the like character and maintained in the like manner, as the general public schools.

The machinery may be altered, the educational methods may be changed, from time to time, to keep pace with advanced educational systems. It was never meant that the separate schools, or any other schools, should be left forever in the educational wilderness of the enactments in force in 1867. Educational methods and machinery may and must change, but separation, and equal rights regarding public schools, must remain as long as provincial public schools last, unless the federal or imperial parliament, which ever may have the power, decrees otherwise."

Province of Alberta.

SUPREME COURT.

Harvey, C.J.] [24 D.L.R. 18.

POLSON IRON WORKS v. MUNNS.

Constitutional law—Appointment of judges—Masters—Powers of province to appoint.

The office of the Master is essentially that of an officer, and while his duties are largely judicial in their character they do not constitute him a judge within the meaning of sec. 96 of the British North America Act, so as to require his appointment by the Governor-General

A. Macleod Sinclair, for appellant. *S. W. Field*, for respondent.

ANNOTATION ON ABOVE CASE FROM D.L.R.

This is an important decision, inasmuch as it appears to be the first reported case—and, therefore, we may probably say—the first case, which deals with the power, under the Constitution, of provincial legislatures to appoint judicial officers with authority to exercise the functions, in Superior Court actions, which are assigned under Judicature Acts and rules to Masters in Chambers in Ontario and in Alberta, and in other provinces. To understand the judgment it is necessary to have before one the following Rules of the Supreme Court of Alberta.

275. When a statement of claim includes a claim for a debt or liquidated demand and any defendant has delivered a defence, the plaintiff may, on affidavit made by himself, or any other person who can swear positively to the facts, verifying the cause of action in respect of the debt or liquidated demand and the amount claimed and stating that in his

belief there is no defence thereto, apply to a Judge for leave to enter final judgment for the amount so verified together with interest, if any, and costs.

536. A local Judge of the Supreme Court shall, in actions brought or proceedings taken, or proposed to be brought or taken, in the Supreme Court in the Judicial District of which he is Judge or Acting Judge, possess the like powers of a Judge of the Supreme Court sitting in Chambers, save and except in respect of the matters following, etc.

541. A Master in Chambers in regard to all actions brought or proposed to be brought in the Supreme Court shall have power and be required to do all such things, transact all such business, and exercise all such authority and jurisdiction in respect to the same, as may be done, transacted, or exercised under and by virtue of these Rules, by any Local Judge of the Supreme Court, with or without the consent of the parties, except the trial of actions.

The question involved is whether the local legislature can confer, directly or indirectly, upon an official of provincial appointment, the powers described in the above Rule 275: or whether to do so infringes upon section 96 of the British North America Act, which enacts that:—

"The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

Even though the powers thus given by section 96 to the Governor-General would otherwise have come within the power of the provincial legislature under No. 14, section 92, to make laws in relation to:—

"The administration of justice in the province, including the Constitution, Maintenance, and Organization of Provincal Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in these Courts"—they are taken out of the latter power by section 96. This will not be disputed, for the British North America Act has to be read as a whole, as the Judicial Committee long since pointed out.

The whole question then is whether conferring upon a provincial official the powers described in Rule 275, in Superior Court actions, is, or is not, virtually appointing a Superior Court Judge?

The learned Chief Justice holds that it is not, because the Master in acting under Rule 275 "is not trying the rights of the parties. He is determining that there is no real issue to be tried. It is only when such a situation is found to exist that the Master is authorized to give a judgment in favour of the plaintiff."

It is true that this is apparently the first decision on the precise case of a Master in Chambers, and that the constitutional position of this functionary has not been dealt with in Reports of Ministers of Justice. But the late Sir John Thompson dealt very thoroughly with the general question of intrusions by provincial legislatures and Governments on section 96, in his report of January 18th, 1889, on the subject of the disallowance of a Quebec Act respecting District Magistrates, as the Act in

question termed them. This Report will be found in Hodgins' Provincial Legislation, 2nd ed., at pp. 354-368; and is printed almost *in extenso* in Legislative Power in Canada, at pp. 140-174.

Sir John Thompson reviews the previous reports of Ministers of Justice, and the decisions of the Courts in respect to provincial appointments of officers exercising judicial functions, such as Police Magistrates and Justices of the Peace Fire Marshalls, Division Court Judges, and Judges of Parish Courts in New Brunswick; and, speaking generally, he says:—

"The most remarkable instance in which provincial legislation has overrun the limits of provincial competence has been the legislation in reference to the administration of justice. . . . Doubtful legislation has been adopted in nearly all the provinces, setting up Courts with Civil and Criminal jurisdiction, with Judges appointed by provincial or municipal authority. . . . In most cases, as in the case of Quebec, now under consideration, the legislatures have been careful to avoid conferring the title of 'Judges' upon the officers whom they have really undertaken to clothe with Judicial functions."

The report of a Minister of Justice which comes nearest to having a direct bearing upon this Alberta decision, is that of Sir Alexander Campbell, of January 30th, 1882, who took exception therein to a provision of the Ontario Judicature Act, 1881, constituting the Judges of County Courts, Official Referees and Local Masters. He says: "The undersigned thinks it doubtful whether the provincial legislature can constitutionally in this manner appoint Judges, who hold office by commissions from your Excellency, to other offices under the provincial Government. The expediency of allowing County Judges to act as Referees and Local Masters is questionable; the same may at some future time require the consideration of Parliament."

The decisions and reports of Ministers of Justice subsequent to Sir John Thompson's report of January, 18th, 1889, are the following: *The King* v. *Sweeney* (1912), 1 D.L.R. 476, wherein the Supreme Court of Nova Scotia held, that under No. 14 of section 92, provincial legislatures have power to appoint stipendiary magistrates notwithstanding section 96; (to the same effect is *The King* v. *Basker* (1912), 1 D.L.R. 295); and *Ex parte Vancini* (1904), 36 N.B.R. 456, where the Supreme Court of New Brunswick held that a provincial Act which created stipendiary and police magistrates a Court with all the powers and jurisdictions which any Act of the parliament of Canada had conferred or might confer, was *intra vires*. This was followed in *Geller* v. *Loughrin* (1911), 24 O.L.R. 18, see at pp. 23, 33. Then there is *Regina ex rel. McGuire* v. *Birkett* (1891), 21 O.R. 162, where it was held that the provincial legislature had power to invest the Master in Chambers in Toronto with authority to try controverted municipal election cases; but this was rested upon the provincial power in relation to municipal institutions; *In re Dominion Provident Benevolent and Endowment Association* (1894), 25 O.R. 619, when it was

held that the Ontario legislature had power to confer on the Master in Ordinary the powers it assumed to confer upon him by the Ontario Corporations Act, 1862, which directs that he shall—settle schedules of creditors and contributories . . . and generally shall have all the powers which might be exercised on any reference to him, under a judgment or order of the High Court.

Lastly, there is a Report of Sir John Thompson, of March 24th, 1892, upon a Quebec Act empowering the Lieutenant-Governor in Council, upon the report of the Railway Committee of the Executive Council to cancel the charter of any railway company incorporated under the laws of the province, in certain cases, in which he makes the remark that it seems clear that a legislature may invest other bodies than the Courts with powers and functions generally reposed by legislation in legal tribunals, without exceeding its jurisdiction. But he is here referring to the power of a provincial legislature to create a special tribunal for the determination of a special matter and not of the power to confer general jurisdiction.

Reference may also be made to *In re Queen's Counsel* (1896), 23 A.R. (Ont.) 792, where the question of the power of the provincial legislature to authorize a Judge of the Supreme Court to depute a Queen's Counsel to perform his judicial duties is somewhat discussed at pp. 799, 811.

In another report of 1889, besides the one already referred to (Hodgins' Provl. Legisl. 2nd ed., at p. 372), Sir John Thompson says that "the view has been taken by nearly all the Ministers of Justice since the union of the provinces, that the words of the British North America Act, referring to Judges of the Superior, District, and County Courts, include all classes of Judges like those designated, and not merely the Judges of the particular Courts which, at the time of the passage of the British North America Act happened to bear those names."

It all, therefore, seems to come back to the question whether the Master in Chambers when acting under the Alberta Rule 275, above set out, is acting as a Superior Court Judge, and exercising jurisdiction proper to a Superior Court Judge. If he is not, the decision is right; if he is, then, with all respect be it said, the decision is wrong. The further question, however, seems to arise whether a proceeding under that Rule in which the plaintiff succeeds, is not really "a trial of the action," for the Rules do not appear to contain any express definition of that phrase, as contained in Rule 541, *supra*.

Bench and Bar.

OBITUARY

His Honour Judge Benson.

The towns of Cobourg and Port Hope and their counties have suffered a great loss by the death of Thomas Moore Benson, formerly Judge of the County Court of the United Counties of Northumberland and Durham, whose funeral took place at Port Hope on December 17th, 1915.

Mr. Benson was born at Port Hope on November 25th, 1833. He studied law in the office of the late Sir Adam Wilson, and was called to the Bar in 1859, and practised his profession in his native town. He was elected a Bencher of the Law Society of Upper Canada in 1871, and was made a Q.C. in 1880. He was a diligent and intelligent student and at one time acted as reporter in Chambers for this Journal, and occasionally contributed to its columns.

In 1861, at the time of the Trent affair, he formed a company of volunteers, subsequently holding a commission in the regiment raised by the late Lieut.-Col. A. T. H. Williams at the time of the Fenian Raid. He was afterwards given its command when Lt.-Col. Williams was promoted. At this time he took a first-class certificate at the Military School in Toronto.

In September, 1882, he was appointed Deputy Judge of the United Counties of Northumberland and Durham, becoming Senior Judge on November 8th, 1887.

Mr. Benson always took an active part in the affairs of the Church of England, in connection with the Synod and other activities. He was also a member of the Council of Wycliffe College and a Director of Ridley College at St. Catharines. He was, as might be supposed, a strong Imperialist and a loyal subject, as well as a loyal friend to those who had the privilege of knowing him.

A graceful tribute was paid to his memory by the Rev. Mr. Elliott at his funeral. We quote a portion of his address on that occasion. After referring to the strength and force of his character, he said: "He had learned the power, the justice and the joy of gentleness. Meeting him as a stranger the first deep impression was his wonderful, his charming courtesy, and as you grew to know him intimately I think your feeling was that of surprise at the power of that gentleness over your own life. Courtesy to him was not a garment to be put on and removed as the occasion might seem to demand, but it was an essential part

of his being. It rested upon a sure and abiding foundation. It was the outward expression of his deep respect for human beings just because they were human, and hence ultimately possessed of divinity. When a man is truly and deeply seized of the value and the significance of a human being, his respect for humanity comes as a matter of course. The criminal before him is a man with all a man's possibility and a man's ultimate destiny. That, in my judgment, was the basis of that gentleness and urbanity of him who so long has been probably the most outstanding and best loved personality in this community. And the second point that I wish to make is that the whole character of our deceased friend was not only ultimately based upon, but continually sustained by his spiritual faith, his perpetual submission to divine ideals. Religion was to him what it ought to be to all, an attitude of life, a perpetual effort and desire to conform to the divine ideals within him."

LAW SCHOOL OF ONTARIO.

Resignation of Mr. King.

Mr. John King, M.A., K.C., one of the Lecturers of the Law School of Ontario, who has recently resigned from his duties there, was the recipient of an illuminated address from the Principal of the School and his brother Lecturers, which we gladly publish. It reads as follows:—

"The Principal and Lecturers of the Law School, Osgoode Hall, have learnt with sincere regret of your decision to retire from active connection with it; a regret due, not only to the loss which the School has thus sustained, but also to the serious loss to them of the pleasure and assistance which our former close association with you invariably ensured.

"We have had unequalled opportunities, not only of observing the benefits which your learning has conferred upon the students for so many years, but also of perceiving the affection and regard which you were always able to inspire in young men. It is neither flattery nor exaggeration to say that no one has more fully taken advantage of the great opportunities which your long tenure of office conferred, to influence by his character as well as by his teaching, the ethical and legal training of members of the Bar.

"Now that you have retired from the more active duties of the Law School, it must be a source of comfort and happiness to you to feel that you have been able to exercise so great an influence

for good, both upon the minds and characters of the hundreds whom you have addressed; and we, your colleagues, share with your former students the sense of help and inspiration which a more familiar intercourse with you has only served to quicken.

"We are delighted to know that the Benchers have conferred upon you the honour of Lecturer Emeritus, and to feel that your connection with the Law School and ourselves is not entirely severed.

"We wish you happiness and returning health in your period of rest, and beg to sign ourselves, with sincerest affection and regard,

N. W. HOYLES, Principal.
JOHN D. FALCONBRIDGE,
SHIRLEY DENISON,
S. H. BRADFORD,
} "Lecturers."

In his reply to the above address, Mr. King referred to his attachment to the Law School work for its own sake, and for its personal associations, and to his sincere regret at having been obliged to sever these relations. One of his chief pleasures, he said, has been his co-operation with the staff, past and present, in a common task and duty, in an institution which stands for an educated profession, and which had an important influence on its character and usefulness.

HAMILTON LAW ASSOCIATION.

The Annual Meeting of this association has just been held.

Mr. S. L. Lazier, K.C., was re-elected president of the association, and Wm. Bell, K.C., re-elected vice-president. The finances of the association were reported to be in good condition. There are 5,345 bound volumes in the library, and the librarian was given a hearty vote of thanks for her faithful and efficient work during the year.