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THE LAW MERCHANT IN CANADA.

There is no part of the history of English law more obscure, said Lord Blackburn,[1] than that connected with the common maxim that the law merchant is part of the law of the land. There is, however, to-day a considerable volume of easily accessible material in English on the history of the law merchant[2] apart from foreign works and works of a more special character.

This lex mercatoria or custom of merchants was formerly not part of the common law of England as it is now, but was a concurrent and co-existent law or custom. It comprised, in addition to a body of maritime law of international character, a body of customary commercial law recognized both in England and on the continent of Europe and slightly affected perhaps by local variations. Up to the reign of Edward III. the law merchant in both its branches was administered in England by local and popular courts of merchants, mariners or civic

(1) Blackburn on Sales, 3 ed., p. 345.

(2) See, *e.g.*, the publications of the Selden Society, especially Select Cases concerning the Law Merchant, 1270-1638 (vol. 1, Local Courts); Select Pleas in the Court of Admiralty (vol. 1, Court of Admiralty of the West, 1390-1404, High Court of Admiralty, 1527-1545; vol. 2, High Court of Admiralty, 1547-1602); also the following essays and extracts from other works: T. E. Scrutton, General Survey of the History of the Law Merchant, being chapter 1 of the Elements of Mercantile Law, 1891, reprinted in 3 Select Essays in Anglo-American Legal History, 1909, p. 7; B. E. S. Brodhurst, The Merchants of the Staple, 17 L.Q.R. 56, 1901, reprinted in 3 Select Essays, p. 16; A. T. Carter, Early History of the Law Merchant, 17 L.Q.R. 232, 1901; F. M. Burdick, What is the Law Merchant? 2 Columbia L.R. 470, 1902, reprinted in 3 Select Essays, etc., p. 34, under the title Contributions of the Law Merchant to the Common Law; W. S. Holdsworth, History of English Law, vol. 1, c. 7, p. 300, 1903, reprinted in 1 Select Essays, etc., p. 289, under the title The Development of the Law Merchant and its Courts; W. Mitchell, Essay on the Early History of the Law Merchant, Cambridge, 1904; T. A. Street, Foundations of Legal Liability, vol. 2, c. 31, p. 324, Northport, N.Y., 1906; see also essays in regard to the early history of negotiable instruments referred to in a subsequent note.

officials. The courts which administered the commercial branch were chiefly the courts of fairs (piepoudre courts), the courts of the more important towns and the courts of the staple. These courts, by administering, helped to create the law merchant. Edward I. was particularly solicitous for the foreign merchants; he endeavoured to give them the speedy justice which they demanded and constituted the King in Council the final court of appeal in mercantile disputes. The staple system dates from his reign, but it was the Statute of the Staple (27 E. 3, st. 2) which consolidated the system and gave Parliamentary sanction to the informal judicial procedure already existing. Certain towns, known as staple towns, were set apart and only in these towns might the more important articles of commerce be dealt in. A mayor and two constables were to be chosen annually in each town to hold the court of the staple with the assistance of two merchants. Justice was to be done to the foreign merchant from day to day and from hour to hour, according to the law of the staple or the law merchant and not according to the common law or particular burghal usages.

The concentration of the foreign trade in the staple towns resulted in the local fair courts becoming less and less important, and the staple courts themselves lost their importance and fell into desuetude when the admiralty in Tudor times assumed jurisdiction in practically all commercial and shipping cases. During the sixteenth century the admiralty was the chief tribunal by which the law merchant was declared.

The admiralty jurisdiction was in turn assailed by the common law courts. The attack began in the reign of Elizabeth, but after Coke's elevation to the bench in 1606 it was carried on more vindictively and was brought to a victorious conclusion under the Commonwealth. The most effective weapon of the common law courts was the writ of prohibition. Not only did the common law courts rigorously prohibit the admiralty from exercising jurisdiction within the bodies of counties, but by means of the non-traversable fiction that a contract really made at sea was made in England, they usurped jurisdiction over com-

mercial causes generally. The importance of the event could not at the time be fully appreciated, for English commerce was destined to expand beyond the most sanguine dreams of the seventeenth century.

The complete incorporation of the law merchant in the common law was not effected till the time of William Murray, first earl of Mansfield, who was chief justice of the King's Bench from 1756 to 1788. Up to his time mercantile business had been divided between the courts of law and equity. No attempt had been made to reduce it to a system. In courts of law "all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. . . . Lord Mansfield . . . may be truly said to be the founder of the commercial law of this country."[3]

The common law procedure was, however, less speedy and effective than that of the admiralty. To the litigant the triumph of the common law courts under Coke "meant much inconvenience. To the commercial law of the country is meant a slower development. But to the common law it meant a capacity for expansion, and a continued supremacy over the law of the future which consolidated the victories won in the political contests of the 17th century. If Lord Mansfield is to be credited with the honourable title of the founder of the commercial law of this country, it must be allowed that Coke gave to the founder of that law his opportunity."[4]

But for Lord Mansfield the merchants might have resorted to the Court of Chancery whose doctrine and practice had much in common with their own. The law merchant borrowed much

(3) Bullen, J., in *Lickbarrow* v. *Mason* (1787), 2 T.R. 63, at p. 73. See also Lord Campbell's account of Lord Mansfield and his special jurymen (Lives of the Chief Justices, vol. 2, p. 407).

(4) Holdsworth, Hist. Eng. Law. vol. 1, p. 326.

from the Roman law, and possibly was the channel through which the Roman law chiefly affected our law.[5]

The law merchant as is pointed out by Cockburn, C.J., in *Goodwin* v. *Robarts* (1875), L.R. 10 Ex. 337, at p. 346 (s.c. 1 App. Cas. 476, 5 R.C. 199), is not fixed and stereotyped, but is capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience. The court proceeded herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it. "When a general usage has been judicially ascertained and established," says Lord Campbell in *Brandao* v. *Barnett* (1846), 12 Cl. & F., at p. 805, 3 R.C., at p. 606, "it becomes a part of the law merchant, which courts of justice are bound to know and recognize. Justice could not be administered if evidence were required to be given toties quoties to support such usages, and issue might be joined upon them in each particular case."

Thus when goldsmiths' or bankers' notes came into general use, Lord Mansfield and the Court of King's Bench had no difficulty in holding that the property in such notes passed by delivery on the ground that they "are treated as money, as cash, in the ordinary course and transaction of business, by the general

(5) A. T. Carter, 17 L.Q.R., at p. 240; cf. T. E. Scrutton, Roman Law in the Law Merchant, extract from The Influence of the Roman Law on the Law of England, Cambridge, 1885, reprinted in 1 Select Essays in Anglo-American Legal History, 1907, p. 237.

consent of mankind, which gives them the credit and currency of money, to all intents and purposes." *Miller* v. *Race* (1758), 1 Burr. at p. 457, 3 R.C. at p. 63.

In *Goodwin* v. *Robarts*, L.R. 10 Ex., at p. 351, Cockburn, C.J., notices another very remarkable instance of the efficacy of usage. It is notorious, he says, that with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a cheque. Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these by the decisions of the courts have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker if he has funds, is bound to pay on presentation of a cheque on demand. Even admission of funds is not sufficient to bind an ordinary drawee while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by the draft of the customer. Besides this, a custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance, by which they become bound to one another.

Bills of lading may also be referred to as an instance of the manner in which general mercantile usage may give effect to a writing which without it would not have had that effect at common law. It is from mercantile usage as proved in evidence, and ratified by judicial decision in the great case of *Lickbarrow* v. *Mason* (1787), 2 T.R. 63,[7] that the efficacy of bills of lading to pass the property in goods is derived.

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(7) Reversed by the Exchequer Chamber, 1 H. Bl. 357; removed into the House of Lords, which awarded a venire de novo, 4 Brown P.C., 2 ed. 57, 6 East 20, note; second trial before the King's Bench, 1794, 5 T.R. 683, 4 R.C. 756.

Again in *Brandao* v. *Barnett*, supra, judicial notice was taken of the usage of trade by which bankers are entitled to a general lien on the securities of customers in their hands.

The greater or less time during which a custom has prevailed may be material in determining how far it has generally prevailed, but if it is once shewn to be universal, it is none the less entitled to prevail because it may not have formed part of the law merchant as previously recognized and adopted by the courts. *Goodwin* v. *Robarts*, L.R. 10 Ex., at p. 356.

A mercantile custom may be so frequently proved in courts of law that the courts will take judicial notice of it, and it becomes part of the law merchant. It would entail useless expense in such a case to require parties to prove by a large number of witnesses a custom which has been proved over and again. But if the reported cases do not clearly establish a custom it must be proved by evidence as on a question of fact. *Ex parte Powell* (1875), 1 Ch. D. 501, at p. 506; *Ex parte Hattersley* (1878), 8 Ch. D. 601; *Chawcour* v. *Salter* (1881), 18 Ch. D. 30, at p. 50; *Edelstein* v. *Schuler*, [1902] 2 K.B. 144, at p. 155. Evidence to establish a custom must relate to the mercantile usage of the place where the obligation is undertaken (*Wisconsin* v. *Bank of B.N.A.* (1861), 21 U.C.R. 284), and is to be performed.

Mercantile usage, however extensive, should not be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the courts, have become, by such adoption, part of the common law. *Goodwin* v. *Robarts*, supra; *Edie* v. *East India Co.* (1761), 2 Burr. 1216.

The authority given by the factors acts to a mercantile agent, who is in possession of goods with the consent of the owner, to pledge the goods when acting in the ordinary course of business of a mercantile agent, is a general authority given to every mercantile agent, and is not restricted by the existence in any particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them. *Oppenheimer* v. *Attenborough*, [1908] 1 K.B. 221.

A custom to be binding must be not merely general, but also reasonable. *Perry* v. *Barnett* (1885), 15 Q.B.D. 388, and cases cited. Cf. Aske, Custom and the Usages of Trade, pp. 158 ff., 169 ff.

A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons whose interests require them to have knowledge of its existence, and in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against such custom. *Parsons* v. *Hart* (1900), 30 S.C.R. 473.

The mere fact that a person employs a broker to buy for him in a particular market does not render a local custom of that market binding upon the principal if he is ignorant of the existence of the custom. *Robinson* v. *Mollett* (1875), L.R. 7 H.L. 802; *Scott* v. *Godfrey*, [1901] 2 K.B. 726, 734-5; cf. Aske, op. cit., pp. 191 ff.

One important product of the law merchant is the law of exchange which is now part of the common law.

The origin and history of bills of exchange and other negotiable instruments are traced by Cockburn, C.J., in his judgment in the case of *Goodwin* v. *Robarts* (1875), L.R. 10 Ex., at pp. 346 ff. in language which need not be quoted at length. The introduction and use of bills of exchange in England, as indeed everywhere else, seems to have been founded on the mere practice of merchants and gradually to have acquired the force of a custom. The old form of declaration of a bill used always to state that it was drawn secundum usum et consuetudinem mercatorum. The practice of making bills negotiable by endorsement was at first unknown, but from its obvious convenience it speedily came into general use, and, as part of the general custom of merchants received the sanction of the courts. In the beginning the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not. In the time of Chief Justice Holt, a controversy arose between the

courts and merchants, as to whether the customary incidents of negotiability were to be recognized in the case of promissory notes. The dispute was settled by the statute 3 & 4 Anne, c. 9, which vindicated the custom and confirmed the negotiability of notes.[8]

The results of the formation, by custom, of the law of exchange are instructive, as pointed out by Chalmers, 7 ed., p. lxi. (Introduction to third edition):—

"A reference to Marius' treatise on Bills of Exchange, written about 1670, or Beawes' Lex Mercatoria, written about 1720, will shew that the law, or perhaps rather the practice, as to bills of exchange, was even then pretty well defined. Comparing the usage of that time with the law as it now stands, it will be seen that it has been modified in some important respects. Comparing English law with French, it will be seen that, for the most part, where they differ, French law is in strict accordance with the rules laid dow / Beawes. The fact is that when Beawes wrote, the law or practice of both nations on this subject was uniform. The French law, however, was embodied in a code by the "Ordonnance de 1673," which is amplified but substantially adopted by the Code de Commerce of 1818. Its development was thus arrested, and it remains in substance what it was 200 years ago. English law has been developed piecemeal by judicial decisions founded on custom. The result has been to work out a theory of bills widely different from the original. The English theory may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A bill of exchange in its origin was an instrument by which a trade debt, due in one place, was transferred in another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills

(8) See also W. Cranch, Promissory Notes before and after Lord Holt, reprinted in 3 Select Essays in Anglo-American Legal History, 1909, p. 72, from the appendix to the first volume of Cranch's Reports of Cases in the Supreme Court of the United States, 1804; E. Jenks, Early History of Negotiable Instruments, 9 L.Q.R. 70, 1893, reprinted in 3 Select Essays, etc., p. 51; T. A. Street, Foundations of Legal Liability, 1906, vol. 2, chapters 31 to 40.

have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit. English law gives full play to the system of accommodation paper; French law endeavours to stamp it out. A comparison of some of the main points of divergence between English and French law will shew how the two theories are worked out. In England it is no longer necessary to express on a bill that value has been given, for the law raises a presumption to that effect. In France the nature of the value must be expressed, and a false statement of value avoids the bill in the hands of all parties with notice. In England a bill may now be drawn and payable in the same place (formerly it was otherwise, see the definition of bill in Comyns' Digest). In France the place where a bill is drawn must be so far distant from the place where it is payable, that there may be a possible rate of exchange between the two. A false statement of places, so as to evade this rule, avoids the bill in the hands of a holder with notice. As French lawyers put it, a bill of exchange necessarily presupposes a contract of exchange. In England, since 1765, a bill may be drawn payable to bearer, though formerly it was otherwise. In France it must be payable to order; if it were not so, it is clear that the rule requiring the consideration to be expressed would be an absurdity. In England a bill originally payable to order becomes payable to bearer when endorsed in blank. In France an indorsement in blank merely operates as a procuration. An endorsement to operate as a negotiation must be an endorsement to order, and must state the consideration; in short, it must conform to the conditions of an original draft. In England, if a bill be refused acceptance, a right of action at once accrues to the holder. This is a logical consequence of the currency theory. In France no cause of action arises unless the bill is again dishonoured at maturity; the holder, in the meantime, is only entitled to demand security from the drawer and indorsers. In England a sharp distinction is drawn between current and overdue bills. In France no such distinction is drawn. In England no protest is required in the

case of an inland bill, notice of dishonour alone being sufficient. In France every dishonoured bill must be protested. Grave doubts may exist as to whether the English or the French system is the soundest and most beneficial to the mercantile community, but this is a problem which it is beyond the province of a lawyer to attempt to solve."

In every province of Canada except Quebec the common law of England prevails, subject to any provincial or other statutes enacted by competent authority and applicable to the province. It is of no importance to define the precise date or mode of the introduction of the law of England, so far as the unwritten law is concerned, but it may be material to do so for the purpose of deciding to what extent Imperial statutes which are not in force in a particular province proprio vigore are nevertheless in force there by virtue of the general introduction of the law of England.[9]

The Provinces of Nova Scotia and New Brunswick being British colonies by settlement, the original law in force there was the common law of England as modified by such statutes of the mother country as were suitable to the condition of the colony. For this purpose the latest date after which statutes passed in Great Britain would no longer apply to the colony, unless expressly made applicable thereto, is the 3rd of October, 1758, the day of the meeting of the first general assembly of Nova Scotia (then including New Brunswick).

Upon a review of the Nova Scotia decisions, it appears that the admission of Imperial statutes has been the exception; those which have been held to be in force being in the main statutes in amelioration of the rigour of the common law, acts in curtailment of prerogative or in enlargement of the liberty of the subject. To a greater extent than has been the case in either New Brunswick or Ontario, the judges of Nova Scotia have deemed it the office of legislation rather than of judicial visions of Imperial statutes not originally capable of being made

(9) See fuller discussion in Clement, Canadian Constitution, 2 ed., 1904 pp. 38 ff.; Maclaren on Bills, 4 ed., 1909. pp. 10 ff.

operative, but which might be thought suitable to the changed circumstances of the colony.[10]

In Prince Edward Island the law of England was expressly introduced by proclamation as of the 7th October, 1763, and in Ontario by a provincial statute of the 15th October, 1792, it was enacted that from and after the passing of the Act, in all matters of controversy relative to property and civil rights resort should be had to the laws of England as the rule for the decision of the same. It was subsequently held that the terms of this statute did not "place the introduction of the English law on a footing materially different from the footing on which the laws of England stand in those colonies in which they are merely assumed to be in force, on the principles of the common law, by reason of such colonies having been first inhabited and planted by British subjects."[11]

In Manitoba it was held that the common law was introduced on the 2nd May, 1670—the date of the charter of the Hudson's Bay Company,[12] but by provincial statute of 1874 and Dominion statute of 1888, the law of England was introduced as of the 15th July, 1870—the date of the admission of Manitoba into the Dominion.

In the North-West Territories (including prior to 1905, the present Provinces of Saskatchewan and Alberta) the common law was in force as of the 2nd May, 1670, until by Dominion statute of 1886 the law of England was introduced as it existed on the 15th July, 1870.

In British Columbia, the law of England was introduced by provincial statute as of the 19th November, 1858.

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(10) Clement, 2 ed., p. 45. The classic case in Nova Scotia on the subject of the applicability of Imperial statutes is *Uniacke* v. *Dickson* (1848), 2 N.S.R. (James) 287. A leading case in New Brunswick is *Doe dem. Hanington* v. *McFadden* (1836), 2 N.B.R. (Berton) 153.

(11) *Doe dem. Anderson* v. *Todd* (1845), 2 U.C.R. 82. In this case were stated the principles which were substantially adopted in the later cases.

(12) *Sinclair* v. *Mulligan* (1888), 5 Man. R. 17.

In Quebec the Custom of Paris and the common law of France were introduced by the royal edict of 1663 creating the Sovereign Council (later known as the Superior Council) of Quebec. "Avons en outre au dit conseil souverain donné et attribué, donnons et attribuons le pouvoir de connaître de toutes causes civiles et criminelles, pour juger souverainement et en dernier ressort selon les loix et ordonnances de notre royaume, et y procéder autant qu'il se pourra en la forme et manière qui se pratique et se garde, dans le ressort de notre cour de parlement de Paris, nous réservant néanmoins, selons notre pouvoir souverain, de changer, réformer et amplifier les dites loix et ordonnances, d'y déroger, de les abolir, d'en faire de nouvelles, ou tels réglements, statuts et constitutions que nous verrons être plus utiles à notre service et au bien de nos sujets du dit pays."[13]

The lois and ordonnances of earlier date than 1663 had not made many changes in the private law, but several of the grandes ordonnances of Louis XIV. have a special importance for the student of commercial law. The ordinance of 1667 on civil procedure with some modifications was in 1678 brought into force in Quebec by registration with the Sovereign Council.[14] The ordinance of 1673 (sur le commerce) and that of 1681 (sur la marine), which codified the commercial law and the maritime law respectively, were, however, not so registered, and

(13) Edits et Ordonnances Royaux, Déclarations et Arrêts du Consei d'Etat du Roi concernant le Canada (Quebec, 1854), vol. 1, p. 38. The text of the Edit de Création is reprinted in Lemieux, Les Origines du Droit Franco-Canadien, pp, 264-7. The Custom of Paris was explicitly introduced, and resort to any other custom was forbidden, by the Ordinance of 1664 establishing the Compagnie des Indes occidentales. The charter of this company was revoked in 1674 and the territory which had been granted to it was restored to the jurisdiction of the Crown. Lemieux, pp. 272, 311. It is to be noted that the Custom of Paris which had obtained a dominating position among the various customs of France, was far from covering the whole field of private law. The important subjects of obligations and contracts were largely regulated by Roman law. General Survey of Events, Sources, etc., in Continental Legal History (Boston, 1912), pp. 209, 262-3.

(14) Lemieux, op. cit., p. 312.

it is still apparently a debateable question whether they were ever in force in the province.[15]

Whether the ordinances of 1673 and 1681 were technically in force in Quebec or not, their character was such that they might, for the most part, be followed as laying down rules of private law of universal applicability and it is said that they were in fact much relied upon by Lord Mansfield and the other judges who erected the structure of modern English maritime and commercial law.[16]

In addition to the changes made by the ordinances published in France and in force in Quebec, the law of the province was subject to alteration by the arrêts and réglements of the Council of Quebec itself and by the ordinances of the governors and intendants of French Canada.[17]

Whether, after the cession of Canada to Great Britain, English civil law was introduced into the province by the royal proclamation of 1763[18] is another much disputed question,[19] but by the Quebec Act, 1774, the general body of Quebec civil law including the commercial law was re-established as the rule for decision in all matters of controversy relative to property

(15) The contention that these ordinances were not in force in Quebec has received, to some extent, the sanction of judicial decision, and is supported by F. P. Walton, The Scope and Interpretation of the Civil Code of Lower Canada, pp. 2 ff. See also the two opposing views summed up and the authorities referred to by Lemieux (op. cit., pp. 278 ff.), who is of the opinion that the ordinances in question belonged to that class of general laws applicable to the whole kingdom of France which did not require registration in the local parlements. Ibid, p. 292.

(16) Walton, op. cit., pp. 139-140. The declaratory and universal character of the ordinances may reconcile the view that they were not in force in Quebec with the fact that it is not uncommon to find ordinances which had not been registered cited in early cases in Quebec without any statement that they were not in force. Cf. Walton, pp. 4-5.

(17) The whole body of law by which the Custom of Paris was modified is collected in the volumes of Edits et Ordinances and in the five volumes of Jugements et Délibérations du Conseil Souverain de la Nouvelle France also published by the Government of Quebec, 1885-9. Walton, p. 5.

(18) See Shortt and Doughty, Documents relating to the Constitutional History of Canada, 1759-1791, pp. 119 ff.

(19) The two recent writers already cited disagree on this question. See Lemieux, pp. 363 ff.; Walton, pp. 6 ff.

and civil rights. See *Stuart* v. *Bowman* (1853), 3 L.C.R. 309, 3 R.J.R.Q. 228, 268; *Wilcox* v. *Wilcox* (1857), 8 L.C.R. 34.

Notwithstanding the legislation of the century following the Cession, the Custom of Paris continued to be the fundamental law of the province, until in 1866 it was embodied with the statutory law of civil rights and property in the Civil Code of Lower Canada.

Nevertheless some important changes were made by statute in the commercial law of the province during this period. The most notable enactments were the ordinance of the Legislative Council introducing in 1785 the English law of evidence in commercial matters,[20] and the provincial statute 10 & 11 Vict., c. 31, in effect bringing into force the 17th section of the Statute of Frauds.

Still more important modifications have been effected by the practice of the courts. The commerce of the country was always mainly in the hands of the English-speaking part of the community and trade was carried on almost exclusively with England, the United States and the other provinces. It was natural, therefore, that the decisions of English judges on commercial law should come to be treated by Quebec courts with a high degree of deference, and this was all the more natural inasmuch as it was found that there was great similarity between the English and French systems by reason of their common origin in the custom of merchants.[21]

The result seems to be that although English decisions may not necessarily be binding authorities in Quebec because the commercial law of Quebec, as a general rule, is the French law (*Gravelle* v. *Beaudoin* (1863), 7 L.C.J. 289, 11 R.J.R.Q. 221; *Young* v. *Macnider* (1895), 25 S.C.R., at p. 283), yet the practice of the judges has been to consider English decisions as well as French (as, *e.g.*, in *Young* v. *Macnider*, 25 S.C.R., at pp. 277 and 278, and in the court below, Q.R. 3 Q.B. 539; *Glengoil* v.

(20) Shortt and Doughty, op. cit., p. 532.

(21) See Walton, op. cit., p. 21.

Pilkington (1897), 28 S.C.R. 146; *Forget* v. *Ostigny*, [1895] A.C. 318, Q.R. 4 Q.B. 118).

In the recent case of *Préfontaine* v. *Grenier* (1906), Q.R. 15 K.B. 143, involving the liability of a bank president for negligence, many English cases were cited. The members of the Judicial Committee, in affirming the judgment of the Quebec court, said that they thought that, in the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England, and in the absence of any evidence of custom and course of business to the contrary, the Court of King's Bench was right in accepting the English rulings, because they were based, not upon any special rule of English law, nor upon any circumstances of a local character, but upon the broadest considerations of the nature of the position and exigencies of business: [1907] A.C. 110.

Propositions based upon the common law of England will not, however, always be applicable to the province of Quebec, and in a number of instances in the course of this book, attention will be drawn to differences between the law of that province and that of the rest of the Dominion. It is manifest that a bank must in many cases enter into contracts, and both incur and have the benefit of obligations, governed by the civil law of a particular province.

The following are some of the salient general differences between the English and the Quebec law in respect to matters which most frequently concern a bank.[22]

(1) In Quebec the hypothecary system of the Roman law prevails. Under English law a mortgage is a conveyance of the mortgaged land to the mortgagee. The mortgagor retains only an equitable interest known as the equity of redemption. The legal title passes to the mortgagee, who on default may bring an action for foreclosure as well as asking for payment. In Quebec the mortgagor merely hypothecates or charges the land

(22) See "The Banker in the Province of Quebec," 13 J.C.B.A. 230 (April 1906), an address by R. D. McKibbon, introductory to a course of lectures on the Bank Act by A. Rives-Hall (13 J.C.B.A. 237, 298; 14 J.C.B.A. 58, 123, 232).

in favour of the mortgagee, in effect acknowledging the indebtedness as a personal obligation, but retaining the title in himself. On default the mortgagee may recover judgment on the obligation and bring the property to sale at the hands of the sheriff, and is entitled to be paid the amount of the hypothec as a preferred claim out of the proceeds of the sale.

(2) The Quebec law on the subject of married women is also peculiar. Unless husband and wife have made a contract before marriage, they are held by the law to be in community, which means that a partnership is deemed to be established between them, each member being entitled to a half interest. The husband is regarded as the head of the community or as the managing partner of the firm, and may deal with the property according to his own discretion.

Ante-nuptial contracts are quite usual and almost any form of settlement may be made, and a woman's private estate secured to her thereby. Even where such a contract exists, a married woman is subject to a legal disability which does not prevail in the other provinces. As a rule, she requires the authorization of her husband in all business transactions. A wife's mortgage of her separate property is void both as to the debt contracted and as to the disposition if it is in any way for her husband's purposes. Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail and the burden is on him to prove that it was not so borrowed. *Trust & Loan* v. *Gauthier*, [1904] A.C. 94. In the other provinces, speaking generally, a married woman is capable of dealing with, and contracting in respect to, her property.

(3) Another class of persons who in Quebec are under disability to contract is that of "interdicts," that is, persons who are placed under restrictions by the court on account of prodigality, drunkenness, etc., and who cannot contract without the assistance of curators appointed by the court on the advice of a family council.

(4) In Quebec, as in France and other countries under the civil law, the notarial system prevails. The notary is an im-

portant personage. He is not, as in the other provinces, a mere verifier of documents and protester of bills, possessed of a seal and a signature, but is a member of a separate branch of the legal profession. Certain deeds must be signed before a notary, such as deeds of mortgage or hypothec, deeds of donation, marriage contracts, etc. The original deed signed by the parties is retained by the notary, and remains in his office until his death, when it is transferred to the public archives. What are known as "authentic copies" may be issued by the notary, certified by him under his seal of office, and these copies are admitted to proof in court and are sufficient for the purpose of registration in the province.

JOHN D. FALCONBRIDGE.

CANADA'S FEDERAL SYSTEM.

A new book, on Canada's Federal System, by Mr. A. H. F. Lefroy, K.C. (referred to in our review columns), aims at explaining it thoroughly, not only in its constitution, but also in its working, as illustrated by the decided cases, by the records of the Department of Justice at Ottawa, and by discussions before the Judicial Committee of the Privy Council. Mr. Lefroy has carried out his intention excellently well, and the result of his labours will find a ready welcome in many quarters.

Federalism is a subject which is much to the fore at the present time, not only by reason of the interest excited in connection with the proposed change in the government of Ireland, but, also, in connection with the movement, ever growing stronger, for the application of the federal principle to the affairs of England, Scotland, and Wales, while in the far background is the dream of the Imperial Federationists.

A federal constitution, therefore, of which nearly half a century of experience has proved the merit, and which is applied to a country of such divided interests, such an expanding population, and so large a territory as is this Dominion, is well worthy of study at the present time. Moreover, a work like this on the

Canadian Constitution deals with matters of no mere theoretical or academical interest, but with a very important part of the actual law of the land.

Canadians of this generation have become so habituated to the easy and peaceful trend of our public life, as compared with that of other less fortunate countries, that we seldom take thought to realise, in any adequate way, the extreme interest which attached to the planning of the British North America Act, nor the consummate, though unobtrusive, statesmanship and skill, which was manifested in its drafting. Canada in truth took the lead in a notable enterprise of political construction, namely, the combination of the British system of responsible parliamentary government with a federal constitution.

In a banquet at the Canada Club in London, on January 9th, 1867, Lord Carnarvon, who, the following month, was to introduce the Bill in the House of Lords, observed: "It has taken us a long time to construct the great fabric of constitutionable government in England; it requires the exercise of the highest and most statesmanlike qualities to maintain that fabric in equilibrium; and when we come to transplant that system —which means a system of changing Ministries and short-lived Parliaments—to distant Colonies, and to connect it, with, after all, but slight bonds, with a similar system of changing Parliaments and Ministries at home, the marvel is that it has been found to work so harmoniously, and with so much success."

The framers of our federal system essayed to dovetail in between "the changing ministries and short-lived parliaments" of Great Britain on the one hand, and the various Canadian provinces of the other, a ministry and parliament for the Dominion as a whole, while still maintaining unimpaired the imperial union. And it speaks well for the spirit in which our Federal Constitution has been worked, and the loyal and law-respecting disposition of our people, that the Imperial equilibrium has not merely been maintained, but is more stable to-day than ever it was.

But apart from all this, how great and responsible a task it was to frame a fundamental Constitution for the young Dominion. It was no mere question of satisfying the requirements of the country in 1867. As Mr. Lefroy well says in his concluding chapter: "If things were never again to be put into the melting pot—if there was to be no future stirring of foundations—a Constitution must be given to the Dominion which her sons might be satisfied with while the British name lasts."

So far as we know, Mr. Lefroy is the first writer upon our Constitution who has endeavoured to put his finger on the very points wherein the excellence of the work done for this country by the fathers of Confederation, and by those who expressed their intentions in the wording of the Federation Act is manifested, and all concerned are greatly indebted to him for this endeavour and for the masterly and luminous way in which he has accomplished his difficult task.

Mr. Lefroy insists that the main desideratum was not to overdo the machinery required to bring about the desired result. It was necessary to construct a firm framework for the system, but that done, wisdom dictated that the clothing of that framework with the flesh and blood and sinews of a complete body politic, should be left to a process of organic development under the influence of the changing circumstances and expanding conditions of the country as time went on. In a very recent judgment (*Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A.C., p. 586), Lord Loreburn, L.C., observed that "the unwritten Constitution of England is a growth, not a fabric." In part, the Constitution of the Dominion had necessarily to be fixed by statutory provision; but, so far as might be, it was expedient, if it was to satisfy successive generations of Canadians, that it should be a growth, and not a fabric.

Mr. Lefroy finds evidence of the recognition of this principle rather in what is not to be found in the North America Act, than in what is in it. He points to the fact, in the first place, that no attempt is made to crystallize by statutory enact-

ment the flexible system of precedents and conventions which make up the customary law of the British Constitution. Then he contends that in indicating the classes of subjects upon which the Dominion or provinces respectively might legislate, the framers of our fundamental statute purposely used vague general language, and overlapping descriptions, in order to leave to time and experience a more exact definition of the federal and provincial areas.

And again, the same self-restraint is shewn in the absence of any attempt to fetter the freedom of our legislatures by fundamental imitations such as abound in the United States Federal and State Constitutions; and which, as Mr. Dicey has pointed out, the very inflexibility of a written Constitution tempts legislators to place among Constitutional articles.

The fathers of Confederation resisted the temptation of enshrining their own individual ideas, or those of their own generation, in the provisions of the British North America Act. They evidently appreciated the wisdom expressed by other legislators, more than 2,000 years before, in the famous clause of the XII Tables of Rome—"The final decision of the people shall be law." In all this too, as Mr. Lefroy has clearly demonstrated, they were faithfully fulfilling the promise expressed in the preamble of the Federation Act—to federally unite us into one Dominion under the Crown, with a Constitution similar in principle to that of the United Kingdom.

The general plan of "Canada's Federal System," as Mr. Lefroy explains in his preface, is to set out, explain, and illustrate all such general principles of construction of the provisions of the British North America Act as are derivable from the authorities, and then to discuss, seriatim, the various law-making powers of the Dominion parliament, and the provincial legislatures in the light of these principles, concluding with a discussion of the provisions of the Act relating to the public property of the Dominion and the provinces respectively.

Of the work as a whole we can truly say that it is a most valuable addition to the literature on the subject discussed, and

more than that, it is a summing up of all previous literature thereon. It is said that no history of events can be accurate until time puts them into their true perspective, and so it may be said that the volume before us is the first chapter in the history of the Constitution of this Canada of ours, whatever its future destiny may be. It gives the history of its past and suggests what future chapters may probably tell to those who come after us.

There will be found in the *Craig Line Steamship Co.* v. *The North British Storage Co.* ([1913], 1 S.L.T. 453) a useful discussion by Lord Hunter as to the question of onus of proof in a claim by consignees against shipowners for short delivery of cargo. The common law rule is that a shipmaster's signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the onus of falsifying them and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent. In the case mentioned the bills of lading contained a statement to the effect that the "weight, quality, quantity and contents," were unknown. Lord Hunter, after a full examination of the decided cases, found that these words shifted the onus and put on the consignee of the cargo the burden of showing that the shortage was due to the fault of the shipowner. The case was accordingly dealt with at the proof on that footing.—*Law Magazine.*

The public will be glad to see the Parcels Post Act passed by the Dominion Legislature. People have too long been subjected to the extortionate charges of Express Companies; and it is well that the example set in other countries as to parcel postage should be followed in this country. The Act is to apply to parcels of all kinds (with a few special exceptions) which do not exceed eleven pounds in weight or greater in size than 72 inches in length and girth combined. The rates are to be fixed by the Postmaster-General.

REVIEW OF CURRENT ENGLISH CASES.

DIVORCE — FOREIGN DOMICIL OF HUSBAND — SEPARATE DOMICIL OF WIFE—JURISDICTION.

De Montaigu v. *De Montaigu* (1913) P. 154, is a case which seems to indicate the desirability of some international law on the subject of marriage. In this case a domiciled Frenchman married in England a domiciled Englishwoman. They lived together for some time in England as man and wife, but before very long the husband's father took proceedings in France to have the marriage declared null and void for non-compliance with the French law, and a decree was made there annulling the marriage. The result being that in France they were declared never to have been husband and wife, although validly married according to the law of England, so that the woman was not married according to French law, and yet if she married again she would in England be liable to a prosecution for bigamy. The wife petitioned for a divorce on the ground of desertion and adultery, and no defence was offered. In these circumstances, Evans, P.P.D., held that the rule or theory of law that the domicil of the husband governs the jurisdiction in suits for dissolution of marriage, as distinguished from other matrimonial suits, may be departed from in proper circumstances, and that the circumstances of this case justified a departure from it and warranted the Court in holding that, for the purpose of such a suit, the wife may be treated as having a domicil of her own sufficient to give the Court jurisdiction to entertain a suit by her for the dissolution of the marriage, and a divorce was accordingly granted.

WILL—CONSTRUCTION—LEGACY — INTEREST — LEGACY PAYABLE AT TWENTY-ONE—POWER TO APPLY LEGACY TOWARDS MAINTENANCE OF LEGATEE—OTHER PROVISIONS FOR MAINTENANCE.

In re West, Westhead v. *Aspland* (1913) 2 Ch. 345. This was an application to determine from what date a legacy of £900 bore interest. The legacy in question was bequeathed by the testatrix to her grand-niece if she should attain twenty-one. The will empowered the trustees in their absolute discretion to

apply the whole or any part of this legacy towards the maintenance and education of the legatee. The testatrix by her will, however, made other provisions for the maintenance and education of the legatee, and bequeathed to her all the money standing to the credit of her current or deposit account, and also devised to her a freehold house. The legatee was thirteen years of age. Warrington, J., held that as the testatrix had made provision for the maintenance and education of the legatee out of other funds, the £900 legacy would only bear interest from the time when the legatee would attain twenty-one.

PRACTICE—DISCOVERY AS BETWEEN CO-DEFENDANTS.

Birchal v. *Birch* (1913) 2 Ch. 375. This was an action by plaintiff, as assignee of the defendant Jackson, to recover from the defendants Birch & Co., commission alleged to be due by them to Jackson. The defendants, Birch & Co., by their defence alleged that the plaintiff had no right at all, inasmuch as they had a claim against Jackson for damages for misrepresentation, which they were entitled to set off against any claim by him for commission. No counterclaim was filed. Birch & Co. applied for an order to examine Jackson for discovery which was refused by Warrington, J., and his order was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Kennedy, and Eady, L.JJ.), Eady, L.J., dissenting.

ADMINISTRATION—REVOCATION OF GRANT—SUPPOSED INTESTACY —SUBSEQUENT DISCOVERY OF WILL—SALE BY ADMINISTRATRIX OF LAND—INVALIDITY OF PURCHASER'S TITLE.

Hewson v. *Shelley* (1913) 2 Ch. 384. In this case the facts were, that a grant of administration was made to a deceased person's estate, on the supposition of intestacy, and the administratrix, his widow, sold the land of the deceased. One-third of the net proceeds was invested to provide dower for the widow of the deceased and the residue was divided between the co-heiresses. After the sale, the widow died, and among her papers a will of her husband was discovered which had slipped out of sight. The parties entitled to the real estate under the will brought the present action to recover possession of the land from the purchasers, and Astbury, J., held that they were entitled to succeed, the sale not having been made for any purpose which the executors of the will would have been obliged to sell.

CORPORATION—CONTRACT NOT UNDER SEAL—EXECUTED CONSIDERATION—WORK DONE AT REQUEST OF CORPORATION NECESSARY FOR PURPOSE FOR WHICH IT WAS CREATED—ACCEPTANCE OF WORK—IMPLIED CONTRACT TO PAY.

In *Douglass* v. *Rhyl Urban District Council* (1913) 2 Ch. 407, the plaintiff claimed to recover for work done for the defendants, a municipal corporation, at their request, as an engineer in making valuations and estimates, and which was necessary to be done for the purpose for which the corporation was created. The contract was not under seal, but the corporation had taken the benefit of the work done by the plaintiff though the scheme for which the work was done was ultimately abandoned. Joyce, J., held that the principle of the decision in *Lawford* v. *Billericay Council* (1903), 1 K.B. 772 (noted ante vol. 39, p. 463) applied, and that the plaintiff was entitled to recover on a *quantum meruit*.

STOCK EXCHANGE—CONTRACT—PRINCIPAL AND AGENT—RIGHT OF BROKER TO INDEMNITY.

In *Aston* v. *Kelsey* (1913) 3 K.B. 314, the plaintiff was a broker employed by the defendant to purchase shares in the stock market for the purpose of speculation, and sought to recover moneys expended by him in and about the purchase. The plaintiff lived at Harrogate and instructed brokers in London and Glasgow to buy the shares required. These brokers purchased the shares from jobbers and sent a note of the purchase to the plaintiff including their commission in the price, without mentioning how much it was, but stating the price to be net. The plaintiff then sent a similar note to the defendant and added a specified sum for his commission. The defendant claimed that the plaintiff in concealing the commission charged by the London and Glasgow brokers, had not acted as brokers, but as principal in buying the shares from them, and was, therefore, not entitled to indemnity from the defendant. Bailhache, J., who tried the case, was, on the facts, in favour of the plaintiff, but thought the case was governed by *Johnson* v. *Kearley* (1908), 2 K.B. 514. The Court of Appeal (Cozens-Hardy, M.R., and Hamilton, L.J., and Bray, J., however, reversed his decision (Cozens-Hardy, M.R., *dubitante*). The Court of Appeal being of the opinion that, on the facts, the cases were distin-

guishable, and that the plaintiff had in fact acted as it was intended he should act in the carrying out of the contract in question.

PRINCIPAL AND SURETY—BANK GUARANTEE—DUTY OF BANK TO GUARANTOR—NON-DISCLOSURE BY BANK TO GUARANTOR OF SUSPICIONS CONCERNING CONDUCT OF DEBTOR — RELEASE OF SURETY.

National Provincial Bank of England v. *Glanusk* (1913) 3 K.B. 335. This was an action by a bank on a guaranty given by the defendant for the payment of all moneys due by one Coles, a customer of the bank. Coles was also the agent of an estate, of which the defendant was life tenant. The manager of the bank had suspicions that Coles was using the funds of this estate illegitimately, and for other than the purposes of the estate, but he omitted to communicate these suspicions to the defendant. The defendant claimed that this omission had the effect of discharging him from liability, but Horridge, J., who tried the action, held that it did not, and that although in the case of a fidelity guaranty such an omission would work a discharge of a surety, yet that rule did not apply in the case of a guaranty of a debt, and that the bank were under no obligation to communicate suspicions affecting the credit of the debtor, even if it entertained them, but he thought the evidence indicated that they had in fact been removed on inquiry.

NEGLIGENCE—BREACH OF DUTY—HORSE AND CARRIAGE HIRED BY HUSBAND—VICIOUS HORSE—INJURY TO WIFE — KNOWLEDGE OF OWNER—CONTROL OF CARRIAGE—ACCEPTANCE OF WIFE AS PASSENGER.

White v. *Steadman* (1913) 3 K.B. 340. This was an action by husband and wife to recover damages for injuries sustained by them in the following circumstances. The husband hired from the defendant, a livery stable keeper, a landau with horse and driver for the purpose of taking a drive. His wife accompanied him in the carriage. The horse shied on meeting a traction engine and became unmanageable, the carriage was upset and both husband and wife were injured. The jury found that the defendant ought to have known, if he had used proper care, that the horse was unsafe to be sent out with the carriage, but that the driver was not negligent. On these findings the de-

fendant admitted liability to the husband, but contended that he was not liable to the wife. Lush, J., who tried the action, held, that on the finding of the jury, the defendant must be deemed to have known that the horse was unsafe, and that it was his duty to have warned the wife (who was one of the persons defendant must be taken to have contemplated would use the carriage) of the dangerous character of the horse, and that this duty arose independently of contract, and therefore that the defendant was also liable to the wife.—See the next case.

NEGLIGENCE—DANGEROUS ARTICLE—SALE BY MANUFACTURER TO SHOPKEEPER—SALE BY SHOPKEEPER TO PLAINTIFF—DEFECT UNKNOWN TO VENDORS—MEANS OF KNOWLEDGE—LIABILITY OF MANUFACTURER.

Bates v. *Batey* (1913) 3 K.B. 351. This is a case very similar in its facts to the case of *Hill* v. *Rice Lewis*,* recently before the Ontario Court. In the present case the defendants manufactured ginger beer which they placed in bottles bought from another firm. They sold the bottled ginger beer to a shopkeeper, from whom the plaintiff bought one bottle. Owing to a defect in this bottle, it burst while the plaintiff was opening it, and injured him. The defendants did not know of the defect, but might have discovered it by the exercise of reasonable care. Horridge, J., who tried the action, held that notwithstanding the defendants might have discovered the defect by the exercise of reasonable care, yet, as they were in fact ignorant of it, they were not liable. The learned judge distinguishes the case from the preceding case on the ground that here the bottle was not in itself dangerous, and, inferentially, he considers a horse is.

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

United States Steel Products Co. v. *Great Western Ry. Co.* (1913) 3 K.B. 357. In this case the plaintiffs were the vendors of certain goods which they delivered to the defendant company for carriage to the purchasers. The goods were received

*28 O.L.R. 366.

on condition that they should be subject to a general lien for any moneys due to the company from the owners of the goods on any account whatever. The plaintiffs paid all freight and charges in respect of the carriage of the goods, and, while the goods were still in the possession of the railway company, the plaintiffs stopped them in transitu. The buyers were indebted to the defendants in the sum of £1,170 which did not include any freight or charges on the goods in question, and they claimed that, under the terms of the consignment note, they had a lien on the goods as against the plaintiffs in respect of the £1,170; but Pickford, J., held, that although the words of the consignment note were wide enough to extend considerably further, yet that the condition ought to be read as meaning that the railway company should not be bound to deliver the goods to the consignee until he had discharged any debt due by him to the railway; but that it ought not to be read as creating a lien on the goods as against persons who had nothing to do with the debt, and, therefore, that the defendants were not entitled to hold the goods as against the plaintiffs.

SHIP—CHARTER PARTY—DEMURRAGE—PERIOD OF DEMURRAGE NOT SPECIFIED—DETENTION OF SHIP BEYOND REASONABLE TIME—DAMAGES—MEASURE OF DAMAGES.

Western Steamship Co. v. *Amaral* (1913), 3 K.B. 366. This was an action by vessel owners to recover damages from the charterer, for detention of the chartered vessel. The charter party provided that if the ship was detained at the port of discharge after the expiry of the lay days, demurrage should be payable at a specified rate; but was silent as to the period for which she could be kept on demurrage. The vessel arrived at the port of discharge on May 17, and her lay days expired on May 31, but she was not discharged until July 14. The plaintiffs contended that the defendants were entitled to detain the vessel for a reasonable time, but as they detained her longer than was reasonable, they claimed to recover damages for the period beyond what was a reasonable time, which they claimed should not be measured by the rate specified for demurrage; but Bray, J., who tried the action, was of the opinion that the plaintiff had a right to take away the ship if it were detained beyond a reasonable time, but that if they chose to let it remain, the demurrage rate of compensation applied to the whole period of detention.

FOREIGN JUDGMENT—COLONIAL JUDGMENT AGAINST DEFENDANT BORN IN COLONY—"SUBJECT" OF COLONY—DEFENDANT NOT DOMICILED OR RESIDENT IN COLONY WHEN JUDGMENT RECOVERED—ENFORCING FOREIGN JUDGMENT.

Gavin v. *Gibson* (1913) 2 K.B. 379. This was an action on a judgment recovered in the Colony of Victoria, Australia. The defendant was born in that colony, but was not resident or domiciled there when the judgment was recovered against him. The defendant was personally served with the writ in England, and had an agent in Victoria whom he instructed to defend the action, and instruct solicitors, but no appearance was entered and the action was not defended, and judgment was recovered by default. It was contended that the case was within the first of the cases mentioned by Fry, J., in *Rousillon* v. *Rousillon*, 14 Ch. D., at p. 371 in which the Court holds foreign judgment to be binding on a defendant, *e.g.*, "where he is a subject of the foreign country in which the judgment has been obtained," because, as was contended, the defendant was a "subject" of the Colony of Victoria. But Atkin, J., who tried the case, came to the conclusion that there is no such thing as a subject of a colony—that a subject of the British Crown involves a personal tie to the King, and that the subject's nationality is the British Empire and not confined to any particular locality in the Empire, the Crown being one and indivisible, and that a British subject's nationality, therefore, cannot be limited to any part of the Dominions of the Crown. The jurisdiction of the Colonial Court, he held to be territorial, and, therefore, the defendant not being within its jurisdiction, and not having submitted to its jurisdiction, the judgment was therefore not conclusive on him in an English Court.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

Lord Chancellor, Lords Dunedin, Atkinson, Moulton.] [13 D.L.R. 618.

GRAND TRUNK R. CO. *v.* MCALPINE.

1. *Railways—Accident at crossing—Signals—At what place required—City streets—Shunting engine.*

The requirement of sec. 274 of the Railway Act, R.S.C. 1906, ch. 37, that a train on approaching a highway crossing shall sound its whistle when at least eighty rods therefrom is not applicable to an engine engaged in shunting cars in a city yard, which at no time was more than one hundred yards distant from a street crossing.

2. *Railways—Accident at crossing—Lookout—Backing engine—Giving warning of approach—Sufficiency of.*

It is not necessary that a person about to cross a railway track at a street crossing should have actually heard the warning given by an employee standing on the tender of a backing locomotive, in order to relieve a railway company of the duty imposed on it by sec. 276 of the Railway Act, R.S.C. 1906, ch. 37, in running trains not headed by an engine moving forward in the ordinary manner over a level crossing, to have a man stationed on that part of the train then foremost, in order to warn persons standing on or about to cross the tracks; since the warning required is only such that, if given in time to avoid danger, it ought to have been apprehended by a person in possession of ordinary faculties, in a reasonably sound, active and alert condition.

3. *Railways—Contributory negligence—Accident at crossing—Failure to stop, look and listen—Duty of person about to cross track.*

The duty incumbent on a person who is about to cross a railway track at a highway crossing at grade to look for moving trains is not satisfied by merely looking both ways on approaching the tracks; he must look again just before crossing.

4. *Negligence—Breach of statutory duty—Contributory negligence.*

In order that a railway company may be held responsible in damages for its negligent omission to perform a statutory duty, it must appear that the injury was the result of such omission and not of the folly or recklessness of the injured person; but the fact that the negligence of the plaintiff contributed to or formed a material part of the cause of his injury, will not preclude him from recovering damages if the consequences of his contributory negligence could have been avoided by the exercise of ordinary care and caution on the part of the defendant.

Dublin, Wicklow and Wexford Railway v. *Slattery*, 3 A.C. 1155, 1166: and *Davey* v. *London and South Western R. Co.*, 12 Q.B.D. 70, specially referred to.

Atkin, K.C., and *E. F. Spence*, for appellant company. *Donald Macmaster*, K.C., and *Harold Smith*, for respondents.

Lords Atkinson, Shaw, Parker.] [13 D.L.R. 702.

IMPERIAL PAPER MILLS, LTD. v. QUEBEC BANK.

1. *Chattel mortgage—After-acquired property—In esse or in posse—"Excepting logs on the way to the mill," construed.*

Where a mortgage by a wholesale manufacturer stipulates to cover generally all present and future acquired assets "excepting logs on the way to the mill," such exception is not to be construed as limited to logs on the way to the mill at the date of the mortgage, when the reason for the exception is in the interest of all parties (including the mortgagee himself) to facilitate those ordinary and essential financial arrangements between the mortgagor and his bank which are only possible if advances can be made upon logs in transit from time to time during the general and regular course of the trade and contract.

Imperial Paper Mills v. *Quebec Bank*, 6 D.L.R. 475, 26 O.L.R. 637, affirmed.

2. *Banks—Statutory securities—Bank Act (Can.)—Form, Latitude in.*

A bank may take security for advances from a wholesale manufacturer under sub-secs. 1, 3, 5 and 6 of sec. 88 of the Bank Act (Can.) R.S.C. 1906, ch. 29, provided the goods involved are

capable of ascertainment and identification; the statutory form in the schedule to the Act, is not compulsory as to its directions for description of goods and their locality but is intended as a guide.

Imperial Paper Mills v. *Quebec Bank*, 6 D.L.R. 475, 26 O.L.R. 637, affirmed; *Tailby* v. *Official Receiver*, 13 A.C. 523 at 533, applied.

J. H. Moss, K.C., for appellants. *Sir Robert Finlay*, K.C., *Geoffrey Lawrence*, and *David J. Symons*, K.C., for respondents.

Lords Atkinson, Shaw, Moulton, Parker.] [13 D.L.R. 707.

KENNEDY *v.* KENNEDY.

1. *Wills—Restraints upon alienation—Perpetuities.*

A bequest is void, as tending to create a perpetuity, by which the residue of an estate was given to executors or trustees to be used by them in their discretion in maintaining and keeping up, until sold, the testator's residence, as a home for his son, his son's family and descendants, or for whomsoever it should by the son be given by will or otherwise, the trust not being to keep up the home for specific persons, but to keep up and maintain a dwelling-house as kept up and maintained before the testator's death, and ending only on a sale being made which might not take place within the perpetuity period.

Kennedy v. *Kennedy*, 11 D.L.R. 328, affirmed; *Clarke* v. *Clarke*, [1901] 2 Ch. 110; *Re Blew*, [1906] 1 Ch. 624; *Re De Sommery*, [1912] 2 Ch. 622, at 630, specially referred to.

2. *Wills—Devise and legacy—"Discretion" of named trustees—Possible exercise by successors.*

While a testator may so express a "discretion" with respect to trust property as to make it exercisable by the named trustees only, yet, where the exercise of the discretion has not been clearly limited by the terms of the will, broader construction is to be given so as to authorize the exercise of the discretionary powers by the holders for the time being of the office of trustee.

Kennedy v. *Kennedy*, 11 D.L.R. 328, affirmed; *Re Smith, Eastick* v. *Smith*, [1904] 1 Ch. 139, applied.

3. *Judgment—Effect and conclusiveness—What matters concluded.*

The plaintiff is not estopped by judgments in former actions,

where the same subject has not been adjudicated, although such former actions may have been between the same parties and concerning the same estate.

Kennedy v. *Kennedy*, 11 D.L.R. 328, affirmed.

E. Douglas Armour, K.C., for appellant. *S. O. Buckmaster*, K.C., for David Kennedy, Robert Kennedy, and Joseph H. Kennedy. *A. J. Russell Snow*, K.C., for Madeline Kennedy.

Lords Atkinson, Shaw, Moulton.] [13 D.L.R. 730.

CLARKSON *v.* WISHART.

Mines and minerals—Levy and seizure—Mining claims, unpatented—Exigibility—Interest—Lands.

The interest of a mining claimant in an unpatented claim duly recorded under the provisions of secs. 34, 35, 53, 59 and 64 of the Mining Act, 8 Edw. VII. (Ont.), ch. 21, R.S.O. 1914, ch. 32, is exigible for a judgment debt due by the claimant.

Re Clarkson and Wishart, 6 D.L.R. 579, 27 O.L.R. 70, reversed; *McPherson* v. *Temiskaming Lumber Co.*, 9 D.L.R. 726, [1913] A.C. 145; and *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405, applied.

While the issue of a certificate of record to a claimant in an unpatented mining claim is declared by sec. 68 of the Mining Act, 8 Edw. VII. (Ont.), ch. 21, R.S.O. 1914, ch. 32, to create a tenancy at will as between the claimant and the Crown, such reference must be taken in conjunction with the other provisions of the statute in determining what is exigible under execution at the instance of a judgment creditor of the claimant, and the effect is that, notwithstanding such declaration, substantial rights are vested in the claimant which come within the word "lands" as used in the Execution Act (Ont.), 9 Edw. VII., ch. 47, R.S.O. 1914, ch. 80.

Re Clarkson and Wishart, 6 D.L.R. 579, 27 O.L.R. 70, reversed; *McPherson* v. *Temiskaming Lumber Co.*, 9 D.L.R. 726, [1913] A.C. 145; and *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 450, specially referred to.

Sir Robert Finlay, K.C., and *Archibald Read*, for appellants. *J. M. Godfrey*, for respondents.

Lords Atkinson, Shaw, Moulton.] [13 D.L.R. 761.

McMillan v. Stavert.

1. *Bills and notes—Illegal consideration—Bank trafficking in its own shares.*

Promissory notes given to a bank by certain of its directors are not invalidated as for an illegal consideration by reason of the fact that they were given for the purpose of recouping to the bank, moneys which had been unlawfully and without the authority of its shareholders employed in the purchase of the bank's shares in furtherance of a scheme whereby the bank's funds were used in trafficking in its own shares to support the price quotations of same on the stock market. *Staver* v. *McMillan* (1911), 24 O.L.R. 456, 3 O.W.N. 6, affirmed on appeal.

2. *Banks—Liability of directors—Breach of trust.*

Where, in breach of trust and without the authority of any resolution of the board of directors or other corporate act of a chartered bank, funds of the bank were used by its manager, in connivance with one or more of the directors, to make purchases of bank shares in the names of brokers and others who were allowed to overdraw their accounts with the bank to make the purchases, knowing that the bank was prohibited by statute fr .n purchasing or dealing in its own shares, the duty of the other directors, on ascertaining that such breach of trust had been committed, was to repudiate the transactions and insist on the restoration to the ban'. of the funds illegally diverted; in such event there could be no claim to indemnity against the bank on the part of such nominal purchasers even if the bank asserted a lien on the shares for the overdrafts while repudiating the purchases; nor can any claim for indemnity against he bank arise in favour of the directors who, after the illegal diversion of funds had occurred, attempted to rectify the same by an adjustment, whereby promissory notes of the directors were given to the bank to recoup it for the money unlawfully diverted, although the recoupment represented the price of the shares illegally purchased.

Stavert v. *McMillan* (1911), 24 O.L.R. 456, 3 O.W.N. 6, affirmed on appeal.

Sir Robert Findlay, K.C., and *D. L. McCarthy*, K.C., for appellants McMillan. *S. O. Buckmaster*, K.C., and *R. H. Roope Reeves*, for respondent Stavert. *Macoun*, for third party.

Province of Ontario.

SUPREME COURT—APPELLATE DIVISION.

Meredith, C.J.O., Maclaren,
Magee, Hodgins, JJ.A.] [13 D.L.R. 750.

RE OLMSTEAD AND EXPLORATION SYNDICATE OF ONTARIO.

Mines and minerals—Claims—Location—Notice and record of claim—Application and sketch.

Under ss. 59 to 65 of the Mining Act, 8 Edw. VII. (Ont.), c. 21, R.S.O. 1914, c. 32, the foundation of the right which a staker acquires or may acquire, is the claim and sketch filed with the recorder after compliance with the requirements as to discovery and staking; and, in determining the area of the location, such application and sketch will control as against the marking of the supposed limits on the recorder's map and the granting of a certificate of record without specific description other than the number of the claim.

J. Lorn McDougall, for the appellant. *W. R. Smyth*, K.C., for the respondents.

Province of Quebec.

SUPERIOR COURT.

EX PARTE HARRY K. THAW (No. 1).

Globensky, J.] [13 D.L.R.

Habeas corpus—Discontinuance—Parties.

A prisoner who applies for and obtains a writ of habeas corpus, alleging unjust detention, has the right to discontinue and desist from his petition, and the Court will give effect to an application for the discontinuance of the proceedings, and order the prisoner's return to jail.

Where the application for the issue of a writ of habeas corpus is made by the prisoner himself, the party who laid the information upon which the prisoner was originally arrested has no status to appear in the habeas corpus proceedings, and ask for the liberation of the prisoner, although such party claims that the prisoner has been illegally arrested.

As to status of information to obtain a writ of habeas corpus, see *Re Thaw, Boudreau* v. *Thaw* (No. 2), post.

J. N. Greenshields, K.C., *W. L. Shurtleff*, K.C., *C. D. White*, K.C., *H. R. Fraser*, K.C., and *W. K. McKeown*, for Thaw. *S. W. Jacobs*, K.C., *J. Nicol*, K.C., and *Hector Verret*, K.C., for Boudreau.

RE HARRY K. THAW (No. 2).

BOUDREAU *v.* THAW.

Hutchinson, J.] [13 D.L.R.

Habeas corpus—Demand by party who laid information upon which prisoner was arrested—Prisoner's opposition to his own liberation—Informant—Petition.

The petition for a writ of *habeas corpus* issued under authority of c. 95 of the Consol. Stat. of L.C. (which extend the provisions of the English Habeas Corpus Act to the Province of Quebec) can validly be made by the party who illegally caused the arrest of the prisoner, although the prisoner may by intervention oppose the application, and by affidavit declare the same is so made without his authority, the prisoner further declaring that he desires to remain in jail.

See *Re Thaw* (No. 3), post p. 672.

Any person is entitled to institute proceedings to obtain a writ of *habeas corpus* for the purpose of liberating another from illegal imprisonment.

Hottentot Venus Case, 13 East's Reports 195, followed.

A party who causes the arrest of another, and who subsequently is advised that such arrest is illegal, is entitled to apply for a writ of habeas corpus, to the end that the person arrested may be restored to his liberty.

The term "on behalf of," when used in an application for a habeas corpus, means "in the name of," "on account of," "for the advantage of," or "in the interests of" another.

Compare *R.* v. *McIver*, 7 Can. Cr. Cas. 183.

No legal relationship is required to exist between the prisoner and the person making the application for a writ of habeas corpus for the prisoner's release.

S. W. Jacobs, K.C., *J. Nicol*, K.C., and *Hector Verret*,

K.C., for the petitioner, Boudreau. *W. L. Shurtleff*, K.C., *C. D. White*, K.C. *H. R. Fraser*, K.C., and *W. K. McKeown*, for the prisoner.

KING'S BENCH.

Archambeault, C.J., Lavergne, Cross, Carroll, Gervais, JJ.] [13 D.L.R. 715.

RE HARRY K. THAW.

THAW *v.* ROBERTSON (No. 3).

1. *Habeas corpus—Procedure—Serving original writ.*

A writ of habeas corpus can be properly served only by delivering the original writ to the person to whom it is addressed, or to the principal person where there are more than one; and where only copies of the writ had been served the irregularity is a ground for quashing the writ, although the original had been exhibited to the persons to whom it was addressed at the time when the copies were left with them.

2. *Aliens—Immigration Act (Can.)—Right to test constitutionality of habeas corpus.*

The provisions of the Immigration Act (Can.) depriving an alien ordered to be deported of any right to apply to the courts to review, quash, reverse, restrain, or otherwise interfere with an order of deportation made "under the authority and in accordance with the provisions of the Act" may prevent a writ of prohibition to the immigration officers, but it does not remove the right of the person detained to obtain a writ of habeas corpus to test the constitutionality of the statute; on due service of such writ the immigration officers would be bound, under penalty for contempt, to make return thereto with reasons assigned for the detention.

See *Re Gaynor and Greene* (No. 8), 9 Can. Cr. Cas. 496.

J. N. Greenshields, K.C., *N. K. Laflamme*, K.C., and *W. K. McKeown*, for petitioner Thaw. *L. T. Marechal*, K.C., and *Gustave Lamothe*, K.C., for respondents.

ANNOTATION ON ABOVE CASES—HABEAS CORPUS PROCEDURE.

The practice in *habeas corpus* in criminal matters varies in the several provinces, although subject to the same federal control as a part of the

criminal law and criminal procedure assigned by the constitution (the B.N.A. Act) to the exclusive jurisdiction of the Parliament of Canada.

This is due to the continuance in effect of the local practice which was in force at the time when each province entered Confederation, except as it might subsequently be varied under statutory authority. As to criminal matters, the writ of *habeas corpus* is specially dealt with in secs. 576, 941, and 1120 of the Criminal Code, 1906.

Sec. 576 of the Criminal Code confers power upon every superior Court of criminal jurisdiction to pass rules of Court to apply to all proceedings relating to any prosecution, proceeding or action instituted in relation to any "matter of a criminal nature or resulting from or incidental to any such matter," and in particular (*inter alia*) for regulating *in criminal matters* the pleading, practice and procedure in the Court including the subjects of mandamus, *certiorari*, *habeas corpus*, etc.

The term "criminal matter" has been held in England to have a very wide significance and to include a matter in the result of which the party may be fined or imprisoned as for a wrong: *Seaman* v. *Burley*, [1896] 2 Q.B. 344; *R.* v. *Fletcher*, 2 Q.B.D. 47; and, in this sense, prosecutions under certain provincial statutes such as the liquor laws are sometimes spoken of as proceedings relating to provincial crimes or as quasi-criminal prosecutions.

Whether or not a detention order made as in *Re Thaw* (No. 3), *supra*, under the Immigration Act, could properly be placed in the category of "criminal matters" it did not become necessary to decide because of the irregularity in the service of a copy of the writ instead of the original writ itself. This objection would apply whether or not the writ was to be controlled by the criminal law practice under federal jurisdiction or the civil practice under provincial jurisdiction. In the provinces of Ontario and Quebec, no rules of Court have yet been passed under the Criminal Code for the purpose of regulating *habeas corpus* practice in criminal matters, although *certiorari* rules were passed in Ontario, 27th March, 1908 (Ont. Consolidated Rules 1279-1288), which are not affected by the Consolidated Rules, 1913, the latter being a consolidation of the rules in civil cases only.

If a writ of *habeas corpus* is issued under the *Habeas Corpus* Act, 1679, it must be indorsed "*per statutum*, etc.," and signed by the person who awards the same, this being an express requirement of 31 Car. II. ch. 2. If a writ were issued not so indorsed, it may still be a good writ of *habeas corpus* at common law: *Crosby's Case* (1771), 3 Wils. 188; *Hobhouse's Case* (1820), 3 B. & Ald. 420.

The writ of *habeas corpus* as regards the Canadian Immigration law (9 and 10 Edw. VII. (Can.) ch. 2), is subject to the restriction contained in sec. 23 of the latter statute directing, in effect, that the Court shall not have jurisdiction to review or quash detention orders made under the authority and in accordance with the provisions of the Immigration Act unless the person detained is a Canadian citizen or has Canadian domicile. The right to a *habeas corpus* exists by the common law and is not created by

statute: *Re Besset*, 6 Q.B. 481, 14 L.J.M.C. 17. The right to the writ has, however, been confirmed by various statutes both in England and in Canada: *Re Sproule*, 12 Can. S.C.R. 140.

The original *Habeas Corpus* Act, 31 Car. II. ch. 2, provided for the issuing of the writ in all cases where a person is committed or detained for any cause (except for felony or treason plainly expressed in the warrant) upon the application of the person detained or *of any one in his behalf*, and it applied only to cases of detention or imprisonment for "criminal or supposed criminal offences." This statute was introduced into the old "Province of Canada" now the Provinces of Ontario and Quebec as part of the criminal law of England under the Quebec Act, 1774: see Cr. Code 1906, sec. 10, and *R.* v. *Malloy*, 4 Can. Cr. Cas. 116 (Ont.).

The Habeas Corpus Act, 31 Car. II. ch. 2, was intended to meet the various devices by which the common law right to the writ had theretofore been evaded, and, in particular, by making the writ readily accessible during vacation, by obviating the necessity for the issue of a second and third writ known respectively as the *alias* and *pluries* writ, by imposing penalties for the wrongful refusal of the writ, and generally by regulating the granting and issue of the writ, and the procedure upon its return. As the Act applied only to cases where persons were detained in custody for some "criminal or supposed criminal matter," its beneficial provisions did not extend to cases of illegal deprivation of liberty otherwise than on a "criminal charge" as, for example, where children were unlawfully detained from their parents or guardians by persons who were not entitled to their custody, or where a person was wrongfully kept under restraint as a lunatic, or where a person was illegally kept in confinement by another. In all such cases the issue of the writ during vacation depended solely upon the common law and remained unregulated by statute in England until the year 1816, on the passing of the *Habeas Corpus* Act, 1816. In Canada, provincial statutes have been passed upon similar lines to the latter Act, so as to facilitate the speedy hearing of the questions involving the regularity of the detention.

A statute of the late Province of Canada, 29 and 30 Vict. ch. 45, extended the application of the writ to matters other than criminal matters, and fixed the practice in certain particulars: *R.* v. *Cameron*, 1 Can. Cr. Cas. 169; *R.* v. *Bougie*, 3 Can. Cr. Cas. 487; *R.* v. *Marquis*, 8 Can. Cr. Cas. 346. That practice, except as it may be altered under federal authority, remains effective in Ontario and Quebec.

In Ontario and Quebec, the writ of *habeas corpus* is the institution of the proceedings and until its return there is ordinarily no opportunity for the opposing party to be heard. The writ itself is granted on an *ex parte* application, and while probably the Crown, as represented by the Attorney-General's department of the province, might, in a criminal matter, intervene and be heard in opposition to the motion for the writ, it is not the practice to notify the department of the intention to apply in those provinces. The writ having been obtained on an *ex parte* motion and service

made on the gaoler or person detaining another in custody, the latter must make his return along with the original writ, it being so directed by the command contained in the writ itself. So it was held in *R.* v. *Rowe* (1894), 71 L.T. 578, referred to in Tremeear's Criminal Law, 2nd ed., 822, that, if the original writ is not delivered to the principal of several persons to be served, the service of a copy of the writ upon the others is not a good service upon any of the others. When it is possible to effect personal service, a writ of *habeas corpus* can only be properly served by actually delivering the original writ to the person to be served, and, if a copy of the writ is served, this is an irregularity which the person served cannot waive by appearing, so as to render himself liable for attachment for disobedience to the writ: *R.* v. *Rowe* (1894), 71 L.T. 578. In the event of the original writ being inadvertently lost before service, a new writ might be allowed to issue: *Pease* v. *Shrimpton* (1651), Sty. 261.

The "return" to the writ if duly made will be endorsed upon or attached to the original writ, and no proof of service will be required: *Re Carmichael,* 10 C.L.J. 325. If the "return" is not made in due form together with the writ served, a motion to attach the delinquent would be in order. An affidavit of a gaoler verifying a copy of the warrant has been accepted as a return when it was accompanied by the original order in the nature of a *habeas corpus* made under the Liberty of the Subject Act, R.S.N.S. 1900, ch. 181, which provides an alternative procedure by motion in Nova Scotia in lieu of the actual issue of a writ: *R.* v. *Skinner*, 9 Can. Cr. Cas. 558.

In other provinces of Canada a different practice prevails in instituting *habeas corpus* proceedings from that followed in Ontario and Quebec. In the Province of Alberta it is the established practice, following in this respect the practice which prevailed in the Courts of the former North-West Territories, to issue a rule *nisi* to be served upon the custodian of the detained party and all others interested as respondents, and which called upon each of them to shew cause why a writ of *habeas corpus* should not issue, and why, in the event of the rule being made absolute, the prisoner should not be discharged without the actual issue of the writ: *R.* v. *Farrar* (1890), 1 Terr. L.R. 306; and see the English case of *Ex parte Eggington*, 2 E. & B. 717. By the Crown Office Rules of British Columbia, 1906, a similar procedure is recognized in that province. An application is to be made either to the Court or a Judge, and if to a Judge he may order the writ to issue *ex parte* in the first instance, or may direct the issue of a summons for the writ: Crown Office Rules (Civil), 1906, rules 235 and 237; Crown Office Rules (Criminal), 1906, rule 1. If, however, the application is to be made to the Court and not merely to a Judge, it must be made by motion for an order, which if the Court so direct may be made absolute *ex parte* for the writ to issue in the first instance, or the Court may follow the more usual course of granting an order *nisi* to shew cause why the writ should not issue. On the argument of the order *nisi* the Court has a discretion, under Crown Office Rule 244, to direct an order to be drawn up for the prisoner's discharge, instead of waiting for

the return of the writ, and such order is expressly made a sufficient warrant to any "gaoler or constable or other person" for his discharge.

In Saskatchewan, by the Practice Rules of 1911 (Crown Rule 35), on the argument of a motion for a writ of *habeas corpus* the Court or a Judge may, in their or his discretion, direct an order to be drawn up for the prisoner's discharge instead of waiting for the return of the writ. Crown Rule 32 (Sask.) requires that, where a return of the writ is made, it shall contain a copy of all the causes of the prisoner's detention indorsed *on the writ* or on a separate schedule annexed to it, but a general clause (Crown Rule 38) provides that it shall not be necessary to serve the original of any writ, but a copy only.

In Manitoba, also, the practice permits of a preliminary summons for the writ of *habeas corpus*, and, by agreement, the whole matter may be presented and disposed of on the return of the summons as if the writs had been issued and had been returned: *R.* v. *Johnson*, 19 Can. Cr. Cas. 203, 1 D.L.R. 548.

A Judge of the Supreme Court of Canada has concurrent jurisdiction with provincial Courts to grant a writ of *habeas corpus* under the Supreme Court Act, R.S.C. 1906, ch. 139, sec. 62, in respect of a commitment in a criminal case where the commitment is in respect of some act which is made a criminal offence solely by virtue of a statute of the Dominion Parliament, and not where it was already a crime at common law or under the statute law in force in the province on its admission into the Canadian Confederation and which had not been repealed by the Federal Parliament: *Re Dean*, 20 Can. Cr. Cas. 374, 9 D.L.R. 304.

Book Reviews.

Canada's Federal System, being a treatise on Canadian Constitutional Law under the British North America Act. By A. H. F. LEFROY, K.C. Toronto: Carswell & Co., Limited, 1913. 966 pp.)

Mr. Lefroy is well known as a student of Constitutional Law and has written much on the subject. The result of his researches, his knowledge and intelligent criticisms find their place in the volume before us, and we welcome its appearance. As we have given it an extended notice in our editorial columns we refer our readers to previous pages. It will doubtless have a large sale amongst all those who are interested in this most important subject in other places as well as Canada.