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*SOME PHASES OF CANADIAN COMPANY LAW.**

When the decision of the Judicial Committee of the Privy Council in *The John Deere Plow Company* v. *Wharton* (1915), A.C. 330, came to hand, it was thought by those who had been following the subject that substantial advances had been made to solve the difficulties in company legislation which had been under discussion since the year 1906. It soon appeared, however, that the difficulties were to be increased. The Appellate Division of the Province of Ontario refused to follow this decision, and a similar attitude was taken by the Courts of some of the Western Provinces.

Then followed the decision of the Judicial Committee of the Privy Council in the *Bonanza Creek Gold Mining Company, Limited* v. *The King* (1916), 1 A.C. 566. This decision upset all well-settled views regarding the capacity and character of companies created under the Dominion Companies Act and of companies under Provincial legislation when created by letters patent. This was accentuated when several Provinces enacted legislation declaring that all companies incorporated under their respective authority be deemed to have the general capacity which the common law attaches to corporations created by charter, Ontario (1916), 6 Geo. V., ch. 35, sec. 6; Manitoba (1917), ch. 12; Saskatchewan (1917), ch. 34, sec. 42. No definition of a common law company or chartered company was given and no provision was made for engrafting the peculiarities of a common law company upon the statutory companies created by these Provinces.

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*The following valuable paper was the substance of an address delivered by Mr Thomas Mulvey, K.C., Under Secretary of State for the Dominion of Canada, at the recent annual meeting of the Canadian Bar Association held in Ottawa.

Then followed the decision of the Appellate Division of Ontario holding in *Edwards* v. *Blackmore* (1918), 42 O.L.R. 105, that the directors of a company have authority to carry on any business whatsoever, notwithstanding the limitations of the purposes and objects set out in the charter. Next the decision of the same Court in *Weyburn Townsite Co., Limited* v. *Honsburger* (1918), 43 O.L.R. 451, that a Provincial company has no authority to carry on business outside the incorporating Province unless duly authorized by a foreign jurisdiction. Undoubtedly this view was condemned by the Supreme Court of Canada, but it may be open to state that this precise question was not raised before that Court and the decision on the subject may be *obiter*.

Perhaps the most disconcerting situation is raised by a direct deduction from the decision of the Judicial Committee of the Privy Council in the *Insurance* case, *Attorney-General for the Dominion* v. *Attorneys-General for Alberta, et al.* (1916), A.C. 588, where it is held that foreign companies, extra Canada, are to be considered as aliens and exclusive jurisdiction respecting them rests with the Federal Parliament.

The result of these decisions undoubtedly is that no exact opinion can be given (1) with respect to the capacity of a Dominion company or a Provincial company incorporated by letters patent or with respect to the authority of the directors of such a company; (2) with respect to the capacity of a Dominion company in any Province with the exception of Quebec and Alberta; (3) with respect to the capacity of a Provincial company carrying on business outside its incorporating Province; and (4) with respect to any foreign company carrying on business in Canada.

It may be of assistance to consider briefly the development of Company Law in Canada. A complete statement of this growth in the Dominion and all the Provinces is unnecessary, as the questions under consideration arose in Ontario or in Ontario legislation, and our attention need be directed to legislation of Ontario and the Dominion alone.

The first general legislation of the Province of Canada was enacted in 1850, 13 and 14 Vict., ch. 28. In preparing this legislation precedents of the United States were taken, not those of the United Kingdom. General legislation passed in the United

Kingdom in 1845, 7-8 Vict., ch. 110, was the first general Act for the incorporation of joint stock companies. That this legislation was not followed in the Canadian Act of 1850 is shewn by the fact that its two main features were not adhered to. Under that Act there was provisional registration, and complete incorporation was granted only after the filing of a deed of settlement. It has been suggested that the methods of the United Kingdom were followed in Canada because the proceedings for incorporation were initiated by the filing of a document. This suggestion does not go to the root of the matter. The essential difference in the two methods of incorporation is not created by the filing of a document or the issue of the so-called letters patent. It is created by the fact that in one case all the constating interests of the company are not public documents and in the other they are. The Act of 1850 provides for the enactment of by-laws, private documents. This is the method which has been followed throughout in the United States. Under all British legislation a memorandum of association or deed of settlement, together with articles of association, were required to be filed with a public officer.

A deed of settlement has been required in modern times even where a company was created by charter. The British South Africa Company was incorporated by charter dated the 28th of October, 1889, notice of which appeared in the "London Gazette" of the 20th of December, 1889, Cd. 8773 (1898), and Cd. 5918 (1890). The deed of settlement, dated the 3rd of February, 1891, was subsequently approved of by Order-in-Council.

It is pertinent also to note that the use of the word "limited" in the name of a company was not introduced in Canadian legislation until the year 1869. The use of this word is of no great importance in the method of incorporation or in the manner of control, but the popular imagination seems to have been moved very greatly by its use, and it is very likely that if British legislation had been taken as a precedent, the word would have been adopted immediately after the year 1862 when it was first used in the United Kingdom. For this reason it is advisable to trace in a few words the development which had taken place in the United States down to that time.

The common law company and its predecessor in trade, the regulated company, were well known to the American colonials. Many of the Colonies owed their origin to charters granted to adventurers for trading purposes in their districts. These corporations became known in the struggle of the colonials with the Home Government, and through the monopolies, liberties, privileges, immunities and franchises with which they were endowed. There appears to be little doubt that such corporations were not in favour with the colonials. This is supported by the fact that no federal authority for the creation of companies is found in the Articles of Confederation or in the Constitution of the United States.

Moreover, the Colonial assemblies were prohibited from creating corporations which by any implication could carry on business beyond the limits of the respective Colonies. The authority at home, which corresponds to the existing Colonial Office, vetoed all legislation which had any extra-territorial effect, *Foreign Corporations in American Constitutional Law*, pp. 22-23; C. C. Henderson, Harvard University Press, 1918. This policy in a limited degree still prevails, as is evidenced by a resolution passed at the recent session of the Canadian Parliament requesting an amendment to the British North America Act authorizing the extra-territorial effect of Dominion legislation, *Votes and Proceedings of Parliament*, session 1920, p. 443.

Moreover, the colonials were hampered in their progress in company legislation through want of precedents for this purpose in the United Kingdom. The Bubble Act, passed in 1720, was strictly enforced, and for that reason the incorporation of companies was prohibited by law. This Act was not repealed until the year 1825, and for over a century there was no advancement whatever in company legislation or promotion in Great Britain.

The persistence of the effect of colonial fears and the colonial policy of the Home Government is apparent when the legislation and the decisions of the Courts of the States are considered. For many years after the Revolution a company which proposed to carry on business in more than one State procured similar

legislation in the other States. It was not until 1811 that the first general Companies Act was passed in the State of New York and freedom of incorporation did not become general until the middle of the last century, Henderson, p. 37. It was not, in fact, until 1837 that it was held by the Supreme Court of the United States that a company could carry on business in a State other than that of its creation, *Bank of Augusta* v. *Earle* (1837), 13 Pet. 519.

Side by side with these restrictive provisions, legislation limiting and restricting the rights of companies other than those of the State were adopted. The first relative to the subject of insurance was passed by the State of New York in 1821. Legislation of this character was passed by all the States limiting foreign companies, and included companies of other States. It was brought about by the jealousies of the various States, more particularly between the North and South. This is referred to by Mr. Justice Field in *Paul* v. *Virginia* (1868), 8 Wallace 168, where he pointed out that if an argument adduced should prevail a State could not charter a company with purposes, however restricted, without at once opening the door to a flood of corporations from other States to engage in the same pursuit. It is pertinent to quote further from the judgment in that case to shew the prevailing views respecting companies held at that time, *Paul* v. *Virginia* (1868), 8 Wallace 168, at p. 181:

"The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. . . . Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their consent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exlcude the foreign corporation entirely; they may restrict its business to particular localities or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

It should be pointed out that the law of the United States stood in this position at the time the British North America Act was passed and this may have had some influence upon the framers of the Confederation Act.

It is pertinent here to remark that the Father of Confederation, who perhaps had more precise ideas upon th subject than any other, namely, Sir Oliver Mowat, in his administration of the Ontario Companies Act would not permit of an Ontario company being authorized to carry on business outside the Province. It was not until after his resignation as Attorney-General that an amendment of the Act was made permitting the incorporation of railways carrying on business outside of Ontario (1899), 62 Vict. (2) ch. 11, sec. 21. Moreover, the Extra-Provincial Corporation legislation was not enacted until later.

These historical references are made not for the purpose of indicating either present views or future progress in Canada, but to point out a narrow system which should be avoided. Further reference to the more recent developments in the United States will also be made.

It is necessary to follow the growth of the company difficulties which were indicated at the outset.

The capacity of Provincial companies was raised by the question propounded by the Court in *Canadian Pacific Ry.* v. *Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405, without any definite conclusion being arrived at. It was also raised in the questions propounded to the Supreme Court of Canada by the Governor-General in Council and argued in what is known as the *Company* case (1916), A.C. 598. A specific case raised in *Bonanza Creek Gold Mining Company, Limited* v. *The King* (1916), A.C. 566, disposed of the subject. Although the *Company* case was discussed before the Judicial Committee of the Privy Council, the decision in this case determined the matter. There is no use criticising the decision of the Judicial Committee. Undoubtedly it was contrary to the well-defined ideas of Canadian lawyers who had given the subject great consideration, and it developed a situation which was fraught with grave dangers in the advancement of company law, either by way of legislation or decisions

of the Courts. Companies incorporated by letters patent had always been considered to be statutory companies, and the decision that they were common law companies came with a considerable shock.

The Provinces, no doubt, considered this decision a virtual victory, and in order to clinch it and to obtain what was supposed to be the greatest advantage for their companies, passed legislation to the effect that all companies provincially incorporated, whether under general or special Acts, should be considered to be common law companies. This legislation appears to have been carried through without any consideration of the difficulties which it would create. Common law companies are very well known to the profession by name. Their exact nature is, however, little known. The common law companies best known and discussed in the books and reports were municipal corporations and foreign-trading companies which had the monopoly of trading and to some extent had delegated sovereign powers. Common law companies, as the usual company incorporated in Canada, were quite unknown. It is fair to say that the method of conducting the business of common law companies was quite different from that of the Canadian company, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720*, p. 150; Cambridge University Press, 1912. Nevertheless, without any consideration whatever of these differences of management and differences of nature, the peculiarities of common law companies were added to companies incorporated by statute.

The only case dealing with the capacity of a common law company, which was discussed, was the *Sutton Hospital* case, 10 Coke 1, and the decision there was that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own Nothing is said about the manner in which the chartered company may bind itself or deal with its property. In fact, a company cannot deal with its property in the manner in which a natural person may. A company can bind itself only through agents, while a natural person binds himself without

any such intervention. The difficulties of company law are largely those which are raised by the manner in which the agents are appointed and the manner in which they act. In fact the by-laws, the authority of directors and officers, the calling and method of conducting of meetings of directors and shareholders, are all substantial matters for consideration in determining the agency by which a company is bound.

One of the first results of this anomalous condition is shewn in the judgment of the Appellate Division of the Supreme Court of Ontario in *Edwards* v. *Blackmore* (1918), 42 O.L.R. 105. There it was held that the directors, without reference to the shareholders, could carry on any business whatsoever, whether set out in the charter or not. This conclusion would be subversive to the conduct of business by means of companies. An investor would have no means whatever of knowing the destination of his capital or the manner in which it was to be used. He would be entirely in the hands of the directors. This was not so in the common law company of which we know. It was the body of members in general meeting who controlled the affairs of the company. Many of these companies had no joint capital, the capital in each case being subscribed for particular ventures, and in many cases there was not even the joint venture of all the members. It may be fairly said that if the principle as laid down in *Edwards* v. *Blackmore* is followed—and undoubtedly this decision is binding on all the Courts of Ontario—the development of business by means of incorporated companies would be at an end; and when it is pointed out that the incorporated company is the greatest instrument of modern commerce, the position of the Canadian merchant or investor may be readily deduced.

The decision of the Appellate Division of the Supreme Court of Ontario in *Weyburn Townsite Co., Limited* v. *Honsburger* (1918), 43 O.L.R. 451, appears to revert to the early American view of the limitation of company activities. No comment or statement in either the argument or judgments in the *Company* case or the *Bonanza Creek Gold Mining* case can be shewn to support this conclusion. A phrase in the *Insurance* case has been suggested as supporting this view. Viscount Haldane (1916), A.C. p. 597:

"But if a company (insurance company) seeks only Provincial rights and powers, and is content to trust for the extension of these in other Provinces to the Governments of these Provinces, it can at least derive capacity to accept such rights and powers in other Provinces from the Province of its incorporation as has been explained in the case of the *Bonanza Company*."

It is questionable whether such a far-reaching conclusion as that of the Court in the *Weyburn Townsite* case should depend on so meagre a statement. Moreover, the Committee was considering an insurance company which is subject to peculiar limitation in all the Provinces. Undoubtedly the limited view was held by the trial Judge and it was affirmed by the Appellate Division. The judgment, however, of the Appellate Division was given on other grounds, and on an appeal therefrom to the Supreme Court of Canada the judgment of the Appellate Division was affirmed. The Judges, however, differed from the views of the trial Judge and of the Appellate Division upon this legal question, and it appears that there was no argument upon it, the decision of the Supreme Court going entirely in supporting the determination of facts held by the Appellate Division. For this reason it is open to be argued that the view of the Judges of the Supreme Court were entirely *obiter* and the question is open still for argument.

It is unnecessary to study the extra-provincial legislation of all the Provinces; that of Ontario initiated the present condition. The legislation of Manitoba on the subject serves as a type. The first legislation there was passed in 1877, and had for its object the invitation of financial companies to do business in that Province. The provisions were extended to other companies, and subsequently dealing in land was restricted. It was not until 1909 that the right of audience before the Courts was restricted.

The Ontario legislation was first passed in the year 1900, 63 Vict., ch. 24. This legislation has been followed in all of the Provinces. Its competency was first called in question in the questions propounded by the Court in *Canadian Pacific Ry.* v. *Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405. The judgment of the Court in this case added very little to the discussion. The

subject was again raised in the questions propounded by the Governor-General in Council and referred to the Supreme Court of Canada by Order-in-Council dated the 10th of May, 1910. These questions were discussed by the Supreme Court and an appeal was made to the Judicial Committee, but in the meantime the decision of the Committee in the *John Deere Plow Company* v. *Wharton* (1915), A.C. 330, was supposed to have decided the question.

The opinions of the Judges of the Supreme Court in the *Company* case were before the Judicial Committee of the Privy Council, and their Lordships refused to consider the abstract question which was raised. Their Lordships refused to define *a priori* the full extent to which Dominion companies may be restrained in the exercise of their powers by the operation of enactments properly framed under the provisions of sec. 92 of the British North America Act. Their Lordships held that it was not within the powers of the Provincial Legislature to enact in their then form the provisions of the British Columbia Companies Act respecting the licensing of Dominion companies. They, in substance, held that the British Columbia Act was *ultra vires* in so far as it related to Dominion companies.

The subject was next before the Courts in *Currie* v. *Harris Lithographing Co., Limited* (1918), 41 O.L.R. 475. The Chief Justice of Ontario, in his judgment, refused to be bound by the decision of the Judicial Committee of the Privy Council. The grounds for not following this decision may be put in this way: The Judicial Committee did not hold that it was beyond the competency of the local Legislature under any circumstances to limit Dominion companies. It was held that the legislation in its then form did not accomplish this purpose. The Chief Justice of Ontario held that the Ontario legislation was not in the same form as that of the Province of British Columbia, and for that reason the decision of the Privy Council was not applicable. It may be said that an analysis of the form of the legislation in both cases was not referred to or dealt with. His Lordship also referred to the general topic of the distribution of legislative authority respecting companies, which it is proposed to consider

in greater detail, and also to the question of mortmain. The method of the Appellate Division of the Supreme Court of Ontario would render it necessary to litigate to the Privy Council the provisions of the Extra-Provincial Corporations Act of each of the Provinces. It is a pity that the precise wording of the British Columbia and Ontario Acts was not compared so that it could be seen to what extent they differed. In this way the Ontario legislation escaped the result of the decision in the *John Deere Plow Company* case.

The subject is now pending before the Judicial Committee of the Privy Council in an appeal from *Currie* v. *Harris Lithographing Company, Limited; Harmer* v. *Macdonald* (1917), 33 D.L.R. 363, and *Davidson* v. *Great West Saddlery Co.* (1917), 35 D.L.R. 526. If after the decision in these cases the Canadian Courts still follow the method applied by the Chief Justice of Ontario, it is likely that no further assistance will be given in solving this difficulty.

There are two grounds upon which the Provinces contend for the control of companies; first, and perhaps the most important, is the revenue derived; second, and one upon which great stress is laid, is the right of the Province in mortmain. With respect to revenue there can be no question where it is in the form of taxation. With respect to the question of mortmain, the whole subject has been misconstrued and the positions of the Provinces and the Dominion in this respect are not adequately understood. Some of the Provinces, notably Ontario, as indicated in the Chief Justice's judgment in *Currie* v. *Harris Lithographing Co., Limited*, maintain their attitude with respect to Dominion companies mainly on their asserted right in mortmain, and the Chief Justice quotes decisions to support this contention. It should be pointed out that there are no decisions which substantiate this claim. There are a number of dicta in decisions of the Judicial Committee of the Privy Council which might support this view, but these utterances cannot, by any means, be considered to be decisions of the Committee. The decisions in question are: *Citizens Insurance Company* v. *Parsons* (1881), 7 A.C. 96; *The Colonial Building and Investment Association* v. *The Attorney-General of Quebec* (1883), 9 A.C. 157; *Chaudiere Gold Mining Company* v. *Desbarats* (1873),

5 P.C. 277; and *The John Deere Plow Company* v. *Wharton* (1915), A.C. 330. In none of these cases was the question of mortmain up for consideration. It should also be pointed out that the decision in *Chaudiere Gold Mining Company* v. *Desbarats* was nullified by legislation of the Province of Quebec before the decision of the Privy Council was given (1872), 36 Vict., ch. 25, sec. 2. Provincial, Dominion, United States, Imperial, and other companies are not required to obtain a license in mortmain in the Province of Quebec.

In considering the question of mortmain, if weight is to be given to the dicta above referred to it should be investigated whether provincial legislation is in fact within the description of "mortmain legislation." The primary purpose of this legislation is to preserve the rights of the lord of the manor. In the Western Provinces, except British Columbia, the Dominion is the lord of the manor and provincial legislation cannot be deemed to be truly within the description. It is in fact restrictive legislation, and it is open to argue that the general license to hold lands contained in the Dominion Companies Act may overrule this restriction. With respect to the other Provinces, it may be fairly said that all, except Ontario and British Columbia, have no mortmain legislation, as such, limiting Dominion companies.

Serious limitations are imposed on the extra-provincial companies legislation by a precise deduction from the decision of the Judicial Committee of the Privy Council in the *Insurance* case (1916), A.C. 588. The second question propounded for consideration in that case is as follows:—

(2) "Does sec. 4 of the Insurance Act, 1910, operate to prohibit an insurance company incorporated by a foreign state from carrying on the business of insurance within Canada, if such company does not hold a license from the Minister under the said Act, and if such carrying on of the business is confined to a single Province?"

The decision therein is as follows:—"The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a license from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single Province.

To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the head in sec. 91, which refers to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative."

No doubt the question under consideration referred to insurance companies only, but the reasons for the decision apply equally to companies of all classes.

The power given the Dominion Parliament in this respect is held to be given under the enumerated clauses of sec. 91 of the British North America Act, and Dominion legislation upon the subject of foreign companies would oust Provincial legislation on the same subject. The right to hold lands in Canada is conferred on aliens not by Provincial legislation but by Federal. A curious situation is brought about by this conclusion. With properly drawn Dominion licensing legislation, the extra-provincial legislation of the Provinces could be set aside and persons desiring to proceed with company activities without control of the Provinces could incorporate in Delaware and obtain a Dominion license, and hold lands notwithstanding the Provincial mortmain legislation.

The modern joint stock company is the great instrument of modern business. If the tendency of the past few years is continued, it may be fairly said that modern business is carried on exclusively by joint stock companies. Any doubt cast upon the effect or operation of company legislation must hamper business. At the present time more than any other during the history of Canada, the greater freedom of business method is necessary. When a lawyer cannot advise his client with respect to the capacity of a proposed company or with respect to the limitations under which it may be placed, business development must be hampered. The difficulties above indicated should be solved. The solution may be assisted by the members of the Canadian Bar Association, and the pressure which the members of the bar throughout Canada may bring to bear upon the Dominion Parliament and the Provincial Legislatures. This will be assisted by a more exhaustive

study of the various questions of company law presented to the Courts. The time for quibbling is past. The working out of logical conclusions of theoretical principles which were sufficient for past times will not avail us at present. Company law is for the business community and the advancement of trade. Company law should not be for the sophist or the quibbler. The question of the method of solving these difficulties remains.

The Chief Justice of Ontario in his judgment in *Currie* v. *Harris Lithographing Co., Limited* (1917), 41 O.L.R 475, at p. 498, after considering the authorities and the interpretation of the statutes upon the subject, refers to the political considerations which induced him to decide as he did. There can be no doubt that political considerations should be dealt with in disposing of the question. When a statute is capable of more than one interpretation, it seems on the ground of expediency and also in the best interests of the community that, where no principle is infringed, that construction which will most greatly promote trade and commerce should be adhered to. The Chief Justice refers to the subject as follows:—

"It is, I think, to be regretted that at the outset it was not determined that the authority of the Parliament of Canada to incorporate companies was limited to creating them and endowing them with capacity to exercise such powers as it might be deemed proper that they should possess, but leaving to each Province the power of determining how far, if at all, those powers should be exercised within its limits.

"Such a construction would, of course, have left to the Parliament of Canada authority to legislate for the incorporation of companies with other than provincial objects, using the words 'incorporation of companies' in the sense which I have just mentioned, but leaving it to the Province to endow the company with such powers as it should deem proper that it should possess."

There can be no doubt that for the purpose of determining the status and the scope of a company this method of distributing legislative jurisdiction in the incorporation of companies would have been quite simple. It is doubtful, however, whether it would have been in the best interests of the Dominion at large. Under

such a method, while a company might be incorporated by the Dominion, it would have no capacity to do business or carry on its activities without the consent and approval of the Provinces. This would leave the operation of the company in the control not of its creator, the Dominion, but in the control of the Provinces. It is likely to follow therefore that the control would be exercised in the interests of the Provinces, and not in the interests of the Dominion at large.

We have copied many things from the United States: many things, in fact, which would have been to our advantage not to have copied. Moreover, there are many developments in the past history of that country which are worthy of careful study. We are now in a similar state of commercial development which was found in the United States during the early decades following the Civil War. The development of trusts and combinations which can be traced in the United States forty or fifty years ago are now apparent in Canada. A study of the causes which led to the trusts of the United States and the methods devised to counteract them should be fruitful in Canada at present. In the United States the States have even greater control over the incorporation of companies and the Federal Government less than prevails in Canada. Adopting the suggestion of the Chief Justice would vary the circumstances very little except that the creation of the company carrying on Dominion-wide business would be in the hands of the Federal authorities although there would be no authority whatever over its future actions. In the United States during the past thirty years or more there has been a growing and persistent agitation for the incorporation and control of companies carrying on interstate trade by the Congress of the United States. It has been pointed out that the control of trusts has not been adequate because of their creation by the States and that it is in fact only the authority which creates which can effectively control. This agitation in the United States developed as far as the introduction of a Bill in Congress for this purpose in the year 1910. This Bill was introduced following a special message to Congress by the then President of the United States, Mr. Taft, 61st Congress, 2nd Session, House Document 484, vol. 131. The pertinent references in the message are as follows:

"In considering violations of the antitrust law we ought, of course, not to forget that that law makes unlawful, methods of carrying on business which before its passage were regarded as evidence of business sagacity and success, and that they were denounced in this Act not because of their intrinsic immorality, but because of the dangerous results toward which they tended, the concentration of industrial power in the hands of the few, leading to oppression and injustice. In dealing, therefore, with many of the men who have used the methods condemned by the statute for the purpose of maintaining a profitable business, we may well facilitate a change by them in the method of doing business, and enable them to bring it back into the zone of lawfulness without losing to the country the economy of management by which in our domestic trade the cost of production has been materially lessened and in competition with foreign manufacturers our foreign trade has been greatly increased . . .

"I therefore recommend the enactment by Congress of a general law providing for the formation of corporations to engage in trade and commerce among the States and with foreign nations, protecting them from undue interference by the States and regulating their activities, so as to prevent the recurrence, under national auspices, of those abuses which have arisen under State control. . . .

"If the prohibition of the Antitrust Act against combinations in restraint of trade is to be effectively enforced, it is essential that the National Government shall provide for the creation of national corporations to carry on a legitimate business throughout the United States. The conflicting laws of the different States of the Union with respect to foreign corporations make it difficult, if not impossible, for one corporation to comply with their requirements so as to carry on business in a number of different States.

. . .

"Such a national incorporation law will be opposed, first, by those who believe that trusts should be completely broken up and their property destroyed. It will be opposed, second, by those who doubt the constitutionality of such federal incorporation, and even if it is valid, object to it as too great federal centralization. It will

be opposed, third, by those who will insist that a mere voluntary incorporation like this will not attract to its acceptance the worst of the offenders against the antitrust statute and who will therefore propose instead of it a system of compulsory licenses for all federal corporations engaged in interstate business."

Mr. Taft proceeded to deal with these objections and after dwelling on the continued efforts of the Government to eliminate trusts proceeded.

"But it is not, and should not be, the policy of the Government to prevent reasonable concentration of capital which is necessary to the economic development of manufacture, trade, and commerce. This country has shewn a power of economical production that has astonished the world, and has enabled us to compete with foreign manufactures in many markets. It should be the care of the Government to permit such concentration of capital while keeping open the avenues of individual enterprise, and the opportunity for a man or corporation with reasonable capital to engage in business. If we would maintain our present business supremacy, we should give to industrial concerns an opportunity to recognize and to concentrate their legitimate capital in a federal corporation, and to carry on their large business within the lines of the law."

The constitutionality of the Bill was then discussed. This need not concern us. There is no doubt of the constitutionality of the Dominion Companies Act.

"Even those who are willing to concede that the Supreme Court may sustain such federal incorporation are inclined to oppose it on the ground of its tendency to the enlargement of the federal power at the expense of the power of the States. It is a sufficient answer to this argument to say that no other method can be suggested which offers federal protection on the one hand and close federal supervision on the other of these great organizations that are in fact federal because they are as wide as the country and are entirely unlimited in their business by State lines. Nor is the centralization of federal power under this Act likely to be excessive. Only the largest corporations would avail themselves of such a law, because the burden of complete federal supervision

and control that must certainly be imposed to accomplish the purpose of the incorporation would not be accepted by an ordinary business concern.

"The third objection, that the worst offenders will not accept federal incorporation, is easily answered. The decrees of injunction recently adopted in prosecutions under the antitrust law are so thorough and sweeping that the corporations affected by them have but three courses before them:

"First, they must resolve themselves into their component parts in the different States, with a consequent loss to themselves of capital and effective organization and to the country of concentrated energy and enterprise; or

"Second, in defiance of law and under some secret trust they must attempt to continue their business in violation of the federal statute, and thus incur the penalties of contempt and bring on an inevitable criminal prosecution of the individuals named in the decree and their associates; or

"Third, they must recognize and accept in good faith the federal charter I suggest."

It was not, however, enacted. We see further evidences quite recently in an amendment of the Act of Congress respecting the Federal Reserve Board. In the first instance authority was given the Federal Reserve Board to control State-created corporations to carry on foreign banking, and after a short experience there was a further amendment providing for the creation of federal corporations for this purpose, 66th Congress, 1st Session, Report 408, Senate Bill 2472. With this example in the United States it appears to be worthy of consideration whether all companies carrying on Dominion-wide business should not be incorporated and regulated by Dominion legislation.

This subject was exhaustively investigated by the Industrial Commission appointed under an Act of Congress in 1898. The report was issued in 1902. This report (vol. 19, p. 643) proposed three plans of legislation for Federal supervision which may control the combinations doing an interstate business as follows: the first that Congress might relegate to States its power of control over interstate commerce; the second, that Congress would enact

a Federal incorporation law under which all corporations doing interstate business must be organized; the third involved modifications of the present law, which by regulative measures would give Congress control over corporations engaged in commerce between the States and with foreign nations.

The first plan was set aside, it being considered inadvisable to adopt it, as great confusion in legislation would result.

The second plan was recommended, with certain criticism and reservations arising from the constitutional difficulties. These difficulties arise, primarily, from the fact that all companies in the United States are State incorporated, and it would create a revolution in business and legal methods to immediately require all of them to apply for Federal incorporation. This difficulty is very slight in Canada. It may fairly be said that all the large corporations in Canada are incorporated under Dominion law. Undoubtedly some of them are carrying on business under Provincial legislation, but the number is negligible. The constitutional difficulties in the United States do not arise in Canada. There is no express authority under the constitution of the United States for the incorporation of companies. If there is such authority it is by implication, and the subject is still under debate. This is not the case in Canada, as it has been held by the Judicial Committee of the Privy Council that the Dominion has authority to incorporate companies carrying on business throughout the Dominion.

The third plan suggested measures of publicity of corporate affairs which are largely embodied in the Dominion as well as in Provincial legislation. An extract from the opinion of Mr. F. J. Stimson, Advisory Counsel to the Industrial Commission, is worthy of reproduction. (The numbering of the plans referred to in this opinion is not that above indicated.)

> "Leaving that second plan, we now come to the third. That is the one I propose to take up first. This is an equally novel proposition, which, I think, originated before this Commission; that in order to meet the evil, real or imaginary, of those trusts or combinations, that is, of those great corporations now created by the States, the Federal Government,

under the interstate power of the constitution, should take under its control all corporations which were organized for the purpose of engaging in interstate-commerce business or are in fact doing such business. I am going to take up that, which I call the system of national control or Federal control. First, for this reason, that it is distinctly the most radical and revolutionary of the three courses, and also by far the most effective. In other words, if it be constitutional, and if Congress should deem it also expedient and wise, such an act of Congress would be a far more drastic and complete remedy, obviously, than the other two. Therefore, if the Commission were, at the end of its debate on this subject, satisfied both as to the constitutional power and the expediency of such a recommendation, it would in a sense dispose of the other two, which are both halfway measures. Therefore it seems to me wise to take up this plan."

Mr. Stimson, in proceeding with the subject, advised that such a measure was constitutional, and he recommended Federal incorporation. This view was supported by the Commission, attention being drawn to the difficulties which such a measure would create. These difficulties are negligible in Canada, but may be substantial in the United States, when the constitution is considered. In future time they may not be negligible in Canada. The present appears to be the time for action towards reaching a decision.

In dealing with this subject, the rights of the Provinces, under the British North America Act, must be duly safeguarded. It is because these rights and also those of the Dominion are not clear or well-defined that a method of compromise should be suggested. The right of the Provinces to create companies with Provincial objects should not be encroached upon, and it is in no way suggested that such an encroachment should be discussed.

Beyond the right which is conferred by the British North America Act, which as such should be inviolable, it is clear that the main motive underlying the contest of the Provinces upon this question is that of revenue. The right of legislation in mortmain is undoubtedly brought forward on all occasions, but there is no

doubt that it is brought forward very largely for the purpose of buttressing the situation of the Provinces for the obtaining of revenue.

The subject was discussed before the Banking and Commerce Committee of the Senate when the Companies Amendment Act of 1917 was considered, and it was suggested that all the revenue, or the bulk thereof, derived by the Dominion from the incorporation of companies should be handed over to the respective Provinces of the head offices of the various companies. It was even suggested that a clause should be inserted in the Bill making a statutory offer to this effect to the Provinces. However, as the matter was one of revenue, it could not be dealt with in a Bill originating in the Senate, and no further steps were taken. If the main contention of the Provinces is with respect to revenue, and if perhaps a greater revenue than that at present received could be handed back to them, a solution of the whole difficulty might be arranged.

Another objection raised to this arrangement—which is trivial when analyzed—is that it would be inconvenient to the people of the various Provinces, perhaps very distant from Ottawa, to apply to Ottawa for incorporation. There is no reason why a branch of the Department of the Secretary of State should not be established wherever it may be found to be convenient, so that no difficulty need be encountered in this way.

It is submitted for the consideration of the Canadian Bar Association that this or some similar method of solution of the difficulty should be submitted to the Dominion and the Provinces. The Association is strong in all the Provinces of Canada. The Attorneys-General of the Provinces are, in fact, officers of the Association, and a conference may be arranged for the purpose of discussing the suggestion, or any other proposed method of alleviating the present situation.

It is one of the purposes of the Association to unite for the unification of Canadian law. There is scarcely any law in which there is greater divesity and where greater benefit would accrue from unification. The method of incorporation by letters patent originated in the Province of Canada, and it has spread to

the Provinces of Quebec, Nova Scotia, New Brunswick and Manitoba. The Province of British Columbia on its erection adopted the English method of registration by memorandum of association. The North West Territories also adopted this method which was subsequently changed and the change continued by the Provinces of Alberta and Saskatchewan. The Provinces of Prince Edward Island and Nova Scotia have lately adopted that procedure. These methods are essentially different in principle, and these differences and their conclusions pervade the details of company organization. Which method should prevail is the subject for discussion. Each has its advantages, and perhaps its disadvantages, but it appears to be in the interest of every one concerned that a uniform method should be adopted, and in the end very little inconvenience would follow the adoption of either method.

THOMAS MULVEY.

OTTAWA, July 16, 1920.

THE APPOINTMENT OF KING'S COUNSEL.

Shortly before the close of 1920 the subject of the appointment of King's Counsel by Provincial Governments came up for discussion.

It would appear that in the Province of Ontario only six patents have been issued since 1910; consequently there has been a pressure from all parts of the Province for further appointments.

There are those who think that the conferring of this distinction has become so meaningless that it might as well be discontinued. However that may be, the Attorney-General took the matter up, and we are glad to know that the same thought came to him as has occurred to others who have the honour and dignity of the Bar at heart; namely: that such an honourable distinction should not be made a political plaything. We can therefore sympathize with him in his laudable effort to have these appointments kept as a recognition of professional eminence and personal worth, and not given for political services.

With this thought in mind, the Attorney-General sought the assistance of Chief Justice Meredith of Ontario, Chief Justice Mulock and the Treasurer of the Law Society of Upper Canada, asking them if they would act with nim in the selection of desirable counsel. This they consented to do.

One of the leaders of the Bar, who is both learned and accurate, in a letter to the press took exception to what seemed to be, on its face, and which might, in view of the published correspondance, have been characterised as an unconstitutional proposition, viz., for a Government "to leave the selection of His Majesty's Counsel to others"; and thus "abdicate their constitutional functions in this respect in favour of someone else." Whilst this view might be a subject of discussion, we are satisfied it was not intended that the gentlemen named should make the appointments. We may well assume that the Attorney-General was quite aware that the responsibility was that of the Government, and that it was never intended it should be bound to appoint the men who might be recommended by the Chiefs and the head of the Law Society. The essence of the proposition was rather that in future no appointments would be made except of a person recommended to the Attorney-General by a majority of the three above named representatives of the Bench and Bar.

Whilst the responsibility is clear, it is not unreasonable, rather the contrary and also beneficial, that the responsible person, in this case the Attorney-General, should get reliable information from some source, so as to be in a position to form an opinion as to the eligibility of applicants or suggested applicants for the honour.

It does not follow, however, that Judges should be chosen for this purpose. The clamour for the distinction of K.C. too often comes from men who are more prominent in the political arena than in the professional, and with them the less the judiciary has to do the better. We have seen lately too much of the evil of this sort of thing, and Governments, whether Federal or Provincial, should set their faces against anything which would have a tendency to drag the judiciary into the mire of party politics. Moreover,

the judicial robe does not always, in the thought of the public, as it should, eradicate all remembrance of party politics or political proclivities. For their own sake, and their high office, as well as for the good of the public they should be protected from such entanglement, or even the suspicion of it. We must not, however, be misunderstood in this matter. It will be the duty of the Attorney-General to lay down the standard for these appointments, and it will be for those who are asked to make recommendations or selections to keep this standard in view. The standard doubtless will be professional eminence and reputable character alone, politics or friendships being unknown. We are believers in the doctrine of *noblesse oblige*, and are quite sure that the advice of the advisers suggested will be acceptable to all.

A correspondent suggests a reason why Judges are not necessarily the most appropriate advisers, and thinks the Benchers would be better, inasmuch as the former do not come across lawyers to the same extent as do the latter. Consequently, those of the profession who live in towns and cities outside the provincial capital are not as well known to Judges as they are to the Benchers who come from their neighbourhood; and so, many who might be proper recipients of the honour are overlooked. This country as well as others, and whether we like it or not, is now cast in the democratic mould, and the public demand elective institutions. There is, however, only one elected body of lawyers, namely, the Benchers of Law Societies. If, therefore, an advisory board is desirable, the Benchers might be requested to approve or disapprove of any list of applicants which might be presented to them by any Provincial Government. The duties for which they were elected do not touch this matter; but it would do no harm if their functions were enlarged; for, so far, they have not done much to help the legal profession to take the important position it ought to occupy in view of its intelligence, education and the influence of isolated individuals. We are glad to see the Canadian Bar Association coming to the front in that respect.

There is another matter akin to the above which was referred to in our columns some years ago, and which may come up again, and it is this: If the appointment of King's Counsel should be

kept free from party politics it is much more important that politics should not be a factor in the appointment of the judiciary. Whilst it is quite true that the duty elected advisers of the Crown must take the responsibility of appointments to positions of honour, such as the above, it is most desirable that, in regard to the judiciary, the Bar should, in some collective capacity, have the right to express its opinion as to who would be most desirable occupants of the Bench. The Federal Government may, and perhaps does, discuss judicial appointments with the Provincial Governments of the various Provinces, or with the head of the legal department in each Province, who in a sense represents the Bar in his Province; but the Bar, as such, is not consulted. It is not in the public interest that they should be ignored, quite the contrary. This, however, opens up another field of discussion into which we cannot at present enter.

APPEALS TO THE PRIVY COUNCIL.

Occasionally an effort is made to bring to the front the thought of some who desire to do away with appeals to the Privy Council. A recent number of the *Law Times* (Eng.) refers to the subject. The writer seems to us to give unnecessary attention to views expressed by the few who think a change is coming.

One of them is a learned professor in Scotland, who evidently knows very little about the matter, and speaks only from what he gathers from a misconception of the spirit of this Dominion. Another who advocates a change is a legal writer of repute, but who is well known in reference to his pet theory, that Canada should sever her connections with the Empire and become an independent nation. He, of course, would naturally be glad to see all ties binding the units of the Empire together severed one by one. His views, therefore, are not of value in this connection. Another member of the profession urges a change, for reasons which have not met with the approval of representative bodies such as the Canadian Bar Association and the Law Societies, and he properly premises his argument by the significant

remark that he speaks as a private in the ranks, and not as one holding a prominent position therein by reason of his being a member of the Government in one of the Provinces. Others there are who think some change in the present practice might be desirable, but have not as yet formulated any scheme to that end.

As therefore the change is not wanted, and as it would, if made, weaken the ties that bind the Empire together, it would be well to bury the subject, and turn to other matters which need the attention of all who desire to do something practical for the welfare of our country.

DOWER.

Conveyances to Defeat.

One of the features in this ancient branch of law was recently discussed in the Dominion Law Reports (*Re Osborne and Campbell*, 55 D.L.R. 258), by Mr. E. Douglas Armour, K.C. His paper, an annotation to the above case, gives point to suggestions made from time to time that this intended benefit for married women should be abolished, and something else less cumbersome and inconvenient and more helpful provided in its place. In some of the Western Provinces dower is no more, and its decease has been a source of satisfaction rather than of sorrow. We should like to hear from some of our readers on the subject of some change in others of the Common Law Provinces.

The article referred to reads as follows:—

In *Re Osborne and Campbell* (1918), 15 O.W.N. 48, it appears that a conveyance was made to M. in fee simple, "to have and to hold unto the said M. his heirs and assigns forever to such uses as he shall by deed or deeds in writing or by his last will and testament appoint, and in default of appointment to the use of him and his heirs absolutely." M. died without having exercised the power by deed, and by his will gave all his property to his executors on trust to convert and divide the proceeds. Upon a sale by the executors, the purchaser objected that the widow of the testator should bar her dower. The Judge held (1) that the will was a good exercise of the power (R.S.O. 1914, ch. 120, sec. 30; *In re Greaves' Settlement Trusts* (1883), 23 Ch. D. 313); (2) that in the absence of the widow, who did not appear, though notified, the question as to the true construction of the deed (on the point

whether the power could co-exist in M. with the fee) should not be considered; and (3) that the widow was not entitled to dower; and that the objection was not well taken.

In *Re Cooper and Knowler* (1920), 19 O.W.N. 27, a similar deed was up for interpretation, but in this case the vendor was the grantee in the deed. The limitations were in fee simple, "to have and to hold unto the said grantee his heirs and assigns to and for such uses as the grantee may by deed or by will appoint and in default of appointment then to hold unto the said grantee his heirs and assigns in fee simple." On an objection by a purchaser that the vendor's wife should bar dower, Orde, J., held that the question was too doubtful for a final decision in the absence of the wife, who apparently had not been notified, and refused to force the title on the purchaser. *Re Osborne and Campbell* was not cited on the argument, but on the Judge's attention being called to it subsequently, his Lordship adhered to his opinion for reasons stated in (1920), 19 O.W.N. 123.

Although Orde, J., was of opinion that the fact that the grantee was dead in the one case and living in the other in no way affected the principle involved, it is submitted that it is an important factor in each case.

Taking *Re Osborne and Campbell* first. Although the Judge stated that in the absence of the widow the question as to the interpretation of the deed (on the point whether the power could co-exist with the fee) should not be considered, his Lordship held that the power was well exercised by the will, which certainly seems to involve a determination that the conveyance to M. to such uses as he should appoint was a well drawn conveyance to enable the grantee to defeat dower. It may be that his Lordship intended, not to decide this point, but merely to re-state the argument of the vendor's counsel, following it by his refusal to consider the interpretation of the deed, and declaring that the wife had no dower because she did not appear to claim it. The report is neither full nor accurate enough to ascertain clearly the grounds of the decision.

Assuming, however, that according to his Lordship's dictum the power was well exercised by the will, it does not follow, in the writer's opinion, that dower was defeated. The effect of a conveyance to a grantee in fee simple to such uses as he may appoint, is to vest in him an estate in fee simple by common law, the conveyance so operating: *Savill Brothers Ltd.* v. *Bethell*, [1902] 2 Ch. 523 at 541. The limitation in fee vests the estate in him, and he is in by the common law; and the addition of a declaration of uses does not add anything to his estate. The utmost that can be said of it is that it may afford an alternative mode of conveyance to the simple grant. Even on the interpretation of the limitations and habendum (in this case) M. was grantee in fee simple, because, by the habendum, in default of appointment the land was limited to him and his heirs. As there was no appointment during his life-time he died seised of a legal estate in fee simple by direct limitation to him and his heirs, and in default of appointment, which estate was capable of being directly devised without resort to the power.

The next step in the case is to ascertain the conditions at the moment after his death. On the moment of his death, his widow became entitled by law to her dower, as he died seised of a legal estate, unless the will was intended

to operate, and could only operate, as an exercise of the power. For, if the will did not operate as an exercise of the power, but as a direct devise of the legal estate, it is quite clear that it could not deprive the widow of her dower. A dowress is always a favourite in the Courts, and if there is any ambiguity in the interpretation of the will, i.e., if it is open to question as to whether it operates directly as a devise of the legal estate, or, on the other hand, as an exercise of the power, it cannot be said that the widow is deprived of her dower —assuming for the purpose of the argument that the exercise of the power would have defeated dower. And it must therefore be determined (apart from the statute to be mentioned shortly) whether the will could and did operate only as an exercise of the power. The Judge determined that it was governed by sec. 30 of the Wills Act, R.S.O. 1914, ch. 120, and that *In re Greaves' Settlement Trusts*, 23 Ch. D. 313, made this plain. Section 30 provides that a general devise of the real estate of the testator, or of the real estate in any place . . . or otherwise described in a general manner, will include real estate over which the testator has a power to appoint by will in any manner, and will operate as an execution of such power, unless a contrary intention appears by the will. That is to say, if a testator has a power over, but no property in, a piece of land, and makes a general devise, without expressing that it is an exercise of the power, the general devise will operate as an execution of the power. But, with deference, there is nothing in the section to indicate that, where a testator has both property in and a power over land, and makes a general devise, that devise is to be taken as an exercise of the power and not as a direct devise of the property.

Nor does *Re Greaves' Settlement Trusts* determine this. In that case land was settled on trustees on trust to pay the income to G.'s wife during her lifetime, with a power in G. to appoint by deed or will. The trustees sold the land, pursuant to a power in the settlement, and invested the proceeds in their own names in the 3 per cents pending another investment in land, which, if bought was to follow the trusts of the settlement. Before land was purchased G. died, and by his will bequeathed "all the money and moneys that I die possessed of, &c." Fry, J., held that the will did not pass the moneys in the 3 per cents because they stood in the names of the trustees, and the testator was not possessed of them, and that it derived no aid from sec. 27 (our sec. 30) as an exercise of the power. The decision as reported is therefore not an authority for his Lordship's dictum. But, even if the decision had been the other way, it would not have helped. For in that case the property in the 3 per cents (treated as land under the direction for conversion) was in trustees, and G. had only a power of appointment; whereas in the case in hand M. had both property and power, and had the power to devise directly without resort to the power.

It is therefore submitted with deference, that M. had all the legal and beneficial interest in the land in fee simple, by the limitations in the conveyance, and in default of appointment, and having died seised his widow was entitled to dower.

Assume, however, that the conveyance is to be interpreted as a conveyance to M. to such uses as he should appoint, and that it must operate only by virtue of the Statute of Uses, i.e., that M. could only dispose of it by exercising the power. Upon this view another consideration arises.

By R.S.O. 1914, ch. 70, sec. 4, where a husband dies beneficially entitled to any land which does not entitle his wife to dower at common law, and such interest whether wholly equitable or legal and partly equitable is, or is equal to, an estate of inheritance in possession, his widow will be entitled to dower out of such land. If M. could not be considered as legal tenant in fee simple, he had at least an interest equal to an estate of inheritance in possession; and though he might possibly have defeated his wife's right to dower by a conveyance under the power in his life-time, yet as he died entitled to an interest equal to an estate of inheritance in possession, she would upon his death be entitled to dower.

The previous paragraph may be a fitting introduction to a consideration of *Re Cooper and Knowler*. Though the death of the grantee does not affect the interpretation of the deed, it does affect the right to dower; and in that way the cases are not exactly similar, and *Re Osborne* affords no assistance in determining what should have been the decision in the later case. The point presented in that case for determination was squarely put, viz., whether, on a grant to A. or his heirs to such uses as he should by deed or will appoint, and in default of appointment, to A. his heirs and assigns, A. could by exercising the power of appointment by deed defeat his wife's right to dower. His Lordship declined to decide this in the wife's absence, and, as there is a doubt about it, refused to force the title on the purchaser. As a matter of law, the wife was at the moment entitled to dower, for the husband was seised of an inheritance in fee simple; and the question put was whether a conveyance made under the power would divest her of her right. The question whether he can do so under the limitations in that case must therefore still remain in doubt. And meanwhile it is wise in drawing conveyances to uses to defeat dower to introduce a grantee to uses who is not also the *cestui que use*. Then the terms of the statute will be fulfilled, for there will be a person seised to the use of some other person, who may exercise the power over the use.

CONTRACTS OF SALE.

It is surprising, when buying and selling have been recognised all these centuries, that there should be so little authority on the question of a house agent's or a solicitor's power to bind his client in matters relating to a sale. The decision of Mr. Justice Sargant in *Lewcock* v. *Bromley* is a useful one as shewing that the law is quite settled that a general authority to find a purchaser does not authorise the signing of a contract on behalf of the principal. Before the agent can do that he must have a special authority from his principal. So far it is clear, but the difficulty comes in when some ambiguous phrase is used as "sell my house for me," or, if he has power to sell, as to what kind of contract he is author-

ised to sign. It is quite true that would-be vendors should make their intentions clear, but the answer is they do not. There is also a curious lack of authority as to how far a solicitor can bind his client in the conduct of the sale. We imagine, for instance, that he can give further time for making requisitions; but suppose he gives this time and afterwards the vendor, being pressed by some awkward requisition with which he refuses to comply, contends that the solicitor had no power to alter the terms of the contract in this way, so that the requisition is out of time, the purchaser would be more comfortable if he could find a case in which it was held that the vendor was bound by the extension conceded by his solicitor. *Rossdale* v. *Denny* (*post*, p. 262), is also an interesting case, as it gives the imprimatur of the Court of Appeal to the principle that, where the documents relied on as constituting a binding agreement are expressly "subject to a formal contract," there is a strong presumption that those documents do not represent a concluded agreement. The Master of the Rolls guarded himself against saying that there never could be a case in which those words were employed and yet there was a binding contract. We can quite understand that there might be a case in which the context would shew that the contract was really concluded, but the parties would like it expressed in formal language. It is, of course, disappointing to anyone who thinks that the property (if he is the purchaser) or the purchase price (if he is the vendor) is his after the price has been agreed on, to find that these are only negotiations, and that the other side is not bound to carry them into effect. But vendors should be grateful for the decision, as under the informal contracts they would be called on to shew a forty years' title, which in many cases is impossible, and in many others oppressive.—*Law Times*.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

STATUTE OF LIMITATIONS—ACTION BY GOVERNMENT DEPARTMENT TO RECOVER MONEY—AGENTS OF CROWN.

Commissioners of Public Works v. *Pontypridd Masonic Hall Co.* (1920) 2 K.B. 233. This was an action on the part of the plaintiffs representing the Crown, to recover money paid under a mistake of facts. The defendants set up the Statute of Limitations, but Bankes, L.J., who tried the action, held that as the plaintiffs were suing as representatives of the Crown, of whom they were merely agents, the Statute of Limitations did not apply. Under the Ontario Limitations Act, R.S.O. 75, however, the case would be different, as the Crown is expressly bound thereby. See s. 2 (*a*).

MARRIED WOMAN— SEPARATE PROPERTY—DEBT CONTRACTED BY WIFE BEFORE MARRIAGE—SETTLEMENT—RESTRAINT ON ANTICIPATION—JUDGMENT FOR DEBT CONTRACTED BEFORE MARRIAGE—MERGER—INTEREST ACCRUING ON DEBT AFTER MARRIAGE —RECEIVER—MARRIED WOMEN'S PROPERTY ACT 1882 (45 and 46 VICT., C. 75) S. 19—(R.S.O. C. 149, S. 17).

Rothschild v. *Fisher* (1920) 2 K.B. 243. This is another instance of the wonderfully ingenious ways in which married women are enabled to escape liability for their debts. The English Married Women's Property Act 1882, s. 19, provides (as does R. S.O., c. 149, s. 17) that a married woman shall, notwithstanding marriage, continue liable to the extent of her separate estate for debts contracted by her before marriage, and that notwithstanding any settlement of her property or restraint of anticipation thereof. In this case the defendant entered into a contract of suretyship for the payment of a certain sum and interest thereon. The principal having made default, the present action was commenced, and, before judgment, the defendant married, and made a settlement of certain bonds of a company of which she was the owner, subject to a charge in favour of her solicitor for costs, and the settlement contained a restraint against anticipation. On the application of the plaintiff, a Master appointed a receiver of the defendant's interest in the bonds so settled. Laurence, J., on appeal set aside the order on the ground that the debt was merged in the judgment, and that was not a liability

contracted before marriage. On appeal to the Court of Appeal, Lord Sterndale, M.R., and Scrutton, L.J., disagreed with Laurence, J., on the question of merger, but they raised another ingenious objection to the appointment of a receiver, inasmuch as they considered that the interest which accrued on the debt before the defendant's marriage was not a debt contracted before marriage, and that a plaintiff cannot, for the purposes of execution, split up his judgment, and as the judgment included a sum not contracted before marriage, the plaintiff was not entitled to a receiver at all, because the appointment could not be limited to that part of the debt contracted before marriage. The Court does not go into detail as to the nature of the interest the Court had in view. If the interest were allowed by way of damages there might be some sort of justification for saying it was a liability not contracted before marriage, but if the interest was, as would appear by the facts as stated, due and payable by virtue of the original contract, then to say that interest was not the subject of the contract before marriage simply because it accrued after marriage, is a process of reasoning hard for ordinary minds to follow. But there were other, and, it seems, more important difficulties in the way of the plaintiff: The trustees of the settlement were not before the Court, and it would be difficult, on principle, to interfere with them in their absence. The plaintiff's remedy would appear to be by way of action to enforce the judgment as against the trust property to which all parties interested would be parties.

LANDLORD AND TENANT—LEASE—COVENANT TO REPAIR—DWELLING HOUSE—DAMAGE BY ENEMY BOMB—LIABILITY OF LESSEE.

Redmond v. *Dainton* (1920) 2 K.B. 256. This was an action by a landlord against his tenant to enforce a covenant to repair. The damage to the demised premises was occasioned by a bomb dropped from an enemy airplane. Darling, J., who tried the action, held that the damage in question was within the covenant, and that the lessee was liable to make it good.

CRIMINAL LAW—DEMANDING MONEY WITH THREATS—HONEST BELIEF IN JUSTICE OF CLAIM—REASONABLE OR PROBABLE CAUSE—LARCENY ACT, 1916 (6-7 GEO. V., C. 50) S. 29 (1)—ACCUSATION OF CRIME—(R.S.C., C. 146, S. 453).

The King v. *Dymond* (1920) 2 K.B. 260. This was a prosecution for sending a letter accusing the person to whom it was sent of crime, and demanding money, and threatening proceedings

if not paid; and the question for the Court was whether or not the evidence of the *bonâ fide* belief of the accused in the truth of the charge would be a defence. Darling, J., held that it would not, and the Court of Criminal Appeal (Lord Reading, C.J., and Shearman and Sankey, JJ.) held that he was right, but the learned Chief Justice is careful to state that the decision of the Court is confined to that point, and that they do not determine as to the right of the accused to put any specific question or tender any specific evidence.

SHIPPING—CHARTERPARTY—CONSTRUCTION—FREIGHT —FOREIGN LAW—CONFLICT OF LAWS—PLACE OF PERFORMANCE—LIABILITY OF CHARTERERS.

Ralli v. *Compania Naviera, &c.* (1920) 2 K.B. 287. The construction of a charterparty in which an interesting point arising on the conflict of laws was involved is the point involved in this case. The facts were that an English firm, in July, 1918, chartered a Spanish vessel from the owners, who were a Spanish firm, to carry a cargo of jute from Calcutta to Barcelona, at freight of £50 per ton, one-half to be paid to the owners in London, on the vessel sailing from Calcutta, and the balance to be paid in Barcelona by the receivers of the cargo. The freight was payable at Barcelona, was to be paid in cash or approved bills at charterers' option, at the current rate of exchange of short bills on London. The charterparty was made in London. Half the freight was paid on the sailing of the vessel. By a decree of the Spanish Commission of Supplies, confirmed by proclamation in September, 1918, the freight on jute, of which the cargo in question consisted, was not to exceed 875 pesetas per ton. Owing to alterations in exchange the £50 per ton reserved by the charterparty exceeded 875 pesetas per ton. The receivers of the cargo paid the balance of the freight at the rate of 875 pesetas per ton; and the present action was brought to recover the difference between the £50 per ton and the amount so paid. The Court of Appeal (Lord Sterndale, M.R., and Warrington and Scrutton, L.JJ.) affirmed the judgment of Bailhache, J., dismissing the action on the ground that although the contract was an English contract, and to be construed according to English law, as part of it was to be performed in Spain, and as by the law of Spain the payment of freight in excess of 875 pesetas per ton was illegal, that part of the contract which required payment in excess of that rate was invalid and could not be enforced. As Scrutton, L.J., put it: "This country should not, in my

opinion, assist or sanction the breach of the law of other independent states." Bailhache, J., arrived at the same result by holding that if there was a contract, in spite of its illegality at the place of performance, the charterer was protected by the exception of "restraint of princes."

LANDLORD AND TENANT—RECOVERY OF POSSESSION—BREACH OF COVENANT—FORFEITURE—WAIVER—ACCEPTANCE OF RENT.

Evans v. *Enever* (1920) 2 K.B. 315. This was an action by a landlord against his tenant to recover possession of the demised premises, on the ground of forfeiture of the term, under a proviso for re-entry in case the tenant became bankrupt. In July, 1918, the defendant was adjudicated bankrupt. On January 21, 1919, two quarters rent were in arrear, and the plaintiff sued the defendant therefor, and for possession, by specially endorsed writ. The defendant taking advantage of the Common Law Procedure Act, 1852, s. 12 (see R.S.O., c. 155, s. 20 (3)) paid the rent and costs and thereupon those proceedings came to an end. In the following May this action was commenced, and the defendant contended that the acceptance of rent in the previous action amounted to a waiver of the forfeiture arising by reason of the bankruptcy, but Lord Coleridge, J., held that that was not a voluntary act on the part of the plaintiff, and had not the effect of waiving the forfeiture occasioned by the bankruptcy of the defendant, though it would seem if he had sued in the first action for rent alone it might have been; see *Dendy* v. *Nicholl* (1858), 4 C.B. (N.S.) 376.

BANKER—LIEN—CONTINGENT LIABILITY OF CUSTOMER—ASSIGNMENT FOR BENEFIT OF CREDITORS—PAYMENT OF DEBTS AS ON BANKRUPTCY—SECURED CREDITOR—SET OFF—BANKRUPTCY ACT 1914 (4-5 GEO. V., c. 59) s. 30 (3), (4), (8)—(1920, 9-10 GEO. V., c. 36, s. 28 (D)).

Baker v. *Lloyd's Bank* (1920) 2 K.B. 322. This was an action by an assignee for creditors to recover certain balances in the hands of the defendants, who were bankers of the debtors. The assignment was not made in bankruptcy, but recited that the debtors were insolvent, and provided that the assets were to be applied in payment of the creditors on a bankruptcy basis. The assignment was dated February 3, 1914, and assented to by the defendants in June, 1914. At the date of the deed, the defendants held to the credit of the debtors on their current account £2934, and the defendants also held certain shares as security

for advances which were subsequently sold and realized £812 in excess of the advances. Before February, 1914, the defendants had discounted bills of the debtors to the amount of £19,941, all of which fell due shortly after the making of the assignment, and were dishonoured. The plaintiff claimed to recover the two sums held by the bank to the credit of the debtors, but the defendants claimed that they had a lien thereon, and were also entitled to set them off *pro tanto* against the amount due to them on the dishonoured bills, and Roche, J., who tried the action, held in favour of the defendants and dismissed the action. See Canadian Bankruptcy Act (1920), c. 36, s. 28.

SOLICITOR'S BILL—COUNSEL FEES NOT PAID WHEN BILL RENDERED —TAXATION—PAYMENT OF COUNSEL FEES PENDING TAXATION.

In re Eden, Watkins v. *Eden* (1920) 2 K.B. 333. In this case a solicitor's bill had been referred for taxation between solicitor and client. Certain counsel fees were charged therein which had not been paid when the bill was rendered, but were paid pending taxation, and it was held by Laurence, J., that they might properly be allowed, and his decision was affirmed by the Court of Appeal, (Bankes and Scrutton, L.JJ.) but the Court of Appeal held that a brief prepared by another solicitor could not be charged against the client, though her solicitors had perused and approved it.

GAMING—CHEQUE GIVEN FOR RACING BET—INDORSEMENT IN BLANK—BANKER RECEIVING FOR COLLECTION—"INDORSEE" OR "HOLDER"—GAMING ACT, 1835 (5-6 W. IV., C. 41) SS. 1, 2 (R.S.O. C. 217, SS. 1, 2).

Dey v. *Mayo* (1920) 2 K.B. 346. This was an action to recover money paid in respect of a racing bet. The plaintiff, in 1917, gave to the defendant five cheques drawn payable to his order, in settlement of certain racing bets. These cheques the defendant endorsed in blank and deposited in a bank to the credit of his account in the name of his wife, and the bank received the amount thereof and credited the same to the said account. It was held by the Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.) reversing Avory, J., that the bankers were holders of the cheque within the meaning of the Gaming Act, 1835 (5-6 W. IV., c. 41) s. 2 (see R.S.O. c. 217, s. 2), and that the money was recoverable.

INSURANCE—BURGLARY AND HOUSEBREAKING—LOSS BY THEFT—ACTUAL FORCIBLE AND VIOLENT ENTRY—BUSINESS PREMISES—BREAKING INTO ROOM—ENTRY BY SLIDING BACK LOCK WITH INSTRUMENT.

In re Calf and Sun Insurance Co. (1920) 2 K.B. 366. This was an arbitration proceeding arising out of a policy against burglary and housebreaking. The premises insured were certain rooms in a house used as a shop and workrooms of the insured, who carried on business as a tailor. A thief got into the coal cellar under the shop in the day time, which as the Court held was not part of the premises insured, and at night, from thence made his way into one of the work rooms by sliding back the lock with an instrument, and from thence he got into the shop, and was thus enabled to steal and carry away goods from the insured premises. The arbitrator came to the conclusion that as the thief had entered the coal cellar without violence, it was unnecessary to consider the nature of his subsequent entry into the insured premises, and he made an award in favour of the insurance company, and Bailhache, J., held that the arbitrator had come to a right conclusion, but the Court of Appeal (Bankes, Atkin, and Younger, L.JJ.) held that there had been a forcible entry into the insured premises by the forcing of the lock, and that even if the whole building had been insured, Atkins and Younger, L.JJ. were of the opinion that the breaking into one room would have been a forcible and violent entry within the meaning of the policy.

BASTARDY — CORROBORATION — EVIDENCE — BASTARDY LAWS AMENDMENT ACT, 1872 (35-36 VICT. C. 65, S. 4—(R.S.O. C. 154, S. 2 (2)).

Thomas v. *Jones* (1920) 2 K.B. 399. This was a case stated by justices. Thomas was charged with being the father of an illegitimate child of Miriam Jones. Thomas was a farmer, and Jones his housekeeper. The child was born in his house, and on the day of its birth, having no other female servant, he lit a fire for her, and took her some tea and brandy, and sent for a doctor. After the birth he allowed the girl and her child to remain in his house five weeks, and he admitted that he had never asked the girl who was the father of the child. After she left his house she wrote charging him with being the father, and asking him if he meant to pay for its maintenance. A Divisional Court (Lord Reading, C.J., and Roche and Avory, JJ.) held (Avory, J. dissenting) that though none of the above facts alone would be sufficient corroboration of the girl's charge, yet their cumulative effect was sufficient corroborative evidence.

BANKRUPTCY—FRAUDULENT TRANSFER—TRANSFER OF ASSETS BY BANKRUPT TO COMPANY FORMED BY HIM—SUBSEQUENT PURCHASER FOR VALUE WITHOUT NOTICE—TRUSTEE IN BANKRUPTCY—RELATION BACK OF TITLE OF TRUSTEE—BANKRUPTCY ACT 1914 (4-5 GEO. V., 3. 59) s. 1 (1) (*b*)—(9-10 GEO. V., 3. 36 (D)ss. 3 (*b*) 25 (*a*)).

In re Gunsbourg (1920) 2 K.B. 426. The new Dominion Bankruptcy Act being now in force, the cases in bankruptcy in England become of interest in Canada, and this case is one deserving attention. The facts were that on 20 September, 1917, a debtor transferred his assets, including some furniture, to a company which he had formed. On 27 September, 1917, he committed an act of bankruptcy. On 8 October, 1917, a petition was presented. On 24 October a receiving order was made, and on 12 December, 1917, he was adjudicated bankrupt. After the date of the receiving order the company sold the furniture to a purchaser without notice, who subsequently resold it to another purchaser without notice. On 3 February, 1919, the transfer of 2 September, 1917, was held to be fraudulent and void and an act of bankruptcy, and the company was ordered to deliver to the trustee all the assets transferred to it. The value of these assets having been found by the registrar, a further order was made for payment of the amount. No payment having been made under that order, the trustee claimed to recover the furniture from the ultimate purchaser. It was held by Horridge, J.: (1) that the judgment against the company being unsatisfied the trustee was not precluded from proceeding against the purchaser according to the authority of *Brinsmead* v. *Harrison* (1817), L.R. 6, C.P. 584; and (2) that the title of the trustee related back to the act of bankruptcy on 20 September, 1917, and that neither the original nor subsequent purchaser had any right against the trustee, and his decision was affirmed by the Court of Appeal (Lord Sterndale, M.R., and Warrington and Younger, L.JJ.; Younger, L.J., however, dissented on the second point.

COMPANY—WINDING UP—SURPLUS ASSETS—PROVISION FOR PAYMENT OF THE ARREARS OF PREFERENTIAL DIVIDEND—NO DIVIDENDS EARNED OR DECLARED.

In re Springbok Agricultural Estates (1920) 1 Ch. 563. By the articles of association of the company in voluntary liquidation it was provided that the surplus assets should be applied in the payment of preferential dividends. The company had

made no profits, and had not declared any dividends. Laurence, J., nevertheless, held that all unpaid preferential dividends were "arrears," and that the surplus was applicable to the payment of preferential dividends down to the commencement of the winding up.

CONTRACT TO EMPLOY PLAINTIFF AS AGENT—INJUNCTION—AFFIRMATIVE AGREEMENT—IMPLIED NEGATIVE STIPULATION—NECESSITY FOR INDEPENDENT NEGATIVE AGREEMENT.

Mortimer v. *Beckett* (1920) 1 Ch. 571. This was an action to enforce an agreement made by the defendant with the plaintiff whereby the defendant agreed to employ the plaintiff as his sole agent for matching the defendant in boxing contests for a period of seven years. In December, 1919, the defendant refused to employ the defendant any longer, and the plaintiff now applied for an interim injunction. Russell, J., who heard the motion, dismissed it, on the ground that there was no express negative agreement on the part of the defendant not to employ any one else but the plaintiff, following in this respect *Lumley* v. *Wagner* (1852), 1 D. M. & G. 604.

COMPANY—UNDERWRITING CONTRACT—SUB-UNDERWRITING CONTRACT—AUTHORITY TO APPLY FOR SHARES—AUTHORITY COUPLED WITH INTEREST—APPLICATION TO RECTIFY REGISTER OF SHAREHOLDERS.

In re Olympic Fire and General Reinsurance Co. (1920) 1 Ch. 582. This was an application to rectify the register of shareholders of a limited company in the following circumstances. A syndicate entered into an underwriting contract in consideration of a commission and other moneys, to subscribe for 150,000 shares to be offered for public subscription, it being agreed that all allotments to the public were to be applied in relief of the syndicate's agreement to take 150,000 shares. The syndicate entered into a sub-underwriting agreement with one Pole, whereby the latter agreed to subscribe for 10,000 of the 150,000 shares, and by his underwriting letter he said, "We now hand you application for the shares hereby underwritten by us, together with a cheque for £1250, being deposit of 2s 6d per share." By the terms of the agreement he was only to be allotted and to pay for so many of the 10,000 shares as should be his due proportion of the shares not allotted to the public. It also provided that notwithstanding any withdrawal or repudiation by Pole, the contract was to be sufficient authority to the directors to allot the

above mentioned shares and enter his name in register of members in respect thereof. No application for shares was enclosed, as contemplated by the letter. Only 55,000 shares were taken up by the public, and the syndicate thereupon applied for an allotment to Pole of 6,334, being his proportion of the shares not taken up by the public. Laurence, J., who heard the application, dismissed it, holding that the syndicate had authority coupled with an interest entitling them to apply for the shares issued to Pole, and that the authority was irrevocable by Pole.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—SHIP REPAIRERS—INFLAMMABLE CARGO—OPEN HATCHWAY.

Grayson v. *Ellerman* (1920) A.C. 466. This was an appeal from the judgment of the Court of Appeal (1919) 2 K.B. 514 (noted *ante* p. 69). It may be remembered the action was brought by Ellerman Company against the Graysons for damages occasioned by their negligence in repairing the plaintiffs' ship. The damage in question arising from a red hot rivet having been dropped into an open hatchway, thereby setting fire to a cargo of jute. The defendants contended that the leaving of the hatchway uncovered was contributory negligence on the part of the plaintiffs. The Court of Appeal disallowed this defence, and the House of Lords (Lord Birkenhead, L.C., and Lords Finlay, Sumner, Parmoor and Wrenbury) affirmed their decision.

CRIMINAL LAW MURDER—MANSLAUGHTER—KILLING VICTIM IN FURTHERANCE OF RAPE—DRUNKENNESS—MISDIRECTION.

Director of Prosecutions v. *Beard* (1920) A.C. 479. This was an appeal from the Court of Criminal Appeal. The defendant was convicted of murder, the evidence shewing that when committing rape on the person of a girl of thirteen, he had placed his hand over her mouth and pressed his thumb against her throat, whereby she died of suffocation. The defence was drunkenness. Bailhache, J., directed the jury that if they were satisfied the accused was so drunk as not to know what he was doing that would reduce his crime to manslaughter. The Court of Appeal substituted a verdict of manslaughter, being of the opinion that Bailhache, J., had erred in applying to a case of drunkenness the act of insanity, and that he ought to have followed the rule laid down in *Rex* v. *Meade* (1909), 1 K.B. 895. The House of Lords (Lord Birkenhead, L.C., and Lords Reading, C.J., Haldane, Dunedin, Atkinson, Sumner, Buckmaster and Phillimore) how-

ever, held that the rule laid down in *Rex* v. Meade did not apply, and that drunkenness was no defence unless it could be established that at the time of committing rape the accused was so drunk that he was incapable of forming the intent to commit, which was not alleged in the present case, inasmuch as the death resulted from a succession of acts, the rape and the act of violence causing suffocation, which could not be regarded independently of each other, and although their Lordships were of the opinion that Bailhache, J., was mistaken in applying the test of insanity to a case of drunkenness not amounting to insanity, yet read as a whole, the summing up did not amount to misdirection. They therefore restored the conviction of murder.

Bench and Bar.

APPOINTMENTS TO OFFICE.

George W. Holmes, of the City of Toronto, to be Master of Titles, vice J. G. Scott, K.C., retired. (Dec. 18.)

Flotsam and Jetsam.

We extract the following from an article in the *Central Law Journal* entitled "The Crime Wave- Its Causes and Cure." The writer truly says: "The cure of crime in this respect, therefore, is a strong revival of belief in the supernatural to counteract the gross materialism of present-day philosophies. Mere social service agencies will not take the place of deep religious convictions. There must be some restraint imposed by a person's own conscience and sanctioned by faith in a Supreme Being who punishes disobedience and rewards faith and virtue before there can be any sound basis for a law-abiding organization of society."

We concur, and commend the above to the attention of all to whom it applies, and that means everybody.

The subject of Legal Aid came before the American Bar Association in St. Louis, U.S.A., last August, and seems to have created considerable interest there. A "Legal Aid Society" is an agency supported by private or public funds which pays the salaries of a staff of lawyers, with offices for that purpose. It is not a feature with us, as there has not been any crying necessity for it so far. The need may be felt hereafter; and when it does information can readily be obtained from those who have had experience therein. The *Central Law Journal* (Nov. 19, 1920) devotes six pages to the discussion of the relation between Legal Aid Work and the administration of justice.