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FEDERAL AND PROVINCIAL JURISDICTION AS TO COMPANIES.

The relative rights of legislation of the Dominion and Provinces with regard to companies has again been under the consideration of the Courts in *Currie* v. *Harris Lithographic Co.*, 13 O.W.N. 6, 326. The main question in that case was whether or not certain sections of R.S.O., c. 179, which impose on corporations incorporated by the Dominion Parliament the necessity of obtaining a Provincial licence in order to do business within Ontario, were, or were not, *intra vires* of the Provincial Legislature. Mr. Justice Masten decided in the negative. The First Divisional Court of the Appellate Division has reversed his decision. Mr. Justice Masten based his judgment on the *John Deere Plou Case* (1915), A.C. 330; 51 C.L.J. 105, 330. The Divisional Court, on the other hand, considers that that case does not decide the point involved.

The Appellate Division lays down certain principles which it considers should govern the Courts in the determination of such questions. The following observations of the late Chief Justice Strong were cited with approval:

"It is, I consider, our duty to make every possible presumption in favour of such legislative Acts, and to endeavour to discover a construction of the British North America Act which will enable us to attribute an impeached statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it; and in doing this we are to bear in mind that it does not belong to Courts of justice to interpolate constitutional restrictions, their duty being to apply the law and not to make it."

We do not think any reasonable objection can be taken to the principle thus enunciated. But when it is asserted that the "basic principle" of the B.N.A. Act is to make each Province autonomous and master in its own house, we very respectfully beg to differ.

For a proper understanding of this subject it is necessary to have before us the provisions of the British North America Act as to the distribution of legislative powers between the Dominion and the Provinces. Section 91, referring to the powers of the Parliament of Canada, provides that the Dominion Parliament may make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the Provincial Legislatures, and the section proceeds to give a list of the matters within the exclusive legislative authority of the Parliament of Canada, and one of these is: "The regulation of trade and commerce." The concluding part of the section refers to the matters assigned exclusively to the Legislatures of the Provinces and designates them as "matters of a local or private nature," and in sec. 91, which specifies particularly the matters assigned to Provincial Legislatures, these are to be found: "The incorporation of companies with Provincial objects;" "Property and civil rights in the Provinces" and "Generally all matters of a merely local or private nature in the Provinces."

Apart from the result of decided cases one would suppose that the residuum of legislative authority as to "Trade and commerce" (which is the only general term applicable to the subject matter of the case under review), remains with the Dominion Parliament. The general principle is clearly stated to be that the matters entrusted to the Provincial Legislatures are those of a "merely local and private character."

If the pronouncement of the Court as to its view of the basic principle of the B.N.A. Act be sound, then Confederation would be based on the like principles which govern the union of the several States to the south of us; that is to say, each Province being regarded as a sovereign State, and the residuum of power being in the Provinces, and not in the Federal Government. It is

well known, however, that the contrary is the fact, and that the Provinces are not sovereign States, and that the residuum of power is not in the Provinces, but, on the contrary, in the Federal Government. No doubt the Confederation of Canada was the result of an agreement between the former Provinces of Upper and Lower Canada and the Maritime Provinces which were the original members of the Federation, but to suppose that it was the case of sovereign States entering into a legislative compact is contrary to the fact. None of the component parts of the Federation stood in that position. The whole Confederation is the creation of a superior authority, and all parts of it have such rights and powers as that authority has allotted to them, and no others.

To pretend that the Provinces were intended to be autonomous is contrary to the plain reading of the statute. They cannot appoint their own Chief Magistrate. They cannot appoint the judges for their own superior courts of law, nor can they do any of the other acts referred to in S. 91 of the Act, and which they could have done if they really were self-governing, as the Appellate Division declares they were intended to be.

The real fact is that to the Provinces was committed the power of self government to a certain defined and limited extent, and no farther. No one would describe our various municipal corporations throughout Ontario as being autonomous and masters in their own house. They have certain powers of self government delegated to them, but may not lawfully exceed those powers. In like manner the various Provinces have certain powers delegated to them which they may not lawfully exceed. To describe the basic principle of the B.N.A. Act as being one intended to make each Province autonomous and master in its own house, appears, therefore, to us to be untenable, and contrary to the plain terms of the Act itself.

Perhaps, however, the sentence was intended to convey the idea "that within the area of jurisdiction specifically allotted to it, each Province was intended to be made and is in fact made autonomous," and if so, we should have less hesitation in coinciding with that view. But the judgment of the Appellate Division

makes no such limitation, and seems to suggest that other Judges have erred because they did not adopt the alleged basic principle as above laid down.

Politicians are accustomed to talk of "self-governing" colonies or dominions. But although the United Kingdom may properly be said to be in the strictest sense "self-governing," yet none of the outlying Dominions of the Crown can be truly said to be autonomous or self-governing except in a restricted sense. They have doubtless a very large measure of self-government, but there are some powers of government which none of them possess. None of them can of itself declare war, or make peace. None of them has a right to send ambassadors to a foreign State, nor make treaties with foreign States. This does not, of course, mean that the outlying parts of the Empire are in any inferior position to the rest of the Empire. It does mean, however, that there are some powers and incidents of government which are reserved for the central authority, which is also the centre of unity.

Canadians may perhaps be inclined to forget that the Imperial Parliament is in fact an Imperial institution, and is the Parliament not only of the British Isles, but of the Empire, and as such is our Parliament, notwithstanding the fact that, as at present constituted, we have no right to send representatives to it. There are many classes of people in the British Isles to this day, however, who stand in a similar position, *e.g.*, all women and persons under age, and nevertheless it is their Parliament, as it is also ours. It is the Imperial Parliament which gave us our political constitution and it is to that Parliament we have to look for any amendment to our constitution that may be found to be needed.

We confess we have no sympathy with those who call themselves "Nationalists," but whose aims and objects are essentially not national, but provincial; and who seem to have no proper conception of the really national idea. The Nation and the only Nation of which British people everywhere are members is the British Empire. Canadians are not merely Canadian citizens, or subjects of Canada, they are British subjects everywhere throughout the wide domain of the Empire, but some of them sadly fail to realize what that means, or the duty and obligation it involves.

Our duties as British subjects arise in an ascending scale. We owe a duty to the municipality in which we reside, to the Province of which it is a part: to the Dominion of which it is a part, and finally to the Empire of which the Dominion is a part. Many people seem unable to rise any further than the first step. Some stick at the Province, and some at the Dominion, and those who are afflicted with this narrow political outlook are very apt to describe all advice to advance beyond it as mere "Jingoism." Recent events in Canada have happily shown that a great majority of our people have a wise and true conception of their duty.

The basic principle of the B.N.A. Act in our opinion is this, viz: to distribute governmental power between the Federal and Provincial authorities in the way thought to be most beneficial to all the people of Canada; and all parts are expected to work together harmoniously as members of one organic whole, and as the eye does not say to the hand "I have no need of thee," nor the leg to the arm "I have no need of thee," so neither does the leg essay to do the work of the arm, nor the eye the work of the hand, so in our body politic there ought to be no such contentions or aspirations, if we wish to carry out the real spirit and interest of the B.N.A. Act. Its successful working depends on each part of the organism being content to confine its activities strictly within the sphere allotted to it.

But to return to the subject under consideration. So far as the question involved in the case of *Currie* v. *Harris Lithographic Co.* is one of law and politics, it may be interesting from a technical point of view to lawyers and politicians, but for some others of the community it has a more practical interest. To those who are engaged in the world of business and the carrying on of the trade and commerce of the country, and employing its capital to the best advantage, in which operations the foundation of companies forms so important a part, the question of which Government shall have the right to incorporate companies is a small matter. What they naturally desire is that the legal question shall be reduced to simple terms, which everyone practically concerned may readily understand. Their desire is that the law may be so

framed that if they wish to incorporate a company, they may not have to apply to half a dozen or more different jurisdictions, but to one, and that that jurisdiction may be enabled to confer on the corporation the requisite power to carry on its operations throughout the Dominion without being hampered and restricted in every Province by Provincial legislation and interference.

On the other hand, with lawyers and politicians the interests and aspirations of this part of the community most practically concerned would almost appear to be quite a secondary matter; with them the interesting questions are the right to exercise certain legislative power, and its consequent collateral advantages in the shape of patronage, the collection of revenue, etc. But this ought not so to be. All laws ought to be framed for the benefit of the community, and not to furnish lawyers or politicians with themes for controversy. And if this fact were kept in view by lawyers and politicians an end would soon be made of the conflict of jurisdiction with reference to the incorporation of companies in Canada.

As is well known, the B.N.A. Act gives the Dominion Parliament no express power to incorporate anybody except banks, and though it has been suggested that the authority to incorporate companies is to be implicitly found in clause 2 of s. 91 as coming under the authority to regulate trade and commerce, or as an incident of the various powers conferred by other clauses of that section; yet the Privy Council has declared that the authority of the Dominion in this respect is rather to be found in the first part of s. 91 as being a matter not assigned exclusively to the Legislatures of the Provinces.

By s. 91 (11) "the incorporation of companies with Provincial objects" is exclusively assigned to the Provinces.

Both the Dominion and the Provinces are therefore held to have power to incorporate companies, but the section empowering the Provinces to incorporate "companies having Provincial objects" has been interpreted to mean that the companies incorporated by a Province are not necessarily bound to confine their operations to the Province which incorporates them, but that such companies have the capacity to carry on business in all

parts of the Dominion subject to the laws of the various Provinces in which they so carry on business: *Bonanza Creek Gold Mining Co.* v. *The King*, 16 P.C. 566; 52 Cl. J. 263 (1916).

On the other hand, a company incorporated by the Dominion Parliament, although incorporated to carry on its operations in all parts of the Dominion, may, if it choose, confine its operations to one particular Province without thereby rendering it necessary to obtain Provincial incorporation: *Colonial Building Association* v. *Attorney General of Quebec*, 9 App. Cas. 159.

Whether this interpretation of the B.N.A. Act actually carries out the intention of the framers of that Act may perhaps be open to doubt.

We are rather inclined to think that it was intended that the Provincial jurisdiction should be limited to the creation of corporations whose operations should be limited and confined to the area of the Province incorporating them. But be that as it may, the result of the judicial decisions appears to establish that a corporation created either by the Dominion or a Province may be endowed with capacity to carry on its operations throughout the Dominion, just as a private individual may do, but subject in all cases to the laws of proprety and civil rights in each Province in which it operates.

The creation of a corporation in effect is the calling into existence of a legal entity which, although composed of or represented by mortals, is endowed with a personality distinct from them, and invested with a species of immortality which is unaffected by the death of the original or any subsequent corporators. The legal entity thus called into existence may, as in the case of many statutory corporations, have its powers limited and restricted by the statute or charter which incorporates it; but, on the other hand, if the charter or statute by which it is incorporated imposes no restrictions on its powers, then it has, and is entitled to exercise, all the powers which any individual has and is entitled to exercise, except only so far as it is restrained by any legislation affecting corporations in general.

Thus it is held that the Dominion cannot create a corporation capable of holding lands otherwise than in accordance with the

Provincial laws affecting the acquiring and holding of lands by corporations, and, therefore, Provincial laws relating to the holding of lands by corporations must be complied with by companies incorporated by the Dominion. The Dominion and the Provinces it is held are able to confer the capacity on corporations to acquire land, but only in accordance with the law of the Province in which the land may be situate. They in fact merely give to the corporation the capacity which a natural person enjoys, viz.: a capacity to acquire property and exercise certain rights and powers, but only subject to, and in accordance with, the laws of the locality in which such rights and powers are exercised.

In the result it would seem that neither the Dominion nor a Province can by incorporating a company thereby override the law of any other jurisdiction affecting corporations, nor can one jurisdiction make laws so as to interfere with or nullify the rightful exercise of legislative power of any other jurisdiction.

It may be observed that as regards Dominion corporations there is no area in which it is possible for them to act except in the Provinces and Territories of the Dominion, or some one or more of them, because the Dominion is merely the aggregation of the Provinces and Territories and it has no specific territorial area of its own exclusive of such Provinces and Territories.

It was at one time doubted whether the artificial personality created by incorporation could, or should, be recognized as having any legal existence outside the jurisdiction which brought it into being, but it is now pretty generally recognized that a corporate body, wherever incorporated, will be recognized and admitted to sue and be sued in the Courts of all other jurisdictions. Thus a company incorporated in Ontario will be recognized and admitted to sue and be sued as such in other Provinces, and *vice versa*. But when it is said that companies by whatever jurisdiction they are incorporated are subject to the laws of the particular Province in which they carry on business, the question arises, as it has done in the case of *Currie* v. *Harris Lithographic Co.*, whether the Dominion on the one hand, or the Provinces

on the other, can validly frame laws which have, or may have, the effect of nullifying the corporate powers conferred.

In the *Currie* case it was a question of imposing on Dominion corporations the necessity of obtaining a Provincial licence, and paying a fee in the nature of a tax to a Province as a condition of being allowed to carry on business in that Province. Now as far as the licence is concerned that seems tantamount to nullifying the Dominion incorporation. The Dominion virtually confers on the corporation it incorporates the power to act in its corporate capacity within the whole of Canada, and the Province of Ontario says by the Act in question: "You shall not act within the area of this particular part of the Dominion unless you first obtain a licence to do so, from a Provincial authority." But for the decision now under consideration, we should have thought this a clear and distinct invasion of the rights of the Dominion, for if it is once admitted that the Dominion has authority to create corporations with capacity to act throughout Canada, then no Province has any right to impose any restriction on that right, and to say that it shall not be exercised within its area except on such conditions as it may choose to impose.

But the Act in question not only imposes the necessity of obtaining a licence, but also requires the payment of a fee.

With regard to the fee, it is contended that the Province by virtue of its authority to impose "Direct taxation within the Province in order to the raising of a Revenue for Provincial puposes" has a right to impose the payment of a fee by Dominion corporations as a condition of their being permitted to exercise their powers within the Province.

It may be remarked that the fee is not a stated sum, but the amount is left to the discretion of His Honour the Lieutenant-Governor in Council. There is in consequence a wide field opened for the blocking of the operation of Dominion companies. It is not a fee payable indiscriminately by all corporations doing business in Ontario, but is specially imposed on corporations incorporated by the Dominion.

In these circumstances the conclusion of Mr. Justice Masten, that such a fee could not be properly imposed by the Province

according to the decision of the Judicial Committee in the *John Deere Plow* case, seems to us well founded.

The statute in question does not apply to all companies alike. It discriminates distinctly as to Dominion corporations which it puts into a class by itself, which it calls class 8, in order to distinguish or discriminate them from eight other classes of corporations mentioned in the statute, and also from Provincial corporations, and it imposes a tax or fee on class 8, which does not apply to six other classes of corporations, nor to any Provincial corporation. If that is not discriminating legislation, then we confess we fail to realize what discrimination can mean.

But in the *John Deere Plow* case the Judicial Committee determined that a Province cannot validly, under its authority to tax, discriminate between Dominion corporations and any other class of corporations.

The Appellate Division finds that there is no discrimination because, as it is said, the tax on Dominion corporations is imposed in the form of a licence fee, and on Provincial companies the tax is imposed in the form of a fee for the grant of letters patent, which confer the right to carry on the company's business. It is thus assumed that a licence to carry on business and a charter of incorporation are the same or practically the same thing, whereas we humbly submit they are totally different things. If a charter of incorporation is the equivalent of a licence to carry on business, then a licence to carry on business must be the equivalent of a charter of incorporation; a proposition which we imagine the Appellate Division would have difficulty in maintaining. For if it were so, then a mere licence to A., B. and C. to carry on business would constitute them a corporation, which, of course, is absurd. No law, common or statutory, enables corporations to be created by a mere licence. Therefore it is plain that a licence to carry a business is not the equivalent of an Act of incorporation. Nor *vice versa*, and a tax imposed on one class of corporations for the grant of incorporation is not the same as a tax imposed on another set of corporations merely for leave to carry on business, and it can only be regarded as a more or less ingenious legislative effort to evade the effect of the decision of the Judicial Committee

of the Privy Council against the legality of Provinces seeking to impose discriminatory taxation on extra-Provincial Corporations. Fairly construed, that decision we take to mean simply this, that if a Province imposes a tax on corporations it must impose such tax on all corporations alike, and not exempt one class, and impose it on another of a similar kind. Something may perhaps be said in favor of Provinces drawing a line between corporations carrying on business for gain, and those of a merely elemosynary character; but between Provincial corporations and extra-Provincial corporations of the same class, as we read the decision of the Judicial Committee in the *John Deere Plow Case* there can be validly no distinction made in the imposition of Provincial taxes.

If a charter of incorporation is the equivalent of a licence to carry on business, then the Dominion charter is a licence to carry on business, and the provincial tax is a tax to compel the Dominion company to procure something it already has.

We are fortified in the views we have expressed by the decision of the Judicial Committee of the Privy Council in the case of *The Attorney-General* (*Can.*) v. *The Attorney-General* (*Alta.*) (1916), A.C. 588. In that case the validity of s. 4 of the Dominion Insurance Act, 1910, was in question. By that section the Dominion Parliament sought to prohibit all persons or companies from doing any insurance business in any part of Canada unless they first obtained a licence from the Dominion. It was held that this section was *ultra vires* of the Dominion Parliament. It was attempted to be supported under the Dominion authority to regulate trade and commerce; but their Lordships held that the authority of the Dominion does not under the B.N.A. Act enable it to regulate, by a licensing system, any particular trade in which Canadians would be otherwise free to engage in the Provinces. The insurance company in question in that case was one incorporated by a foreign State, but the same rule must of necessity apply to any company incorporated by a Province. That case, therefore, seems to have been the exact converse of the *Currie* case. By the Act in question the Dominion was seeking to prohibit a Provincial company from carrying on its business, unless

licensed by the Dominion, and it was held to be *ultra vires*. In the *Currie* case a Province is seeking to prohibit a Dominion company from carrying on its business unless and until it obtains a Provincial licence. The cases seem to stand on a similar footing, and to both the same answer should be given.

The case in (1916) A.C., to which we have referred, however, appears to have escaped the attention both of counsel and the Court in the *Currie* case.

The *Currie* case will, no doubt, be carried further, and its final issue will be awaited with interest by all concerned in company law. Whatever the final result may be, we should hope that the litigation that has taken place as to the relative rights of the Dominion and Provinces on the subject may ultimately lead to legislation of a simple and unifying character. The B.N.A. Act contains provisions for that purpose, but up to the present time no attempt has been made to give any practical effect to them. What is wanted is one company and incorporation law for the whole Dominion. The present condition of uncertainty and confusion is scarcely short of a calamity and should not be allowed to continue.

In the distribution of authority between the Provinces and the Dominion the aim was, we believe, to make it in such a manner as was thought to be most beneficial to the people of Canada; not necessarily to make the people of the Provinces "Masters in their own houses," but simply to give to the Provinces so much of the power of government as could be most beneficially exercised by the Provinces; and to give to the central authority so much of the powers of government as could be most beneficially exercised by it. The Provinces were never intended to be put into antagonism with the Dominion, nor vice versa. All were intended to work together, each in its own sphere, so as to constitute one harmonious whole; and when differences of opinion arise between Federal and Provincial authorities as to their jurisdiction, means ought to be found to remove the cause as speedily as possible, to which end both Federal and Provincial authorities should willingly give their aid.

The prosperity of the Dominion and its continuance as a whole and complete unit of the Empire depends not only upon the cohesion of its various parts, which must be maintained and insisted upon, but also as we believe upon the maintenance to the fullest extent of the rights conferred by the B.N.A. Act upon the Dominion Government as distinguished from those of the Provinces. Unfortunately, there has been a constant effort on the part of those who represent the Provinces to aim at powers which they were apparently never intended to possess. This ought not to be and can only be productive of evil.

ONTARIO BAR ASSOCIATION.

The twelfth annual meeting of this Association was held at Osgoode Hall, Toronto, on February 21st and 22nd. The bill of fare was a full one, and will, we trust, be of benefit to the profession, as well as to the public, which always reaps fruit from the gatherings of lawyers to discuss the condition of the law and wherein it may be improved in the interests of justice and business relations.

After certain preliminary proceedings, the President, Mr. George C. Campbell, gave his opening address, which was full of information as to what had been done and suggestions as to what might be done in the cause of law reform. The subject of his address was: "Law, the hope and the defence of democracy." He appealed for a wider acceptance of the principles of international law, a subject, however, which, though fundamental in its benefits to the world at large, is not, unhappily, under the present stress of circumstances, of much practical importance. He also referred to various matters which were to be brought before the Association in the reports of the various committees.

These reports were as follows:—Legislation, Law Reform, Legal Ethics, Criminal Law, Company Law, Patent Law, Legal Education and Legal History. The reading of them occupied the remainder of the first day's session. They came up for discussion on the following day.

On the second day several interesting addresses were delivered: A paper by Mr. A. H. Lefroy, K.C., on "Flaws in the common law;" by Mr. S. W. Jacobs, K.C., M.P., of the Montreal Bar, on the necessity for a Canadian Bankruptcy Act; by Mr. Z. A. Lash, K.C., Honorary President of the Association, on "Difficulties in changed position of the Canadian constitution." An eloquent address was delivered by Mr. Walter George Smith, of Philadelphia, President of the American Bar Association, on "Democracy under constitutional limitation." We would gladly give all these reports and addresses, but want of space forbids.

The Committee on Law Reform referred to the following matters as important and requiring attention at the hands of those who are responsible for legislation:—(1) Cross-examination on an affidavit of production. (2) Amendments to the Coroner's Act. (3) An amendment of the Supreme Court Act in reference to appeals, having in view the difference in the various Provinces as to when appeals will lie and urging that they should be uniform, and that the question of amount in controversy should not be considered in such appeals. (4) An amendment of the Criminal Code by allowing an appeal to the Court of Appeal for a new trial upon the discovery of new evidence, the same as in civil cases. (5) Assaults occasioning bodily harm. (6) Uniformity in registration of titles in the various Provinces under the Land Titles system.

The report of the Committee on Criminal Law also referred to the desirability of a change in appeals to the Supreme Court. Other matters referred to were the imposition of minimum sentences in criminal cases; the inadvisability of requiring the Crown counsel's consent as to suspended sentences, etc. In connection with this report were read various letters to the chairman of the committee on the subjects above referred to.

One of the most important subjects which came before the Association was the report on Company Law, bringing up the necessity for uniformity in the Provinces in this important branch of the law, and referring to the confusion existing at the present time respecting the rights of companies incorporated under the Dominion Act to carry on business in the various

Provinces without obtaining a license from the Province. It is sincerely to be hoped that the Dominion Government will on the first opportunity take up the subject of Company Law with the proper authorities in the various Provinces, and evolve legislation which shall clear up some of the doubts, difficulties, inconveniences and hamperings of trade resulting from the present chaotic condition.

The report of the Committee on Legislation was largely historical in its character, referring to the legislation of the last year.

The Committee on Patent Laws referred specially to a letter from the Honorary President, Mr. Z. A. Lash, as to the difficulties under which the holder of a patent laboured by reason of the provision of the law requiring manufacture and sale; the deadlock that may arise between respective holders of original and improvement patents, and the unsatisfactory state of the law relating to process patents. The Committee, however, did not see their way to making any recommendation.

The report of the Historical Committee and of the Archivist of the Association, Lieut.-Col. Ponton, K.C., was in our historian's usual happy and interesting style. We have pleasure in quoting part of it where he "recommends to all desiring to keep in touch with the trend of legal events, and the bright genius of fresh legal thoughts, our own two standard legal periodicals, the *Canada Law Journal* and the *Canadian Law Times*. There are none better. Of their respective Editors we may truly say: *Nihil tetigit quod non ornavit*, and the sympathetic attitude of each to the profession is perhaps best expressed in Chaucer's pregnant words: 'And gladly would he lerne and gladly teche'." The report in eloquent terms dwelt at some length upon the sacrifice made by so many members of the profession in connection with the war, on their splendid work and heroism in the cause of freedom and justice. We are sorry we cannot refer more at length to this interesting paper.

The report of the Committee on Legal Education dealt largely with suggested amendments in the course of study in our Law School, so as to conform it to the system adopted in the

Harvard Law School. This, however, is a large subject, and we shall refer to it on another occasion.

The discussion which took place on the various reports brought out strongly the necessity for uniformity in laws in the various Provinces; and the following resolution was consequently passed at the close of the proceedings:—

Whereas uniformity of law in the various Provinces of Canada and in its administration is of prime importance for the welfare of the Dominion. And whereas the great diversities that exist have been shewn to be productive of confusion and serious inconveniences, and are therefore a hindrance to the due development of the Dominion. And whereas this matter has been under the consideration of the Canadian Bar Association:—

Be it therefore resolved, that the Executive of this Association be requested to bring to the attention of the appropriate Committee of the Canadian Bar Association, the various reports which have been read at this meeting wherein such diversities are shewn to exist, or an adequate summary of them. And also that the same information, together with a copy of this resolution, be sent to the Bar Associations of the various Provinces."

MUNITION FRAUDS.

In a recent case, a munition worker, Dr. H. L. Hanselman, of Brantford, was charged, under sub-sec. 1 of sec. 74 of the Criminal Code, with treason, in that he assisted a public enemy at war with His Majesty, and also, under sec. 436A, with deception in the manufacture of shells. Chief Justice Falconbridge, in passing sentence, made it clear that workmen can no longer plead ignorance of the probable result of plugging shells, or that they were following instructions of superiors. The learned Chief Justice said, *inter alia* —

"Evidence was given at the trial that your actions, however culpable they really may have been, were in conformity with

instructions given by your superiors. There was no direct evidence of intention upon your or their part to assist the enemy. Under these circumstances the jury found you not guilty of the charge of treason, but found you guilty of the charge laid under section 436A of the Criminal Code, being a section passed in 1915, and directed against dishonesty, fraud or deception in connection (among other things) with the manufacture of military stores. In finding you guilty, the jury added a rider to their verdict, in which leniency is suggested upon the ground that you were acting under orders. Punishment under our law is designed not only to deter the guilty person from again committing a crime, but also to deter others from committing like crimes. Dealing first with you, one cannot but reflect that, according to the finding of the jury, you acted upon instructions received from others, who should perhaps be considered the prime offenders. Whether or not the authorities intend to take any proceedings against any others I have no knowledge, but, it is to be borne in mind that, whilst, so far, no others have suffered, you have been incarcerated for nearly two months. If your crime had consisted of an intention to assist the enemy, or even of participation in an act or acts which to your knowledge might result in injury to His Majesty's Forces in any manner or degree, the maximum of the punishment imposed by section 436A—that is to say, imprisonment for two years and a fine of five thousand dollars—would be quite inadequate. Giving you the benefit of the doubt in the particulars just adverted to, and taking into consideration the following facts, namely, that you have already been confined for nearly two months, that you were acting under instructions, that you have hitherto borne a high character, and that leniency is asked for by the jury, suspended sentence would seem to be the most fitting adjudication. It is hoped and believed that that will act as a deterrent in your case.

"As to the question of deterring others, I may point out that even if, prior to this present prosecution, it was open to anyone charged with playing a part, whether large or small, in plugging holes or in any other improper proceeding in the manufacture of shells designed for the use of His Majesty's Forces, to plead that

they were innocent of any wrong intent, no such plea will be open to them hereafter. The evidence of Major W. J. Keightley has established clearly that shells treated as they were treated in this factory at the time when your offence was committed would be rejected by the Government inspectors if to their knowledge such treatment had taken place. To put it shortly, holes in shells must not be plugged, and nothing whatever must be attempted to deceive the Government inspectors. If hereafter any such things are done, either in the factory concerned in this present prosecution or in any other factory in the Dominion of Canada, it will be done at the peril of prosecution not only under section 436A for an act of dishonesty, fraud or deception upon His Majesty, punishable as aforesaid, but also under section 74, clause 1, for an act of treason punishable with death. For the appalling possibilities of a weakness in the base of the shell are these (it being borne in mind that the striking force which it is expected to resist is 13 tons to the square inch!): The shell may explode within the gun, blowing it to pieces and killing the gun crew and every living being within a wide area; or even if it leaves the gun intact it might fall short, dealing death and destruction within our own lines instead of to the enemy. So that one is not surprised to hear Major Keightley say that thousands of shells have been 'scrapped' for a speck no larger than a pin point.

"I do not forget, but I entirely ignore, the evidence given by witnesses for the defence to the effect that if there was the specified depth of solid metal in the base after deducting the depth of the plugged hole, the strength of the shell would not be impaired. I do not find this to have been proved. It is opposed to the evidence of Major Keightley, and even if it had been proved, I would consider it quite negligible, and foreign to this inquiry. The bald fact remains that holes were plugged and the surface then so treated by planing off that no inspection could detect it, even with the aid of a glass, and this is fraud and deception under the Code."

The accused gave his own recognizance to appear for sentence when called upon. It may be hoped that this case will become widely known and be a deterrent both to ignorant and traitorous persons engaged in such occupations.

EQUITY AND FORECLOSURE.

The case of *Greisman* v. *Roxenberg*, 13 O.W.N. 382, seems to us a curious illustration of the way in which what is supposed to be equity is sometimes administered. The facts were simple. The plaintiff instituted an action for foreclosure, there being at the time an execution against the lands of the mortgagor in the hands of the sheriff affecting the mortgaged land. The plaintiff proceeded with his action without making the execution creditor a party and obtained a final order of foreclosure against the mortgagor. The execution creditor then applied to set aside the final order and, strange to say, the application was granted. The final order in no way affected the applicant, as it only foreclosed the parties to the action. There was no obstacle to the sheriff proceeding to sell the equity of redemption in due course as it existed at the time the writ was placed in the sheriff's hands, nor was there any obstacle to the applicant instituting an action for redemption; but what *locus standi* he had in law or equity to set aside the final order is not very apparent. Rule 217, which provides for the setting aside of *ex parte* orders, is limited in its operation to parties affected by the order sought to be set aside; here the applicant was not "affected" by the order and yet his application was entertained. Lord Justice Bowen once declared that a suit is not like an omnibus which anyone may hail from the pavement and get in at his pleasure. Here, according to this decision, the stranger may hail the suit, and the Court obligingly stops it and opens the door.

The well settled principle used to be that a plaintiff is *dominus litis*. A defendant, or the Court itself, may very well say the proper parties are not before the Court to enable the Court to adjudicate, and in such cases the Court may require the plaintiff to bring the proper parties before it, or in default of his so doing may dismiss his action; but as for adding parties against his will or allowing persons not parties to step in and dictate to the plaintiff how he shall conduct his suit seems a very strange and unwarranted departure from well settled principles. It cannot be said that the final order in the case referred to was a nullity.

The mortgagor might probably have moved against it on the ground of irregularity, but that a stranger to a suit has any right to complain of irregularities which do not affect him is a novel doctrine.

HUSBAND'S LIABILITY FOR HIS WIFE'S TORTS.

In an article on this subject in the London *Law Times*, the writer speaks at some length as to the right of a husband to inflict corporal punishment upon his wife. After giving some history as to this right he remarks that he does not desire to encourage any husband to revive the so-called privilege, which, indeed, would be a hopeless task. He then continues:—

"Generally speaking, a wife could not commit a tort in the eye of the law, or, to put it in another way, any tort she committed as against third parties was a tort committed by her husband. There is, of course, abundant authority for this proposition. Let the reader refer to the judgment of Sir George Jessel, when Master of the Rolls, in the case of *Wainford* v. *Heyl* (33 L.T. Rep. 155; 20 Eq. 321). This, of course, relates primarily to torts committed during coverture. But the point to observe is that this liability of the husband is a joint liability. He is jointly responsible with his wife to the person against whom she has committed the tort.

When the Married Women's Property Act, 1882, was passed, questions arose whether this joint liability was affected by the Act. Up to the passing of that Act the wife had no property which was not her husband's except her separate estate under the doctrine of equity, her paraphernalia, and certain things secured to her under previous statutes. The effect of the Act of 1882 was to secure to her, as it were, a statutory separate estate. Wherefore, it was suggested, her statutory separate estate was a fund for discharging her liabilities, whether in tort or contract. To put such a construction on the Act would be, as was pointed out by Mr. Justice Mathew in the important case of *Seroka* v. *Kattenberg* (54 L.T. Rep. 649; 17 Q.B. Div. 177, at p.

179), to make the Act one for relief of husbands, and not an Act affecting the property of married women. In that case the Court held that the Act did not relieve the husband from his old liability to be sued jointly with his wife in respect of his wife's torts, although the plaintiff might, at his own option, sue the wife alone, and obtain judgment against her and have execution issued against her separate property. If she has no such separate property, the plaintiff may still sue the husband as a co-defendant.

The case of *Seroka* v. *Kattenberg*, *supra.*, was decided by Mr. Justice Mathew and Mr. Justice A. L. Smith. The decision was in effect confirmed by the Court of Appeal in *Earle* v. *Kingscote* (83 L.T. Rep. 577 (1900) 2 Ch. 585). The same point was raised and dealt with again before the Court of Appeal in the case of *Beaumont* v. *Kaye* (90 L.T. Rep. 51; (1904) 1 K.B. 292) in, however, a somewhat less direct manner, the exact question in the latter case being on a point of pleading. And these three cases may be regarded as the standing authorities for the proposition that a husband is still liable, jointly with his wife, for torts committed by her during coverture.

We ought here to notice that the proposition thus laid down by the three last-mentioned cases was very severely criticised by Mr. Justice Fletcher Moulton in the more recent case of *Cuenod* v. *Leslie* (100 L.T. Rep. 675; (1909) 1 K.B. 880, at p. 889). That learned Lord Justice expressed the opinion that it was most desirable that the matter should be reviewed by the House of Lords, because, in his lordship's view, the present state of things is highly anomalous. "I cannot believe," said his Lordship, "that the Married Women's Property Act, 1882, which drew such a clear line of separation between the husband's and the wife's property and liabilities and arranged them in other respects so fairly on the lines of separate personal responsibility, could have intended to leave such a blot on the legislation as would follow from permitting a plaintiff to recover damages from a husband in respect of torts of the wife, either before or after coverture, although he was not liable for the torts or any participation in them, and was not needed as a party to the action."

These remarks of the learned Chief Justice, as he then was, are certainly deserving of weight, and they may serve the purpose of reminding the reader that the last word on the subject has not yet been heard. It may be that the House of Lords may take a different view to the several learned Lord Justices and Judges who decided the three cases we have mentioned. Yet one cannot but feel the weight of Mr. Justice Mathew's remark that to put any other construction on the Act would be to make it an Act for relieving husbands and not an Act for dealing with the wife's property.

In truth, it would seem that the husband has come off badly in the course which the development of the law has taken. He has lost his privilege of gentle chastisement while still retaining his liability for his wife's torts. The Legislature has destroyed the comfortable doctrine that the wife's property belongs to the husband. The old doctrine embodied in the homely and apt phrase in the mouth of the husband, "What is thine is mine, and what is mine is my own," has gone, together with his homely privilege of correction. Yet he continues liable for his wife's torts, although he may never have known of the commission of such torts till he hears of it through the plaintiff. Now, until the House of Lords thinks fit to do so—if the House of Lords is prepared to override the decisions of a considerable number of eminent lawyers—and until occasion arises the husband must submit to things as they are.

Some further observations ought to be added on this liability of the husband for his wife's torts. The liability of the husband, is, as we have pointed out, a liability to be sued jointly with her. The foundation of this liability was originally that she could not be sued alone. When judgment was obtained against the defendants, it was a personal judgment against both. But if the wife died while the action was pending, and before judgment, the whole action fell to the ground. On the other hand, if the husband died while the action was pending, the action was continued against the wife alone. The ground for the husband's liability in such cases was not, nor is it still, that he participated in or must be taken to have known of the tort. "During coverture,"

said Chief Justice Erle in the case of *Capel* v. *Powell* (17 C.B.N.S. 743, at p. 748), speaking of the law as it stood in 1864, "the wife has no such existence as to enable her to be a suitor in her own right in any Court, neither can she be sued alone. For any wrong committed by her she is liable, and her husband cannot be sued without her, neither can she be sued without joining her husband. Seeing that all her property is vested in the husband, it would be idle to sue the wife alone—the action would be fruitless."

The remarks of Chief Justice Erle in the last-mentioned case certainly support the view put forward by Lord Justice Fletcher Moulton, as he then was, in the case of *Cuenod* v. *Leslie* (*sup.*). It certainly seems illogical that, when the Legislature has given to the wife the right of acquiring, holding, and disposing of property as if she were a *feme sole*, and it was, as we have seen, only really an accident of the law that the husband had to be joined as a co-defendant in any action in respect of the wife's torts merely because at that time she could not hold property herself, the husband should still be liable to be joined as a co-defendant when the original purpose or necessity for such joinder has now disappeared.

It is, of course, notorious that tort and contract trench the one upon the other. Wherean alleged tort by a wife is in truth a wrong so connected with contract as to give a remedy in breach of contract only, the husband is not liable. As the old law stood, a wife was incapable of binding herself by contract. No action lay either against the husband or the wife for a breach of an alleged contract which the wife had purported to enter into. In the case of fraud committed by the wife in respect of any contract, and which was directly connected with the contract and was the means of effecting it, and parcel of the same transaction, the matter was looked upon as grounded on contract, and neither the husband nor wife could be sued, either alone or together: (see *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Ex. 422). On the other hand, however, where a contract was entered into by a married woman in respect of her equitable separate estate, that equitable separate estate was liable to make good such contract. As to this,

the reader is referred to the judgment of Sir George Jessel in the case of *Wainford* v. *Heyl* (*sup.*).

In the recent case of *Cole* v. *De Trafford* (117 L.T. Rep. 224) the Court held that a husband was not liable jointly with his wife for damages arising in respect of an accident to the plaintiff who had been employed by the wife to drive her motor-car. The Court looked upon the action as arising out of contract and not out of tort, and, on the principle above mentioned, held that the husband had been properly dismissed from the action."

The general rule is that, in the absence of an agreement, one partner is not entitled to compensation for his services while employed in the partnership business; but where one partner is intrusted with the management of the partnership business, and at the instance of his co-partners devotes his whole time and attention to it, while the co-partners are attending to their individual business, it is held in the Kansas case of *Rains* v. *Weiler*, L.R.A. 1917F 571, that the case is taken out of the general rule, and from the acts and conduct of the parties the law implies an agreement to pay the active managing partner compensation for his exceptional services.

REVIEW OF CURRENT ENGLISH CASES.

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HIGHWAY—WILFULLY OBSTRUCTING HIGHWAY—EVIDENCE.

Gill v. *Carson* (1917) 2 K.B. 674. This was a case stated by justices. The defendants were prosecuted for breach of a statute, making it unlawful to wilfully cause any obstruction in any public thoroughfare. The evidence adduced shewed that the defendants had, at 4 p. m., allowed two vehicles, each with a horse in the shafts and with a chain horse in front, to stand unattended on the highway in question for five minutes, whilst the defendants were in an inn near by getting refreshments. The street in question was 25 yards wide from kerb to kerb, it had two tramway tracks, so that in order to pass the defendants' vehicles, it would be necessary to draw on to the tram lines. There was no evidence that any person had been actually obstructed. A Divisional Court (Lord Reading, C.J., and Avory and Sherman, JJ.) held that it was unnecessary to shew that any person had actually been obstructed, but that the evidence was insufficient to establish any wilful obstruction of the highway within the meaning of the statute.

SALE OF GOODS—CONTRACT TO SHIP ALUMINIUM—PROHIBITION TO EXPORT WITHOUT LICENSE—PROHIBITION AGAINST BUYING, SELLING OR DEALING IN ALUMINIUM — DEFENCE OF THE REALM REGULATION, 1914, reg. 30A.

Re Anglo-Russian Merchant Traders and Batt (1917) 2 K.B. 679. This was an appeal from an order of Bailhache, J., made on an appeal from an award. The question in dispute was as to whether or not the appellants were liable to the respondents for breach of a contract in the following circumstances: By the contract in question, made in August 1915, the appellants sold to the respondents, both parties being resident in England, 50 tons of aluminium to be shipped by steamers to Vladivostock during the following December and January at a price including freight and insurance. At the date of the contract there was, to the knowledge of both parties, a prohibition against the export of aluminium from England except on license granted by the British Government, and on December 7, 1915, an order was made applying reg. 30a of the Defence of the Realm (Consolidation) Regulation to aluminium.

This regulation prohibits buying, selling or dealing in, or offering or inviting an offer to buy, sell or deal in or enter into any negotiations for the sale or purchase of or other dealing in the material to which the regulation is made applicable, and whether or not the sale or purchase or dealing was effected in the United Kingdom. No aluminium was shipped under the contract, and the umpire found as a fact that the parties contemplated that the aluminium should be shipped from England, and that neither party contemplated or intended any shipment to be made from America; that the sellers applied for a licence which was refused, and that the failure to deliver was due to the inability of the appellants to obtain a licence, but that the sellers did not make any effort to obtain a licence to ship from America. The umpire held that the contract not being made in express terms conditional on the obtaining of a licence by the vendors, they were liable for breach of contract, and he so awarded, and Bailhache, J., affirmed the award. The Court of Appeal (Lord Reading, C.J., Lord Cozens-Hardy, M.R., and Scrutton, L.J.) reversed his decision, holding that it was an implied term of the contract that its performance was to be conditional on the vendors being able to obtain the necessary license by the exercise of reasonable diligence; and they moreover held that the vendors were not in default, because they made no effort to ship the aluminium from America, because to have done so would have been an illegal act on or after December 7, 1915.

CONTRACT TO BE VOID ON A CERTAIN EVENT—VOID OR VOIDABLE —RULE THAT PARTY CANNOT TAKE ADVANTAGE OF HIS OWN WRONG.

Re New Zealand Shipping Co. v. Societé Des Ateliers &c. (1917) 2 K.B. 717. This also was an appeal from Bailhache, J., made on an appeal from an award. The matter in controversy was a contract made between the parties in 1913, whereby the Societé Des Ateliers &c. (hereafter called the builders) agreed to construct for the New Zealand Shipping Co. a steamer to be completed by January 30, 1915, subject to an extension of time if the construction was delayed by an unpreventable cause beyond the control of the builders. And the contract also provided that if by reason of France becoming engaged in a European war the builders were unable to complete the vessel within 18 months from the date agreed by the contract for completion that the contract should be void, and the purchase money in that event was to be refunded with interest thereon. While the

steamer was in course of construction, and on 2nd August, 1914, France became involved in a European war and the builders had been prevented by unpreventable causes beyond their control from completing the vessel. In these circumstances they claimed that the contract was void, and the company was only entitled to a return of the purchase money and interest. The company, however, contended that the builders could not take that position, as it would be taking advantage of their own wrong. The umpire held that the builders were entitled to treat the contract as at an end, and Bailhache, J., affirmed his award; and the Court of Appeal (Lord Reading, C.J., and Pickford and Scrutton, L.JJ.), affirmed his decision holding that the builders' inability to perform the contract could not be attributed to their own wrong.

CARRIER—THEFT BY SERVANT—PROSECUTION BY CARRIER—PROPERTY IN GOODS LAID IN CARRIER—ACTION AGAINST CARRIER BY OWNER OF GOODS—RATIFICATION—ESTOPPEL.

Harrisons v. *London & North Western Ry.* (1917) 2 K.B. 755. The point involved in this case is a somewhat technical one. The plaintiffs sent a consignment of goods to wharfingers with instructions to deliver them to the defendants for carriage to a specified place. A carter who was in the employment of the defendants, but who was absent on sick leave, appeared at the wharfingers, dressed in a uniform of the defendants' carters, with one of the defendants' carts and demanded and received the goods in question without any order or authority from the defendant so to do, and converted the goods to his own use. The defendants prosecuted the carter for theft, laying the property of the goods in the defendants, and the carter was convicted of the theft. The present action was brought to recover from the defendants for the loss of the goods; the defendants denied that the goods had ever been delivered to them, and the question was whether they were estopped from setting up this defence, by reason of their having claimed the property in the goods on the prosecution of the thief; Rowlatt, J., who tried the action, held that they were not, that though they adopted the possession of the carter as their own possession, they did not necessarily adopt his possession as a bailment to themselves for carriage as it was consistent with what they did that they adopted it as being theirs, and entitling them to order the carter to deliver the goods back to the wharfingers, or to themselves, but not thereby necessarily adopting the contract of carriage, which the carter had purported to make. He therefore dismissed the action on the ground that

no contract for carriage in fact was made with the defendants, and what had taken place on the prosecution of the thief did not amount to a ratification of a contract for carriage, but merely to the ratification of a bare bailment.

SHIP—SHIP REQUISITIONED BY ADMIRALTY—CHARTERPARTY—ABSENCE OF LIGHTS IN PURSUANCE OF ADMIRALTY INSTRUCTIONS—COLLISION—"CONSEQUENCE OF WARLIKE OPERATIONS"—"CAUSE ARISING AS A SEA RISK."

British and Foreign S.S. Co. v. *The King* (1917) 2 K.B. 769. This was a petition of right to recover for the cost of a ship requisitioned by the Admiralty in the following circumstances: The requisition was made subject to the terms of a charterparty whereby it was provided that the Admiralty shall not be held liable if the vessel shall be lost in consequence of any cause arising as a sea risk, but the Admiralty took the risk "of all consequences of hostilities or warlike operations." The vessel came into collision with a French battleship and was lost. The collision was due to the fact that both vessels were steaming without lights, due to warlike operations and neither vessel was to blame for the collision, Rowlatt, J., held that the Admiralty was liable for the loss, as being one due to warlike operations and not to an ordinary sea risk.

[redacted]

PRINCIPAL AND AGENT—SALE OF GOODS—CONTRACT MADE "FOR AND ON BEHALF OF" A FOREIGN PRINCIPAL—SIGNATURE BY AGENT WITHOUT QUALIFICATION—RIGHT OF AGENT TO SUE ON CONTRACT—F.O.B. CONTRACT—PROHIBITION AGAINST EXPORT—LICENCE TO EXPORT—ON WHOM DUTY TO APPLY FOR LICENSE RESTS.

Brandt v. *Morris* (1917) 2 K.B. 784. This was an action on a contract for the sale of oil f. o. b. in Manchester. The contract on its face purported to be made by H. O. Brandt & Co. "for and on behalf of Messrs. Sales Blacheries" but was signed by Brandt & Co., without any qualification. It was contended that Brandt & Co. had no right to sue. After the contract was made the export of oil was prohibited by an Order-in-Council, and this prohibition existed during the greater part of the time fixed by the contract for the delivery of the oil, but licences to export were granted in certain cases. The action was brought by the buyers for breach of contract in not delivering the oil; Lawrence, J., held that the plaintiffs were parties to the contract and entitled

to sue on it, he also held that as the defendants had taken upon themselves to procure a licence, but did not make sufficient applications therefor, and therefore had no defence to the action; but the Court of Appeal (Lord Reading, C.J., and Scrutton, L.J., and Neville, J.) while agreeing with Lawrence, J., that the plaintiff had a right to sue, disagreed with him on the question of obtaining the licence, holding that the obligation to procure the necessary licence rested on the plaintiff and not on the defendants because the contract was f.o.b. Manchester, and it was the plaintiff's duty to supply the ship and get the necessary authority to export, the information required to obtain such a licence being in their possession, and not in that of the defendants. The judgment of Lawrence, J., was therefore varied.

SALE OF GOODS — C.I.F. CONTRACT — NON-DELIVERY — TIME FOR MEASURING DAMAGES—ARRIVAL OF SHIPPING DOCUMENTS —ARRIVAL OF GOODS—"TIME OR TIMES WHEN THEY OUGHT TO BE DELIVERED"—SALE OF GOODS ACT 1893 (56-57 VICT. c. 71) s. 51 (3).

Sharpe v. *Nosawa* (1917) 2 K.B. 814. The Sale of Goods Act 1893, which is regarded as declaratory of the common law touching the matters with which it deals, by s. 51 (1) provides that where a seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages; and by s. 51 (3), it is provided that the measure of damages is *primâ facie* the difference between the contract price and the market price at the time or times when they ought to have been delivered. The defendants, a firm of merchants in Japan, sold goods to be shipped to London in June, at a price including cost, freight and insurance. Shipping documents, including bill of lading and policy of insurance, relating to the last possible shipment in June from Japan, would, if sent forward with reasonable dispatch, have reached London on July 21; and the goods themselves would have arrived on August 20. The goods were not shipped, and the action was for non-delivery. The question was from what date the measure of damages ought to be computed under the statute. Atkins, J., who tried the action, held that the delivery contemplated by the contract was a constructive delivery by the delivery of the usual shipping documents, and that therefore, the date at which the shipping documents ought in due course to have been delivered, viz., July 21, was the date at which the market price must be ascertained for fixing the damages.

CONTRACT—SALE—PRINCIPAL AND AGENT—FIDUCIARY RELATION—FRAUD—RESCISSION OF CONTRACT—RESTITUTIO IN INTEGRUM—FALL IN VALUE OF THING SOLD.

Armstrong v. *Jackson* (1917) 2 K.B. 822. In this case the plaintiff employed the defendant, as his broker, to buy certain shares, and the defendant, without the knowledge of the plaintiff, sold to him his own shares. On discovering the fact, the plaintiff brought the present action to rescind the contract, and in the meantime the value of the shares had fallen, and the principal point in the case was whether, in these circumstances, the contract could be rescinded, as it was impossible to restore both parties to the same position as they were in at the time of the contract. McCardie, J., who tried the action, held that on the evidence the contract was obtained by fraud and misrepresentation, and the plaintiff was entitled to have it rescinded, and the fact that the shares had fallen in value, for which the plaintiff was in no way responsible, was no obstacle to the granting of that relief. The defendant was therefore ordered to repay the purchase money, and on payment the plaintiff was ordered to retransfer the shares.

RAILWAY COMPANY—TOLLS—FALSE ACCOUNT OF GOODS—INTENT TO AVOID PAYMENT OF PROPER TOLL—CRIMINAL LAW—MENS REA—PERSON—CORPORATION—RAILWAY ACT 1845 (8-9 VICT. C 20) SS. 98, 99—(R.S.C. C. 37, SS. 398, 399)—INTERPRETATION ACT 1889 (52-53 VICT. C. 63) S. 2—(R.S.C. C. 1, S. 34 (20)).

Mousell v. *London & North Western Ry. Co.* (1917) 2 K.B. 836. This was an appeal on a case stated by a magistrate from conviction on a charge brought by the railway company for breach of the Railway Act 1845, ss. 98, 99 (see R.S.C. c. 37, ss. 398, 399), which imposes a penalty for failure on demand to give an exact account in writing signed by the person on whom the demand is made, of the number and quantity of goods conveyed, and if the goods are liable to different tolls specifying the respective numbers and quantities thereof liable to each or any of such tolls. The prosecution was against a firm for having given, on demand, a false account of goods delivered to the railway company for carriage, with intent to avoid payment of the tolls payable in respect thereof. The demand was made on one of the firm's servants by whom the account complained of was given, and it was contended that there was no mens rea on the part of the firm, and therefore that the firm was not liable to conviction,

as it could not be made liable for the criminal and unauthorized act of its servant. On the part of the railway company the *Interpretation Act* 1889, s. 2, was relied on (see R.S.C. c. 1, s. 34, (20)), as shewing that "person" includes "corporation," and as a corporation would be liable in such a case for the act of its servants so must an ordinary firm be liable, though there be no mens rea. The Divisional Court (Lord Reading, C.J., and Ridley and Atkins, JJ.) held that the appellants were properly convicted and dismissed the appeal.

MERCHANT SHIPPING—SEAMAN—DESERTION—FAILURE OF MASTER TO ENTER IN LOG STATEMENT OF WAGES DUE TO SEAMEN "LEFT BEHIND"—MERCHANT SHIPPING ACT 1906 (EDW. VII. c. 48), s. 28.

Colbourne v. *Lawrence* (1917) 2 K.B. 857. This was a case stated by magistrates. The defendant, the master of a vessel, was summoned for breach of the Merchants Shipping Act 1906 (6 Edw. VII. c. 48) s. 28, which requires that "if a seaman belonging to any British ship is left behind out of the British Islands, the master of the ship shall . . . as soon as may be enter in the official log-book, a statement of the effects left on board by the seaman, and of the amount due to the seaman on account of wages at the time when he was left behind." During a voyage nine seamen of the vessel deserted, one at New York, two at Newcastle, N.S.W., and the rest at Melbourne. The log-book contained a record of the several desertions, and it was proved that they were in fact deserters and took away all their effects; but the log-book contained no statement of the amount due to any of the seamen on account of wages at the time they deserted. The seamen's wages account, however, contained particulars of the amounts due to seven of them, and the amounts overpaid to the other two. It was contended that seamen deserting were not "left behind" within the meaning of the Act, and that there was no evidence that they had in fact been left behind, as they might have joined other ships. The justices held that the Act must be construed strictly, and as there was no evidence that the men had in fact been "left behind" they dismissed the summons. The Divisional Court (Darling and Avory, JJ.) held that they had erred, and that the deserters were seamen "left behind" within the meaning of the Act. The case was therefore remitted to the justices.

URBAN AUTHORITIES—TREES PLANTED IN HIGHWAY AND PROTECTED BY SPIKED GUARDS—NEGLIGENCE—STREET LIGHTING PROHIBITED UNDER DEFENCE OF REALM REGULATIONS.

Morrison v. *Lord Mayor &c. of Sheffield* (1917) 2 K.B. 866. This was an action against an urban authority to recover damages sustained by the plaintiff in the following circumstances: The defendants planted trees in a public highway under their control, and surrounded such trees with spiked guards. The defendants were prohibited from lighting such highways after dark by the Defence of the Realm Regulations. The plaintiff, after dark, came into contact with the spiked guards around one of the trees, and suffered a severe injury. Rowlatt, J., who tried the action with a special jury, gave judgment in favour of the plaintiff for £660 16s. The defendant appealed but the Court of Appeal (Lord Reading, C.J., Pickford and Scrutton, L.JJ.), held that after the promulgation of the lighting regulations there was a continuing duty on the part of the defendants to take such measures as might be necessary to prevent the guards round the trees from being a source of danger to persons using the highway.

MASTER AND SERVANT—COMMON EMPLOYMENT—LICENSEE WITH INTEREST—LIABILITY OF MASTER FOR NEGLIGENCE OF SERVANT—NEGLIGENCE.

Hayward v. *Drury Lane Theatre* (1917) 2 K.B. 899. This was an action to recover damages for injury to the person of the plaintiff, sustained in the following circumstances: The defendants, "Moss Empires," had hired Drury Lane Theatre for a performance to be given by Moss Empires thereat. The plaintiff was a professional dancer, who was desirous of obtaining employment with Moss Empires as one of the performers. She accordingly at that company's request attended rehearsals, and took part therein in order to test her capacity and fitness for engagement. While thus attending a rehearsal, she was ordered by one Wilson, the producer of the performance, to stand on a staircase which was part of the scenery. Owing to negligent construction the staircase collapsed, and the plaintiff's ankle was crushed. She sued both the Drury Lane Theatre and Moss Empires. The action was dismissed at the trial as against the theatre, and the plaintiff did not appeal, but judgment was given against the Moss Empires in her favour. These defendants appealed contending that the plaintiff was a fellow servant with the defendants' servant who had caused the injury, and that it

was herefore a case of common employment and the action did not lie. The Court of Appeal (Lord Reading, C.J., and Scrutton, L.J., and Neville J.), held that the plaintiff was not in the position of a servant of Moss Empires, but was a licensee having a common interest with that company and not a mere volunteer. And although, if a mere volunteer, the plaintiff would have had no right of action, as a licensee with interest she had a right of action, as the injury was caused by a defect in the nature of a trap against which the company ought to have guarded the plaintiff.

PROBATE—WILL—STRIKING OUT WORDS IN WILL—WILL READ OVER—PRESUMPTION OF KNOWLEDGE AND APPROVAL BY TESTATOR—EVIDENCE REQUIRED TO REBUT PRESUMPTION.

Gregson v. *Taylor* (1917) P. 256. This wa an action to revoke the probate granted of a will and for a fresh grant of probate omitting certain words in the codicil to the will purporting to give a legacy "to Maude Adelaide Ashurie (daughter of Francis Manley Bird Ashurie) £4,000" on the ground that these words had been inserted by mistake and the testatrix did not properly appreciate them. By the will, £5,000 was given to Adelaide Maud Ashurie, the wife of F.M.B. Ashurie, and it was alleged that the real intention of the testatrix was to substitute therefor a legacy of £4,000. There was no such person as the person named in the codicil, but there appeared to be no doubt that the person intended was Adelaide Maud, the wife of F. M. B. Ashurie. Horridge, J., who heard the application, held that the evidence was not sufficient to rebut the presumption that the testatrix knew and approved of the codicil as read over to her and he therefore refused the motion, and though he was of the opinion that the testatrix by "Maude Adelaide Ashurie" probably meant the wife of F. M. Ashurie, yet he was left in doubt what was the testatrix's real intention as to the £4,000 and therefore he thought the only safe way was to abide by the words as read over and approved by her.

TRUSTEES—POWER TO POSTPONE CONVERSION—EXERCISE OF DISCRETION.

In re Charteris Charteris v. *Biddulph* (1917) 2 Ch. 379. In this case a legatee sought to compel trustees to proceed to convert the trust estate for the purpose of paying his legacy, which amounted to £230,000, or to compel payment of interest on the amount

as if converted and invested as directed by the will creating the trust. It was conceded that the trustees were acting *bona fide*, and claimed that in the best interests of the persons interested in the estate, it would be a most inopportune time for realization. The Court of Appeal (Eady, Bankes, and Warrington, L.JJ.), considered that in the circumstances the discretion of the trustees had been properly exercised and could not be interfered with and that the legatee was only entitled to the interest provided by the will pending conversion.

WILL—LEGACY OF ANNUITY "FREE OF ALL DUTIES" TO SOLICITOR-TRUSTEE—INCOME TAX.

In re Saillard, Pratt v. *Gamble* (1917) 2 Ch. 401. This was an appeal from the judgment of Neville J. (1917) 2 Ch. 140 (noted *ante* vol. 53, p. 390). The question was whether a legacy of an annuity of £200 bequeathed to a solicitor-trustee for his trouble as such trustee, "free of all duties," entitled him to have the legacy paid free of income tax. Neville, J., decided in the negative and his decision is affirmed by the Court of Appeal (Eady, Bankes and Warrington, L.JJ.).

VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—MORTGAGE ON PROPERTY SOLD—INABILITY OF VENDOR TO REDEEM OR OBTAIN RELEASE OF MORTGAGE—MEASURE OF DAMAGES.

In re Daniel, Daniel v. *Vassall* (1917) 2 Ch. 405. This was an administration action. In his lifetime the deceased, whose estate was being administered, had contracted to sell land. On this land, at the time of the contract, there was an outstanding mortgage, which also covered other land. The deceased died before completion, and his personal representatives were unable to redeem the mortgage, or procure a release of it, and were consequently unable to convey free from incumbrances in accordance with the contract, and the purchasers sent in a claim for damages against the vendor's estate, which included not only the costs they had been put to in investigating the title, but also a sum for loss of the bargain. The executors contested this claim and relied on Bain v. Fothergill, L.R. 7 H.L. 158, where it was held that where a contract for the sale of land fails by reason of the vendor being unable without any default on his part to make title, the purchaser cannot recover as damages more than the

expense he has been put to in investigating the title. Sargant, J., held that that rule was not applicable in the present case, because the objection was not one of title, but of conveyance, and he decided that the purchasers were entitled to damages for loss of bargain, but not also to the costs of investigating the title.

WILL—BEQUEST TO SERVANTS IN TESTATOR'S EMPLOYMENT AT DEATH—LUNACY OF TESTATOR—SERVANTS EMPLOYED BY COMMITTEE.

In re King Jackson v. *Attorney-General* (1917) 2 Ch. 420. The only point for which we think it necessary to refer to this case is that Younger, J., decided that where a testator bequeaths legacies to servants in his employment at the time o his death, and subsequently becomes lunatic, servants employed by his committee and in attendance on him at the time of his death are not entitled to the benefit of such bequests.

SOLICITOR AND CLIENT—ORDER OBTAINED BY CLIENT FOR TAXATION OF SOLICITOR'S COSTS—NEGLECT OF CLIENT TO PROSECUTE REFERENCE—LEAVE TO SOLICITOR TO SUE—SOLICITORS ACT 1843 (6-7 Vict. c. 73) s. 37—(R.S.O. c. 159, s. 38 (*c*))

In re Plummer (1917) 2 Ch. 432. In this case a client had obtained the usual order to tax his solicitor's bill of costs. Having neglected to proceed with the reference with due diligence, the solicitor applied to rescind the order or for leave to sue: see R.S.O. c. 159, s. 38 (*c*). It may be remarked that in this case the order contained an unlimited stay of proceedings pending the reference, and notwithstanding its terms the learned Judge held that he could, by virtue of the inherent jurisdiction of the Court to prevent an abuse of its process, rescind the order unless the client within a limited time proceeded with the reference, and this order he accordingly made.

Reports and Notes of Cases.

Dominion of Canada.

EXCHEQUER COURT

THE KING v. RITHET AND THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

Cassels, J.] [January 22.

Constitutional Law—Dominion and Provincial rights—Revenues—Bona Vacantia—Secs. 102 and 109 B.N.A. Act 1867.

Held, having regard to the provisions of sec. 102 of the B.N.A. Act, 1867, which refer to certain revenues, over which the provinces at the date of the Union had, and have, power of appropriation, as passing to the Dominion except such portions as are reserved to the provinces under sec. 109, it is apparent that all royalties of every kind were not intended to belong to the provinces under the wording of section 109. Royalties arising from lands, mines, minerals and from escheats, as referred to in sec. 1 of the Imp. Act 15-16 Vict. c. 39, passed to the provinces, but it was not the intention of the B.N.A. Act to give to the provinces royalties such as *bona vacantia*, and the like.

E. L. Newcombe, K.C., and *C. P. Plaxton*, for plaintiff; *J. A. Ritchie*, for defendant.

Correspondence.

REGISTRY OFFICES—ONTARIO.

THE EDITOR CANADA LAW JOURNAL: FEB. 28th, 1918.

Sir:—Is it not time that a change was made in the ridiculous practice, which has prevailed for years, in every Registry Office in Ontario, of designating deeds, on the abstract index, as "B. and S," meaning bargain and sale? As the old deed of bargain and sale was superseded by the deed of grant (the present common form of conveyance) very many years ago, it is nothing short of an absurdity to go on labelling these deeds "B and S,"

when their proper designation would be indicated by the letter "G," signifying "Deed of Grant."

I suppose the perpetuation of this error is simply significant of the tenacity with which the law clings to old customs.

Yours very truly,

F. P. BETTS.

Bench and Bar

CANADIAN BAR ASSOCIATION.

We are informed by the most efficient Secretary of this Association, Mr. R. J. Maclennan, that a booklet will be issued shortly containing the reports which were prepared for the annual meeting. In it will appear an alphabetical list of the members of the Association in good standing. The officers are anxious that all members should pay their dues for this year, so that their names may appear in the booklet.

The following is a summary of the membership at the present time: Nova Scotia 22; New Brunswick 49; Prince Edward Island 18; Quebec 169; Ontario (outside Toronto) 100; Toronto 170; Manitoba 177; Saskatchewan 87; Alberta 93; British Columbia 26, making a total of 911.

COUNTY OF YORK LAW ASSOCIATION.

The thirty-second annual report of the trustees shews that at the commencement of the year the number of members of the Association was 395, and that 14 joined during the year 1917, making a total of 409, reduced by death or resignation to 401.

The report recorded with pride and sorrow the gap made in the ranks of the Association by the death of Major Langstaff. It also recorded with great regret the death of Sir William Mortimer Clark, who was President of the Association in 1898-9. It also referred to the lamented death of Mr. Mahlon K. Cowan, K.C.

The subject of the library was referred to, making special reference to the efficiency and unweary interest shewn by Miss Read, the librarian. 146 volumes were added during the year,

and 397 donated to other county libraries or otherwise disposed of. There are now 5,850 books in the library.

Reference was also made to the patriotic work undertaken by members of the Association during the past few years; though there is nothing new about this, as no class of the community has done more for the country than have the lawyers. The treasurer's report shews that $650.00 was given to various patriotic funds during the year. This, however, is a small matter compared with the amount raised by members of the Association in connection with the various financial campaigns that have taken place in the City of Toronto and County of York.

The need of a new Courthouse separate from the City Hall was referred to and recommended, the present arrangements being found unsatisfactory and inadequate.

The officers are as follows: Past President, Angus MacMurchy, K.C.; President, Daniel Urquhart; Vice-President, D. T. Symons, K.C.; Treasurer, George C. Campbell; Secretary, W. J. McCallum; Curator, T. H. Barton; Historian, George Bell, K.C.; Trustees: Edward Bayly, K.C.; J. P. MacGregor; I. S. Fairty, H. W. Mickle, Gideon Grant, W. K. Murphy, R. D. Hume, J. D. Spence, and R. J. MacLennan.

JUDICIAL APPOINTMENTS.

(Feb. 11.)

Hon. Robert Edward Harris, one of the Justices of the Supreme Court of Nova Scotia, to be Chief Justice; vice Hon. Sir Wallace Graham, deceased.

Humphrey Mellish, of the City of Halifax, Nova Scotia, K.C., to be a Puisne Judge of the Supreme Court of Nova Scotia; vice Hon. Robert Edward Harris, appointed Chief Justice.

(March 2.)

Hon. Sir Frederick William Gordon Haultain, Knt., Chief Justice of Saskatchewan, to be Chief Justice of the Court of Appeal for the Province with the title of Chief Justice of Saskatchewan.

Hon. John Henderson Lamont, a Judge of the Supreme Court of Saskatchewan, to be Judge of the Court of Appeal.

Hon. Edward Lindsay Elwood, a Judge of the Supreme Court of Saskatchewan, and Hon. Henry William Newlands, a Judge of the Supreme Court of Saskatchewan, to be Judges of the Court of Appeal for that Province.

Hon. James Thomas Brown, a Judge of the Supreme Court of Saskatchewan, to be Chief Justice of the Court of King's Bench for that Province.

Hon. James MacKay, Judge of the Supreme Court of Saskatchewan, to be Judge of the Court of King's Bench of that Province.

Hector Y. Macdonald, of the City of Regina, K.C., to be Judge of the Court of King's Bench for the Province of Saskatchewan.

Henry Veeder Bigelow, of the City of Regina, K.C., to be Judge of the Court of King's Bench for the Province of Saskatchewan.

John Fletcher Leopold Embury, of the City of Regina, K.C. to be a Judge of the Court of King's Bench for the Province of Saskatchewan.

George Edward Taylor, of the City of Moosejaw, K.C., to be a Judge of the Court of King's Bench for the Province of Saskatchewan.

Flotsam and Jetsam.

Eating and Drinking on the Bench.

We remember to have read in a book of travels in Africa that a screen was held before the King of Dahomey when he took any refreshment, for the people must not see the King eat or drink. The notion that eating or drinking in public is attended with some loss of dignity may possibly be the origin of the custom for our judges sitting in robes to leave the court on a suitable occasion and to take their luncheon in a private room. The custom is not, however, without exceptions, and it appears from a paper written by Mr. Gregory King, Lancaster Herald, entitled "The Method of Proceedings upon the Trial of a Peer," that "upon any intervals during the trial the Lord High Steward may have wine and 'biskits' presented him on the knee, and the judges and officers attending him may also have wine and biskits." Another exception was certainly that of the Judicial Committee of the Privy Council, where their Lordships brought their Luncheons with them and ate and drank when they thought proper to do so. We have heard of judges whose digestions enabled them to support a protracted fast, and who exercised their power by keeping counsel on their feet from the sitting until the rising

of the court. We have reason to believe, however, that such instances of judicial tyranny do not occur at the present day. —*Solicitors' Journal.*

The Legal Mind.

The average man, writes William W. Brewton in the March *Case and Comment*, does not possess the legal mind; and hence the average man is not competent to adjudge cases at law. Because he possesses a fair sense of justice and right by no means establishes his competency to adjudge law. The gist of the competency requisite for the judge is the ability to admeasure the morality of laws. The admeasurement is properly performed, in a particular case, when the judge has interpreted that case in law; that is to say, when he has declared the true status of that case before the laws applicable to it, when he has adduced from those laws the morality justicially applicable to that case—and which, in all probability, is inapplicable to any other case. Not only is legal skill and knowledge necessary for such expert adjudication but the possession of *the legal mind*, the peculiar mental cast which we properly suppose to be an idiosyncrasy and not an acquirement, is necessary, if adjudication is to reach its highest possible validity and merit——

Carrier—Sleeping Car.

A sleeping car company is held liable in damages to a passenger who is assaulted and robbed when attempting to board the car, if the conductor is present and fails to afford assistance, in *Garrett* v. *Southern R. Co.*, L.R.A.1917F 885.