The Legal News.

Vol. VIII. OCTOBER 17, 1885. No. 42.

In 1883 it was enacted that "every appeal from interlocutory judgments (*sic*) shall be inscribed by the clerk of the Court, and heard by privilege, in a summary manner, without any reasons of appeal or factums." 46 Vic. c. 26, sec. 6. An application was made by the successful party in a case at Quebec (Oct. 8) to tax a *factum* which he had filed. After consultation a majority of the judges, (Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.) were of opinion that the proper interpretation of the section referred to was that the *factum* was not obligatory, not that it was prohibited, and that any party could still file a *factum*, for which he would be entitled to charge in his taxed bill if successful, but that there should be no delay to file it. The object of the enactment was to shorten the delays in these appeals, not to render their decision more difficult.

In the opinion of Mr. D. Macmaster, Q.C., on the Riel case, reference is made to the adverse authority of Mr. Justice Stephen, in his Digest of Criminal Law. We may add that in Mr. Justice Stephen's "Digest of the Law of Criminal Procedure," (A. D. 1883) p. 2, it is stated that "the criminal law of England extends to high treason, misprision of treason, and concealment of treason committed out of the realm of England by any subject of Her Majesty," and reference is made to the statute 35 Hen. 8, c. 2.—The case is to be heard before the Judicial Committee of the Privy Council on the 26th inst.

The books contain a few cases which may be cited with reference to small-pox. One bears upon the responsibility of physicians in performing vaccination. In *Landon* v. *Humphrey*, 9 Conn. 209, it was held that the physician, while he does not guarantee the specific value of the vaccine virus, yet guarantees its freshness; so that if he inoculate a patient with virus in an altered state, constituting as it then would mere putrid animal matter, and erysipelas or injury to any limb necessitating amputation should ensue, he will be held responsible for the suffering, loss of time, and permanent injury to the patient. It is also the duty of a physician to take all possible care to prevent the spread of small-pox or other contagious disease. So, where the paper upon the walls of a room in which there had been small-pox patients had become so soiled and smeared with the small-pox virus as to make its removal necessary, a physician or other attendant may order the paper to be torn down, and it was held in *Seavey* v. *Treble*, 64 Me. 120, that the landlord cannot maintain an action against the physician for doing this.

In England it is an indictable offence for a physician, or any one else, unlawfully and injuriously to carry along or to expose in a public highway, on which persons are passing, and near to the habitations of others, any person infected with the small-pox, or any contagious disorder; and it is for the accused to show that the object of the carrying or exposure was lawful; *Rex* v. *Burnett*, 4 M. & S. 272; *Rex* v. *Sutton*, 4 Burr. 2,116; *Rex* v. *Vantandillo*, 4 M. & S. 73. These cases are referred to in Rogers, "Law and Medical Men."

Inoculation for the small-pox has been referred to as a thing actually performed in some recent cases. In England, since 1840, it has been an indictable offence to inoculate for the small-pox; 3 & 4 Vic. cap. 29, sec. 8. 30 & 31 Vict. cap. 84, sec. 32. And by 16 Vict. (Can.) cap. 170, s. 1, it was made an indictable offence in Canada: Consol. Stat. Can., cap. 39, sec. 1; and the license of any physician contravening the Act thereby becomes null.

The following paragraph from an English paper shows how even subordinate judges are remunerated in England:—

"At a recent meeting of the corporation of the city of London, it was decided to raise the salary of the assistant judge of the Mayor's Court from £1,600 to £2,000 per annum. Mr. Woodthorpe Brandon, who now occupies the post, has been in office since 1873, having formerly been registrar of the court, in which position he enjoyed an income greater than he hitherto received in his judicial capacity."

The salary as now arranged is just double that of the judges of our Court of Queen's Bench and Superior Court.

*COUR SUPÉRIEURE—MONTRÉAL.**

Certiorari—Règlement de la Cité de Montréal—Billards et Pools.

JUGÉ:—Qu'une table de *pool* n'est rien autre chose qu'un *billard*, et qu'un règlement de la cité de Montréal imposant une taxe de $100 sur les billards comprend également les tables de *pool*.—*Vincelette* v. *De Montigny, et La Cité de Montréal*, Loranger, J., 2 février 1885.

Saisie-conservatoire—Bail—Cession de biens—Insolvabilité—Intervention—Droits du syndic.

JUGÉ:—1o. Que les cessions de biens faites à un syndic pour le bénéfice des créanciers, ne donnent pas le droit au syndic cessionnaire d'intervenir dans une saisie des biens du débiteur insolvable par un créancier, pour réclamer, en sa dite qualité, la possession des effets saisis; cette cession n'a aucun effet vis-à-vis les tiers, et ne peut lui permettre d'ester en justice ni pour le cédant, ni pour les créanciers du cédant.

2o. Qu'un bail de meubles pour une certaine somme représentant leur valeur, avec la condition que lorsque la somme stipulée sera payée les meubles seront la propriété du locataire, est parfaitement régulier et constitue bien un louage et non pas une vente.—*May* v. *Fournier*, Mousseau, J., 23 avril 1885.

Meubles—Vente judiciaire—Adjudicataire—Tiers—Saisie—Revendication.

JUGÉ:—Qu'en l'absence de fraude ou de collusion, un tiers, propriétaire de meubles qui ont été saisis et vendus judiciairement, n'a aucun droit en revendication contre l'adjudicataire qui en a payé le prix, son recours est sur le produit, s'il n'est pas encore distribué, ou s'il l'est, contre le saisissant pour la valeur du meuble.—*Mackie* v. *Vigeant*, Mathieu, J., 25 juin 1885.

Mise en demeure—Demande de paiement—Lieu de paiement—Vente de marchandises—Lettre—Usage du commerce.

JUGÉ:—1o. Qu'un marchand qui poursuit sur compte pour marchandises vendues et livrées est tenu, comme dans les cas ordinaires, de faire personnellement ou par procureur, avant l'action, une demande de paiement au domicile du débiteur; que la demande faite par lettre du marchand, par envoi de compte ou par lettre d'avocat est insuffisante.

2o. Que la coutume ou l'usage du commerce ne peut prévaloir contre une disposition formelle de la loi.—*Smardon* v. *Lefebvre*, Jetté, J., 31 mars 1884.

Société commerciale—Dissolution—Paiement des dettes—Garantie.

JUGÉ:—Que lorsqu'à la dissolution d'une société commerciale, l'un des associés assume le paiement de toutes les dettes, l'autre associé, contre lequel les créanciers de la société auraient obtenu des jugements conjointement et solidairement, ne peut obtenir une condamnation personnelle contre celui qui s'est chargé des dites dettes, et faire déclarer que les biens de la société sont son gage et doivent le garantir contre les jugements des créanciers, mais qu'il a seulement contre lui une action en garantie.—*Brouillet* v. *Bogue et al.*, Mathieu, J., 25 juin 1885.

Exception à la forme—Timbres judiciaires—Alias bref de sommation—Informalités.

JUGÉ:—1o. Que lorsque le demandeur ne rapporte pas son action le jour du retour, et qu'il est, en conséquence, forcé de prendre un nouveau bref, ce dernier ne peut être considéré comme un *alias*, et le montant des timbres judiciaires qui doit y être mis lors de son émanation et de son retour est le même que sur le premier.

2o. Que le bref de sommation n'a de forme légale et met le défendeur en demeure de comparaître en cour, qu'en autant que le montant des timbres judiciaires fixé par la loi y a été apposé lors de son émanation et de son retour; que l'informalité résultant du défaut des dits timbres rend l'action nulle et elle peut être déboutée sauf recours sur exception à la forme.—*Riendeau* v. *Casey*, Chagnon, J., 15 avril 1885.

Action qui tam—Indivisibilité de l'action—Compensation—Garantie.

JUGÉ:—1o. Qu'une action pénale n'est ni divisible, ni compensable; qu'en conséquen-

*To appear in full in Montreal Law Reports, 1 S.C.

ce, un plaidoyer de compensation fait à une action de cette nature sera renvoyée sur réponse en droit.

2o. Qu'en matière pénale, il n'y a pas lieu à la garantie ; qu'il s'ensuit que, dans une action *qui tam*, le défendeur ne peut, par demande incidente, appeler le demandeur en garantie.—*Normandin* v. *Berthiaume*, Mousseau, J., 20 octobre 1884.

Police d'assurance—Prescription—Conditions—Propriété—Femme commune—Autorisation maritale—Réticence.

JUGÉ :—1o. Que la condition mis au dos d'une police d'assurance contre le feu, que tout recours légal contre la compagnie d'assurance qui a émis la police est prescrit après le laps des douze mois qui suivent la date de l'incendie, n'a rien d'illégal, et que cette prescription doit être mise en force.

2o. Qu'une femme commune en biens et sous puissance de mari ne peut valablement faire assurer les meubles de son ménage sans l'autorisation de son mari ; et que le fait de n'avoir pas ainsi déclaré son état à la compagnie d'assurance rend nulle la police d'assurance.—*Rousseau* v. *La Compagnie d'Assurance Royale*, Taschereau, J., 6 juin 1885.

Achat et vente—Billet promissoire—Terme—Compensation.

JUGÉ :—1o. Qu'en matière commerciale, lorsque l'acheteur néglige de donner au vendeur un billet promissoire, tel qu'il aurait été convenu, ce dernier peut, alors et avant l'expiration du terme, poursuivre l'acheteur pour le montant de la vente.

2o. Qu'il peut aussi, dans le cas précédent, offrir le montant de la vente en compensation à l'encontre d'un billet promissoire dont l'acheteur réclame le paiement contre lui.—*Quintal* v. *Aubin*, en Révision, Torrance, Rainville, Jette, JJ., 20 juin 1883.

Douaire coutumier — Enregistrement — Créance antérieure ou préférable — Adjudicataire — Nullité de décret.

JUGÉ :—1o. Que lorsqu'un douaire coutumier a été enregistré sur un immeuble, une créance ayant la priorité de date et d'origine, mais enregistrée sur le même immeuble subséquemment au dit douaire, ne constitue pas "*une créance antérieure ou préférable*," purgeant le douaire coutumier dans le sens de l'article 710 C.P.C. qui n'a trait qu'à l'antériorité de rang, et à la préférence à raison d'un privilège en vertu des lois réglant les privilèges, les hypothèques et l'enregistrement des droits sur les immeubles.

2o. Qu'un adjudicataire qui connait personnellement qu'au moment de l'adjudication l'immeuble par lui acheté est affecté d'un douaire, ne peut subséquemment demander la nullité du décret et de son contrat d'acquisition, à raison de cette cause d'éviction éventuelle qu'il connaissait.—*Lizotte* v. *Deschesnaux*, En Révision, Torrance, Papineau, Jetté, JJ., 30 décembre 1884.

Mandat—Procuration générale—Achat—Tiers.

JUGÉ :—Qu'une procuration générale dans les termes suivants : "Je vous autorise à "conclure tous contrats que vous jugerez à "propos avec les cultivateurs pour la culture, "cette année, de la betterave à sucre et aussi "les travaux pour sa culture," n'autorisait pas le mandataire d'acheter des cultivateurs des betteraves à sucre, et ne pouvait lier le mandat vis-à-vis des tiers pour le prix d'achat de ces betteraves.—*Jarry* v. *Senécal*, Mousseau, J., 13 juin 1885.

Action qui tam—Acte des élections fédérales—Affidavit—Fin de non-recevoir.

JUGÉ :—1o. Que l'action pour recouvrer la pénalité imposée par l'acte des élections fédérales est une action *qui tam* qui doit être précédée d'un affidavit sous le statut 27-28 Vict., ch. 43.

2o. Que le dit acte des élections fédérales (37 Vict., ch. 9) n'a pas soustrait ces actions à la nécessité d'être précédé d'un affidavit.

3o. Que cette absence d'affidavit est une fin de non-recevoir qui peut être invoquée au mérite.—*Rouleau* v. *Lalonde*, Cimon, J., 14 mars 1885.

Pari—Enjeu déposé entre les mains d'un tiers—Droit d'action—Paiement.

JUGÉ :—Que lorsque dans un pari la somme d'argent pariée a été placée entre les mains

d'un tiers, celui qui a gagné a un droit d'action contre le tiers pour s'en faire remettre le montant, ce dépôt étant assimilé à un paiement; C. C. 1927.—*Riendeau* v. *Blondin*, Rainville, J., 12 novembre 1880.

Succession vacante — Insolvabilité — Légataires universels et particuliers—Réduction de legs—Renonciation—Droits des curateurs.

JUGÉ:—1o. Que tous les biens d'une succession insolvable ne sont pas le gage des créanciers de préférence aux légataires particuliers, de manière à ce qu'ils puissent empêcher ces derniers de prendre possession de leurs legs; s'il doit y avoir réduction des legs particuliers pour payer les dettes du testateur, les créanciers ont une action contre les légataires à ce titre pour obtenir cette réduction, mais il ne peuvent faire mettre au nom d'un curateur nommé à la succession insolvable tous les biens du testateur.

2o. Que la renonciation d'un légataire universel unique ne rend pas la succession vacante s'il reste d'autres héritiers au testateur.

3o. Qu'un curateur nommé à une succession vacante par la renonciation des légataires ou héritiers n'a que les droits qu'auraient eu ces légataires ou héritiers.—*La Banque Ville-Marie* v. *Rocher*, En Révision, Johnson, Torrance, Loranger, JJ., 30 avril 1885.

Inscription en Révision—Contestation d'élection municipale—Appel.

JUGÉ:—Qu'un jugement final rendu par la Cour Supérieure sur une requête en contestation d'élection municipale ne peut être inscrit en Révision, ce jugement n'étant pas susceptible d'appel; et une inscription ainsi faite en Révision sera rejetée sur motion.—*Beauchemin* v. *Hus*, en Révision, Doherty, Loranger, Cimon, JJ., 30 mai 1885.

Bail—Réparations—Dommages—Résiliation.

JUGÉ:—Qu'un propriétaire qui, en faisant des réparations à sa maison, emploie des matériaux émanant des odeurs infectes, lesquelles causent des dommages à son locataire, sera condamné à payer le montant de ces dommages en sus de la résiliation du bail.—*Levesque* v. *Daigneault*, En révision, Sicotte, Gill, Loranger, JJ., 30 mai 1885.

QUEEN'S BENCH DIVISION.

TORONTO, Feb. 9, 1885.

Before WILSON, C.J., ARMOUR, J., O'CONNOR, J.

CONWAY v. CANADIAN PACIFIC RAILWAY CO.

Railways and Railway Companies, 42 Vict., ch. 9, 46 Vict., ch. 24 (D)—Liability to fence.

[Continued from page 328.]

On the other hand, it was no more trouble or expense to the company to fence in the one case than in the other: but their doing so as regards occupants under such circumstances would be an encouragement to actual settlement.

Under these circumstances the Amending Act of 1883 was passed, I think, in all probability, for the protection of people situated, in respect to occupancy, as the plaintiffs were.

It is immaterial whether different parts of the lot were occupied by several persons or not.

If a village had been formed at the place in question of such occupants, it could make no difference, except to increase the necessity for fencing, if there was an increase of cattle.

That the plaintiffs entered the house which they occupied as the tenants of and paid rent to Worthington, could make no difference. Whether his tenants or not they were in occupation. However, Worthington, as appears by the evidence, abandoned the house when his contract was completed, and after November, 1883, the plaintiffs continued in possession independently, cultivated a small portion of the land, used another part for pasture, made an effort to obtain title, as recognized settlers, from the Crown Lands Department, and were awaiting an answer, expected to be favorable to their application, when the horses were killed.

The term "occupied," as used in this clause, must be construed in its ordinary grammatical meaning; in that meaning which naturally and obviously belongs to it, and has been given to it in common language.

It is not a technical term, but one of the common understanding of mankind, and as such in common use; Wilberforce on Statute Law, p. 122; Hardcastle, pp. 26, 27, 74.

As to what occupancy is,—"Occupancy is the thing by which title was in fact originally gained; every man seizing to his own contin-

ued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else:" Blackstone (by Kerr, 4th ed.) vol. ii, p. 74.

"Occupancy is the taking possession of other things, which before belonged to nobody:" 2 Broom & Hadley's Commentaries, p. 411. The plaintiff's case, in this instance, greatly resembles and is strongly supported by the English case of *Dawson* v. *The Midland R. W. Co.*, L. R. 8 Ex. p. 8.

If the foregoing is not the correct interpretation of the amending act in question, I know not what it means, or that it means, or can mean, anything.

Falling short of that, it means, as I apprehend, nothing different from, or more than, the Act which it purported to amend. The Amending Act, then, is meaningless and idle. But I am not disposed to take this view of what I conceive to be an important Act of Parliament, having a useful and just object in view, and which is expressed with sufficient clearness and precision by the Act itself. It is unnecessary, therefore, to look for indicia outside of the Act, for they can only afford help to give it a forced instead of a natural interpretation.

I think judgment should be entered for the plaintiffs for $300 and costs.

ARMOUR, J. The word "owner," as used in the Consolidated Railway Act of 1879, is therein to be understood to mean any corporation or person who, under the provisions of that Act, would be enabled to sell and convey lands to the company; sec. 5, ss. 14: and the word "lands" is to include all real estate, messuages, lands, tenements and hereditaments of any tenure; sec. 5, sub-sec. 6. The railway company shall set forth in its book of reference a general designation of the lands intended to be passed over and taken therefor, and the names of the owners and occupiers thereof, so far as they can be ascertained; sec. 8, sub-sec. 1, *a.* and *b.* "Any omission, mis-statement, or erroneous designation of such lands, or of the owners or occupiers thereof,....may....be corrected:" sec. 8, sub-sec. 5. "The lands which may be taken without the consent of the proprietor thereof shall not exceed," &c., sec. 9.

All corporations and persons whatever, tenants in tail or for life, *grevés de substitution*, guardians, curators, executors, administrators, and all other trustees whatsoever not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes covert*, or other persons seized, possessed of, or interested in any lands, may contract, sell and convey unto the company all or any part thereof: sec. 9, sub-sec. 3. "After one month, &c., application may be made to the owners of lands, or to parties empowered to convey lands, or interested in lands, which may suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway, and, thereupon, agreements and contracts may be made with such parties touching the said lands, or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained as may seem expedient to both parties, and in case of disagreement," &c., sec. 9, sub-sec. 10.

"Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land, any part of which is occupied, or within three months after such construction hereafter, or before such construction, within six months after any part of such section or lot of land has been taken possession of by the company for the purpose of constructing a railway thereon (and in the last case after the company has been so required in writing by the occupant thereof), fences shall be erected and maintained over such section or lot of land on each side of the railway, &c., but this clause shall not be interpreted to the profit of any proprietor or tenant in any case wherein the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars:" 46 Vic. ch. 24, sec. 9. sub-sec. 16.

"If, after the expiry of such delay, such fences, gates and cattle-guards, are not duly made, and until they are so made, and afterward if they are not duly maintained, the company shall be liable for all damages which shall be done on the railway by their trains or engines to the cattle, horses or other animals

of the occupant of the land in respect of which such fences, gates, or guards have not been made or maintained, as the case may be, in conformity herewith."

These last two clauses were by 46 Vic. ch. 24, sec. 9, substituted for the following clauses in the Consolidated Railway Act of 1879:

"Within six months after any lands have been taken for the use of the railway, the company shall, if thereunto required by the proprietors of the adjoining lands, at their own costs and charges, erect and maintain on each side of the railway fences," &c.: sec. 16, sub-sec. 1.

"Until such fences and cattle guards are duly made, the company shall be liable for all damages which may be done by their trains or engines to cattle, horses, or other animals on the railway," sub-sec. 2.

"The term "proprietor," as used in the Act, is included within the term "owner," and the word "owner," as defined in the Act, would seem to include only those corporations and persons mentioned in sec. 9, sub-sec. 3, and would thus include proprietors and tenants; and by the Consolidated Railway Act of 1879, sec. 16, it was only as against such owners of adjoining lands that the railway company were bound to fence.

What difference, then, do the clauses substituted for section 16 in the Consolidated Railway Act by the Act 46 Vic. ch. 24, sec. 9, make in the law as it stood before the passing of the latter Act? Are the railway company bound to fence as against any one but an "owner" as defined by the Act? He is no longer required to be the owner of adjoining lands; it is sufficient if he be the owner of any part of a section or lot upon which the railway has been constructed, or a part of which has been taken possession of by the company for the purpose of constructing a railway thereon; but I think he must be an "owner" within the meaning of the Act, which term, as I have above said, includes proprietors and tenants; and I think the word occupied in the substituted clause means occupied by the owner, that is, the proprietor or tenant thereof; for where there is a tenant, both he and his landlord are owners within the meaning of the Act; and I think the term "occupant" in the substituted clause means owner, that is, proprietor or tenant, and I think the use of the terms proprietor and tenant so occupying in the substituted clause, in the connection and manner in which they are used, shows this to be the true construction of the clause.

The clause will then read as follows: "Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land, any part of which is occupied by the proprietor or tenant thereof, or within three months after such construction hereafter, or, before such construction, within six months after any part of such section or lot of land has been taken possession of by the company, for the purpose of constructing a railway thereon, and in the last case, after the company has been so required in writing by such proprietor or tenant thereof, fences shall be erected and maintained over such section or lot of land, on each side of the railway, &c.; but this clause shall not be interpreted to the profit of any proprietor or tenant in any case wherein the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars."

"If, after the expiry of such delay, such fences, gates, and cattle guards are not duly made, and until they are so made, and afterwards if they are not duly maintained, the company shall be liable for all damages which shall be done on the railway by their trains or engines, to the cattle, horses or other animals of such proprietor or tenant of the land in respect of which such fences, gates or guards have not been made or maintained, as the case may be, in conformity herewith."

This construction brings all parts of the clause into harmony, and is, I am satisfied, having regard to the various provisions of the Act which I have above quoted, the true construction to be put upon the clause.

The provisions of the Act respecting line fences, R. S. O. c. 198, entirely support this construction, and the question under discussion has to be considered to some extent with reference to these provisions.

It is not reasonable to suppose that the Legislature intended that the railway company should be bound to fence against any

person who should without any title whatever, and as a mere trespasser, occupy any part of a section or lot upon which the railway has been constructed, or a part of which has been taken possession of by the company for the purpose of constructing a railway thereon, and that, too, when such person would not be compellable by, nor could he compel, his adjoining owner to make, keep up and repair a just proportion of the fence which marks the boundary between them.

The plaintiff was a person precisely in this position, and so was Worthington, to whom she at one time paid rent.

I think, therefore, that the company were not bound to fence as against her, and that the order *nisi* must be discharged with costs. See *Douglas* v. *London and Northwestern R.W. Co.*, 3 K. & J. 173; *Re Evans*, 42 L. J. Chy. 357.

Order *nisi* discharged, with costs.

THE RIEL CASE.

An opinion by Mr. D. Macmaster, Q.C., on the case of Louis Riel, now under sentence of death, has been made public, in which a new point of general interest has been raised. The learned counsel says:—

The prisoner was indicted at Regina, in the Northwest Territories of Canada:

1. For levying war against Her Majesty "in the said Northwest territories of Canada, and within this realm," while a subject of Her Majesty, and

2. For levying war while living in Canada and enjoying Her Majesty's protection.

He was tried by a stipendiary magistrate, a justice of the peace, and a jury of six, under the provision of "The Northwest Territories Act, 1880," convicted, and sentenced to be hanged.

My legal opinion is now asked:—

1. Upon the competency of the court that tried him, and

2. Upon the legality of the conviction and sentence.

I.

The court which tried the prisoners was, in my view, legally—though exceptionally—constituted in virtue of special delegations of legislative power from the Imperial to the Canadian Parliament.

II.

The indictment is framed under the statute 25 Edward III., cap. 2, which has never been formally re-enacted as a law of the Dominion of Canada. How far it may be in force in the Northwest Territories as part of the common law is open to some question, owing to the restricted language of the statute of Edward.

The indictment is for levying war against Her Majesty "in the Northwest Territories of Canada and within this realm." The statute 25 Edward III., is, as it expresses, "A declaration which offences shall be adjudged treason," and among these is, "If a man do levy war against our Lord the King in his realm."

Are the Northwest territories a part of the realm within the meaning of the statute of Edward? Referring to this statute Sir Matthew Hale says that "Ireland, though part of the dominion of the crown of England, yet is no part of the realm of England." . . . "The like is to be said for Scotland, even while it was under the power of the crown of England, as it was in some times of Edward I. and some part of the time of Edward III." The Court of Queen's Bench of Ireland has decided that the same statute of 25 Edward III. only became applicable to Ireland by the provisions of 10 Henry VII., cap. 10, passed by the Irish Parliament, introducing it into Ireland. The House of Lords subsequently confirmed the decision of the Irish court. Sir M. Hale thus discusses the clause in 25 Edward III.:—"Now as to this clause of high treason: *Ow si home levy guerre contre notre Seigneur le Roy en son realme.*"

"To make a treason within this clause of this statute there must be three things concurring:—

"1. It must be a *levying of war.*

"2. It must be a levying of war *against the king.*

"3. It must be a levying of war against the king *in his realm.*"

The italics are used by the learned jurist. After stating that Ireland and Scotland are not within "the realm," as before stated, he continues: "And the same that is said of Ireland may be said in all particulars of the Isle of Man, Jersey, Guernsey, Sark and

Alderney, which are parcels of the dominion of the Crown of England, but not within the realm of England as to this purpose concerning treason."

In a celebrated case of treason, it was held that the words: "This realm," "meant the United Kingdom of Great Britain (excluding Ireland) and nothing else."

A prisoner who had stolen goods in Guernsey and brought them into England was arrested and committed for trial in England. Mr. Justice Byles, at the Devon Summer Assizes, 1861, after consultation with Baron Channell, held that Guernsey not being a part of the United Kingdom, the prisoner could not be convicted of larceny for having the goods in his possession here, nor of receiving them in England.

The following joint opinion was given by the attorney and solicitor-general, Sir Robert Henley, and the Hon. Charles Yorke, in 1757:—

"My Lords,—In obedience to your lordships' commands, signified to us by Mr. Pownall by letter dated April 1st, 1757, accompanied with an enclosed letter and papers, which he had received from Jonathan Belcher, Esq., chief justice of His Majesty's colony of Nova Scotia, relating to the case of two persons convicted in the courts there of counterfeiting and uttering Spanish dollars and pistareens, and requiring our opinion, in point of law, thereon; we have taken the said letters and papers into our consideration, and find that the question upon which the case of those two persons convicted of high treason depends is this: Whether the Act of Parliament, 1 Mary, c. 6, entitled, "An Act that the counterfeiting of strange coins (being current within this realm), the Queen's sign-manual or privy seal, to be adjudged treason," extends to Nova Scotia, and is in force there, with respect to the counterfeiting Spanish dollars and pistareens in the said province?

And we are of opinion, first, that it doth not; for that the Act is expressly restrained to the counterfeiting of foreign coin current within this realm, of which Nova Scotia is no part.

Secondly, we are of opinion that the proposition adopted by the judges there, that the inhabitants of the colonies carry with them the statute laws of the realm, is not true, as a general proposition, but depends upon circumstances; the effect of their charter—usage, and acts of their legislature; and it would be both inconvenient and dangerous to take it in so large an extent.

The statute 25 Edward III., is simply a definition of the crime of high treason. By that definition it is high treason to levy war against the King in his realm.

From the authorities cited it would seem that it is of the essence of the offence that the levying of war should be within the realm.

Mr. James Fitzjames Stephen, in his Digest of the Criminal Law, says that it is treason to levy war against the Queen in her Dominions, and refers in a foot-note to the statute under consideration and the works of Sir Matthew Hale. He does not explain his reasons for using the term "dominions" for "realm," though his definition is no doubt better adapted to the present conditions of the Queen's world-wide sovereignty. His digest, however, does not always express the law as it is and was objected to on this ground by the Chief Justice of England when it was proposed by legislative action to convert the digest into a criminal code. Mr. Justice Stephen did not pretend that his digest in all cases expressed the law as it is. He aimed not merely to consolidate but to improve the criminal laws. I could not, however, in fairness overlook the definition of so great an authority as Mr. Justice Stephen, though I do not think it impairs the force of Sir Matthew Hale's interpretation of the statute. The value of Sir Matthew Hale's constructions, Mr. Justice Stephen himself concedes in his History of the Criminal Law in these words:—"The Act 25 Edw. III., is still the standard Act on which the whole law of treason is based, and the constructions put upon its different members by Coke, Hale, Foster and others, have been in many instances adopted by the court, and must still be taken to be part of the law of the land."

Upon the whole, there is fair ground for argument that the North-west Territories of Canada are not within "the realm" as intended by the statute of Edward, and if not, it is doubtful if that statute can be made to apply to offences committed there, without more express enactment.

The difficulty here presented is obviated in the United States by a clause in the constitution which declares that: "Treason against the United States shall consist in levying war against them, or adhering to their enemies, giving them aid or comfort."

The object of the statute of Edward was to define and limit the matters which should be adjudged treasons, and to prevent the Sovereign from making arbitrary encroachments upon the life, liberty, and property of his subjects by resort to prosecutions for ill defined and constructive treasons.

The validity of the conviction and sentence might be tested by an application to a judge of the Supreme Court of Canada for a writ of *habeas corpus*. There is an appeal from the decision of a judge in such case to the full court.